the HUMAN LIFE REVIEW

SUMMER 1998

Featured in this issue:

William Murchison on . . . . . Those Relativists Next Door

Ellen Wilson Fielding on . . . . . Why Love Dare Not Lie

Lynette Burrows on . . . . . Whoring for Fun and Profit

The RICO Outrage: ***Are "Pro-lifers" Really Mafia Mobsters?***

Maria McFadden • John Leo • G. Robert Blakey • Dennis Byrne
Robyn Blumner • Michael M. Uhlmann • Paul Greenberg

Robert A. Destro on . . . . . Is *Roe* v. *Wade* Obsolete?

Hadley Arkes on . . . . . Slouching Towards Infanticide

Wesley J. Smith on . . . . . Our Discardable People

Marilyn Hogben on . . . . "What Size Is an Embryo's Soul?"

Also in this issue:

Mary Ann Glendon • Benjamin J. Stein • David Gelernter • Maggie Gallagher • Matthew Scully • Wesley J. Smith • Wendy Shalit

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ABOUT THIS ISSUE . . .

. . . in this issue, we bring you a special section devoted to the scandalous (for our judicial system) RICO decision handed down in Chicago against anti-abortion protesters. We hope it will help clarify for our readers the crucial issues involved. We include a column (p. 38) by Professor G. Robert Blakey, the main author of the RICO law; we thank him, and the *National Law Journal* (where it first appeared) for permission. We would also like to thank the Catholic monthly *Crisis* for allowing us to reprint Michael Uhlmann's column (p. 51) from their June issue; the July/August *Crisis* also has special coverage of the RICO ruling. For subscription information, call 800-852-9962.

Contributing Editor William Murchison, whose article "Those Relativists Next Door," is our lead, is currently working on a new book, *There's More to Life than Politics*, due out in September. Alan Wolfe's book is titled *One Nation, After All*, published by Viking Penguin and at your local bookstore.

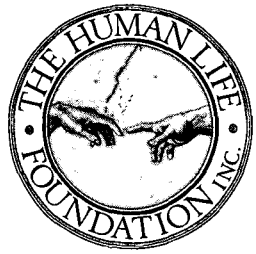
Wesley J. Smith, author and lawyer for the International Anti-Euthanasia Task Force, has written a powerful book: *Forced Exit: The Slippery Slope From Assisted Suicide to Legalized Murder*, available from Times Books/Random House. As his article (p.78) demonstrates, we can't afford *not* to be informed about the state of medical "care" for the sick and the elderly—end-of-life "decisions" are already being *forced* on ordinary Americans.

We would like to thank noted Harvard Law Professor and author Mary Ann Glendon for permission to reprint her excellent column from the *Wall Street Journal* (*Appendix A*). She, along with Eric Treene, wrote "Selective Humanism: The Legacy of Justice William Brennan" for our *Winter* '98 issue—if you missed it, let us know, copies are still available. (By the way, you can now reach us *via* E-mail: the address is humanlifereview@mindspring.com.)

Benjamin Stein is known to many as an actor and a comedian; perhaps not as many know that he is also a serious, and seriously pro-life, writer. Thanks go to the *American Spectator* for permission to reprint his column (*Appendix B*) from the regular feature "Ben Stein's Diary." We are likewise pleased to include a reprinted New York *Post* column by David Gelernter, Yale professor and writer. He is the author of *Drawing Life: Surviving the Unabomber* (Free Press) and *Machine Beauty: Elegance and the Heart of Technology* (Basic Books).

Finally, we thank Nick Downes, the main cartoonist in this issue, who graciously sent us a selection of cartoons to reprint. We hope they lighten your spirits as they do ours.

MARIA MCFADDEN
EXECUTIVE EDITOR



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INTRODUCTION

In his famous Preface to *Saint Joan*, George Bernard Shaw wrote "We must face the fact that society is founded on intolerance" simply because "society must always draw a line somewhere" between "allowable conduct" and the intolerable. What happens when a society *stops* drawing lines?

That is the question William Murchison ponders in our lead article, based on a recent book by Sociologist Alan Wolfe, who claims to have discovered what Americans think "about right and wrong, truth and falsehood" by extensive interviews "with everyday middle-American suburbanites"—i.e., the prototype Middle Class.

As it happens, Shaw made great fun of "Middle-class morality"—but of course he (like his fellow Fabians) depended on middle-class *readers*, just as our own pundits and propagandists do today. Change mostly comes not from the top or bottom, but when the majority in the middle accept it.

Well, if Professor Wolfe is right, Middle America has accepted quantum changes from the moralities of previous generations, and is now mainly tolerant only of *intolerance* itself—the mood, Murchison says, is "you can do what you want so long as you let me do what I want." (Wolfe found two exceptions; neither homosexuality nor "bilingualism" are yet acceptable.) Not surprisingly, the new Mushy Morality is most prominent *in re* religion, where "diversity" has replaced virtually any shred of dogma; a typical Wolfe "answer" runs "Having morals can exist without believing in God." Small wonder that relativism reigns. As regular readers know, none of this pleases Bill Murchison, who flays all the falsehoods in his accustomed style—in short, it's a very good read.

Actually, Ellen Wilson Fielding picks up the same theme, but from a specific angle: "unfaithfulness" is now tolerated far beyond the lines our society drew just decades ago. Put crudely, Gary Hart was ruined by sins quite venial compared to those "alleged" against our sitting President, whose only penance seems to be soaring "approval" ratings. The question is whether our society can recover *in time*, before all the lines are gone (Who would have predicted that "learned and cultured" Germany would free-fall into Nazism?). As Ellen puts it:

> The failure to honor a promise or act honestly, the bending of the truth on a witness stand, the willingness to let what is pleasant trump what you have pledged to do, may seem far removed from the holocaust of abortion or Oregon's lapse into state-sanctioned assisted suicide. But it is not far removed. Toleration of multiple acts of individual unfaithfulness leads to the overwhelmingly oppressive toleration of greater wrongdoing on a colossal scale. This is not supposition or an exercise in logic: it is observable truth.

How much of our moral and cultural decline should be blamed on television? As Mrs. Lynette Burrows points out, books were a primary source of entertainment in pre-TV times—in the last century the latest installment of a Dickens novel was as eagerly awaited by "everybody" as any sit-com today. Nor was it uncommon for "working class" people to be quite well read, and when millions were reading the same popular books there was a "values commonly shared" civility of manners (Shaw's "Deserving Poor" certainly knew what respectable behavior was, whether they practiced it or not!).

In sharp contrast, Burrows argues, TV projects an "alternative reality" to the real world, especially in its politically-correct portrayal of working women as "Beautifully dressed, affluent, sexually liberated and 'in command'" whereas "the overwhelmingly majority of them do not have a career, they have 'a job' which most of them dislike and which they do only from economic necessity." Sounds like interesting stuff? We sure think it is: when the faxed copy came in from Cambridge we "glanced" at the first sheet, intending to put the piece aside for later; instead, we kept right on glancing to the end of it, by turns laughing and nodding agreement—we bet you will do likewise.

By the way, lest you think our title (*not* hers) "Whoring for Fun and Profit" is sensationalized, it is not: it fits BBC-TV shows Mrs. Burrows was "on" along with supposedly-happy prostitutes touting their lucrative "jobs"—the fact that this could happen at *all* vividly illuminates where the once-staid BBC itself stands on such "social issues" (needless to add, its programs are monolithically pro-abortion, pro "Gay Rights," the lot, despite its charter guaranteeing "Fairness"!).

Next we have a special section on what we justly call "the RICO Outrage"—it has its own introduction (see page 35), but we want to add a few comments here. The glaring lesson of *NOW* v. *Scheidler* is *old* news; ever since *Roe* v. *Wade* a quarter century ago, abortion has "enjoyed" a unique status in our courts, high and low. It is not only fair but painfully *accurate* to say that, when abortion is the issue, the ordinary rules of judicial decisions—not to mention fairness—simply do not apply. In *Scheidler*, the "charge" was that non-violent picketing of abortion mills (exactly what civil-rights protestors did in the '60s) was in fact comparable to *Mafia*-style extortion and violence. Nobody *believes* that is true, but extremism in defense of abortion has become the vice of judges.

In the Chicago case, as several of our commentators argue, the abortion fanatics are playing a high-risk game that may well bounce back on them; the "rationale" for *Scheidler* is applicable far beyond money-poor "pro-lifers"—indeed, it might well be used against the tempting riches of the Abortion Establishment (whose members surely "conspire together"?) itself. *Oremus*.

Without doubt, history shows that legal *fiats*—even the "final solution" of *Roe* v. *Wade*—can end up producing results never dreamed of by their black-robed authors. As it happens, Mr. Robert Destro next weighs in with an analysis of what has been happening to *Roe* itself—and what *more* may happen soon. We won't

attempt to describe his closely-reasoned arguments here, but we will serve up a tantalizing morsel. It has been assumed that *Roe* made the unborn *non*-persons before the law, but what of the "embryos" created for *in vitro* fertilization? They are obviously alive: Do they have rights, or are they merely "property"? Frozen (for "future use") embryos cannot be aborted, so *Roe* doesn't apply: What law does? It's all news to us, as it may be to you (if you *start* this one, you'll finish it).

Professor Hadley Arkes has appeared in our pages several times before. Indeed, it seems he appears everywhere several times; he is a most prolific commentator on social and political affairs, yet he is unfailingly capable of a "different view" even on *over*-reported issues. Here, in an article that first appeared in *The Weekly Standard* (the still-young Washington conservative magazine), he injects a new insight into the vexed "partial birth" abortion debate. Again, we won't attempt a summary; his arguments will carry you along to his proposal, which certainly belongs in our permanent record of the Abortion Wars.

Wesley Smith has also appeared here previously, and he too has become a prolific commentator on another front in the total war, having become the attorney for the International Anti-Euthanasia Task Force. Did he know what he was getting into? Euthanasia—wearing its many bogus masks ("Death with Dignity" *et al.*)—has become politically-correct *chic*, a Disneyland of the "hard-case" scenarios once used to promote legalized abortion. Originally, of course, the claim was that the terminally-ill should enjoy a "right to die" that would end their pain; that was merely the "wedge"—the *agenda* is to snuff out what the pre-Nazi German doctors labeled "lives unworthy of life"—Dr. Kevorkian is just giving away the game plan (and getting *away* with it!). So it is no surprise that doctors now resent being used as mere *agents* of death: they now bid to *decide* who will enjoy the "right" to be killed.

That is a grisly subject Mr. Smith tackles here: "Futile Care Theory" argues that while *you* may want to prolong your earthly life, doctors should decide if it's more "cost-effective" to polish you off. Who is promoting such a dogma? Why, says Smith, our Medical Elite, doctors who have "discarded the once self-evident truth that all human beings have equal moral worth." That truth was of course thrown overboard by *Roe* v. *Wade*; the difference is, whereas none of *us* can be aborted, the "futile life" may be *yours*, even if you are a doctor.

Our final article is . . . *not* that; indeed, it may well be the most unusual piece we have ever run. An Australian friend who sawa version printed in a journal there sent us a copy, saying (he'd inquired) there was actually more in the original text. We were stunned: the story-line is straight enough; a woman thrilled to have had an *in vitro* baby later faces the fact that the "process" also produced five "sibling" embryos. What does she want done with *them*, since the time-limit for frozen "storage" has run out?

She wrote down her agonizings in a journal, excerpts of which you get here. It is beyond us to attempt commentary, this is one you *must* read for yourself! But there

is one thing that sprang into mind as *we* read it first: our Abortion Establishment rejects the very notion of any "Post-abortion Syndrome"—they insist that women feel no guilt for having killed an "unwanted" baby—hand us a Magic Wand and we'd make every one of them read *this* story, which ought to bring tears to their eyes. Oh yes: some "drawings" were available; it turns out that they figured in the text, and so we asked for one, which we have reproduced where it fits. If, after reading her "jottings" you find yourself praying for her, you're in our company.

* * * * *

As usual, we have a number of relevant appendices, beginning with an important piece from the distinguished legal scholar Mary Ann Glendon (*Appendix A*) that in fact covers a great deal of the recent history of abortion as an international issue. Specifically, Glendon recounts the strange case of President Bill Clinton's willingness to veto the long-awaited bill "regularizing" the U.S. status at the U.N. (by paying long-withheld dues) simply because it would endorse the U.N.'s *own* anti-abortion policy. But as we've noted above, when abortion is the issue, the ordinary rules don't apply?

In *Appendix B* you get an unusual commentary from an unusual man: Ben Stein is a multi-talented actor, author, and lawyer who is well-known to TV viewers and movie-goers as well as his many readers. But perhaps the most unusual thing about him is that he lives in Hollywood, yet openly holds anti-abortion views that are politically *in*correct in the extreme. They are also powerful, forcefully written and, as you will see, exactly compatible with William Murchison's lead article: Americans may think ours is "A Golden Age" because of the trippling numbers on the stock exchange, but there are "some other numbers"—such as some 37 million abortions since *Roe*—that should shame us all.

As we say, we are fortunate in having pieces that fit well with our featured articles; in *Appendix C* you get one that adds chapter and verse to Ellen Fielding's epistle on telling the truth. Mr. David Gelernter gained "fame" *via* being maimed by one of the Unabomber's devilish mailings; after a long and painful time, he wrote a book (*Drawing Life: Surviving the Unabomber*) that will remain unforgettable to anyone who has read it—if you haven't, you *should*, it is a noble statement of faith. Here, Gelernter focuses on recent examples of *successful* lies—the facts no longer seem to matter. As it happens, one of his examples you will find reprinted here as well (see *Appendix E* below), so you can see for yourself whether Gelernter is right in his somber conclusion that "our national conversation has broken down" because of our failure to respond to untruths.

Next we have feisty Columnist Maggie Gallagher (*Appendix D*), who rarely fails to command attention with her no-nonsense prose. And—Guess what?—here she takes off on the very *Kass* v. *Kass* case that Robert Destro analyzes expertly above, but of course Gallagher gives you not legal passions but *human* ones, e.g. "Meanwhile, Maureen Kass' heart is breaking; what mother's wouldn't?" And she vividly adds to Destro's point: Can "embryos"—obviously living humans—really

be mere "property"? And even if so, couldn't they be "donated" to some *other* infertile couple? Mr. Destro is right: we have by no means heard the last of the cold-blooded decision in the *Kass* case.

As promised, you next get (*Appendix E*) one of the stories Mr. Gelernter cites above, and you can indeed see for yourself how "disinformation" has dominated the "partial birth" abortion controversy. Fact is, in this one piece Matthew Scully may well have produced the best short summary of the whole affair—and of course he in turn complements the article by Hadley Arkes. True, regular readers of this journal have read it all before, but in a *dozen* different pieces, whereas here you get a valuable synopsis, complete with all the important names and dates—you may want to keep this one handy.

There is still more in our bag of tricks: next we out-do ourselves by having Mr. Wesley Smith add another commentary (*Appendix F*) to his own featured article, but we think you will agree that it is an excellent addition because—as we noted above—Jack "Doctor Death" Kevorkian is the personification of the "right to die" agenda. And in this short but powerful piece, Smith gives you the truth about Kevorkian and his crimes that you don't get in the "regular media"—the smirking ghoul is surely the *only* Serial Killer ever to achieve Star status? What kind of society *celebrates* such cold-blooded inhumanity? Good question.

We conclude with one *more* trick: in *Appendix G* you get a very down-to-earth description of what it's *like* to have an abortion. The "Would-be Mother" is all too usually left *out* of the ideological polemics that strait-jacket the public abortion debate—but there is always a formerly-pregnant woman left alone after a "successful termination"—Why did she do it? What does she think now? Again, we've already given you a classic case above (even though the woman involved agonized over "mere" embryos, not an actual abortion); here, you get an added dimension. What about the "guy"? Whatever happened to "shotgun weddings"? Another good question, albeit a rather disturbing one to leave you with—but then "our" issues aren't kindly or calm ones, are they? Maybe next time we'll provide lighter fare. Meanwhile, enjoy our cartoons—which *are* funny (a friend writes "Cartoons in a serious quarterly?—what a marvellous idea!").

—J. P. MCFADDEN
EDITOR

Those Relativists Next Door

William Murchison

In one of the most invigorating—and at the same time depleting—books I have read lately, Alan Wolfe, the Boston University sociologist, introduces us to the modern American middle class.

Maybe, better said, he sets a pier mirror before his overwhelmingly middle class readers, inviting them decorously to inspect themselves. But not for sagging chins or trim bellies; not even for cancerous lumps; rather, for the convictions and concepts his viewers bring to the living of life. Wolfe is set on telling us what we think about right and wrong, truth and falsehood, the way to do things and the way not to do them. The author thinks many viewers will be jolted by what they see in his mirror. I think he is right.

Here are sound bites and snippets and expostulations culled from interviews that Wolfe and his staff conducted with everyday middle-American suburbanites—your Uncle Fred and Aunt Sue, and Old Man Johnson, and Ruby-who-works-behind-the-pharmacy-counter; maybe (though Las Vegas odds warn sternly against it) you yourself:

"You don't have to accept anybody's dogma whole. Live with the concept of God as you perceive it."

"Having morals can exist without believing in God."

"[Y]ou try to choose wisely [to make sure] that the choices that you make don't do any harm to any of those people that are choosing differently from the way that you're choosing."

"There's morals, and there's morals. I don't know how we can teach morals as such because it's the fiber of you, and what is socially acceptable in some families is not socially acceptable in another."

". . . [T]here is no one right and no one wrong and the greater the exposure you have to different ideas . . . more tolerance, I would think, grows out of that."

"I am not here to judge anyone."

"Thou shalt not judge."

Here, standing amid these folk, pad in hand, is Wolfe, head of the Middle Class Morality project he conceived a few years back and brought to fruition:

"Neither determined secularists nor Christian-firsters, middle-class Americans

William Murchison, our contributing editor, is a nationally-syndicated columnist at the Dallas *Morning News* and a popular speaker on a wide range of current religious and cultural issues.

have come to accept religious diversity as a fact of American life. Reluctant to pass judgment, they are tolerant to a fault, not about everything—they have not come to accept homosexuality as normal and they intensely dislike bilingualism—but about a surprising number of things, including rapid transformations in the family, legal immigration, multicultural education, and the separation of church and state. Above all moderate in their outlook on the world, they believe in the importance of leading a virtuous life but are reluctant to impose values they understand as virtuous for themselves on others; strong believers in morality, they do not want to be considered moralists."

Their viewpoint is "morality writ small": local and personal in its applications, non-prescriptive, scornful of abstractions. "Rules are not to be broken," Wolfe translates, "for down that path lies anarchy. But they are made to be bent, for down that parth lies modernity."

"Very few" middle-class Americans take their religion "so seriously that they believe [it] should be the sole, or even the more important, guide for re-establishing rules about how *other* people should live." "Religious tolerance in America bears a distinct resemblance to *laissez-faire* economics: you can do what you want so long as you let me do what I want."

"It is important to pay homage to such classic virtues as courage, perseverance, honesty, loyalty, and compassion, but nothing should be taken to extremes . . . Of course children should be taught right from wrong"—just not with "didactic morality plays," please.

I'm OK, You're OK, We're all OK, not to mention Better Than We Ever Were Before—saving, perhaps, the active homosexuals from whom middle class America somwhat contradictorily withholds endorsement. (What, by modern, non-judgmental yardsticks, can be wrong with the pursuit of sexual pleasure and expression?)

Wolfe walks up boldly to the popular concept of culture war, grabs it by the lapels, makes its eyeteeth rattle. Only the "intellectuals," left and right, he instructs his readers, are fighting such a war. In the purlieus of the middle class, where the air-conditioning hums and pagers vibrate, tolerance reigns mildly, sweetly, expansively.

We believe all right—just not strongly enough to enforce our beliefs. The juices have somehow been sucked from belief. The plant is dry and lifeless. It bends with whatever wind blows through the community.

Welcome to *fin de siècle* America. "Live with the concept of God as you perceive it." Above all, don't step on somebody else's "concept." Relativism is in the saddle. Supposedly.

Two questions leap to the fore, commanding our attention:

1. Is Wolfe right? Is the age as de-valued and de-natured as he makes out?
2. If he is right, what then?

As to Question 1, who can say for dead certain—Wolfe included? A single-family portrait of us, the American middle class? Try it yourself some time. In surveying any such portrait, however carefully framed and artfully conducted, we remind ourselves—or should—that here is a sampling only. Wolfe and his staff sought to be scientific. They conducted 200 interviews in Brookline and Medford, Massachusetts; Southeast DeKalb and Cobb Counties, in Georgia; Broken Arrow and Sand Springs, Oklahoma; and Eastlake and Rancho Bernardo, California. The communities were selected to reflect not only different areas of the country but different economic and ethnic groupings. Seventy-one percent of the interviewees were white, 55 percent were female, 36 percent were Baptist or Catholic, two-thirds earned more than $50,000 a year. And so on.

Still, they didn't ask *me*. Did he ask you? We can bicker about the representational or non-representational character of the responses; we can score pro points and con points. Of greater salience is that the responses seem at least plausible.

Whether or not "culture war" rages among us, we know moral relativism to be alive and well in America and all sprawled out with its feet up. The history of the 20th century is a history of relativism. As Paul Johnson relates, in *Modern Times*, Albert Einstein's theory that space and time are relative terms in measurement—not absolute at all—achieved verification in 1919. The old, right-angled Newtonian universe was no more.

"At the beginning of the 1920s," says Johnson, "the belief began to circulate, for the first time at a popular level, that there were no longer any absolutes: of time and space, of good and evil, of knowledge, above all of value. Mistakenly but perhaps inevitably, relativity became confused with relativism." (The misapprehension distressed Einstein himself.)

Wolfe found believers in absolutes; they just happened not to be numerous, at least in comparison with God-as-you-perceive-it relativists. What surprises here, to the extent anything does, is the fervent middle-class participation in relativism. All of us middle class types know relativists from school, the office, even church and quite possibly home. We simply tend, I think, not to regard them as dominant in the culture.

The Silent Majority, the Moral Majority, the Christian Coalition, readers and disciples of *The Book of Virtues*, Schlaflyites, Disneyland boycotters, pro-life marchers, home schoolers, Promise Keepers embracing in sports

arenas all over the country—such groups and coalitions are so well-known that the temptation exists to credit them with vast social leverage. On Wolfe's showing, the temptation should be resisted. Some leverage, yes. Just not as much as their publicity clippings might seem to call for.

Even on family questions—Mom and Pop and family dinnertime *vs.* single-parentism and gay adoption—there is nothing like unity in the Wolfian worldview. Many middle-class Americans could be called "realists": well, the old times weren't bad, but the old days are gone, and divorce and working moms, that's just how things are. A larger number are traditionalist and modernist at the same time: "Ambivalents," Wolfe calls them. The organizing principle for family life, the middle class seems to believe, overall, is tailoring family structures and duties to the needs of individuals rather than making individuals adhere to "some preestablished family structure."

But if we disbelieve such analysis—from Wolfe, I mean, not from his interview subjects—we might look more closely at the culture. How do we actually live, as opposed to how we dream? For one thing, we tell pollsters we don't care whether President William Jefferson Clinton played, ah, fast and loose with a White House intern, or whether Paula Jones' accusations against him struck home. Get off his back! (His figurative back, beg pardon.) Send the independent counsel home! We keep telling pollsters these things, or things close to them. Imagine similar offenses being imputed to most of Clinton's predecessors. Would Americans have stood for it? Not a chance. Clinton's great personal joy is to have emerged at the national political level about the time the Wolfe Era had entered full swing. "Thou shalt not judge": Just what our president loves to hear!

I draw attention also, not for any reason save that it strikes me as true, to a recent New York *Times* story about the coarsening and crudification of public language. You can say about anything you want to nowadays, the reporter noted. You can show almost anything in an ad. "A new vulgarity and tastelessness are transforming the content of advertising," the *Times* solemnly reported.

And what about TV talk shows, such as Bill Bennett talked blithely about cleaning up a couple of years ago? What about, specifically, Jerry Springer, with all the fighting and grabbing and clothes-tearing-off and generally awful and crummy people—not a few of whom are middle class, as are the viewers? What about performances of this sort when, as was the case last spring at least, they outdraw the book talk and bromides of "Oprah"?

A truly (and properly) judgmental society would shut down Mr. Springer faster than one of his guests can say "*#&<c>*&!" No: Mr. Springer and his aspirations would never have gone on the air in the first place. Jack Paar, one

recalls—the king of late-night talk in the '50s—was disciplined by the network for an inadvertent reference to a toilet. ("You see, it *was* a better age," sighed the middle-aged controversialist, high school class of 1959.)

The general public's attitude toward moral corruption of this sort—so I would guess—could be characterized as, well, some people like it, but I don't have to watch it if I don't want to, and, you know, whatever they do is their choice, and choice is the thing I'm most for. *Quod erat demonstrandum*, Mr. Wolfe?

Let us concede to our author, then, at least for the sake of argument, his point about the relativism of modern American society. The larger question, I say, is, what then? What do we do about it? This is in fact *the* question of modern times, touching all we do and say, and how we live life.

The question—What then?—tips the interrogator's hand and still more the question, what do we do about it? These are judgmental questions, anti-modern, anti-relativist questions. What then? Nobody cares what-then. It's nobody's business, see? Live and let live. Thou shalt not judge. As for what-do-we-do: Who asked us, pray, to do anything? Bunch of meddling old fools, sticking their intolerant noses into other people's business! Do? Tell you what you can do, buddy. Pull down your window shade if the view offends you. Mind your own business.

The latter admonition has a peculiarly ironic taste. "Our own business"? "Mankind was my business," said Marley's Ghost. The extreme individualism that Wolfe notes (as did Robert Bork, in *Slouching Toward Gomorrah*) works out to be anti-social. A society in which individuals make their own choices about everything and no one says *boo*, is not a society at all. It lacks social properties and attributes, starting with agreement on basic values.

In Alan Wolfe's Middle America, there are values; it's just that they have no value—that is, no extrinsic value. Socially worthless in the sense of commanding respect and observance, modern values are set out for disinterested observation only.

It is as though we inhabited a national museum. ". . . And in this room, ladies and gentlemen, if you'll step in this direction, our old American notions about family: one lifetime, one spouse; father knows best; supper at 7. Mind the glass cases; you'll get dust on your sleeves if you lean down; nobody much comes here any more. Next we come to the Religion Room . . ."

A relativist society, living on inherited moral capital, can keep going for a while, particularly if there is general prosperity and opportunity. A 9000 Dow Jones Index calms tempers, papers over stresses and strains by the carload.

This same relativist society depends nonetheless on that elusive quality,

tolerance. Wolfe finds tolerance spread thick as chocolate icing across the surface of contemporary life. As we see, he may be right about that. Tolerance is a negative virtue—assuming one calls it a virtue. (Chesteron called it the hallmark of a society that believes in nothing.) All the tolerant must do is withhold judgment, or, failing that, bite their tongues. Individuals thus drive the wagon. Drive it where? Forward? Backward? Off the cliff? We're really not supposed to worry about that. It's up to the individual.

But this is to fantasize. Societies, communities, nations do not work that way. We have heard of the social order? Note the giveaway word, "order"—a way of doing things, commonly accepted, generally acknowledged for superiority, perhaps even for rightness.

General acknowledgements are hard to come by these days and, if Wolfe is right, will be still rarer in the future. Nevertheless, they are of the essence. They hold life together, ensure cooperation, prevent the outbreak of Hobbes' "war of all against all."

The professionally, and endlessly, tolerant should worry about that war. Foundations can crumble and creatures of a diverse and repellent sort crawl out from beneath flat rocks. Look only at what has happened in the moral realm. While moral concensus of a certain sort endured—say, up to 30 years ago—there were no illegitimate children, far fewer kids on drugs or alcohol, far fewer broken marriages, far fewer instances of parents abusing children, beating children, killing children. And there were no instances—mark me, not one in those quaint, bygone days—of children slaughtering their teachers and schoolmates with automatic weapons.

The toleration of the intolerable is itself intolerable: an obscenity, one could continue, flung at the natural order. That word again—"order." So anti-relativist; so lofty in the judgment it passes on pronouncements such as "There's morals and there's morals."

What if there actually is a natural order; not a let's-pretend order, a construct of Mr. Rogers' Neighborhood. A real and objective order, rather; a framework within which a real and objective deity works out His sovereign purposes. What then?

Quite a lot of Alan Wolfe's interview subjects claim religious affiliation, or simply report a personal interest in spirituality. However, so-called "nonabsolutists" in religion outnumber so-called "absolutists"—those who believe in objective truth. "Quiet faith" is what Wolfe says we evidence. We just sit there quietly, being faithful . . . to whatever it is we repose our faith in.

"Religious tolerance in America," says Wolfe, "bears a distinct resemblance to *laissez-faire* economics: you can do what you want so long as you let me do what I want." As a prescription for religious peace, this one may

have merit. As a deduction from Jewish and Christian teaching concerning the transcendent God who made this world, such an approach to religion flunks every conceivable test.

This is because it is *not* religion. Six-of-one, half-dozen-of-the-other tolerance may have a certain spiritual dimension. Is it religious? Not in any common or well-understood sense. A real, not a made-up, God addresses His created beings more or less in the no-nonsense spirit of Edward G. Robinson in the old television commercial: "Do it my way, see?"

In the view of such a God (the only view that matters, when you get down to it), there is right, there is wrong; there is truth, there is falsehood. Tolerance of wrong and falsity and injustice and indecency is a strange commodity to praise as right and just. Indeed, to tolerate falsehood is to call into question the very existence of right and justice. Maybe these are merely names—control devices; weapons the establishment uses to keep subcultures like blacks and women at bay. Such deductions are very much open to acceptance. What is more, we have invited them. We have invited subversion and ultimately violence. What we invite we are altogether likely to get some day.

We get a foretaste now, in truth; violence against the unborn by those following their own noses, acting in accordance with "principles" we forbid society to contradict. Violence, increasingly, against the terminally ill. Permissive violence at first (who can object if they end their own pain?); later, as respect for life wanes further, violence of a more compulsory sort. Anarchic violence as a society unwilling to affirm the goodness of life licenses the taking of "useless" lives—for high and noble purposes, you must understand.

That relativism should take over a society only nominally committed to religious truth, fearful lest that truth be asserted too brusquely, too publicly—where is the coincidence in this? The thing was bound to happen. Now that it has happened there is one thing to do and one only: shift into reverse; go back; abandon such sterile and dangerous territory as this, where everything seems right and nothing seems to contradict divine purposes.

Wolfe, in his research, uncovered a few prospects willing to aid in such a hopeful enterprise. At least a few Americans with whom he and his team spoke seem clearly to understand the seductions and the dangers of hypertolerance.

"As the country gets 'further away from God [said one of these], then we replace it with whoever's morals are in force at the time, and God is out of the picture. Then you have no absolute laws, you have nothing but relativism.'

Mr. McLaughlin uses a metaphor from golf to explain his point. If you sliced your drive, it will continue to fade farther and farther off course. America is also off course, moving inexorably away from its proper target. 'This nation was not formed by Buddhist framers of the Constitution; it was formed by Christians,' he continues. That is important to him because 'our whole nation was founded on the principles of God, and God's principles are absolute, not relative.'"

The gentleman from Broken Arrow, Oklahoma, says a mouthful. What his fellow Americans must do is back up his words with words of their own, especially words of prayer. Then they must follow up with deeds: kind but firm; "intolerant" even; connected all the same to the overarching purposes of Him who used to run our mortal show.

"There's morals and there's morals"? "There is no one right and no one wrong"?

Oh, shut up.

"I'm glad to see the bank hasn't become *totally* automated."

Why Love Dare Not Lie

Ellen Wilson Fielding

> *"[Thomas] More was a very orthodox Catholic and for him an oath was something perfectly specific; it was an invitation to God, an invitation God would not refuse, to act as a witness, and to judge; the consequence of perjury was damnation. . . . A man takes an oath only when he wants to commit himself quite exceptionally to the statement, when he wants to make an identity between the truth of it and his own virtue; he offers himself as a guarantee. And it works. There is a special kind of a shrug for a perjurer; we feel that the man has no self to commit, no guarantee to offer."*
>
> *—Robert Bolt, author of* "A Man For All Seasons"

For most people, there are only one or perhaps two occasions when they are called upon to bind themselves to the truth of what they promise by a solemn oath. By far the more common occasion is a wedding, where the couple make a solemn promise before God or at least the state to be faithful and loving spouses until death. A second, more common in our litigious society than it was in earlier ones, is the oath sworn in a court of law before giving testimony. You will recall that it goes like this: "do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?"

Then there is a considerably smaller group of people who find themselves entering religious orders or working for the military or for the government in a capacity that requires them to take a membership oath or oath of office. The highest such office is the presidency, and this is the oath of office we have all heard every four years in January: "I do solemnly swear that I will faithfully execute the office of president of the United States, and will to the best of my ability, preserve, protect and defend the constitution of the United States."

One line of unease about the current status of truth-telling in modern-day America runs straight from the marriage chapel to the divorce court. Why are so many people—so enormously many people—no longer, it seems, greatly bothered by their violation of a solemn oath to be there, united to their spouse, " 'til death do us part"? Robert Bolt was referring to Thomas More's determination in *A Man For All Seasons* to testify truthfully in signing a disguised loyalty oath when he made the remarks about oath-taking that I

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have put at the head of this article. But the mind turns inevitably to the willful and infatuated Henry VIII, who managed the awesome task of convincing himself that he and Katherine of Aragon were not legitimately married so that he could exchange her for Anne Boleyn.

Whether his self-hypnotic ability to see the truth as he wished it to be permitted Henry to persuade himself a few years later that the accusations of adultery and incest he piled on Anne Boleyn were true is an interesting question. Perhaps he was trying, with as little rending of the marriage vows as seemed necessary to a Renaissance prince, to honor marriage oaths.

Oddly enough for a man with six wives, Henry's marriage to Anne marked the last time he swore a wedding vow that could not potentially have passed muster with the Catholic Church. For when he took Jane Seymour as his wife, Anne Boleyn had already been executed and Katherine of Aragon had died a natural death earlier in that same year. After Jane's death in childbirth, Henry contracted a marriage, sight unseen, with a German princess, Anne of Cleves, whose appearance so disgusted him that he sent her home untouched a few months later—obvious grounds for an annulment, even in the sixteenth century. Henry's fifth marriage, to the young and unfaithful Catherine Howard, ended with her execution for adultery (for it is treasonous to be unfaithful to your king). That left him clear to live his final gouty years with Catherine Parr, who survived him.

So, although Henry himself never sought reunion with the Church of Rome, no marital impediments stood in his way after 1536. (The impediments caused by his imprisonment and execution of loyal Catholics and the despoilment of monasteries no doubt loomed much larger in his mind.) Henry apparently shrank from breaking oaths or solemn vows cavalierly, though he would do so if urged on strongly enough by his desires and in the absence of other more legitimate means of fulfilling them.

We know, however, that in every age a sizeable number of people have not shrunk from lying under oath or proving unfaithful to wedding vows through adultery or desertion or mistreatment. In the terms of Robert Bolt's quotation, they thereby lost themselves by letting some vital aspect of their integrity slip through their fingers like water. They became, perhaps, forerunners of our more numerous and more openly unselved generation of Hollow Men.

The just man justices, says the poet Gerard Manley Hopkins, "myself it speaks and spells, Crying What I do is me: for that I came."

And the unjust? We are what we do; we do what we are. Or we become what we do, like Dorian Gray's portrait in the attic, which reflected the moral deformity of its subject. About one out of every two new marriages contracted

in the United States ends in divorce. It is not always, or even usually, both partners who break faith; divorces which one partner wishes never took place are common. Still, even the unwilling partner may eventually violate the sworn words of his vow " 'till death do us part" by marrying someone else with the same promise. That adds up to a daunting number of people frozen into unfaithfulness by new marriages.

The just man justices. The people who break faith—what else can they be, objectively speaking at least, but faithless? Like Henry VIII (only more so, since four centuries and millions of divorces later, it is easy to slip into delusion by simply surrendering to the current), many people are taught or convince themselves that divorce for even trivial reasons does not turn them into marital perjurers. They see at the time of the wedding, or perceive in hindsight, all kinds of implicit conditions and limitations on their vows—conditions like compatibility, staying in love, knowing what they were getting into, being happy. These conditions are nowhere to be found in any traditional wedding service (though the flower-child, make-up-your-own vows service sometimes hinted at or even boldly proclaimed them, in phrases such as "so long as we both shall love"). In reality, the vows themselves promise love, as something that can be promised, as an act of the will rather than a condition which may evanesce without one's volition.

Yet this kind of self-delusion or self-deception, that there are a variety of implicit conditions on what would otherwise seem a fairly watertight promise, has its effect on the institution of marriage and the weightiness of those vows. It becomes harder for people to hold onto the idea of marriage as a thing with intrinsic weight when so many marriages evaporate through the sheer weightlessness of the vows once made. In reaction, ministers from many Protestant denominations recently supported the passage of Louisiana's two-tier marriage law, offering harder-to-get-out-of covenant marriages as an option. Some two dozen other states are also tinkering with similar bills.

The result of permitting large numbers of people to renounce solemn promises—retroactively lying under often sacred circumstances—is enormous, though it is sometimes hard to show which baleful statistics are causes and which are effects. Certainly the perceived right to divorce a spouse for any and all reasons has led to the widespread divorce of children from their parents. We take no special oath to the child when we become parents, but inherent in the act of intercourse itself and in the abject helplessness of the infant who results from that act is a solemn duty to nourish and protect him. Caring for one's child is also one part of the payment for the gift of our own birth and nurture.

Divorce frustrates the fulfillment of that built-in promise. Whether or not he wills it, or even willed the divorce, the spouse who leaves (usually though not always the husband) becomes at best a sometime, nonresident protector and nurturer, a part-time parent. At worst, he disappears from the scene.

There are other possible repercussions from lying with one's body in the act of intercourse. The denial of a fundamental duty toward one's partner and any child resulting from intercourse can lead to one or both of the parents abandoning the child before birth. If the father does this, it is termed desertion. Before viability, the mother finds it physically impossible to separate from her unborn child without killing it. Then the act is called abortion.

In his discussions on the meaning of marriage and the marital act, John Paul II lays great stress on the distinction between lying and telling the truth with one's body and one's actions. One of the many ways of explaining why sexual intercourse is reserved by religious law and traditional social custom for marriage is that the marital act promises more than unmarried couples can deliver. It promises, because it enacts, complete self-giving. It is "lovemaking" because it is making a gift of oneself to the beloved. it is complete self-giving because each couple is acting out the offering not only of past and present but of future, since a child is one natural outcome of intercourse. A child is a strong, future-oriented bond between husband and wife, pointing not only to immediate child-rearing duties, but to a widening future of common descendants.

All this is violated by divorce, which takes back the offer of self, but it is also violated by abortion. Abortion is a hideous act against the child, of course, but it sins against other ties as well. The solidity of marriage is shaken because the meaning of the marital act is thinned, leached of its powerful life-giving purpose, debased to a highly pleasureable experience whose only significance or justification is the satisfaction it gives the participants. Marriage diminishes from something obstinately objective, an institution whose significance survives the failings and lack of charity of the spouses, to a pathetically subjective partnership dependent upon the frail feelings of wavering men and women taught to be satisfied with nothing less than happiness but not taught that happiness cannot be held in one's grasp in this life.

The value of human life becomes as subjective as the value of the institution that produces it. The child is valuable if it is wanted. If it is not wanted, it can be disposed of, perhaps with pain and regret but without real doubt about the primacy of one's own happiness.

In a few short decades we have seen the conditions placed on preserving human life spread to the terminally ill, the severely handicapped, and the

very old. Euthanasia of the old, like abortion, is wrong because it is an act of human sacrifice but also because it violates a fundamental human duty. To care for and respect the old is to partially repay our debt to our parents and to the generation of those who shaped the world in which we were born.

This is another of those basic human duties acknowledged by all great civilizations. It does not depend upon feelings or one's individual assessment of how well or badly one's parents performed their part. It is an act of piety, so to speak; an acknowledgement that we are not self-made, or self-sustaining. A failure to recognize how universal this duty is also contributes to the thinning of our understanding of human life and family relationships. That is why, in Aldous Huxley's *Brave New World*, we see human generation detached from sexual intercourse and family on the one hand, and euthanasia on the other. The beginning and the end of life are related by the neat knot of traditional marriage, which reaches back to the separate lines of husband and wife, now joined together, and then reaches forward to the children who are the corporeal proof that the two have become one flesh.

That is also why the idea of homosexual marriage is absurd. Whatever the emotions involved, the coupling of homosexuals does not speak or enact union and total self-giving between the partners. It is not even potentially life-giving; the act, in and of itself, cannot cast its shadow into the future, where it materializes into a third person who embodies the union of his parents.

Divorce, abortion, euthanasia, homosexuality—all are issues where modern man chooses to lie, whether with full knowledge and approval of what he is doing or without such knowledge, and hence without the personal guilt of lying. In either event, he is objectively locked into a lie which works its own relentless logic, and these lies further drain his actions and his doings of their meaning.

What a coincidence—or is it a coincidence?—that at this point we find ourselves bound to a president who faces multiple charges of deceitfulness, unfaithfulness, and oath-breaking. As our figure of speech tells us, the truth does not seem to be in him. By his own reluctantly-wrung confession, he has been unfaithful to his wife and his marriage vows (though, characteristically, that is not the conclusion he seems to draw from his misbehavior). The testimony of a cloud of witnesses suggests that he has been massively, repeatedly, perhaps pathologically unfaithful.

But all this the political commentators overwhelmingly consign to the category of private behavior, not in itself constituting a fatal public flaw. They focus instead on the less awkward legal charges of possible perjury, suborning of perjury and obstruction of justice as the site of potentially serious

legal and political problems for Mr. Clinton. Yet remember how we began, with a discussion of oath-taking and another, earlier head of state with his own set of marital problems. Isn't the belief that marriage is a purely private, individual association, some sort of informal confederation of people bound by emotional ties of love and affection, merely a manifestation of our modern subjectivist heresy?

Weddings are not only private parties and religious rituals (though secularists also consign religious rituals to the ghetto of the personal and the private); they are state occasions. They require marriage licenses, blood tests, the fulfillment of legal requirements about age, consanguinity, consent and the like. Even with extremely lax divorce requirements, the law stipulates substantial paperwork and often involved legal processes to dissolve a marriage. Spouses are held responsible in many ways for any children that result from their union—both partners are held responsible, except in the unusual event that blood or DNA tests establish that the husband is not the father of the child.

Even today, spouses are perhaps vestigially bound in other ways—there are laws about health insurance, desertion, child support, social security disbursements, and of course inheritance. For marriage and family, though they are anterior to the state and therefore possess a function and identity that cannot be violated by the state, are necessary to the successful survival of the state. Though the family is something "private and personal" because it has the natural right to limit the state's intrusion, it is also social and public because it is the primary building block of society.

We call the lives played out in our families our private lives. We feel more comfortable about relaxing our guard there, taking less care about the appearance we present. If we are fortunate, we do not face potential rejection from the members of our family. But however we let our personalities bloom there, and however many private acts find their proper place in the home, the family does have a wider social identity, tied by a thousand strings to custom, religion and law. When families succumb in increasing numbers to divorce, then all three of these wider overarching things—custom, religion and law—are weakened as well. In America, most weddings take place in houses of worship; most wedding vows are exchanged before God. What does it do to our habits of reverence and obedience to God to take those vows back, one year or five or ten years later?

Commentators on President Clinton's possible perjury trouble over the Monica Lewinsky controversy frequently belittle the importance of perjury in a case involving sex. They point to divorce courts, where it is well-known that one or both parties will quite commonly commit perjury in efforts to

protect themselves or their reputations, to gain custody of the children, or hurt the other spouse.

Remember Robert Bolt's words on oath-taking and breaking. If large numbers of Americans have sworn faithfulness " 'til death do us part," and then have forsworn those vows, and then find themselves in a courtroom furnished with an American flag, laying a hand on a Bible while swearing to tell the whole truth, and if large numbers of these Americans then violate that oath to tell the truth, how much erosion is taking place in the meaning of any oath, any vow? Despite the claim of commentators that lawyers, judges and juries distinguish between lying in divorce cases ("it's just sex") and lying in criminal cases, are we sure that there is not a closer relationship between the two in ordinary people's minds?

After all, human lives can be badly damaged by divorce cases. There are some civil and criminal cases where perjury causes less emotional upheaval and even economic hardship than it does in many divorces. Do we really have a separate category in our minds for oaths sworn in divorce court, or in sex cases (or in a wedding dress) and oaths sworn elsewhere? If we reserve the right to testify falsely in either case, aren't we simply saying, as today's Americans say in so many circumstances, about so many decisions, "It depends, I have to weigh and choose, I have to decide myself"? We are back, as we so often end up, with subjective standards, judgments based on perceived self-interest or situation ethics. There is no room for the allegorical figure of blindfolded Justice bearing her scales.

Private and public bleed into one another. They are not watertight compartments—and certainly not now, when our ship of state has, like the *Titanic*, sliced open its hull on the black ice of modernity. In a more innocent era, a head of state might commit adultery and thereby sin, and experience guilt and moral discomfort. He might repent of it, or he might persist uneasily, ashamedly. But he would know what he was doing and had done. He would be unable to defend it to himself as something other than the breaking of a vow and a trust. If he were found out, he would not, *a la* Henry VIII, comb *Leviticus* and *Deuteronomy* for an escape clause—not if he wanted the people's acceptance or approval.

But Clintonism, as we have explained it, is a morally deadly miasma of escape clauses, conditional phrases, legal loopholes, retold stories, appeals to high motives and low enemies, and voluntary blindness. It lies in the-dog-ate-my-homework tradition of truth-telling and promise keeping. It is dangerous to the American people to the extent that they tolerate it and grow accustomed to it, but it could never have been tolerated to begin with if we

had not all become too willing to tolerate broken vows and shaded truths and touchy/feely "will it make me happy?" criteria for making moral decisions. Bill Clinton is an extreme case, but he is not unrecognizable to us. We expected no more of him. That in itself is damning, since we should have demanded more of anyone we were inviting to swear the presidential oath of office.

Most people were aware, in 1992, that Mr. Clinton had fashioned a series of fallback lies and evasions on a whole range of issues, from evading the military draft to marijuana use—and, yes, to Gennifer Flowers and others. The Clintons' "60 Minutes" interview that year, in which Mr. Clinton indirectly admitted to past indiscretions and seemed to promise not to repeat them as president, was mollifying to many people not because he seemed chastened and repentant, but because his self-interest lay in keeping his bargain. We were trusting not his integrity, but his instinct for self-preservation.

But the contract he seemed to have made with us was no more honored than the vows he made on his wedding day. And the many other scandals that bubble up with, by now, an almost predictable regularity, suggest an equally cavalier attitude toward his oath of office.

Perhaps those who read this journal will most strongly remember Mr. Clinton and his presidency for something he never denied doing, though his penchant for throwing up fogs of evasion and equivocation showed there too.

I refer to his partial-birth abortion ban veto. Mr. Clinton spun stories for himself and us of women who would be mutilated or condemned to infertility without this technique. Then he entangled himself in untruths about the unborn's inability to feel pain because of the effect of the anesthetic given to the mother. Even staunch abortion proponents like the American Medical Association and a sizeable number of congressional Democrats were at a loss to understand what he could possibly have meant by such "inaccuracies." And even after the AMA declared that there was no known medical situation which required the technique of partial-birth abortion, our president, backed into his falsehoods by his determination to cede no ground to those seeking to restrict abortions, proclaimed his willingness to veto the bill a second time.

To be willing to use deception and disinformation for such a very low end, on such small victims, renders Mr. Clinton's other alleged lies, cover-ups and violations of faith both plausible and, in a way, less significant. A president who lies to cover up compulsions or self-interest or the tracks of ambition is very bad; but a president who lies for convenience sake, so he won't have to dodge a half-hearted attack from a feminist left that has nowhere else to go,

knowing that he is condemning many small human beings to a painful death, is appalling.

Perhaps it is a relief to us to have someone in office who seems to present a moral portrait much inferior to our own. Perhaps we want, not someone to look up to and feel judged by, not someone "just like us," an average Joe, but someone who appears quite clearly morally *inferior* to us. That way we can perhaps put to rest the vague unease and dissatisfaction that our own far from exemplary performance gives rise to.

We have our faults and failings, but no one accuses us of running through rows of adulterous lovers, or selling information or access to a foreign power, or assassinating the reputations of little people involved in matters too big for them. We can feel morally superior, to him and at the same time toward those in the media who pursue him, while we "wait for the facts."

But it is important for us to focus on the degree to which Americans now resemble Mr. Clinton, in our rationalizations, our willingness to abandon past people, responsibilities, promises, because they will not accommodate themselves to our present needs and desires. The Bill Clinton whose morality play has been running in Washington for the past six years is a caricature of ordinary Americans, but caricatures have a basis in fact, because they are meant to be recognized. It is time to see how much can be recovered of the selves we have let slip through our fingers.

M. Scott Peck is a best-selling psychiatrist with an unorthodox, somewhat New-Age take on Christianity. He is squishy on hard issues like abortion and euthanasia. But he wrote one book, almost fifteen years ago, that was not in the least New Agey or soft, because its topic was evil people. Not Hitlers or Stalins or mass murderers, but very ordinary evil people, whom he had occasionally run into as patients in his practice. Most of the conversations and events he described were not obviously extraordinary or alarming, but the book almost smoked with a sensation of evil. I recall reading portions of it in a busy well-lighted lunch spot in Wall Street and even so I barely resisted the temptation to keep looking over my shoulder.

Peck called his book *People of the Lie*, because that was their obvious common denominator: the inability to face truths or speak truths, the pattern of evading, ducking responsibility, and deceiving others. "Evil" seems a very extreme term for people who for the most part never committed an act that would land them in jail. But their ability to destroy the lives and peace of others, and create moral and mental confusion wherever they went, was real nonetheless.

It is the same with the rest of us, who are much less desperate cases, we

hope. The failure to honor a promise or act honestly, the bending of the truth on a witness stand, the willingness to let what is pleasant trump what you have pledged to do, may seem far removed from the holocaust of abortion or Oregon's lapse into state-sanctioned assisted suicide. But it is not far removed. Toleration of multiple acts of individual unfaithfulness leads to the overwhelmingly oppressive toleration of greater wrongdoing on a colossal scale. This is not supposition or an exercise in logic: it is observable truth.

The extent to which society can recover is unclear, though of course we should operate on the supposition that we can reverse our free-fall into faithfulness. And perhaps—one never knows—we have sufficient time in which to do so. "What is truth?" asked jesting Pilate—still some centuries before the fall of Rome.

Whoring for Fun and Profit

Lynette Burrows

A Learned Disquisition on the Subject of the Revolting Nature of Commerce and Its Repulsive Handmaiden, Feminism

The permissive age has been an object lesson to many people. How does the particular emphasis of a culture develop? What were the factors fuelling its general direction? What elements produced ours?

When we look at our history and read favourite authors from the fairly recent past, Charles Dickens, Anthony Trollope and Jane Austen, we are fascinated by the differences between them and us. How did they evolve a culture so unlike our own, coming from an earlier period, the 18th century, which had distinct similarities to our own. When one thinks of Addison's purpose in starting *The Spectator* in 1713, "to recover the Age from the desperate state of vice and folly into which the age has fallen," he could have been speaking about us; but not the Victorians, or the Edwardians of the first decade of this century.

How did we evolve from them, to be so different today? Did people really speak then in such measured and articulate tones to one another? Were the working classes really so respectable and well mannered; frowning on uncouth behaviour and absolutely forbidding strong language in the presence of women?

The answer is, yes they did and they were. I have the most tenuous grasp of the late Victorian period because my husband, having lost his parents during the war, was brought up by his elderly, great aunt. She was the second oldest of thirteen children and a Londoner, born and bred in the last quarter of Victoria's reign. She was unmarried, having lost her young man in the first world war, together with a couple of brothers, and she had worked all her life as a seamstress. She was, by tradition and education, working class and proud of the fact.

When she died, not long after I married the man she had done such a valiant job in rearing, she left him all her possessions and books. We thus inherited a piano and piles of Scarlatti, Chopin and Bach, with her neatly written notes about interpretation written in the margins. Likewise her copies

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of Tennyson, Longfellow and Browning. Everything was annotated in simple, literate English expressing her comments upon the sentiments expressed in the text. They were like the books of an unusually assiduous University student today and yet she had left the Penny School at 12 years old. Incidentally, these schools, which predated State education, were attended by 100 per cent of children in London, according to recent comment upon the subject. They were run by Trusts and charities mostly, and those who could not pay the penny a day received their education free.

Aunt Grace also left a most interesting collection of local newspapers recording significant historical events such as Queen Victoria's Jubilee; the relief of the siege of Maefeking during the Boer War in 1900, and the popular loathing of the Suffragettes! These were big-circulation, tabloid newspapers and yet the style and, even more, the content was that of, say, the *Times* and the *Daily Telegraph* today. Measured and judicious criticism; long and beautifully written descriptions of accidents, incidents and the personalities in the news; it was intelligent prose addressed to intelligent people.

The strange thing is that formal education simply didn't come into it. It was the culture itself that educated people. Tolstoy's *Anna Karenina* was published in a London magazine and, when it came to the last chapter, it was reported that the streets were as deserted as they are today when a major sporting event is on TV. It is difficult to believe now, isn't it? Leo Tolstoy as the "Dallas" and the "Dynasty" of the day; Charles Dickens as the shared reading in millions of ordinary homes.

Our wonderful brass-band tradition started then with the musicians being the real workers in the coal mines and factories whose names the famous bands still have, even though the people playing in them now are very unlikely to be miners or factory workers. Different Trades Unions regularly challenged one another to proper debates on topics of the day and, as D.H. Lawrence recorded, the working men's magazine, *John O'Groats Weekly*, regularly had a competition involving the best translation of a Goethe or Schiller poem!

Ah, well! Before we get too melancholy about the best-laid plans of Bernard Shaw and H.G. Wells to educate us all, one should consider the fact that neither progress nor decadence go in a straight and predictable line. Things can change quite quickly from one period to the next. Jane Austen started off her writing with a little tale about a young girl who has an illegitimate child. It was never published but the very fact that it is so inimical to her later subject matter indicates that the world was changing for her too, into a more restrained mode, leading to the reforming zeal and practical morality which was such a feature of the 19th century.

There are always gains as well as losses however, and the purpose of this long introduction is to give a context in which one can place the calamitous collapse of the status of women in the modern world. It is difficult to know the exact progression which first gave rise to it but certainly its later manifestations were contrived by a fatal combination—the needs of commerce and the philosophy of feminism.

Both of these forces have, of course, been oxygenated and propagated latterly by television, without which they probably would have lost most of the arguments which have dominated our post-war thinking. The crucial advantage of television is that it can, by presenting a more or less consistent point of view, provide an alternative reality to that of the real world which, for a while, beguiles the viewer.

Thus, in the world portrayed by television, women at work are free agents. Beautifully dressed, affluent, sexually liberated, and "in command," they represent at best a mere handful of women in the workplace—including television itself—and, at worst, are figments of the imagination of politically-correct fiction writers.

By contrast, the real world contains women who are obliged, by the high cost of housing, to work in uninteresting and repetitive jobs where they must follow the rules from clocking-on to going home. Repeated surveys have shown that the overwhelming majority of them do not have a career, they have "a job" which most of them dislike and which they do only from economic necessity.

Why then is this fact of life not part of our cultural consciousness? Why are most women ashamed to say that they are "only a housewife," when most of them say that they would prefer to be at home with their families when their children are young? What prevents them being more assertive of the truth of their own experience?

The answer is the climate of opinion created largely, but not only, by television. It is easily done and the technique is by means of the "parallel universe" syndrome. When every "Soap" shows people for whom religion is a dead duck, it is easy to think that you, watching at home with your family, are isolated extremists if you all go to church. If every homosexual you ever see on the box is a handsome, generous paragon, your own feelings and judgement are called into question. Even when the programme makers do not actually control the script entirely, they still have ample scope for propaganda by means of "selective exposure." A studio discussion on a topic like "racism" or capital punishment can have weak speakers for the media-abhorred opinion and show business personalities putting the "correct" view.

The audience is equally significant. In my experience they are all selected by means of the places where the programme-maker advertises for them—gay clubs and bars for homosexual debates; *Guardian* readers for women's matters; University "Anti-Nazi-League" societies for anything to do with crime and punishment.

The purpose of this vetting of the audience is pure propaganda. They can be relied on to bay and howl in a parody of normal political expression. They give an impression that is both subconsciously threatening to anyone who doesn't agree with them, and powerfully demonstrative of moral certainty. Anyone not sharing their opinion is thereby made to feel in the wrong and, even more importantly, in a minority.

The portrayal of women is even more propagandist. Women with small children are never, just never, able to control them. Nor do they ever educate them except in the most mundane sense, with pointless nagging and stereotypical expressions of a limited, put-upon housewife. It is made quite clear to them that their job is to wait on and placate their children, just as if they were the most menial of servants. A traditional handmaiden is at least expected to deploy some of her womanly qualities, her charm, latent sex-appeal, wit, etc. Today's mothers are supposed to be women without will or personality. They are mistresses of nothing. No job description of their duties would be tolerated in the world of work, for even five minutes. Drudgery combined with the tyranny of their children is the fashionable view of the mother's role. It goes beyond the definite rules and disciplines of being a servant and into the realm of slavery.

This aspect is, of course, emphasised by radical feminists, who like to insist that the female partner in a marriage receives no proper income from her role and is oppressed by the man to whom she is married. They see her as a slave, and fashionable child-care practices carelessly underwrite this interpretation by the maternal powerlessness they advocate.

The irony—though not surprise—is that the women who advocate this demeaning role for women *never* do it themselves. By definition, almost any woman with the time and opportunity to be up there instructing others how to manage children, is not in her own home gaining hand-on experience of the job. This too is typical of those women who, as a class, have the least experience of actual child-rearing. They are professionals who, at the end of the day, go home and ask the nanny how their own child (if they have one!) has fared that day.

In fact, this unreality and the warped advice which is so widely disseminated by people who are media-made authority figures, is going ever downstream.

Nowhere, so far, has it encountered a barrier, or cultural resistance, to its ever-lower portrayal of women.

The latest manifestation of this dismal phenomenon is the media celebration of women as prostitutes. The idea of the Tart with a Heart is, naturally, long dead since kindness is seen as a sign of weakness. But the tart with an education is an absolute turn-on for journalists and programme-makers at present. Whether this indicates a dissatisfaction with the women who inhabit their own world, it is impossible to say, but there has been a plethora of programmes and features in the press about female University students who turn to prostitution to subsidise their studies. You see, for the first time since University education became widespread, middle-class parents with a good income are not eligible for grants for their children. *Quel catastrophe*!

This must, no doubt, strike Americans as risible since they would see no reason why those who earn a lot, should have their children's education paid for by taxes levied on those who earn far less. As a matter of fact, most of Europe thinks the same and none of our European partners have ever had grants which not only paid the fees of University students, but also provided a full living-away-from-home allowance to the student. Until last year, in fact, other European students who came to study in England were able to claim this grant too if they could satisfy loose residence requirements, and get accepted by a college—even though, in their own country, no such money was available to them. One positive advantage of the introduction of this new policy is that more than a thousand of what are called "Mickey Mouse" courses are to be axed because the people for whom they were designed, are not prepared to pay for them.

With that all gone now, media people, in common with the rest of the affluent middle-class, are feeling the effect of educating their children beyond the age of eighteen for the first time. In consequence of this, they are casting around in their minds for another group on whom to pin their protest. After all, it seems kind of impertinent to argue for hardship on their own behalf, when it plainly does not deserve that description, so they agonise instead over how ordinary people are going to manage. In fact, in a society awash with jobs for those willing to do them, students have taken to working for their keep extremely well. They have always worked in the holidays anyway and it is no big deal to have to work weekends or some evenings so as to offset the amount they need to borrow.

However, from the media person's point of view, discussing this sensible and character-forming solution puts ordinary people in a good light and, what is more, defeats the object of shaming the government into reversing

its policy. The English middle-classes are extraordinarily bossy, as our empire indicates, and there is nothing they like more than a daily fix of telling people what they should be doing. That they should already, and unaided, *know* what to do, is pretty well insupportable, as well as being unlikely to help in their personal crusade for more taxpayers' money.

Bereft of the experience of washing-up in a restaurant, or cleaning offices, they fasten upon the supposed big money of prostitution instead. Prostitution also appeals to their egalitarian fantasies since any damn fool can do it, and their ignorance of its downside is total. As like as not, some of them have also heard that one strand of feminism is objecting to the so-called "victim culture," which places too much emphasis on women as life's victims. So, by showing prostitutes as "in control," they can feel that they are striking a blow for that as well. Two birds with one stone!

So they fill the studio with a gaggle of very young, unusually pretty prostitutes, all done up to the nines, and as "feisty" as can be. There is usually some story-line attached to them, such as that they all have University degrees, for example; or that their fathers are doctors or rich lawyers. Judging by their accents and general demeanor, this is seldom true and in the last programme I did on the subject, the prostitute who was shown taking part in the rather prestigious "Mastermind" competition on the subject of art history, had not done so; the clip was pure fabrication.

Another poor creature I was with on a programme claimed to be an ex-nun but, in conversation with her afterwards, it appeared that she had once *wanted to be* a nun, which, of course she had told the researcher. She had also been severely beaten-up twice but this fact was not mentioned; only the "Harrods" Gold Card which, she said, made it all worth while. Her "Madam" accompanied her to the studio but did not appear, which was just as well since she was a fearsome battle-axe who looked as though she could suck the corners off a house-brick, and wore a lot of gold. It was not at all obvious that her "girl" shopped at Harrods.

Time and again I have been assured that the content of programmes on prostitution would address the subject seriously, or at least truthfully. Before the last one, they told me the programme would include a criminologist who had studied prostitution, a social worker whose job was to rescue the wrecked and beached girls once their useful life was at an end—usually because of addiction, ill-health or injury. A mother whose daughter had been murdered after a foray into prostitution (which, she told me afterwards, had been embarked upon after seeing a programme about its easy money) and an "older" prostitute who looked fifty and was actually thirty-two. Altogether, it seemed a reasonable line-up for a forty-five minute discussion.

In the event, the criminologist got less than a minute to say that there was no job on earth that had such a high rate of death and injury, before he was howled down by the cat-calling girls. The mother was allowed to gasp out how awful the life was and that the audience had no idea, before she was cut off to allow some phony sympathy to be expressed by one of the girls who said that she was just unlucky. And the social worker was not asked to give an account of her twenty years experience at all. The poor little "older" prostitute was humiliated by being peremptorily asked if she enjoyed the work and when she replied with incomprehension, was left behind as the bandwagon rolled on.

Why does the media do it? Of course they are lied to by the prostitutes, who spin them a yarn which they know will make a sensational programme and will do their professional image good. The researchers too know that they are being lied to, but pretend otherwise—also to make a good, sensational programme. They are parasitic upon one another and, as such, have a lot in common.

And yet, they believe the stories about 500 pounds per client and repeat, with shining eyes, what the girls tell them about earning 2,000 pounds a night, "no problem." "Do they look to you like women who earn 10,000 pounds a week?" I asked my researcher; who looked at me blankly and said, "Why not?" "Because a punter could get another prostitute for far less money on the next corner; why would he want to pay so much?" Silence.

What puzzles me is why any group of comfortable, reasonably well-educated people should want to believe that prostitution is a pleasant, or at least a neutral, job. Even if they have never thought about the likely composition of most of the clients, and the circumstances surrounding most of their encounters, these media people are the very ones who are so obsessive about what goes into their own bodies that they spend hours examining tins of food, lest there are any unhealthy additives in them. Yet they are prepared to support a way of life that invades the body far more comprehensively and is, in some ways, worse than slavery. At least slave owers had a financial interest in the continued health of their slaves, whilst men who use prostitutes have no such consideration and will use them regardless of whether or not they are rotten with disease themselves.

Here again, the word "slave" arises, almost unbidden, in considering the way our culture regards women. It is as if there is some subconscious process of thought going on, where we acknowledge that women are physically the weaker sex and, because of that, are highly exploitable. It is "Open Season" on using them in whatever way they can be persuaded to allow themselves to

be used; the only trick is to turn it round so that it seems they are being exalted rather than set-up.

Who seriously thinks that women combat soldiers will ever be used? It would be like asking men to run into the ferocity of battle carrying a toddler. So why do we set up this charade which, at best, can only result in their eventual humiliation. Why do we endlessly rehearse how well women are doing in comparison with men, when all that has happened is that women have been induced to take over an ever-larger share of life's most boring jobs. If we looked at many primitive societies around the world, we should see a mirror image of what we think we are aiming for, but at a lower level. Women do all the work, with their babies strapped to their backs, whilst men do "other things"!

However, in our case, the need is not women to do work instead of men, it is that we are actually short of "manpower" so women are being primed, dosed and directed towards the work force. The shortfall in the birth-rate in Europe is now sufficiently worrying for even governments to take notice—Who is going to pay for pensions in the future? Meanwhile, the short-term necessity of women joining the work force is exacerbating the long-term problem of insufficient children being born to replace their parents.

In return for being allowed the privilege of taking on the tedium of a job, women have been persuaded to hand over their bodies and their long-term health to the care of an almost uniquely greedy and unprincipled drugs industry. The makers of the various contraceptive and abortifacient pills which render women fit for the workplace, will probably only admit on judgement day that their products are not the panacea they are sold as. Testing them on the Third World poor and deploying them amongst the young and the ignorant, the barons of chemical sterility have a history of obfuscation and denial of their ill effects that make the cigarette manufacturers appear paragons of virtue in comparison.

Ranged against them *should* be the relentless investigators of public health issues in the media. Instead, they are, for the most part, complicitly silent, and the reason for this is yet another symbiotic relationship. Our culture's intelligentsia support the aims and arguments of feminism, and that means that women must be "freed" from their own biology. They simply cannot face the implications of uncovering the possibly malign effects of long-term use of artificial steroid hormones. It has given them everything they wanted; the ability of women to function as men, through suppressing their biology as women, and for men to disclaim any responsibility for their health and well-being.

It would be funny if it were not so serious. The BBC had a cautious discussion of the growing realisation that women in their thirties and forties are beginning to go down like flies with breast cancer. Very many studies world-wide have predicted this as a result of giving powerful steroid drugs to women on a daily basis; either too young or for too long. This possibility has always been flatly denied by the industry and its cohorts, and I have never seen a programme that looked at the evidence dispassionately. On this occasion, it was simply not mentioned as a factor. Instead, the dutiful medical expert attributed the fact that we have a rate of breast cancer that is vastly greater than that of the Japanese, as being possibly caused by their eating fish oil!

Funny that not eating raw fish never gave us so much cancer before, isn't it? The interviewer *didn't* say that. What he didn't say either—probably because he didn't know—was that the Pill is illegal in Japan.

Anyhow, it gives one an idea of how seriously we take the well-being of women, that fear of having one's favourite philosophy invalidated is enough to silence all rigorous enquiry. Quite a lot hangs on it of course, and not the least thing—though certainly the most buried and subconscious—is that, if women are to be lured back into accepting their responsibility for the family and the community, they must first find out the hard way that there is no alternative.

As it is, when the chips are down, it is women we blame for the dysfunctional family and neglected children; and that is largely true. Unless women are at their post as guardians of the family and the community, nothing works. Feminists may know little about families since so many of them are spinsters, but most people know who to blame when the family fails, because they know who to praise when it flourishes. We *know* these things and yet we act as if we did not.

We have taken rather the same line with homosexuals; of toleration rather than confrontation. Briefly, the *raison d'etre* is "Give them enough rope and they'll hang themselves" or, put more kindly, "let them do what they want, and, if they are wrong, let them take the consequences." It's hard and it's weak and it's unprincipled, but it's where we are at the moment. It saves bruising argument which, in the psychological state engendered by feeling that we have climbed to the end of a turbulent century we do not feel equal to.

Come the new century, probably the wellsprings of energy and boldness will be replenished. We are old now, and we feel like it. In two years time we shall be young again and far more prepared to face the various realities that can no longer be evaded. It is an old *cliché* to say that once we have hit the bottom, there is nowhere else to go but up, but it is probably true.

Certainly once a lethargic and morally confused society has allowed its media to commend the degradation of prostitution to its young women, as a profitable alternative to working, there is nowhere lower they can go. If that is where sexual liberation has taken them, then so much the worse for them. Sooner or later, the rampant promotion of promiscuous sexual activity, and all its attendant ills, is going to be seen as an enormity of unprecedented proportions.

Commerce is the driving force behind this aberration in our cultural behaviour at present, with feminism as its "useful idiot," giving a gloss of approval to that which, above all, hurts women. I am afraid that there is more chance that a combination of reality and our own survival instinct will come to our aid, than there is of feminism coming to its senses. They will be remembered, if at all, for this fact. That, and an awful lot of dead, born and unborn, will be their monument.

"She's done quite well for an office temp."

The RICO Outrage:

Are "Pro-lifers" Really Mafia Mobsters?

This past April, a federal jury in Chicago convicted several anti-abortion activists and their organizations of extortion (including the intent to incite violence) under the Racketeer Influenced and Corrupt Organizations Act (RICO), a law drafted in 1970 to combat the activities of organized crime. The suit (*NOW* v. *Scheidler*) was originated 12 years ago by the National Organization for Women against, among others, Joe Scheidler, the Executive Director of the Pro-Life Action League.

We have known Mr. Scheidler for years; he is a giant in the anti-abortion movement and an activist committed to using only peaceful means of protest. NOW's "victory" is a great injustice to him and a staggering blow to the First Amendment rights of all Americans, as the writers in our following special section agree.

First to discuss the RICO case and its implications is John Leo, who explains how RICO allowed the "mostly low-level offenses" of the anti-abortion protestors to be "lumped together and seen as a nationwide conspiracy to intimidate abortion doctors and patients," which *should* have had the ACLU up in arms. We then go to G. Robert Blakey, the Notre Dame law professor who actually *wrote* RICO: he says it is a "legal outrage" that the RICO law is being used as "a weapon of terror" against civil protest, and cautions "Those who love the First Amendment ought not rest so easily at night in light of what NOW has so wrongly wrought."

Dennis Byrne is a columnist at the Chicago *Sun-Times*; he has written a sort of backdrop piece for us, describing Chicago as the once proud site of a long line of social protests (remember when free speech advocates even defended the right of the Nazis to march in surburban Skokie?). Yet Chicago's press and politicians seem all in favor of silencing anti-abortion protestors. Next, Robyn Blumner, who is pro-choice, observes that NOW's win is "the Constitution's loss . . . RICO was enacted to bankrupt the Mafia, not to bring down philosophical opponents."

Finally, we bring you two columns which point out that the RICO ruling is just one more in a line of unjust legal decisions aimed at quashing anti-abortion protestors—and that the same tactics *could* have been used to cripple the civil rights movement in the 60s. Michael Uhlmann shows that the legal system has employed a double standard when it comes to considering abortion cases where: "the normal rules of judicial review were twisted or suspended" and abortion protestors are being denied rights "enjoyed by everyone else." Paul Greenberg agrees, and warns: "What has been done to Joseph Scheidler can now be done to anyone who speaks against the household gods of the day. . . . It is no longer enough that abortionists should be able to ply their trade as if they were just another convenience store. Now the rest of us must keep quiet about it."

But of course Greenberg won't, nor will Mr. Scheidler, nor will this journal.

—Maria McFadden

Are Protesters Racketeers?

John Leo

Congress wrote an intentionally vague and loosely worded law in 1970 as a tool to combat organized crime—the Racketeer Influenced and Corrupt Organizations Act. The American legal system being what it is, RICO was soon put to more imaginative uses. Its civil provisions—triple damages and the opportunity to smear somebody as a racketeer—made it a favorite among plaintiffs' lawyers. Soon tenants were suing "racketeer" landlords under RICO, and divorcing wives were suing their "racketeer" husbands. And a chorus of voices, left and right, warned that it was just a matter of time before someone managed to use RICO against political protesters.

That has now happened, but because the target group—antiabortion demonstrators—is very much out of favor with civil liberties groups and the chattering classes, the chorus has been mostly silent. One who did speak up, Harvard law professor Charles Ogletree, said this use of RICO "is unprecedented and raises serious questions about chilling important opportunities for political protest. This stretches the law beyond its logical limits."

The political stretching was accomplished by the National Organization for Women and two abortion clinics in a 12-year civil suit against antiabortion activists. Last week a U.S. district court jury in Chicago decided that two antiabortion groups and their leaders had engaged in a conspiracy to commit extortion and threats of violence against those operating or patronizing abortion clinics.

Lethal violence, such as arson and bombing, was not an issue in this suit. The antiabortion activists were accused of making threats, blocking clinic doorways, putting glue in door locks, occasionally grabbing and pushing and pulling the hair of doctors or patients, and "creating an atmosphere" that made more arson and bombing possible.

Easy Cases. All lawbreaking deserves punishment, but RICO allowed these mostly low-level offenses to be lumped together and seen as a nationwide conspiracy to intimidate abortion doctors and patients. Congress specifically intended to make conspiracy easy to demonstrate in mob cases: Under RICO two violations over a period of 10 years, even relatively trivial offenses, can be defined as a pattern of racketeering activity. But using this easy standard against political protesters should raise eyebrows. When combined with the

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severe threat of triple damages, it invites the use of the courts as arenas to punish political enemies.

One of the drafters of RICO, Notre Dame law professor G. Robert Blakey, warns that under RICO, a minor illegality—a bit of pushing and shoving or a rock thrown through a window—can transform an ordinary political demonstration into an attempt at "extortion."

The concepts of "extortion" and "obtaining property" used in RICO cases come from another law, the Hobbs Act, and those concepts are now astonishingly open to abuse. "Property" now means anything of value, such as the right of a store or clinic to solicit business or an individual's right of access to a clinic, so that even momentary interference, such as blocking a doorway, can be deprivation of property or extortion.

RICO could easily have been used to quell the antiwar protests in the 1960s, as the American Civil Liberties Union noted some years ago. But thanks to the ever broadening language of RICO decisions, it could also be used against many kinds of protests and simple sit-ins. If RICO had been available in the early '60s, segregationists would surely have used it to knock the legs out from under the civil rights movement. In the 1960 Woolworth lunch counter sit-in in Greensboro, N.C., the "property rights" of Woolworth to attract paying customers would have been seen as violated by conspirators who filled the counter seats for months. The group of black football players who stood protectively around the demonstrators would have been depicted as an illegal intimidating force.

In the antiabortion case, the judge's instructions to the jury stressed that property rights included the right of women to use the clinics and the right of clinic operators to provide services free of fear, including "fear of wrongful economic injury." Surely Woolworth customers and owners would have qualified for the same rights, and their "fear of wrongful economic injury" was beyond dispute. Woolworth lost $200,000 during the sit-ins, and it capitulated.

It takes little imagination to see how almost any protest group could be hammered by RICO, from Greenpeace and anti-nuclear protesters back to César Chávez's grape boycott (which certainly induced the growers' fear of wrongful economic injury). This has been clear for years. In 1970, the ACLU opposed RICO as being "one of the most potent, and potentially abusive, weapons for silencing dissent." Since then, the ACLU's voice has been more muted and ambivalent, mostly because its feminist allies argued hard that RICO was an ideal weapon to use in the abortion wars. The ACLU really ought to make an effort to recapture the principled position it staked out in 1970. Either you believe in First Amendment rights, or you don't.

Enlarged RICO Threatens Right of Free Speech

G. Robert Blakey

Should RICO, the Racketeer Influenced and Corrupt Organizations statute, be applied beyond gangsters and savings-and-loan kingpins to those who engage in social protest?

I thought not when I drafted the act in 1970 for Sen. John L. McClellan, D-Ark. I also argued as much in 1994 before the U.S. Supreme Court in *NOW* v. *Scheidler*, 510 U.S. 249, when I represented Joseph Scheidler, a longtime student of the non-violent philosophy of Dr. Martin Luther King Jr. My argument, however, failed to persuade the court. The untoward consequences of the court's decision are now being played out in Chicago, where a jury has just returned a verdict for $85,926 against Mr. Scheidler.

In April 1986, Joseph Scheidler went to the Delaware Women's Health Organization to tell its administrator that a demonstration against abortion would take place at the clinic the next day. Believing from her Irish surname that she might be a fallen-away Catholic, he warned her that she was in danger of losing her soul, as God had a commandment, "Thou shall not kill." His comments were a threat, but hardly of this world, unless you are prepared to make God a conspirator in an illicit plot.

Change of Direction

Following the protest, Mr. Scheidler was arrested, found guilty of trespass, not guilty of harassment and given a small fine, but was commended by the judge for his nonviolent approach. The Chicago verdict rewrites the 1986 result.

Not satisfied with the normal outcome of the criminal process, the clinic, with the help of the National Organization for Women, filed suit under RICO. Mr. Scheidler and others were accused of a conspiracy to shut down abortion clinics in the United States. The clinic alleged that the protesters had hatched a plot of "extortion," threatening doctors into "giving up" performing abortions. It sought a nationwide injunction, treble damages and attorney fees, as RICO properly authorizes against mobsters or swindlers.

The lower courts threw out the suit, since the conduct alleged was social protest, not economically motivated, but the Supreme Court granted a petition for certiorari. After argument, the court held that RICO itself applies

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beyond economically motivated conduct. The court did not address the First Amendment or the scope of "extortion," although I vigorously argued that the litigation was inconsistent with the First Amendment and that the conduct alleged did not amount to extortion. The court left those issues for another day.

Congress enacted RICO in 1970 to deal with "enterprise criminality," that is, patterns of violence, the provision of illegal goods and services, corruption and commercial fraud in the "upper-world" or the underworld. When Senator McClellan proposed RICO in 1969, Sen. Edward Kennedy, D-Mass., objected to its application beyond "organized crime"; he was concerned that President Nixon would use it to quell the protests against the war in Vietnam. The American Civil Liberties Union also objected, arguing the the bill would restrict anti-war demonstrations. To meet these objections, Senator McClellan told me to narrow the bill. I did what I was told.

Question of Semantics

No offense remotely related to trespass, vandalism or any other aspect of a civil disturbance that might go beyond First Amendment protections was included in the bill. "Extortion" was included in the list, but its meaning, taken from early English law and reflected in well-established federal jurisprudence, of which I was fully aware, as a federal prosecutor, was "obtaining property by fear." To "obtain" means "to get"; it does not mean "to give up." "Extortion" is like larceny or robbery—it protects property; it is not like "coercion," which protects autonomy, that is, "to do."

Senator Kennedy's concern was not simply to exclude from RICO constitutionally protected conduct, which could not be reached anyway: He did not want RICO's criminal and civil sanctions to be even threatened in the context of social demonstrations.

No knowledgeable statutory drafter in 1969 would have believed that "to protest" could be equated with "to extort." A world of difference exists between a mob boss using a picket line to get a payoff from the hapless owner of a restaurant and a college kid who sits in a draft board office to protest war in Vietnam. All of those who were closely involved in drafting RICO—even those opposed to it—believed that because of the changes I made in it, RICO posed no danger to protests, even when they exceeded First Amendment limits. In fact, the ACLU filed a laudatory statement with the Judiciary Committee that praised us for appropriately narrowing the bill.

Mr. Scheidler will, of course, appeal the Chicago verdict, attacking the lower court's unwise expansion of "extortion." Until the applicability of RICO to protests is definitely decided, however, this kind of litigation will

inconstitutionally chill social protest—of all types, not just anti-abortion demonstrations. The verdict establishes no bright line for distinguishing "picketing" from "pushing" or "yelling" from "threatening."

Obviously, few who desire to bring about social or political change—to say nothing of economic justice in the labor context—will risk their jobs, homes or bank books to join demonstrations if they may be named in a suit and be forced to pay the huge legal fees generated by aggressive litigators. Even if they win, the stakes are too high; given the vagaries of modern litigation, they might lose. Such a weapon of terror against First Amendment freedoms is not what I was directed to draft in 1969. Had it been, I would have declined. It is a legal outrage that, at the behest of NOW, the federal judiciary is rewriting the law in a fashion that Congress, after careful consideration, specifically refused to draft in 1970.

Those who love the First Amendment ought not rest so easily at night in light of what NOW has so wrongly wrought.

It's the *Helluva* Town?

Dennis Byrne

Chicago's tolerance for the annoying is remarkable.

Named after a smelly swamp onion of local origin, Chicago has suffered the likes of stockyards and steel mills, Al Capone and Dennis Rodman. And, of course, the Cubs.

Chicago has lived with, even embraced, a long line of agitators, troublemakers, busybodies, scolds and moralizers. It has forborne disruptions, demonstrations and aggravations, from Nazis marching in a predominantly Jewish suburb to Peacenik raids on draft offices. All with the supportive clucking of local and national free speech advocates.

How is it, then, that a Chicago jury, under the watchful eye of a federal judge, decided that none of it was as bad as pro-lifers demonstrating outside abortion clinics? How is it that the jury agreed with the National Organization for Women that such protests are the stuff of organized crime? And without a peep of complaint from the free speech establishment?

Here is a town where Saul Alinsky, the father of community organizing, perfected his Rules for Radicals, a handbook of aggravating tactics that's the prototype for activists throughout the country. "Machiavelli wrote *The Prince* as a handbook for the Haves on how to how to hold on to their power. My book is for the Have-Nots on how to take it away," he wrote. In Chicago, Alinsky has been canonized for saving a working class neighborhood through threats, intimidation and assorted works of nonviolent civil disobedience designed to get under the skin of the wealthy and politically powerful.

He hasn't been alone. Nuns and self-described groups of "concerned" clergy and laity, citing a law higher than civil authority, have closed off downtown streets, stopping buses and interrupting commerce, marching for peace and social justice. Feminists, fighting for passage of the Equal Rights Amendment, chained themselves in front of the state Senate's door, disrupting the people's right to have their elected representatives deliberate without intimidation. The Fox, an anonymous environmental icon immortalized by the late newspaper columnist Mike Royko, made his point about the industrial pollution of the suburban Fox River by dumping pails of goo in corporate lobbies, to the applause of the high-minded socially conscious.

Dick Gregory gave up his promising career in comedy to picket outside the desolate Criminal Courts building on the Southwest Side on lonely nights

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for some forgotten cause. For this he was admired. And who will ever forget the thousands of unwashed who argued the moral correctness of turning the town upside down during the 1968 Democratic National Convention, and to hell with all those laws about aggravated battery, trespassing, drug possession and incitement to riot.

When the Rev. Martin Luther King brought his moral crusade for civil rights to Chicago, to march down the streets of the most racist part of town, it was correctly judged the job of the police to protect the marchers from the taunts and rocks of the racists, despite the provocative nature of King's enterprise. In Chicago, the Rev. Jesse Jackson established his Operation Breadbasket, a predecessor to Operation PUSH, providing the prototype for boycotts, direct action and nonviolent civil disobedience that not a few of his corporate targets, in an honest moment, would consider to be little more than extortion. The way to break the white economic "colonialism" in the black community, Jackson explained back then, was to "squeeze a company's vitals, which is the profit margin."

To this day, housing activists embarrass slumlords by marching in front of their suburban homes and disrupting the peace. Senior and disabled activists take on City Hall and the local transit authority by disrupting public meetings. And Jackson's direct action last year shut down a parking garage construction site at the popular Museum of Science and Industry to force the hiring of more minorities.

Berkeley may have been memorialized as the birthplace of the '60s free speech movement, but in gritty Chicago, the preachers and lecturers, the blowhards and wiseacres, the dissenters and discordant are as much of a way of life as the stinging January wind off Lake Michigan.

All of this with the active defense, if not the encouragement and blessing, of Chicago's substantial establishment of civil rights and First Amendment activists.

Well, hooray for them. But where were they when Joe Scheidler and his fellow pro-life defendants were convicted of racketeering in the unwarranted, if not unconstitutional, application of a law meant to apply to the thugs and murderers of organized crime? To the shame of First Amendment activists, they were hardly to be found. Those who were heard from soiled their own honorable free speech tradition by praising the jury's decision, and expressing their fondest hope that it would result in the muzzling and bankruptcy of pro-life activists throughout the land.

Thirteen years ago, 700 Chicagoans headed out to Washington D.C. to protest the Reagan administration's policies on nuclear weapons, social

programs and apartheid. They joined thousands of demonstrators from 39 other cities that included such groups as the National Organization for Women and Jackson's Operation PUSH. They weren't headed there simply to lobby and picket. Their avowed goal was civil disobedience. They were going there, they proclaimed, to break the law and trample on someone else's rights to govern or do business.

Giving his blessing upon their departure was Chicago's mayor, the late Harold Washington, a hero of civil libertarians and the political left. When Washington issued a statement "wholeheartedly" endorsing and encouraging those activities, no one suggested a financial assault on the meager treasures of these "people of conscience," arguing that their homes, cars and children's college funds should be taken from them because they are the moral equivalent of organized hit men.

Those who would now drop the hammer of the Racketeering Influenced and Corrupt Organizations law on pro-life demonstrators would have been aghast at the thought of using such a law to stifle their kind of social and political protest—the very thing that Sen. Edward Kennedy (D-Mass.) and the now-silent American Civil Liberties Union warned against when the law was passed.

But such repressive use of the law now becomes the proud legacy of NOW and all the civil rights "advocates" who are content to sit quietly by while protest and non-violent civil disobedience are being stifled—now that the protest and non-violent civil disobedience are being conducted by pro-life activists. The ACLU proudly defended the rights of Nazis to march in Skokie, home to hundreds of Holocaust survivors, but is now willing to sacrifice its free speech creed for the absolute right of women to choose to kill their own children.

We shouldn't be surprised. These were the same people who sat silently by when the repressive Freedom of Access to [Abortion] Clinic Entrances Act of 1994 was passed. The act, aimed exclusively at abortion protesters, is, on its face, content-based infringement of free speech. Not only didn't they oppose the law, free-speech absolutists, such as the ACLU, pushed for its passage.

Such intellectual dishonesty shouldn't be surprising. With the opening of Scheidler's trial, NOW held a press conference in Chicago to equate the "death threats, arson, bombing, stalking, extortion and murder" at abortion clinics with the nonviolent civil disobedience or peaceful protest that the defendants and their allies advocate or practice. NOW peppered its references to the defendants with such descriptions as "terrorists" and "mobsters."

How ironic that NOW should hurl such charges while happily oblivious of the violence and brutality practiced within the clinics it defends.

And what were the death threats, arson, bombing, stalking, extortion and murder incidents that the jury attributed to the defendants?

Actually, we'll never know. Under the RICO law, the plaintiffs had to show only two criminal acts to prove a "pattern" of extortion and violence. The jury convicted on 21 counts, but it was never exactly clear what acts they had in mind. "The judge would not require that [the jury] specify precisely what acts they found to be extortion," said Scheidler attorney Thomas Brejcha. "The statute says it must be a pattern [of acts]. But what is a pattern? The judge bought the argument that just about any two [incidents] in ten years makes a pattern.

"They [the plaintiffs] took the position that any blocking of access to an abortion facility was ipso facto a violent act, qualifying it as extortion. They told the jury that the defendants had crazy ideas of violence. . . . They used the word 'force' interchangeably with 'violence' [so] any kind of blocking of access was an act of force and violence. Even going limp when you were arrested was an act of resistance."

"Anything we did was considered violence," Scheidler said. "Sitting down or standing up, even handing a brochure to a woman. Picketing, singing, praying—apparently they accepted it all."

Blockading entrances? Making too much noise? Clogging the sidewalks? Going where they were unwelcome? Trespassing?

By these measures, the illegal sit-down by civil rights protesters at white-only lunch counters would have qualified as extortion and racketeering. And if the court's current interpretation of RICO had been in effect, the civil rights movement would have been in danger of bankruptcy.

And so goes NOW's plan. Said NOW in a press release as the trial started: The seeking of a "national injunction" would be a "pro-active step toward guaranteeing the promise of Roe v. Wade. . . . If the suit is successful, NOW will also ask the court to award triple damages to every clinic in the U.S. affected by the defendants' violence." Added President Patricia Ireland: "If the anti-abortion thugs won't obey the law, we'll go after them where it hurts—their wallets."

Scheidler, however, seems nonplused about the coming arguments about whether he and the other defendants should pay damages to the nation's 1,200 abortion clinics. They're talking, oh, $50 million, and at triple damages, that's $150 million. Then there are lawyers fees.

"We're trying to tell the judge we don't have the money; my organization was wiped out by the cost of the suit. The transcripts alone were $17,000.

Witnesses were tremendously expensive," he said, to fly them in and house them during the lengthy trial.

But, he told me, "I couldn't in conscience give any money to them. How could I? I'd give them some books maybe."

None of it apparently will slow up Scheidler. "I'm going to talk all over the country," he told the press after the verdict. "I imagine I'll be getting all kinds of invitations now that I am a racketeer. Racketeers for Life. I will make lemonade out of this. You watch me."

Other pro-lifers aren't so sure, however. Privately, one activist told me that the verdict will have a chilling effect. After all, she said, most pro-life protesters are simply regular people, who have families, homes and children they want to be able to send to college. Brejcha also described the effect of the decision as a "sub-zero blast."

Even before the verdict, with the passage of FACE in 1994, some feared that activism at abortion clinics had dropped off. Ralph Rivera, legislative chairman of Illinois Citizens for Life predicted that until the Scheidler case runs through its appeals, some pro-lifers will "sit on the sidelines." Indeed, talk quickly started after the verdict that pro-choice and liberal state legislators would be encouraged to move a bill that would make protesters civilly and criminally liable if they block access to abortion clinics. The bill would create a 50-foot protest-free buffer zone around clinics.

Asked if the decision would be a damper on his own efforts, Scheidler sounded undaunted: "Not mine," he replied. He's still giving speeches and is receiving "tremendous support. I'm doing everything the way I did," he said. Indeed, to change now could be construed as an admission that his tactics were anything but peaceful—something that he has steadfastly asserted.

And so what if the judge hands down a nationwide injunction? "How," he asked, "will it be stronger than the FACE law, which already carries some pretty draconian penalties?"

Those aren't the same kind of draconian penalties attached to other protests, though. Clarke D. Forsythe, Scheidler's former attorney, four years ago asked the U.S. Supreme Court to do what two lower courts had done—throw out the suit. The lawsuit, he told the court, was an attempt "to chill or criminalize lawful protest. If social protest that deprives an industry of business constitutes extortion, it would apply to protest against any industry that had an effect on business: environmentalists against the logging industry; AIDS activists against medical organizations; animal rights activists against fur manufacturers and stores, and peace activists against the military weapons industry." The high court turned aside this eloquent argument without

RICO: Be Careful What You Wish For

Robyn Blumner

I've been on the front lines of the abortion war. I know how ugly it gets when escorts have to crowd around a patient so she doesn't have to endure the pictures of mangled fetuses thrust in her face or the "Mommy don't kill me" taunts broadcast through a bullhorn.

I have locked arms with fellow pro-choice activists as dozens of abortion foes crawled on their hands and knees toward the clinic door. I have even had an elderly scarecrow of a man, with "God is Pro-Life" tattooed across his knuckles, wrapped around my legs, reciting Scripture and trying to crawl past me. He didn't get past. He got arrested.

All the crawlers got arrested, as they should have. They had unlawfully trespassed, and committed simple battery against me and other clinic defenders. Their protests crossed the line from peaceable to lawless. Even so, I am not willing to take the step the National Organization for Women has, and sacrifice the First Amendment to silence these abortion opponents.

On Monday, NOW won a 12-year court fight to try to bankrupt leaders of the anti-abortion movement with the use of a vague and over-broad federal anti-racketeering law. NOW's win is not only the Constitution's loss, but it is a loss for every activist group challenging the status quo.

The federal jury in Chicago found Operation Rescue, the Pro-Life Action League and three anti-abortion activists guilty of violating RICO, the Racketeer Influenced and Corrupt Organizations Act of 1970. The jury found that the defendants had engaged in 21 acts of extortion that qualified them as part of a criminal enterprise, and awarded two abortion clinics $85,926 in damages, which under the law will be tripled. The case was a class-action suit, which gives more than 900 clinics across the country the opportunity to file for damages as well.

Yes, the executive director of the Pro-Life Action League, Joseph Scheidler, violated the law by trespassing on clinic property and dogging clinic workers. He used whatever non-violent tactics were at his disposal in trying to close down a concern that, to his mind, was in the business of infanticide.

But how different is that from the African-Americans in the 1960s who defied segregationist Jim Crow laws in the South by illegally parking themselves at whites-only lunch counters? Or Greenpeace activists who took it

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upon themselves to plug industrial pipes that were spewing toxic waste into the oceans? Or General Motors workers in 1937 who staged a "sit-down strike" occupying the plant so their union would be recognized?

All were acts of conscience, of civil disobedience, and all were illegal. But now the civilly disobedient face not only jail but financial ruin as well, and so do the organizations associated with them.

RICO was enacted to bankrupt the Mafia, not to bring down philosophical opponents. The RICO law simply should not be applied to groups with a non-profit, issue-advocacy motive. It's too potently punitive and, with its loosely drawn definition of a criminal enterprise, too easily fits political advocacy organizations whose leaders and followers engage in occasional law violations in furtherance of a cause. Moreover, the judgment calls that have to be made to define political acts and speech as "extortionist" crimes skirt too close to the First Amendment.

But, in 1994, the U.S. Supreme Court said the law as written by Congress is not limited to criminal enterprises with an economic motive and allowed NOW's suit to progress to a jury.

At trial, NOW alleged that the activists were part of a nationwide conspiracy to close abortion clinics through a pattern of racketeering activity including extortion. Did members of Operation Rescue and others engage in conduct designed to close abortion clinics? Of course, that was their raison d'etre. But is that "racketeering"? NOW claimed the illegal actions were extortionist use of fear, threats and violence to induce clinic employees, doctors and patients to stay clear of the clinics, thus injuring the abortion clinics' business interests.

An abortion protest is intended to be intimidating. Screaming and crowding are all part of the campaign to persuade—to make having an abortion too anxiety-producing to do. It's not different than a labor picket, staffed with strikers trying to keep replacement workers from taking their jobs.

Imagine the damage a suit like this would have done to the civil-rights movement had the NAACP been successfully sued under RICO when some of its leaders used intimidation and threats of violence (and even allegedly actual violence) in enforcing its black boycotts of racist stores in Mississippi. At the time, the Claiborne Hardware company tried to sue for malicious interference with its business but was turned away by the U.S. Supreme Court, because the boycott, despite its violent fringes, was deemed constitutionally protected.

NOW's case seems to go directly contrary to that ruling. With this win, NOW and other pro-choice groups have the tool they need to bankrupt their most ardent and indefatigable anti-abortion rivals. And the drug companies

have the tool they need to bankrupt the AIDS activist group ACT-UP. And the fur coat designers have the tool they need to bankrupt People for the Ethical Treatment of Animals. And the corporate farms have the tool they need to bankrupt the United Farmworkers Union.

NOW has fashioned quite a sharp tool. It should be careful it doesn't cut itself.

Muffling the Constitution

Michael M. Uhlmann

Americans complain like no other people on earth, confident in the conviction that the Constitution, if not God himself, guarantees their right to do so. When something really bugs us, we join others of like mind to alter or remove the object of our discontent. Political protest has been a grand theme of our history since at least the Boston Tea Party, and thanks to the First Amendment's right of "peaceful assembly," has become the *sine qua non* of every significant political movement from abolitionism and union organizing to the civil rights, antiwar, and anti-abortion demonstrations of more recent years.

Those on the receiving end of protest will typically hunker down behind legal barricades, opposing both the merits and the tactics of the protestors. As both sides reach for lawyers, the matter goes to court. Ninety-nine out of 100 times the right of protest is vindicated. It is an old story, and its lessons are celebrated whenever Americans recall their history as a freedom-loving people.

The traditional vindication of the constitutional right of protest, however, now faces a new and ominous threat. Gradually but inexorably, abortion protestors are being denied First Amendment rights enjoyed by everyone else. To those who follow the Supreme Court's chop-logic on the abortion question, this will come as no surprise. As Justice Sandra Day O'Connor noted in 1986, the Court's abortion decisions had "worked a major distortion in . . . constitutional jurisprudence." It is "painfully clear," she went on, "that no legal rule or doctrine is safe from *ad hoc* nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." Without putting too fine a point on it, Justice O'Connor was accusing her colleagues of imposing a double standard: When it came to the consideration of abortion cases, the normal rules of judicial review were twisted or suspended.

As Justice Antonin Scalia presciently warned in a 1993 abortion protest case, the Court's arbitrariness now threatens to engulf even well-settled standards under the First Amendment. In late April, in *NOW* v. *Scheidler*, a Chicago jury found three anti-abortion protestors in violation of the Racketeer

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Influenced and Corrupt Organizations Act, otherwise known as RICO. The law was enacted in 1970 to aid prosecutors in their pursuit of Mafia-type enterprises, declaring such entities to be criminal conspiracies and imposing legal liability on all those "associated" with the enterprise—whether or not they had direct responsibility for the illegal acts of their "associates." RICO makes sense when applied to organized criminal undertakings, but none whatsoever when applied to acts of political protest. Yet that is precisely the strategy being employed by the National Organization for Women in its well-financed efforts to silence anti-abortion demonstrators.

When the *Scheidler* case first came to the attention of the Supreme Court in 1994, the justices ruled that RICO has a far broader reach than those who enacted the statute ever dreamed of and, specifically, that it was not limited to those seeking economic gain. After remand to federal district court and a lengthy trial, the jury delivered its verdict, awarding $85,000 to the plaintiffs (which, under RICO, can be trebled by the judge) and setting the stage for a permanent injunction that (again because of RICO's octopus-like reach) could in theory cover virtually every organized anti-abortion protest in the nation.

The implications of this jury trial, in short, reach far beyond the immediate facts and parties. The verdict is a signal victory for NOW and the proprietors of abortion clinics, who have labored mightily for years to stigmatize pro-life demonstrators as so many hate-filled proponents of violence. Not content with court decisions making abortion a constitutional right, NOW and its allies seek to insulate the barbarity of abortion from the searing scrutiny and corrective political action energized by public demonstrations. The RICO verdict threatens criminal liability and financial ruin against anyone, however pacific, who is found to be "associated" with acts or threats of physical violence committed by others. Such a theory of the first Amendment would have choked the civil rights movement in its infancy and turned Martin Luther King Jr. and his courageous followers into bankrupt federal felons.

King and his movement escaped that fate largely because federal courts energetically protected their constitutional rights. Will judges grant analogous protection to pro-life demonstrators, or will the First Amendment be sacrificed to protect the abortion agenda being so aggressively advanced by the judiciary? This remains to be seen. But as the Chicago case makes it way on appeal, let there be no mistake about what is at stake: nothing less than the ability of free citizens to protest not only immoral policies, but the increasingly imperial manner in which the judiciary justifies them.

Shut Up, the Court Explained

Paul Greenberg

Abortionists now have found a splendid new way to quell protesters: Sue 'em. A federal court in Chicago has handed down a $258,000 judgment against three anti-abortion protesters and a couple of pro-life outfits that lent them moral support.

Something tells me that people so committed to life aren't going to be discouraged by this latest attempt to stifle them. Rather, the big loser will be the First Amendment in general and, in particular, the constitutional right of Americans to peaceably assemble to express their ideas, however unpopular some of those ideas may be.

The decision in Chicago wasn't aimed at just a handful of dissenters from our contemporary culture (of death), but at any protesters who can be scared off by lawsuits in the future. It's called the Chilling Effect. And the temperature just dropped a few degrees if folks who organize demonstrations can be held legally responsible for any violence perpetrated by the few crazies in any movement.

This wouldn't be the first time the law has been used as an instrument of intimidation. Civil-rights workers down South were once arrested by everything from faulty tail lights to inciting a riot by trying to eat at a Woolworth's.

Today's great moral protest is against the slaughter of the unborn, and the law has been twisted to quell it, too. First came a federal statute designed to keep protesters away from abortion clinics; now comes a civil case based on a law against, yes, racketeering. It's a casebook example of how to make dissent illegal and drive peaceful protest underground.

It is no longer enough that abortionists should be able to ply their trade as if they were just another convenience store. Now the rest of us must keep quiet about it. Just as it was not enough in an earlier century for the slave trade to continue; anti-slavery agitation had to be suppressed.

Walker Percy once said he could foresee that those who favored abortion would win the political debate, but that they would be told what they are doing. Now he might be gagged, at least if it could be proved that his words had inspired others to act. Percy may once have been a writer; today he might be judged a racketeer.

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If only the segs back in Jim Crow times had been able to avail themselves of this Nixon Era law, who knows how long they could have held on to their crumbling caste system? Here in Arkansas, we might all still be following those little signs saying WHITE and COLORED. Any group that protested could be sued and slapped with huge awards, dangerous racketeers that they are.

The professor who drafted this anti-racketeering law, G. Robert Blakey, could only express consternation at what has been done with his words. Asked for his reaction, the professor noted that his brainchild (The Racketeer Influenced and Corrupt Organizations Act, or RICO) could now be used to punish labor unions or civil rights groups when they organize protests. Free speech is being redefined as extortion when it is practiced by the wrong sorts of ideas. Anti-abortion protesters become Racketeers, and the pro-life movement a Corrupt Organization.

Blakey pointed out that few demonstrations are perfectly disciplined. "Somebody's going to throw a rock," he said. "Somebody's going to step on a blade of grass." But instead of leaving such infractions where they should be left—to local law enforcement and state laws against trespassing and disturbing the peace—now dissent can be chilled by huge awards against those who organize or support demonstrations. Even if the organizers are on record as warning against violence.This protest's leader, a former Benedictine monk, denounced violence in his speeches and publications, but that didn't matter to those who wanted him punished—and others discouraged.

What has been done to Joseph Scheidler can now be done to anyone who speaks too loudly against the household gods of the day. And the National Organization for Women, which brought this case, seems jubilant at the result. NOW's leaders will doubtless remain jubilant till the precedent is turned against them or their ideas.

In another time, another clergyman—a martyr, and possibly a saint—who dared speak out against the injustices of his time—Dietrich Bonhoeffer—was executed as a traitor. Of course he was protesting the whole, ungodly apparatus that was Hitlerism, not just the abortion and euthanasia that were but minor accessories of that whole culture of death.

Today, in the land of the free and the home of the brave, a Dietrich Bonhoeffer might only be hauled into court and assessed a monetary penalty if it could be proved that his words had moved others to act. Instead of a traitor, he would be only a racketeer. Who says we haven't made strides?

Is *Roe* v. *Wade* Obsolete?

Robert A. Destro

As science races ahead, it leaves in its trail mind-numbing ethical questions.[1]

Kass v. *Kass* will never be as famous as *Roe* v. *Wade*, but the recent ruling by New York State's highest court may well be just as important.

As everybody knows, in *Roe* the United States Supreme Court held (on January 22, 1973) that a woman has a constitutional right "to terminate her pregnancy before viability."[2] *Kass* v. *Kass*, by contrast, is a New York divorce dispute over the custody and control of frozen embryos before pregnancy begins; it was decided by the New York Court of Appeals on May 7, 1998, and it raises an important question: *Does the holding in* Roe *v.* Wade *control the outcome of a case where no pregnancy yet exists*?

In a unanimous decision, the Court of Appeals said "No." *Roe* v. *Wade* is about abortion—the "termination of a pregnancy" *in utero*. By its very terms, *Roe* does not control a dispute between husband and wife over custody and control of unborn children who exist, or are capable of surviving, outside of the uterus of their mother.

Kass is thus a powerful reminder that the "central holding" of *Roe* v. *Wade* is limited by its facts. So is its holding that an unborn child is not a "person" entitled to equal protection of the laws. Advances in medical technology now make it possible for unborn children to survive independently from their mothers much earlier if a pregnancy "terminates" by premature birth or abortion in the later stages of pregnancy. Advances in biotechnology now make it possible for the child to "survive" indefinitely even before pregnancy begins.

Kass thus offers pro-life advocates a "window of opportunity." The New York Court of Appeals holds in *Kass* that the custody of frozen embryos is controlled by the law of contract. For the first time since the adoption of the Thirteenth Amendment's prohibition of slavery, an American court has held that human beings are to be treated as chattel. We can accept the challenge and make a clearly articulated case for the humanity of the unborn, or we can concede the territory to those who view the unborn as property, to be created and disposed of at will, and for whatever price the market will bear.

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I. HOW CAN YOU "TERMINATE" A PREGNANCY THAT HASN'T STARTED YET?

Kass v. *Kass* is a divorce case. The litigants were Maureen and Steven Kass, a New York couple afflicted by an all-too-common disability: infertility. Like thousands of other couples, they sought help from a medical subspecialty that did not even exist at the time of *Roe* v. *Wade*: the "infertility specialist."

Their first attempt at "assisted reproduction" was decidedly low-tech: artificial insemination. When that was unsuccessful, the next step was *in vitro* fertilization (IVF) and embryo transfer. Unfortunately, IVF was unsuccessful as well, and shortly after their last IVF attempt ended in failure, they divorced. In *Kass* v. *Kass* the New York Court of Appeals had to decide what to do with all those "extra" embryos.

Because failure rates—and the physical, psychological, and economic costs of ovarian stimulation and egg harvesting—are so high, IVF specialists recommend the fertilization of many eggs and the cryopreservation of the "pre-zygotes" (the term used to describe embryos in the four- to eight-cell stage) that result from the process. If pregnancy does not occur after transfer of several of these embryonic human beings into the fallopian tubes of the mother, the others serve as "extras" held in case of another attempt at full-term development. If pregnancy does occur, they are simply "extras" preserved in liquid nitrogen, with an uncertain fate and an even more unsettled legal status.

For Mr. Kass, the frozen "pre-zygotes" were property and their disposition was governed by the property settlement and "informed consent" forms signed by the couple as a precondition for their participation in the hospital's IVF program. Those forms stated:

> III. Disposition of Pre-Zygotes.
>
> We understand that our frozen pre-zygotes will be stored for a maximum of 5 years. We have the principal responsibility to decide the disposition of our frozen pre-zygotes. Our frozen pre-zygotes will not be released from storage for any purpose without the written consent of both of us, consistent with the policies of the IVF Program and applicable law. I*n the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction.* Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand that we may determine the disposition of our frozen pre-zygotes remaining in storage [emphasis added].

Prior to their divorce, Mr. and Mrs. Kass had also drawn up and signed an "uncontested divorce" agreement. It included the following language:

> The disposition of the frozen 5 pre-zygotes at Mather Hospital is that they should be disposed of [in] the manner outlined in our consent form and that neither Maureen Kass[,] Steve Kass or anyone else will lay claim to custody of these pre-zygotes.

Steven Kass argued that this contract language controlled the outcome of the case. Maureen Kass had a different view. Relying on *Roe*, she argued that

> a female participant in the IVF procedure has exclusive decisional authority over the fertilized eggs created through that process, just as a pregnant woman has exclusive decisional authority over a nonviable fetus, and that [she] had not waived her right either in the May 12, 1993 consents or in the June 7, 1993 "uncontested divorce" agreement.[3]

In a stunning blow both to Mrs. Kass, and to the broad "reproductive autonomy" reading of *Roe* preferred by most abortion-rights advocates, the New York appellate courts *unanimously* agreed on two "fundamental" (their term) propositions.

1. That a woman's right to privacy and bodily integrity are not implicated before implantation occurs; and
2. That when parties to an IVF procedure have themselves determined the disposition of any unused fertilized eggs, their agreement should control.

Each of these "fundamental" propositions is significant in its own right. Taken together, they make *Kass* v. *Kass* an enormously important case. I will discuss each, briefly, in turn.

A. **Proposition One:** A woman's right to privacy and bodily integrity are *not implicated* before implantation occurs.

The reason that New York's highest courts (the Court of Appeals and the Appellate Division of the Supreme Court) were unanimous in support of this proposition is simple. The literal words of *Roe* v. *Wade* cannot be read in any other way.

Roe v. *Wade* rests on an explicit "balance" struck by the Supreme Court between the interests of *pregnant* women and the right of the State of Texas to assert its sovereign power to protect the unborn from harm. Not only did this "balance" *affirm* (at least in theory) a limited power to protect the unborn after viability, it simply *assumed* that unborn children capable of existing outside the womb of their mother were within the protective ambit of State law. So the *Kass* decision says:

> This holding, we feel, is consistent with the relative weights of the respective

> interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day.[4]

Kass thus raises an intriguing question: Is *Roe* v. *Wade* obsolete? Is it an artifact that will someday be recognized as a tragic reminder of primitive medical technologies that force a "choice" between the interests of the mother and those of her child?

If so, *Kass* seems to affirm the Supreme Court's own position that advances in medical technology will render *Roe* increasingly irrelevant to the decisions of courts and legislatures called upon to reconsider the legal status of unborn children. Justice Sandra Day O'Connor was the first of the Justices to point out the technological "self-destruct mechanism" embedded in *Roe*'s reliance on medical technology. Observing that the holding in *Roe* v. *Wade* "is inherently tied to the state of medical technology that exists whenever particular litigation ensues,"[5] she warned that the Court's approach in *Roe*

> is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.[6]

In 1973, "termination of pregnancy" before 28 weeks gestation almost inevitably meant the death of the child. Today, it does not. Medical journals are filled with studies on the management and care of severely premature infants. "At some institutions, the fetal survival rate approaches 90 percent at 24 to 27 weeks of gestation,"[7] and a recently-published Baylor University actuarial study

> ... confirms that survival data provided by traditional survival-from-birth analysis and actuarial analysis are quite different. For example, our survival from birth is 27% for infants born at 23 weeks' gestation and 51% for those born at 24 weeks' gestation. Because one-half of the deaths in these infants occur during the first few days, their actuarial survival rates by 6 weeks postnatal age increases to greater than 80% to 90%.[8]

At the other "end" of pregnancy, science is moving quickly as well. The first advances came, as they always do, in agricultural biology. IVF, embryo lavage and transport, intra-fallopian transfer, and cloning all had their genesis in the science of biotechnology. It was inevitable that specialists in human reproduction would seek to use that knowledge. Their spectacular success undoubtedly "leaves in its trail mind-numbing ethical questions."[9]

B. Proposition Two: When parties to an IVF procedure have themselves determined the disposition of any unused fertilized eggs, their agreement should control.

At first glance, such a rule looks problematic. Seen in medical and legal context, however, it is clear that the New York courts simply do not know what to do. Because the "rule" (or "holding") of *Roe* v. *Wade* does not apply to many of the controversies that arise under the new reproductive technologies, the Court of Appeals would naturally look to state law. It too provides little guidance: Legislatures have not decided what should be done either.

Astute observers of the political scene have been aware of this policy vacuum for years. Until *Kass*, however, advocates for unfettered "reproductive autonomy" and fetal experimentation have had the advantage. Like Mrs. Kass, they argue that *Roe* guarantees a right of "procreative autonomy," not simply the right to "terminate a pregnancy prior to viability." *Kass* levels the field, and puts pro-life and abortion-rights advocates in a roughly equal political bargaining position. If Mrs. Kass cannot rely on *Roe* to defend her "procreative autonomy" in a case involving her *own* offspring, the derivative claim of those who sell embryos to infertile and gay couples—or of those who produce them for experimental purposes—is even weaker. Insofar as the new reproductive technologies are concerned, *Kass* marks a quantum shift in comparative political advantage.

II. *Kass* v. *Kass* and the Politics of Reproductive Technology

A political debate focused on the ethical and political dimensions of "assisted reproduction" techniques, including *in-vitro* fertilization, cloning, and the transfer and indefinite cryopreservation of embryos before implantation works to the advantage of the anti-abortion argument.

First, the holding in *Kass* offers a golden opportunity for public education. Since "disposition of these pre-zygotes does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice," and pre-zygotes are not "recognized as 'persons' for constitutional purposes," the Court of Appeals' holding that "The relevant inquiry thus becomes who has dispositional authority over them" [10] raises a whole series of unsettling policy questions with which the public is only vaguely familiar.

Just as the Supreme Court predicted, advances in biotechnology and neonatology make medical science "better able to provide for the separate existence of the fetus." In 1998, embryos are routinely conceived *in vitro*. The technology exists to "transfer" embryos from one woman into another during the earliest stages of pregnancy, and surgeons have successfully

removed a fetus for surgery and returned it to its mother's womb. It will not be long before scientists successfully "clone" a human being, or create mixed life forms that have both human and animal or plant genes.

Setting aside the regulatory questions that will certainly arise as the public becomes aware of these practices, it seems rather clear that the embryonic human beings involved in them either have, or can have, a separate existence. It makes little difference whether that existence is *in vitro*, in a surrogate mother, or frozen in liquid nitrogen. The key point is that, in a small but increasing number of cases, technology has made it possible for the "right to terminate a pregnancy" to coexist with the child's right to life. As long as doctors are able to "terminate the pregnancy" without harming the child, "viability," as the Court defined it in *Roe*, has occurred. We have not yet reached the stage where physicians can extract and maintain a fetus in the first and mid-second trimesters, but Justice O'Connor was correct when she observed in 1983 that "fetal viability in the first trimester of pregnancy may be possible in the not too distant future."

Will pro-life advocates and policy experts be prepared to enter this "Brave New World"? They had better be. Otherwise, the battle will be over before they are aware that it is going on.

III. *Kass* v. *Kass* and the Legal Status of Human Beings Prior to Maturity

The most unsettling aspect of *Kass* is the New York Court of Appeals' reliance on contract principles to resolve the dispute between Mr. and Mrs. Kass over the custody of the embryos. For practical purposes this means that cryopreserved, unborn human beings are viewed – at least in New York – as a species of property that can be bought, sold, bartered, or traded on the open market. It is important to note, however, that nothing in either the United States Constitution or the Constitution of the State of New York requires that conclusion.

The existence of human embryos and fetuses *ex utero* raises a number of important ethical questions. Most, if not all of them, have been fleshed out in the debates over fetal experimentation, but the decision in *Kass* v. *Kass* provides an additional reason why pro-life advocates need to stake out, and defend, a clear position on these issues.

About six months prior to the decision in *Roe* v. *Wade*, the New York Court of Appeals held that New York's law permitting abortions up to 24 weeks was a constitutional exercise of legislative authority. Its decision, *Byrn* v. *New York City Health & Hospitals Corporation*[11], is significant for two reasons. First, *Byrn* was cited in, and relied upon, by the Court of Appeals in *Kass*. Second, *Byrn* holds that the legal status of the unborn is a question of

law to be decided *by the legislature*, not the judiciary.

> The ... real [debate] ... turns on whether a human entity, conceived but not yet born, is and must be recognized as a person in the law. ... It is not true, ... that the legal order necessarily corresponds to the natural order. That it should or ought is a fair argument, but the argument does not make its conclusion the law. It does not make it the law anymore than that the law by recognizing a corporation or a partnership as persons, or according property rights to unconceived children, make these 'natural' nonentities facts in the natural order.
>
> When the proposition is reduced to this simple form, the difficulty of the problem is lessened. What is a legal person is for the law, including, of course, the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person. [citations omitted] The process is, indeed, circular, [whether] the law should accord legal personality is a policy question which in most instances devolves on the Legislature, subject again of course to the Constitution as it has been 'legally' rendered. That the legislative action may be wise or unwise, even unjust and violative of principles beyond the law, does not change the legal issue or how it is to be resolved. *The point is that it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence.*[12] [Emphasis added]

Pro-life advocates need to take this admonition seriously, and to set aside their philosophical differences with those who reason in this fashion. *Roe* v. *Wade* does *not* hold that unborn children may *never* be counted as "persons" under the law. By its own terms, the Court's holding that a state may not, "by adopting one theory of life . . . override the rights of the pregnant woman that are at stake"[13] is limited to cases in which her right to "terminate" *a pregnancy prior to viability* are involved. In all other cases, the legal status of the unborn is a question of state—*not* federal—law.

IV. Distinguishing Symbol from Substance: *Roe* v. *Wade* as the Rhetoric of Pro-Abortion Politics

The importance of *Kass*, in law and in politics, rests on its holding that the legal status of unborn children *remains* an "open" political question. This is an important development, but it requires that pro-life advocates distinguish clearly between the "symbolic" importance of *Roe* v. *Wade* (which is considerable) and the actual "rules" the Court wrote into American constitutional law.[14]

To abortion-rights advocates, the "central holding" of *Roe* is "a milestone on the path to full emancipation of women."[15] In their view, the alleged right to "procreative autonomy" said to have been recognized in *Roe* validates the practice of selling or donating sperm and eggs, or both, to infertile and homosexual couples. Of necessity, it would also require legal acceptance of not

only the practice of "surrogate motherhood," but also the right of individuals to transfer their parental rights by gift, contract, or sale, even though the law almost universally frowns on baby-selling.[16]

This is precisely what has happened. Practices such as these have become so widespread that it is fair to describe them as part of a "market" in which human beings are conceived, bought, and sold. Review of the statute and case law indicates that the courts find them "mind-numbing" indeed.[17]

Because there is no New York law prohibiting such transactions, *Kass* implicitly allows human embryos to be sold or donated on the open market in New York, either for implantation or for experimental use. This "deregulated" state of affairs is perfectly congruent with the interests of advocates for "reproductive freedom" and fetal experimentation.[18] It is safe to predict that they will fight tooth and nail in the federal courts against any interpretation of *Roe* that would permit legislatures to declare human embryos *ex utero* to be "persons" subject to the normal rules of child custody and protection.

This is why the combined effect of *Kass* and *Byrn* are so significant. *Byrn* leaves open the possibility that states can regulate the "market" in human embryos *and* that it can do so by treating them as human beings who, by definition, should not be bought and sold like embryonic farm animals.

The current controversy over "partial birth" abortions contains some important lessons. Though there may be some room to quibble on the margins, most of the children subjected to this grisly procedure *are* "viable." The point of the procedure is twofold: to minimize the danger of a late term abortion to the woman, and to make certain that the child does not survive it.

Abortionists who challenge laws prohibiting partial birth abortions do so on two grounds: 1) that the laws are vague and thus might prohibit previability abortions, and 2) that the "partial birth" procedure may be a "safer" alternative for the mother than other, more invasive, abortion techniques. Although it is important, we can safely skip a discussion of the vagueness issue[19], and proceed immediately to the major reason that partial birth abortion statutes have the abortion-rights camp up in arms. Laws that prohibit specific *methods* of performing *post*-viability abortions are designed to protect the *children*, and may require both abortionists and pregnant women to take account of their interests.

Abortion rights advocates are aghast at the possibility:

> "This is just terrible," says Janet Benshoof, head of the Center for Reproductive Law and Policy. "Here you have a right-to-life district attorney determining what abortions can be performed. That is extraordinary. You have the Constitution being decided by a district attorney." By protecting some abortion rights, "he's admitting everything else is a free-for-all."[20]

To pro-abortion activists like Ms. Benshoof (who has served as chief, or co-counsel in many, if not most, key abortion cases, including the challenge to the Hyde Amendment), *Roe* v. *Wade* means that the states may *never* intervene to protect the life of an unborn child. If its mother chooses abortion, the welfare of the child is not a valid state concern.

But this is not what the Court said in *Roe* v. *Wade*. Its words – which have the force of law – speak for themselves.

> ... [Jane Roe] and some amici *argue* that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree.[21]
>
> * * *
>
> If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[22]

Partial-birth abortion legislation challenges the "broad" reading of abortion rights so prevalent in "progressive" circles, and it does so in a manner perfectly consistent with *Roe* itself. A woman is free to "terminate her pregnancy," even after the point of viability, but the scope of the right ends with the decision to terminate. The abortionist's *implementation* of that decision is a matter of medical judgment subject to review by appropriate state authorities.

This, of course, is what has abortion rights advocates worried. If a state may "review" abortionist's decisions concerning "viability," and may prohibit post-viability procedures that guarantee the death of the infant, the "nose of the camel" is (at least in their view) "under the tent." To pro-abortion litigators like Janet Benshoof, the very *idea* that the state might protect an unborn child at or near the end of pregnancy is "totalitarian."

Histrionics aside, she had best get used to the idea. *Kass* demonstrates that *Roe* v. *Wade* is increasingly irrelevant at the "start" of pregnancy too.

Pro-life advocates also need to get used to this "brave new world." To most pro-lifers, the phrase "termination of pregnancy" is a euphemism designed to hide the grisly reality of abortion and to mask the exercise of what Justice Byron White, dissenting in *Roe*, called "an exercise of raw judicial power."[23]

The debate over "partial birth" abortion demonstrates, however, that the phrase "termination of pregnancy" need not be viewed, in all instances, as a euphemism. "Termination of pregnancy" and the death of the unborn child are biologically separate events. It serves the interests of pro-abortion advocates to use the terms interchangeably. We must develop a new vocabulary.

We can begin that process by re-familiarizing ourselves with the Thirteenth Amendment, and with the lessons our Nation has learned from its experience with the evils of slavery and racial discrimination.

V. Humans as "Chattel": Has the Court in *Kass* Unwittingly Re-Opened the Debate Over Slavery?

Advances in medical and biotechnology have put the courts in a bind. Because technology makes it possible to conceive and sustain life under circumstances where nature alone would not provide support, it has become necessary to determine what, if any, protection the law provides to individuals in need of technology to survive.

On the "front end" of the biological continuum, the issue is whether or not the state may mandate care and protection for the unborn. Unfortunately, most courts do not accept the proposition that "all Men are created equal, that they are endowed by their Creator with certain unalienable Rights." Being creatures of positive law, they have accepted the proposition that the rights of human beings are conferred by the law. As a result, what (or "who") counts as a human being does not (in the words of the New York Court of Appeals) "necessarily correspond to the natural order." On the "back end" of the biological continuum are the "right to die" cases. In these cases as well, the courts have held that states are free, but not required, to withdraw the protection of homicide law from the handicapped (i.e. those who are "terminally ill").[24]

Although the case law on both ends of the biological continuum is heavily-freighted with rhetoric about "autonomy," the law must make a judgment. Unfortunately, the courts have made one that is all too common. They have decided, once again, that some human beings are "more equal" than others.

They have done this before, and we are still living with the consequences. In *Dred Scott* v. *Sandford*, the United States Supreme Court held that persons of African descent had no rights a white person or State was bound to respect. Chief Justice Roger Taney observed that

> . . . a negro of the African race was regarded . . . as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. . . . The legislation of the different colonies furnishes positive and indisputable proof of this fact. [25]

For the late Chief Justice, such treatment was dispositive:

> They [persons of Black African descent] had for more than a century before been

> regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. . . . [They] were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.
>
> [A]nd it is hardly consistent . . . to suppose that they [the people of the states] regarded at that time, as fellow citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; . . .upon whom they had impressed such deep and enduring marks of inferiority and degradation; . . . to include them in the provisions . . . . for the security and protection of the liberties and rights of their citizens.[26]

Several abortion rights advocates have noted the relationship between the Court's treatment of the unborn in *Roe* and its treatment of persons of African descent since *Dred Scott*. Some, like American University Law School's Professor Jamin Raskin, reject the analogy *in toto*. They will not even entertain the possibility that the interests of the unborn are in any way comparable to those of either the woman, or persons of African descent. The cases are distinguishable, wrote Raskin, because "*Dred Scott* decided that African-Americans had no constitutional right to be treated like citizens [and] *Roe* decided that women have a constitutional right of privacy."[27] Perhaps after *Kass* he will see the connection.

Others see it quite clearly. Professor Deborah Threedy of the University of Utah College of Law has written:

> In one sense, the reference to slavery in the abortion context is appropriate. Not since the national debates over slavery has this country found itself so divided over an issue involving fundamental concepts of personhood. Moreover, both issues have created intense disagreement whether the issue should be resolved politically, by the elected representatives, or judicially, by the courts.
>
> * * *
>
> Pro-choice rhetoric analogizes the woman faced with an unwanted pregnancy to the slave. The logical appeal hidden within this analogy runs something like this: a slave is compelled to render services for another; prohibiting abortion compels the pregnant woman to render service to another, the unwanted child; therefore, a woman who is compelled to bear an unwanted child is a slave.
>
> Conversely, anti-abortion rhetoric analogizes the unborn child and the slave. The implicit logical appeal is: a slave is a living individual who is legally compelled to hold his life at the will of another; the unborn are living individuals whose lives are held at the will of others; therefore, unborn children are slaves.[28]

One need not go so far. Unborn children need not be classified as "slaves" in order to make the case that treating *any* human being as property that can

be bought, sold, or bartered violates the Thirteenth Amendment. It provides:

> *Section* 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> *Section* 2. Congress shall have power to enforce this article by appropriate legislation.

All commentators agree that legal recognition of an "ownership" interest in a human being is the functional equivalent of slavery. In *Dred Scott*, the Supreme Court defined the term broadly:

> The status of slavery is not necessarily always attended with the same powers on the part of the master. The master is subject to the supreme power of the State, whose will controls his action towards his slave, and this control must be defined and regulated by the municipal law. In one State, as at one period of the Roman law, it may put the life of the slave into the hand of the master; others, as those of the United States, which tolerate slavery, may treat the slave as a person, when the master takes his life; while in others, the law may recognize a right of the slave to be protected from cruel treatment. *In other words, the status of slavery embraces every condition, from that in which the slave is known to the law simply as a *625 chattel, with no civil rights, to that in which he is recognized as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor.* Which of these conditions shall attend the status of slavery, must depend on the municipal law which creates and upholds it.[29] [Emphasis added]

By recognizing the biological fact that a woman's "right to terminate her pregnancy prior to viability" is not involved in IVF situations, the court in *Kass* has changed the nature of the debate over the humanity of the unborn. The issue, after *Kass*, is whether or not the States are empowered to treat unborn children, including embryos and "pre-zygotes" as "persons" for purposes of the law of child custody and homicide. Nothing in *Roe*, not even its holding that an unborn child is not a "person" under the Fourteenth Amendment, requires us to allow people to buy, sell, and trade the unborn on the open market like beef cattle.

VI. Conclusion: *Kass* as a "Wake-Up!" Call for the Pro-Life Movement

After *Kass*, the issue is whether the states may hold that the unborn are subject to the protection of their own laws in any case where federal law (*Roe*) does not prohibit them from doing so. Given the case law to date, States would be on strong grounds should they decide to grant such protection. No court – not even the Court in *Roe* – has ever ruled that the unborn offspring of human beings is anything *other* than a "human being." No court has ever held explicitly that human embryos are property. Even professional

"bioethicists" fudge the issue by taking a utilitarian, or "pragmatic," approach to the question. The New York State Task Force on Life and the Law, to cite but one example, has urged that gamete bank regulations should require specific instructions regarding disposition, and that no embryo should be implanted, destroyed or used in research over the objection of an individual with decision-making authority[30]. Were embryos simply "abandoned property," the Task Force would have had no occasion to consider the question.

In *Roe*, the Court explicitly denied that it was seeking to resolve

> ... the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[31]

Instead, it decided to skirt the issue altogether. Like the New York Court of Appeals in *Byrn*, it drew a distinction between the *legal* status of the unborn and their biological identity as members of the human family. Although *Roe* holds that no state may "override the rights of the pregnant woman that are at stake" when she seeks to terminate a pregnancy, the post-*Roe* case law, both state and federal, makes it clear that *Roe* does not control when the status issue arises in a case *other than* legal abortion. In many, if not most, of these cases, the unborn child is viewed by the law the same manner as any other "person in the whole sense."

Once the debate shifts to the rights of the unborn who are not, or need not, be dependent upon their mothers' bodies for nourishment and protection, the usual abortion rights argument no longer holds water. It will no longer be plausible to dismiss pro-life advocates as an unrepresentative group of religious "zealots" that either ignores or subordinates women to their idiosyncratic views on the humanity of the unborn. In the "Brave New World" of "assisted reproduction" and cloning, both men and women have exactly the same rights as women to avoid assuming the legal obligations of parenthood,[32] and precisely the same right to offer their offspring for sale to the highest bidder.

We know from the polls that the public is overwhelmingly in favor of restrictions on partial-birth abortions. We know also that recent popular literature on abortion by women who have had "the procedure" attests to the gut-wrenching nature of the "choice" they have made. An abortion would not be a searing experience worthy of extended commentary in the Sunday *Washington Post Magazine* were there not something fundamentally wrong with viewing unborn children as masses of undifferentiated cells.[33]

The task of the pro-life movement is to make the case—convincingly—that Congress and state legislatures should provide protection to unborn human beings in every setting where a "literal" reading of *Roe* law permits it to do so. The arguments to the contrary will be ugly, and we can expect to learn quite a lot about the "need" for children "grown to order" for childless heterosexual and gay couples. We will learn as well that society has a pressing "need" for tissue derived from individuals bred or aborted specifically for that purpose, and that "humanity" will "benefit" if the law permits human cloning and the creation of chimeras whose genetic compliment makes them "less than" human. We have heard it all before.

In *Brave New World*, Aldous Huxley predicted that such a world would someday come to pass. In 1998, we have the right to "reproduce" *in vitro*, but no right to protect ourselves or the privacy of our homes, papers, books of account, and medical profiles against the intruding hand of government or its surrogates. We are nearly there.

But there is a bright spot. Technology is pushing *Roe* v. *Wade* toward the "dustbin of history." It is time for pro-life advocates everywhere to get with the program — and *push*! If we do, we may find that we have more allies than we think.

NOTES

1. *Kass* v. *Kass*, 1998 N.Y. Slip Op. 04450, 1998 WL 225157 (N.Y. Ct. App., May 7, 1998).
2. In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 860, 879 (1992), the Supreme Court held that Roe establishes that "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on non therapeutic abortions.

   Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate *her pregnancy* before viability" [emphasis added].
3. *Kass* v. *Kass* [page numbers not available as of this writing].
4. Id. 410 U.S. at 166.
5. Id.
6. *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 457-58 (O'Connor, J. dissenting).
7. Beverly A. Von Der Pool, "Preterm Labor: Diagnosis and Treatment; Problem-Oriented Diagnosis," *American Family Physician*, May 15, 1998, Vol. 57; Pg. 2457, Section 10.
8. Timothy R. Cooper, M.D., Carol L. Berseth, M.D., James M. Adams, M.D., Leonard E. Weisman, M.D., "Actuarial Survival in the Premature Infant Less Than 30 Weeks' Gestation", *Pediatrics* 101: 975-978 (1998).
9. *Kass* v. *Kass*, 1998 N.Y. Slip Op. 04450, 1998 WL 225157 (N.Y. Ct. App., May 7, 1998).
10. *Kass* v. *Kass* [at FN 14 – page numbers not yet available].
11. *Byrn* v. *New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), *appeal dismissed*, 410 U.S. 949 (1973).
12. Id. 31 N.Y.2d at 201, 335 N.Y.S. 2d at 393.
13. *Roe* v. *Wade*, 410 U.S. at 162.
14. The ink on the opinion was hardly dry when Dean John Hart Ely observed that *Roe* was "a very

bad decision ... because it [was] not constitutional law and [gave] almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973).

15. 25 Iowa Advocate 18 (Fall/Winter 1986-87) (quoting Justice Harry Blackmun).
16. *See, e.g.*, William Saletan, Commentary, "Culture Watch / At 25, *Roe* Decision Creaks into Brave New Worlds," *Newsday*, Sunday January 18, 1998, all eds., p. B6.
17. A significant number of States (but still a minority) have legislation addressing surrogacy agreements. Some simply deny enforcement of all such agreements (*e.g.*, Arizona, Indiana, New York, and Utah). Others expressly deny enforcement only if the surrogate is to be compensated (*e.g.*, Kentucky, Louisiana, and Washington). Alabama, Iowa, and West Viriginia have exempted surrogacy agreements from provisions making it a crime to sell babies. A few have explicitly made unpaid surrogacy agreements lawful. Florida, New Hampshire, and Virginia require a showing that that the intended mother is infertile; and New Hampshire and Virginia place restrictions on who may act as a surrogate, and require advance judicial approval of the agreement. Arkansas, by contrast, avoids all these issues by creating a statutory presumption that a child born to a surrogate mother is the child of the intended parents and not the surrogate.

    The case law is developing, but sparse. The most famous "surrogacy" case is the New Jersey "Baby M." case, *Matter of Baby M.*, 109 NJ 396, 537 A.2d 1227 (1988), where the New Jersey Supreme Court invalidated a compensated surrogacy contract because it conflicted with the law and public policy of the State. The more recent case law is harder to describe, and appears to take the position that surrogacy is simply a "fact," and that it is the duty of the courts to "fit" the practice into an existing corpus of legislation. *See, e.g.*, Adoption of Samant, — S.W.2d ——, 1998 WL 304686 (Ark., Jun 11, 1998) (NO. 97-1358) (holding that Arkansas had jurisdiction over the adoption of a child born to a surrogate mother in California, even though neither the child, the adoptive parents, nor the surrogate mother had any significant contacts with the State of Arkansas); *Doe* v. *Doe*, 244 Conn. 403, — A.2d ——, (1998) (holding that the Connecticut Superior Court has jurisdiction in a divorce case to decide a custody dispute between the husband, who had fathered a child born of a surrogate mother, and his wife, who was not the biological mother and had never adopted the child; hence legally the child could not be considered a "child of the marriage," or of the wife); In re Marriage of Buzzanca, 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280, (Cal. App. 4 Dist., 1998) [holding that: 1) California's artificial insemination statute applied to both intended parents, though neither provided the genetic material to conceive the child, and *both* were to be treated, in law, as natural parents; 2) the husband became the lawful father by causing conception of the child, despite the wife's alleged promise to assume all responsibility for child's care, and thus, the father was obligated to support his child; and 3) the fact that a written surrogacy contract had not been signed at the time of conception and implantation did not abrogate the husband's obligation to provide child support].
18. *See, e.g.*, Stephen Smith and Bob Edwards, "Gays and Reproduction," National Public Radio, NPR Morning Edition (NPR 10:00 am ET), Friday, June 12, 1998 Transcript # 98061206-210; "Gay Couples Using Surrogate Mothers to Have Children," CNBC News Transcripts, Equal Time (7:30 PM ET), Thursday, June 25, 1998; Margo Harakas, Staff Writer, "Increasingly, Same-Sex Households Are Opting for Parenthood, Whether by Adoption or Other Methods. They're calling it . . . 'The Gayby Boom,'" *Broward* (Fla.) *Sun Sentinel*, Monday, May 11, 1998, Broward Metro ed., "Lifestyle" section, p. 1D.
19. Vagueness is an important legal issue. Legislation designed to eliminate partial-birth abortion must be as clear as possible given the inherent vagaries of predicting "viability." If a reviewing court sees the law as an attempt to do an "end-run" around *Roe* v. *Wade*'s protection for previability abortions, it will be invalidated. Laws that make it clear that only *post*-viability "partial birth" abortions are prohibited allow the court to reach the real issue: state power to protect *viable* unborn children.
20. Judy Mann, "Small Step From Partial Birth to Full Ban," *The Washington Post*, May 20, 1998, final ed., "Style," p. D16.
21. *Roe* v. *Wade*, 410 U.S. 113, 153-154 (1973).
22. Id., 410 U.S. at 163-164.
23. Id., 410 U.S. at 222 (White & Rehnquist, JJ., dissenting).
24. *Washington* v. *Glucksberg*, 117 S.Ct. 2258 (1997); *Vacco* v. *Quill*, 117 S.Ct. 2293 (1997); *Lee* v. *State of Oregon*, 891 F. Supp. 1429 (D. Or., 1995), *vacated and remanded*, 107 F.3d 1382

(9th Cir., 1997), cert. denied, *Lee* v. *Harcleroad*, 118 S.Ct. 328 (1997).
25. *Dred Scott* v. *Sandford*, 19 How. 393, 408 (1857).
26. 60 U.S. (19 How.) 393 (1857). Id. at 407, 410, 416. This holding was overturned by the Citizenship Clause. U.S. Const. Amend. XIV § 1 (1868).
27. *See, e.g.*, Jamin B. Raskin, Roe *v.* Wade *and the* Dred Scott *Decision: Justice Scalia's Peculiar Analogy in* Planned Parenthood *v.* Casey, 1 Am. U. J. Gender & L. 61 (Spring, 1993).
28. Deborah Threedy, *Slavery Rhetoric And The Abortion Debate*, 2 Mich. J. Gender & Law 3, 12-14 (1994).
29. *Dred Scott* v. *Sandford*, 60 U.S. 393, at 625.
30. N.Y. State Task Force on Life and the Law, *Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy* (April 1998) at 289 ["Assisted Reproductive Technologies"].
31. *Roe* v. *Wade*, 410 U.S. 113, 159 (1973).
32. In the abortion context, the decision to carry the child rests with the woman alone. The father's rights and obligations are thus contingent on the woman's decision to carry the child to term. In cases involving IVF, such as *Kass* v. *Kass*, and *Davis* v. *Davis*, 842 S.W.2d 588 (Tenn. 1992), cert. denied, 113 S. Ct. 1259 (1993), the father has "equal" rights, and may deny his wife the right to have the embryos implanted.
33. R.C. Barajas, "The Procedure," *The Washington Post*, April 5, 1998, Sunday, Final Ed., Magazine; p. W15.

"Let me through, please—I'm a doctor who may be in his HMO!"

Slouching Towards Infanticide

Hadley Arkes

Sometime in the fall, before the elections in November, the pro-life leadership in Congress will bring back the bill to forbid partial-birth abortions. Only the veto by President Clinton prevented it from becoming law in 1996. But for the opponents of the bill, that veto bought time, and in that time the federal courts have been at work. When the pro-life leadership returns to that bill in the fall, they may discover that they have been reduced to acting out a gesture with no consequence: that the federal courts have boxed them in, and they are no longer free to legislate.

For over the past five months, federal judges have been blocking the enforcement of laws on partial-birth abortion that were enacted by the states: Illinois, Michigan, Ohio, Nebraska, Arizona. In all, the laws in eleven states have been challenged, and all of them have been either struck down or put on hold. By the time a federal bill is passed, the judges will have put in place several layers of arguments and precedents, all now casting the most serious doubt on the constitutionality of a federal ban. Those precedents will no doubt be cited by the opponents of the bill, as they stage their resistance and latch on to anything that even faintly resembles a moral argument.

For the most part, those laws in the states were carefully drafted, and while they offered their own variations, they all took as the core of their concern the ghastly procedure that has fixed the attention of the Congress and inspired a recoil in the country: A surgeon plunges a sharp instrument into the base of the skull of a child half-delivered, whose body is in the birth canal but whose head is still in the womb; the brains are then suctioned out so that the head can be collapsed and the child more easily removed in one piece. Most of these procedures are performed at five or six months into a pregnancy, and late enough in some cases that the child could survive a normal delivery.

The laws in the states have been confined, quite precisely, to this procedure of abortion; and yet the judges have claimed to find a disabling "vagueness" in what the legislatures have sought to forbid. And as they have warmed to their argument, the judges have made explicit what has been lurking all the while in the decisions of the Supreme Court: most notably, that birth marks no

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distinction of consequence for the law of abortion; that no fact, no evidence, about the state of the child even at the point of delivery has any standing if it is used to limit the freedom to choose abortion.

With a show of inventiveness, the judges have blocked every path for defending these laws on partial-birth abortions. But beneath the language of the decisions, a political message is being conveyed. The political class that forms the judiciary is making the point, in a steely way, that it will not brook even the slightest restriction on the "abortion liberty," which it is coming to regard as the first freedom. Yet, it seems to have gone unnoticed that the judges have also confirmed the political strategy that lay behind the legislators' effort to forbid partial-birth abortions.

Part of the purpose behind that strategy was to induce the partisans of abortion to defend abortion on the terrain of their hardest cases—not abortions after rape and incest, but the destruction of a partially delivered child. And now we find the judges doing precisely that: They tell us that we cannot legislate against abortions performed even on children partially delivered, with their feet dangling out of the birth canal. We cannot do that, according to the judges, because these abortions are indistinguishable from a large number of abortions that must remain legitimate. And so, in the Sixth U.S. Circuit Court of Appeals, Judge Cornelia Kennedy insisted that it might not always be so easy to distinguish these abortions from so-called D & E abortions (dilation and evacuation), where the child is cut up. For in that procedure, too, the surgeon may have to use clamps to compress the head. And in some cases, as she pointed out, "some physicians compress the head by using suction to remove the intracranial contents" (*Women's Medical Professional Corp.* v. *Voinovich*).

The willingness of the judges to say these things should mark a new stage in the politics and law of abortion—and a new opportunity for the pro-life movement, if it can summon the wit to act. This move by the judges brings out dramatically what the bill on partial-birth abortion sought to teach—and indeed, teaching was part of the purpose of that bill.

The bill on partial-birth abortions sprang from the strategy of the "modest first step." That strategy would not focus on a constitutional amendment to ban all abortions; it would begin at the clearest point, where even the partisans of abortion would not deny that they were dealing with a human life. The strategy also meant to draw on the surprising points of agreement among the public. The polls revealed persistently that even people who called themselves "pro-choice" thought that some abortions were not justified and should rightly be restrained by the law. For the most part, Americans thought that

abortions should not be chosen for reasons that were less than grave. They did not think that abortions were justified to relieve financial strain, to avoid embarrassment, or even to permit a young woman to finish school.

But only one person in ten understood that all of these abortions are now permitted under the law of *Roe* v. *Wade* and its companion case, *Doe* v. *Bolton*. The strategy of the modest first step was designed then to break out news that most of the public would find startling: namely, that abortions could be performed through the entire length of the pregnancy—and even after the child came out. In one notable case in the 1970s (*Floyd* v. *Anders*), a child had survived an abortion for 20 days, and the question was posed as to whether there had been an obligation to preserve his life. The answer, tendered by Judge Clement Haynsworth, was that there had not been: The mother had decided on abortion, and therefore "the fetus in this case was not a person whose life state law could protect." The baby, twenty days out of the womb, was still a "fetus" because the mother had decided she didn't want it.

And so some of us suggested, as early as 1988, the most modest first step of all: that we move simply to protect the child who survives an abortion. With that step we would plant this premise: that the right of the child to receive the protections of the law cannot pivot on the question of whether anyone happens to want her; that the child is a real being, with standing in the law. Give us that premise, we said, and we can eventually unravel the "right to abortion."

Douglas Johnson, the skilled lobbyist for National Right to Life, was rather skeptical. He thought that legislation of this kind was so modest as to be meaningless, that even ardent pro-abortionists could vote for it. And besides, there might be too few cases to justify legislation. But in 1992, Johnson showed fine political judgment when he seized upon an issue that could fit the purposes of the modest first step, with even more dramatic effect. In that year he learned of a paper by Dr. Martin Haskell, who offered an account of a procedure of abortion he had performed, late in pregnancies, over 700 times. The procedure was called "D & X" (dilation and extraction), and Haskell's description of it was artlessly explicit.

The pro-life leaders would offer a title more descriptive, less euphemistic—they would call it "partial-birth" abortion, and they sprang forward with a federal bill to ban this procedure. They also explained in ordinary language what it meant: an abortion performed when a physician "partially vaginally delivers a living fetus before killing the fetus and completing the delivery." The hearings on this bill in Congress, and the subsequent arguments, did manage to diffuse through the country news that the public found shocking.

The sentiment building in Congress was bolstered when the American Medical Association came out in opposition to this procedure, the first procedure of abortion that the AMA had opposed. In explaining its opposition, the AMA would register the professional judgment that this procedure was "never the only appropriate procedure and has no history in peer-reviewed medical literature or in accepted medical practice."

When it came to a vote, the Republicans would show remarkable cohesion: 214 voted for the ban in the House, with only 15 drifting into opposition. In the Senate, the Republicans voted 44-7 in favor of the bill. With this kind of support among Republicans, the bill mustered a margin in the House large enough to override a presidential veto (286-129). In the Senate, however, the margin of victory was slightly narrower, and it appears that the level of support is still not high enough to overcome a second veto by President Clinton.

Despite the remarkable precision of the states' laws on partial-birth abortion, the judges have flexed their arts of interpretation to find them fatally "vague." And yet, the judges are not really complaining of a want of clarity in the statutes. Their contention, rather, is that there is no clear way to distinguish the killing done of the child near birth and the killing routinely done in other abortions, even grislier. For the most part, the framers of these statutes have made it clear that they are not challenging those other abortions, that they are limiting their focus to those abortions performed at the point of birth. And so, in Arizona, federal judge Richard Bilby acknowledged that the purpose of the bill on partial-birth abortions was, as the drafters said, to "erect a firm barrier against infanticide" (*Planned Parenthood* v. *Woods*).

But the remarkable thing now is that the judges are explaining, in language suitably muffled, that this is exactly what we cannot do. In Illinois, federal district judge Charles Kocoras noted the predicament of the physician, who "may 'deliver' or 'partially deliver' an intact, living fetus or a part of a 'living' fetus that continues to have a heartbeat" (*Hope Clinic* v. *Ryan*). As Groucho Marx used to say, "Are you going to believe me, or your own eyes?" Any ordinary person, looking on the scene, might ask, Why are you killing an infant with a beating heart? Or why would you assume that this child, emerging with a beating heart, should not summon the efforts of the staff to preserve her life? But Judge Kocoras's mind has been furnished by jurisprudence on abortion, and what it tells him now is that the things plainly before our eyes do not count: There is no child with a beating heart; the existence of that child, in that condition, is overridden by the right of a woman to "terminate" her pregnancy.

With these kinds of words, the judges have provided the clearest distillation: It

is no longer legitimate to "erect a firm barrier against infanticide," because even outright infanticide is indistinguishable from a large number of the abortions now performed routinely. And with these words the judges should concentrate the minds of the pro-life leadership in Congress. If congressional leaders continue on their current course, if they sleepwalk into another round of votes on partial-birth abortion, then they are likely only to impair the cause, for the judges have now cut them off at the knees.

By doing nothing, the pro-lifers will acquiesce in this fate prepared for them by the judges. On the other hand, they could take this latest round of decisions as an event worth noticing in itself; an event that sharpens the issue—and needs to be addressed, decisively, in turn before anything can be done on partial-birth abortions. After all, the same doctors in Illinois who claim that they are inhibited, "chilled," threatened by a state law on partial-birth abortions will make precisely the same claim about a federal law on the same subject. They will take their case before the same friendly federal judge, and they will produce, no doubt, the same result. A bill on partial-birth abortions will mean nothing unless these new barriers, cast up by the judges, can be cleared away.

But the point has been pressed on the other side, that the bill on partial-birth abortions still has its value: It still brings news to the public, and it still generates embarrassment for President Clinton and the congressmen who stand with him on this issue. That may be, but the bill may have exhausted its uses here. It has already driven down the poll numbers in the support for abortion; but those numbers will mean nothing unless they can be turned into a legislative result. Lest anyone forget, one of the purposes behind the strategy of the modest first step was to show that Congress could indeed legislate on the subject: that under the logic of the separation of powers, Congress has the authority to flesh out, in legislation, any rights that the Supreme Court has the authority to declare. And in filling out those rights, the Congress may establish their limits.

In the case of abortion, it is the sense of that limit—the boundary of abortion—that is needed now more than ever. As it turns out, then, the most decisive thing that the Congress could do in countering the courts is to return to the "first step" that was the most modest of all: It could erect that simple bar to infanticide by insisting that the child who survives an abortion be protected. Even the people who call themselves pro-choice do not think that they are in favor of outright infanticide. They must think there is a distinction between abortion and infanticide, and if there is, it must begin at least at birth. There would be no need to say anything about second trimesters or

even third; this measure could be the sparest of all.

The pro-life leaders thought that the bill on partial-birth abortion actually gave them a chance to reach into the second trimester with restrictions on abortion, because most of these partial-birth abortions are performed in that period. But that supposed advantage was turned into a lever to be used against the bill: Precisely because the bill reached into the second trimester, it was argued by the judges that the bill was treading on the freedom to perform abortions well before the point of birth, on fetuses that would not survive outside the womb.

In the meantime, as the framers of the bill leaped ahead in this way, they had neglected to fill in a critical step: They had never sought to establish, in the first place, that the child was a being, a real entity, whose injuries could be a matter of concern to the law. It was only when that cardinal point was neatly blocked from view that Bill Clinton could veto the bill because of a concern, gravely proclaimed, for the health of the pregnant woman: What of that being whose head was being punctured and her brains sucked out? What of her health or injuries? The injuries to the child simply did not register; they were screened from view for the same reason that the child had no standing in the law, as a being whose injuries "counted."

But it should be clear now that the bill on partial-birth abortion cannot be enacted until we return to that elementary point and fill in that missing premise for the law. Congress could summon even broader majorities across party lines, to insist that even the right to abortion must have its rightful limit; that however we describe ourselves, as pro-choice or pro-life, we must draw the line at infanticide.

A ban on infanticide could be part of the bill on partial-birth abortion, but that might simply give Bill Clinton cover in vetoing the whole package. In that event, the Congress could send up this measure standing alone, as an anti-infanticide bill. It would still cover only a handful of cases, but that would no longer be so important; for the bill would be a response this time to the crisis brought into being by the courts, in this recent wave of decisions. Those decisions supply all of the justification that is required now for this simplest of acts.

It is curious that even certain pro-life lawyers were willing to presume in the past that the judges took birth to mark the limit of any right to abortion; the point seemed so obvious that it could be taken for granted. In a case in 1983, Justice Lewis Powell noted the opinion of one doctor, that "the abortion patient has a right not only to be rid of the growth, called a fetus . . . but also has a right to a dead fetus." Powell pronounced this argument "remarkable."

But his comment, offered in a footnote, did not constitute the same thing as declaring that the doctor's understanding was wrong; and still less did it offer an explanation as to why it was wrong.

Part of the object of this anti-infanticide bill is to force the judges to face up to that question, and it could be done through the simplest of devices. Congress could append a preamble, in the old style, explaining its purpose and understanding: that the child is a being with a claim to the protection of the law; that her right to be protected by the law does not hinge on whether anyone happens to "want" her. If the judges reject that modest claim, if they strike down this kind of measure, then even a public anaesthetized by the Clinton years is likely to be delivered from its slumber.

With the collaboration of many seasoned, pro-life lawyers, a bill of this kind was drafted a few years ago. It is in the files and could be sprung at once. But the thing we must not do at this moment is drift into another round of voting on partial-birth abortions as though it were "business as usual" and nothing had changed. Edmund Burke once remarked that the political man "who could read the political sky will see a hurricane in a cloud no bigger than a hand at the very edge of the horizon." The evidence facing the pro-life leaders is no longer that subtle: They have a box score with eleven decisions, and a trend that is unmistakable. Either they strike back now at those decisions, or the vote on partial-birth abortions will be futile.

Political leaders with the wit to see what is before them would recognize that the judges have moved deftly to undo their work. But from another angle, the pro-life politicians may see that the judges have confirmed the wisdom of their original strategy of starting at the point of birth, and that the judges, with their arrogance, may have stepped into a trap. The question is whether the pro-life leadership in Congress is agile enough to spring that trap.

Our Discardable People

Wesley J. Smith

> *It is not up to* [the doctor] *whether . . . life is happy or unhappy, worthwhile or not, and should he incorporate these perspectives into his trade . . . the doctor could well become the most dangerous person in the state.*
>
> —Christoph Wilhelm Hufeland, a German physician, in 1806

Assume you are dying of cancer and do not want CPR (cardiopulmonary resuscitation) should you go into cardiac arrest. You issue written instructions to your doctor and family telling them that when the time comes, you want to be allowed to die naturally without medical intervention. Since each of us enjoys the legal and ethical right to refuse unwanted medical treatment, your desire should be followed as a matter of protecting patient rights and respect for personal autonomy.

Now assume the same scenario, but rather than eschewing medical intervention, you *want* CPR in the hope that it will gain you a few extra weeks of life. Consistency and the principle of personal autonomy demand that this decision receive equal respect. After all, "choice" is choice, right?

Not necessarily. Increasingly, when it comes to end of life care, patient autonomy is sacrosanct only if the choice is to refuse treatment and die. The decisions of people who want to accept treatments such as CPR, antibiotics, ventilator, or blood transfusion in order to stay alive, are increasingly viewed by medical ethicists and health care cost utilitarians as "inappropriate." Under this philosophical construct, known generically as Futile Care Theory, your "inappropriate" desire for CPR should—some would say *must*—be refused since it conflicts with the ethical values and moral beliefs of health care providers (and not coincidentally health financing imperatives).

Welcome to the surrealistic world of biomedical ethics, where "futilitarians" are actively redefining the role of doctors, the ethics of health care, the perceived moral worth of sick and disabled people, and the power of patients over their own bodies. Its proponents see Futile Care Theory as a way to control costs, protect the "integrity" of health care professionals "demoralized" by having to treat hopelessly ill people, and prevent "unnecessary" suffering at the end of life. In the words of Susan Fox Buchanan, executive director of the Colorado Collective for Medical Decisions (CCMD), a futilitarian think

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tank (although Buchanan dislikes the term), Futile Care Theory is about "facing limits on our mortality, on our technology, our community relationships with each other and our responsibility for stewardship of shared resources."

Lurking just beneath these feel-good concepts lies futilitarianism's ultimate agenda: to instill in the nation a collectivist notion of "health care justice" by refusing medical treatment to people who are dying, who are elderly, who are disabled—all the most vulnerable and defenseless among us—for the benefit of the young, the vital, the productive, the able-bodied and the healthy—people seen by futilitarians as worthier recipients of "limited resources." Futile Care Theory is the first step, the proverbial foot in the door, that opens up the traditionally individualistic health care system to mandatory "community" control.

Futile Care Theory has been an increasingly hot topic in biomedical ethics and medical journals and at seminars and professional forums. Drawing little attention from the mainstream media and the general population, futilitarians have hewn a rough consensus that personal autonomy is limited to the right to say no to unwanted medical treatment, and that care deemed inappropriate by medical professionals can and should be denied to patients in the clinical setting—regardless of patient desires.

Defining Futile Care

One would think that such a profound alteration in medical ethics and morality would require much public discussion and democratic dialogue. Indeed, futilitarians usually give lip service to the need for achieving community consensus on these issues. For example, the authors of a February, 1994, article in the *Journal of the American Medical Association* (*JAMA*) titled "Beyond Futility to an Ethic of Care," stressed that in implementing Futile Care Theory, "the emphasis should be on allocating treatments and limiting costs according to principles of justice arrived at through open society debate." But futilitarians are not waiting for society to give its consent; they are already surreptitiously implementing official futile-care protocols in hospitals and medical associations' ethical guidelines. Traditional access to end-of-life care is already being restricted and most people don't even know it is happening.

So, just what is futile care? Even futilitarians don't always agree. Amy Halevy, MD and Baruch A. Brody, PhD., two futilitarians writing in the August 21, 1996 *JAMA*, were unable to define it but claimed, "we know it when we see it." The bioethicist Daniel Callahan offered several vague definitions in his 1993 book, *The Troubled Dream of Life*, among them that a presumption for non-treatment should exist when "there is a likely, but not necessarily

certain, downward course of an illness, making death a strong possibility." Others define treatment that "prolongs the dying process" as futile. The American Thoracic Society says treatment is futile "if reasoning and experience indicate that the intervention would be highly unlikely to result in a meaningful survival for the patient," and further opines that a "health care institution has the right to limit a life-sustaining intervention without consent . . . based on the ethical principle of medical triage," a process which weighs "the severity of illness, the type and certainty of prognosis, and . . . the extent of benefits reasonably expected for a given patient compared with the burdens to that patient." However defined, current futilitarianism emphasizes on the subjective value that health care professionals place on the lives of dying and disabled people rather than the values and ethics of the patients and/or surrogates themselves.

It wasn't always so. Futility used to be primarily an objective concept. Doctors have never been under a duty to give treatment with no physiological value to the patient, nor should they be. Prescribing antibiotics for a viral infection is a good example of a futile treatment, albeit a common one. While effective against bacterial infections, antibiotics are useless against viruses. Moreover, giving antibiotics to people with a viral infection can kill beneficial bacteria in the body and lead to antibiotic-resistant bacterial strains.

But this objective definition of futility is not what primarily concerns Futile Care theorists. Futilitarianism is concerned more with utilitarian determinations about the quality of patients' lives rather than with the likelihood that a treatment can produce an objective physiological benefit. For example, a common "treatment" futilitarians want withheld, regardless of patient or surrogate desires, is tube-supplied food and fluids for people diagnosed in "a permanent vegetative state" (PVS). Never mind that PVS is a notoriously misdiagnosed condition and that a study published in the June 1991 *Archives of Neurology* found that 58% of patients with a firm PVS diagnosis recovered consciousness within three years! Ironically, nutritional support is labeled inappropriate by futilitarians not because it doesn't work but precisely because it provides a demonstrable physiological benefit, i.e., it keeps the body nourished and functioning. Thus, it isn't the treatment, but the *patient* who is deemed futile, since he doesn't have a life worth living or worth spending resources upon.

Two primary approaches are currently used in the clinical setting to determine whether treatment should be withheld as futile. Let's call them "process futility" and "categorical futility." Process futility is obsessed with procedure. Reflecting the mores of current biomedical ethics culture, it assumes that if participants go through an agonizing process, they must be doing the

right thing. Thus the primary emphasis among process futilitarians is the *method* used to determine who should be denied care. Non-treatment decisions are made on a case-by-case basis, using predetermined administrative processes.

Such administrative non-treatment decision-making is already taking place in some Houston hospitals. The August 21, 1996 *JAMA* article mentioned above described the futile care policy created by a collaboration of area hospital ethics committees so that "professional integrity and institutional integrity" would serve as a counter balance "to patient autonomy." The Houston Policy creates an eight-step "conflict resolution mechanism"—essentially an adversary system between doctors and patients—to resolve disputes in which patients or family members refuse to accept a doctor's decision that continued treatment (other than comfort care) is "inappropriate." If the institutional procedure is followed, the hospital itself has the final-say in withholding or withdrawing "a medically inappropriate intervention . . . without obtaining the agreement of the patient (or surrogate decision maker)."

Here's how the Houston process might work in real life:

Assume your seventy-five-year-old grandmother, already partially disabled by a stroke, is transferred from her nursing home to the hospital with a high fever and breathing difficulties. She is very ill and chances of her survival are estimated to be 25 percent. The doctor decides that giving her antibiotics and respiratory assistance is "futile," because in his opinion, even if she lives, she will never regain a quality of life which would be of benefit to her, thus not justifying the depletion of institutional resources.

You protest. Your grandmother has told you she is content with her life and that she wants treatment no matter how ill she becomes.

Unable to pressure you into cutting off care, her doctor initiates the next phase of the process by bringing in nurses, chaplains, social workers or other hospital "resources" to attempt to resolve the dispute. You are told you are causing your grandmother unnecessary suffering and are otherwise pressured, cajoled, and pleaded with to follow the doctor's advice.

You still refuse to give in. A second doctor is brought in to examine your grandmother and render an opinion. She agrees that treatment is "inappropriate." The hospital ethics committee is then contacted and a formal hearing to resolve the dispute is scheduled.

The hearing is held seventy-two hours later. You appear and explain why you want treatment to continue. The doctor and others explain why they believe the treatment is futile. The ethics committee takes a secret vote and sides with the doctor.

Your grandmother's treatment is about to be stopped. You are now left

with two options. Under the hospital's protocol, you can accept the decision and make sure your grandmother receives comfort care until she dies, using a different doctor within the hospital if you desire. Or, you can transfer your grandmother to another hospital, assuming you can find one willing to accept responsibility for her care.

In desperation, you speak with another doctor. You are thrilled when he agrees to provide the desired treatment in the hospital. You ask that responsibility for your grandmother's care be transferred to the new doctor. You are refused. The ethics committee has ruled. Under the hospital's futile care policy, any further treatment other than comfort care in the hospital is now forbidden. There is no appeal. Treatment is withdrawn.

Your grandmother is now too weak to move to another hospital, even if you can find one willing to accept her care. You hold her hand as her temperature rages at 105 degrees. She becomes delirious and soon expires. You are left with the bitter feeling of having been abandoned and betrayed.

Category futilitarians get to the same place—the denial of wanted care—through a somewhat different route: defining the afflictions for which treatment is to be deemed futile. The desire here is to bring consistency into futile care decision making, garner obedience from patients and families who may be less likely to resist futility determinations if they are based on pre-established rules and at the same time, "comfort" families with the knowledge that the futility determinations are not personal rejections.

A Categorical Futility policy (Non-beneficial Treatment) was instituted in February 1997 at the Alexian Brothers Hospital in San Jose, California—*a Catholic institution.* Its stated purpose: "to promote a positive atmosphere of comfort care for patients near the end of life" and to ensure that the dying process not be "necessarily prolonged"—a determination to be made by the hospital, not patients or families.

The Alexian Brothers Policy creates the presumption that requests for medical treatment or testing, including CPR are "inappropriate" for a person with "irreversible coma, persistent vegetative state, or anencephaly;" "permanent dependence on intensive care to sustain life;" "terminal illness with neurological, renal, oncological or other devastating disease;" "untreatable lethal congenital abnormality;" and "severe, irreversible dementia." The only care such patients are entitled to receive is comfort care.

Doctors who wish to provide "inappropriate" treatment in contradiction of the policy's guidelines must "provide written justification." Hospital personnel are urged to report doctors who violate the guidelines by providing inappropriate treatment such as "antibiotics, dialysis, blood tests, or monitoring," to

the hospital's medical director. The punishment for deviation from the policy is unmentioned, but the one club any hospital holds over doctors is the suspension or withdrawal of staff privileges.

Even though the Alexian Brothers policy defines the conditions for which continued medical treatment is deemed inappropriate, bureaucratic process remains important. If the patient or family "insists on continuing 'inappropriate' treatment after being advised that it is non-beneficial," the case is sent to the biomedical ethics committee. "If the recommendations of the bioethics committee are not accepted by the patient (or surrogate) care should be transferred to another institution." And if, as is often the case, there is no other institution willing to take the patient? The policy is silent but one suspects that the care will be denied despite patient and family desires.

The Emerging Power of Hospital Ethics Committees

Both the Houston and San Jose Alexian Brothers policies illustrate the growing power of hospital biomedical ethics committees: a dangerous development for anyone interested in protecting patient rights. Originally designed to give informal advice in difficult situations, hospital ethics committees have in recent years been given tremendous power, including, in some hospitals, power over life and death in futile care controversies.

Despite this awesome responsibility, ethics committees have few checks or balances placed upon them. Membership is anonymous. Deliberations are confidential. There are no uniform criteria for membership and no standardized training or education. No written record is kept of committee deliberations. There are no performance reviews or opportunities for appeal. Individual members generally cannot be questioned later in court about their assessments and conclusions. The potential for abuse due to prejudice, inadequate information, ideological zeal, or incompetence, is mind boggling.

Recent litigation over the continued treatment of a Lodi, California, man named Robert Wendland illustrates the power and secrecy of ethics committees, though Wendland himself is not a futile care case. Wendland's brain was severely damaged in an auto accident. He was unconscious for 16 months but then awoke and improved to the point where he was able to maneuver a wheelchair down a hospital corridor and eventually use yes and no buttons to answer simple questions. Robert's wife, Rose Wendland, decided to remove his feeding tube because, she claimed, he would not want to live in a profoundly dependent state. Rose's decision was supported by Robert's doctor and referred to the Lodi Memorial Hospital Ethics Committee, which quickly and unanimously assented to the dehydration.

An anonymous whistle blower, upset about the plan, warned Robert's

mother, Florence Wendland and sister, Rebekah Vinson, about the pending dehydration. The two immediately sued to save his life.

The bitter litigation raged for more than two years, during which the ethics committee's opinion became a major issue. Rose's attorney repeatedly argued that the ethics committee's unanimous approval should serve as a basis for the judge to permit the dehydration to proceed. Yet, nurses who were in charge of his care and who opposed the dehydration were not called before the committee to give their opinion. Nor were Florence or Rebekah asked to present to the committee the reasons why they believed Robert should not be dehydrated.

Janie Siess, Florence and Rebekah's attorney, issued a subpoena to have committee members appear in court to testify about the recommendation. But the judge granted Lodi Memorial Hospital's request to quash the subpoena to keep the identities of the members and the processes of the committee confidential. Thus, the ethics committee decision was used in court to support dehydrating Robert while Siess was denied the opportunity to examine the committee's deliberative processes or cross examine members to determine the rationale behind their decision.*

Hospital ethics committees exercise tremendous power but their members do not necessarily reflect the types of people about whom they are asked to make futile care determinations. The poor, minorities, and those with disabilities are generally not members of ethics committees, yet these are the very people whose lives tend to be devalued by greater society. (Disability rights activist Diane Coleman, a leader in the Independent Living Movement and founder of Not Dead Yet, an anti-assisted suicide group, tells the story of the time she was invited to speak to a Michigan conference of ethics committee members. She asked the attendees how many of their respective ethics committees had anyone on them with a disability. Only two people out of about seventy raised their hands.)

Another point to consider: ethics committee members, though they may act in good faith, are akin to grand juries; they can only work with the information they are given. In futile care disputes, information presented to committee members will be controlled primarily by powerful professionals seeking to cut off care, backed by resource-conscious administrators, opposed by distraught and fearful family members, some of whom will have little education and may not even speak English. Their pro-treatment attitudes may well be dismissed as irrational, emotionally based, and/or driven by

* The judge eventually ruled that current California law did not permit him to order the dehydration of a conscious cognitively disabled person. The decision is expected to be appealed.

guilt or feelings of obligation. Given the god-like status accorded doctors, such disputes are loaded against the families.

This is all the more worrisome because several studies conclude that physicians, in the words of an article published in a Spring 1993 *Journal of Clinical Ethics*, "often underestimate their patients' perceived quality of life" and are limited "in their ability to be empathetic—that is to imagine their patients' feelings and ideas." Moreover, the data suggest that "physicians actually project their own personal preferences for lifesaving treatments onto their patients." Thus, the actual practice of Futile Care Theory is likely to devolve into something of a lottery, with some receiving wanted end-of-life treatment and others denied it based on their physicians' desires for their own end of life care.

The Early Cases

Futilitarianism has already cut a destructive path through some patient and family lives. People have been taken off respirators without consent. Nursing home residents have had DNR orders placed on their medical charts without authorization. Parents have been reported to authorities for child abuse because they have insisted on life support for prematurely born infants. In Flint, Michigan, a court stripped the parents of Baby Terry of the right to make their child's medical decisions solely because they refused to accept the doctors' determination of futility—the court favored an aunt who agreed to permit the treatment to be withdrawn. (If futility guidelines had been in place, the court action would have been superfluous; the doctors simply would have done as they pleased.)

A case in Spokane, Washington demonstrates just how dangerous Futile Care Theory really is. On October 27, 1994, Baby Ryan was born prematurely at 23 weeks gestation. He was put on dialysis but the doctors determined that continuing treatment was futile and they removed him from kidney dialysis over his parents' objections. (It may not be a coincidence that Ryan's parents were poor and on Medicaid.) Ryan would have died had his parents not obtained a court order to continue his treatment. That led the hospital administration to turn the parents in to protective services for child abuse. When that tactic didn't fly, administrators and doctors fought the parents in court, swearing under oath that "Ryan's condition is universally fatal" and that the infant had "no chance" for survival, contending that Ryan's continued treatment was futile and a violation of their integrity, values and ethics. The court never decided who had ultimate say over Ryan's care—his parents or the hospital—because his treatment was transferred to Emanuel Children's Hospital in Portland, Oregon, where he was soon weaned off dialysis and

survived. Had his original doctors successfully imposed their futile care philosophy on their patient and his parents, Ryan would be dead instead of a living three-year-old child.

The Broader Agenda

Ironically, imposing Futile Care Theory into end of life medical care will not provide significant health care cost savings. Contrary to the popular view, care for the dying only consumes approximately 10% of health care expenditures. Much of this cost is for treatment before the end of life is reached and for comfort care, which is not considered inappropriate by futilitarian theorists. Thus, in 1994, Drs. Ezekiel Emanuel and Linda Emanuel wrote in the *New England Journal of Medicine*, "at most," the percentage of health care resources that would be saved by "reducing the use of aggressive life-sustaining interventions for dying patients [is] 3.3%."

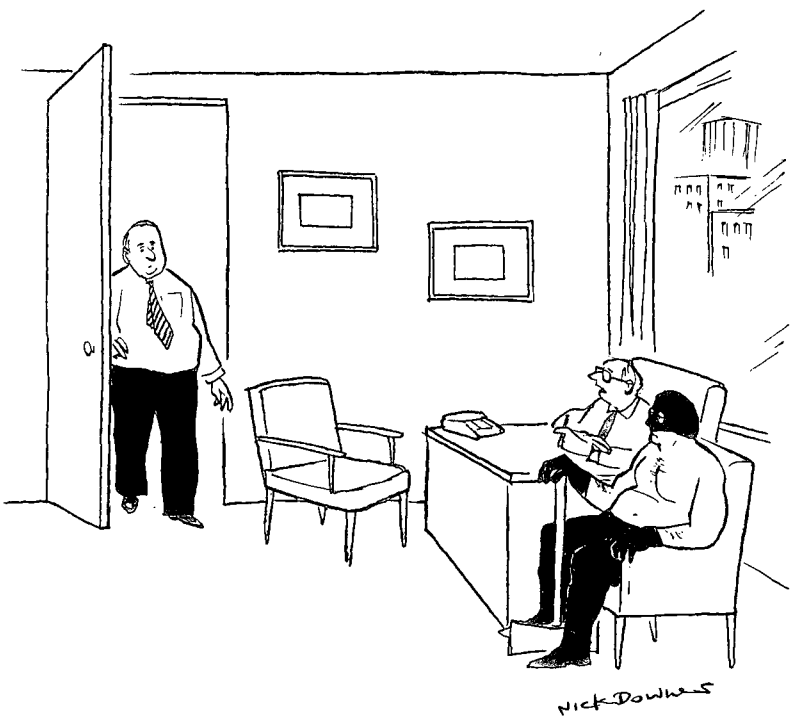
With so little benefit and so much potential harm, what is the point of futilitarianism? By focusing first on end-of-life care in the (probably accurate) belief that Futile Care Theory will pass relatively easily into routine clinical practice, bioethicists hope to establish a new controlling principle of health care that would transform the current individualistic system into one founded upon so-called "community standards." Once the country accepts the idea that "the community" has the right to limit individual health care decision making in the name of a more "equitable" distribution of "finite medical resources"—the overarching justification underlying Futile Care Theory—the door will be opened to collective control on a far broader basis.

What new policies could we expect in such a collectivist health care system? Rationing—that is, denying undeniably beneficial medical treatment to people based on "relevant characteristics" such as age, disability, or perhaps upon previous lifestyle choices (i.e. smokers might be denied aggressive treatment for lung cancer that would be available to nonsmokers). Indeed, rationing is already very much in vogue among some within the medical intelligentsia and some rationing scheme would most likely be introduced into clinical practice close upon the heels of widespread acceptance of Futile Care Theory.

Another idea under active discussion among health care policy makers, is a dramatic redefinition of the concept of the term "health." Many biomedical ethicists support the idea that health should be considered primarily a community concept rather than an individual one. Once so redefined, health care resources would be redirected away from the treatment of individuals and into public health initiatives designed to keep the general populace healthier. Imagine cancer patients being denied a second round of chemotheraphy to free up money for clean needle exchange programs or ads teaching the

dangers of fatty foods all to allocate "limited resources" for the good of the community even if individuals must suffer. This may sound alarmist, but the radical notion that resources should be directed away from individual care and into public health initiatives has already been urged by the influential bioethicist Daniel Callahan, in his new book *False Hopes*.

It is often said that a society is judged by the way it treats its weakest and most vulnerable members. Futile Care Theory threatens to devolve the traditional values and ethics of our medical system into a stark utilitarianism, designed and controlled by medical elites, who have discarded the once self-evident truth that all human beings have equal inherent moral worth. In such a world, the worst fears of Christoph Wilhelm Hufeland, expressed so long ago will have come to pass: the physician will indeed become "one of the most dangerous persons in the state."



"Come in Crenshaw—you know Boyce, from Human Resources?"

What Size Is an Embryo's Soul?

Marilyn Hogben

In 1985 my partner and I were married. We wanted to have a child but were unsuccessful so after a year we went to see our GP who referred us to an obstetrician/gynaecologist. Late in 1989 we were referred on to an infertility specialist at Melbourne IVG and we commenced on the IVF program early in 1990. During the break from treatment cycles, over the Christmas holiday period of 1991/1992, I became pregnant and our daughter was born in September 1992. At that time we had five embryos in storage. About two years later we decided that we were happy with one child. As we did not wish to donate our embryos and the law did not permit the disposal of embryos, our embryos remained in storage.

Thursday 24th July 1997: "Today we received a letter from the Senior Counsellor at Melbourne IVG concerning our five embryos that have been in storage since 6 September 1991. I had been thinking about phoning her on-and-off for some time to talk about our embryos but hadn't made the call. The letter informed us that under new legislation, to be proclaimed on 1 January 1998, embryos could not be kept in storage for more than five years. The choices we have are: collect them after they had been removed from storage, have them discarded, donate them, or apply for an extension. With the letter was a form to be completed and returned by 1 October 1997, informing them of our choice. Also enclosed was a questionnaire."

"I feel awful. I know that we will choose to discard them and then I'll feel like a murderer. What do they call the act of a mother killing her own children?—An infanticide?"

I had kept up-to-date with developments in assisted reproduction technology by reading the Melbourne IVF newsletter, "IVF News" and other print media, and via the Internet. It was important for me to know what was happening as I felt responsible for our embryos and thoughts of them were always in the back of my mind. It seemed unfair to the embryos to keep them in storage when we weren't going to use them. At the beginning of 1992, before we found out that I was pregnant, my partner and I had talked about

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Marilyn Hogben is . . . Marilyn Hogben, an "ordinary" Australian woman who wrote down her reactions to what might be called Brave New World technology. She sent her journal extracts to the *Monash Bioethics Review*, which published an edited, shortened version in its April, 1998 issue, titled "Frozen embryos—A view from my journals." Here, you get the full text (from which our title is taken), reprinted here with her permission, as is her drawing, which she describes.

what we wanted to do about IVF. We decided to continue on the program and use our options again and possibly come off the program. Before we had started on the IVF program my partner and I worked out what were our limits. (At that stage we still didn't know why we were infertile.) If we had a child we wanted it to be part of both of us. We would not use donor eggs, sperm or embryos. Now we could not donate our own embryos. I could not give away my daughter's siblings. I felt bad enough that we had chosen not to provide any sisters or brothers for her but it seemed much worse to give away her potential sisters and brothers. I had my daughter in front of me; I could see what I would be giving away. The only choice we could make then was to have the embryos destroyed. (It seemed so illogical that I could choose to have our embryos destroyed rather than give them away. But it was my feelings and not logic that were guiding my decisions.)

Monday 28th July 1997: "At my appointment with my gynaecologist/obstetrician today I told him about the letter from Melbourne IVF and we talked about the embryos. He said that I should not have any guilt about the embryos. I replied that I didn't expect to be guilt free."

Tuesday 12th August 1997: "Today I went to see the Senior Counsellor at Melbourne IVF about our embryos. It was good to see her again (she was our counsellor when we were on the IVF program) and to talk to her about the embryos and our situation. I had spoken to her on the phone last week but had decided that I really needed to see her. I talked with her about my daughter and our decision not to have any more children. I asked her about the procedure for disposing of embryos as I was particularly concerned about this. I talked about the impracticalities of my using the embryos—I couldn't have three more pregnancies or five more children—I was too old. She talked to me about donation and the life-long commitment it involved. I talked about the strong emotional attachment I had for our embryos and she told me that many of the women she had spoken to also had these feelings, feelings stronger than had been anticipated by some health professionals."

The emotional attachment is very real, and, I believe, is to be expected. On the IVF program, having embryos is almost as important as a pregnancy. When we started on IVF we didn't even know if we would be able to produce embryos. At most of our embryo transfers we saw a magnified view of our embryos on a monitor. Being able to see them made the whole process seem more tangible and gave the embryos a physical identity. We could see them; they were real.

"Our discussion helped me a great deal but I still feel that the decision on the fate of our embryos is one that only my partner and I can bear. (At the

worst I feel that I am killing our daughter five times. Denying them their potential and squandering their souls.)"

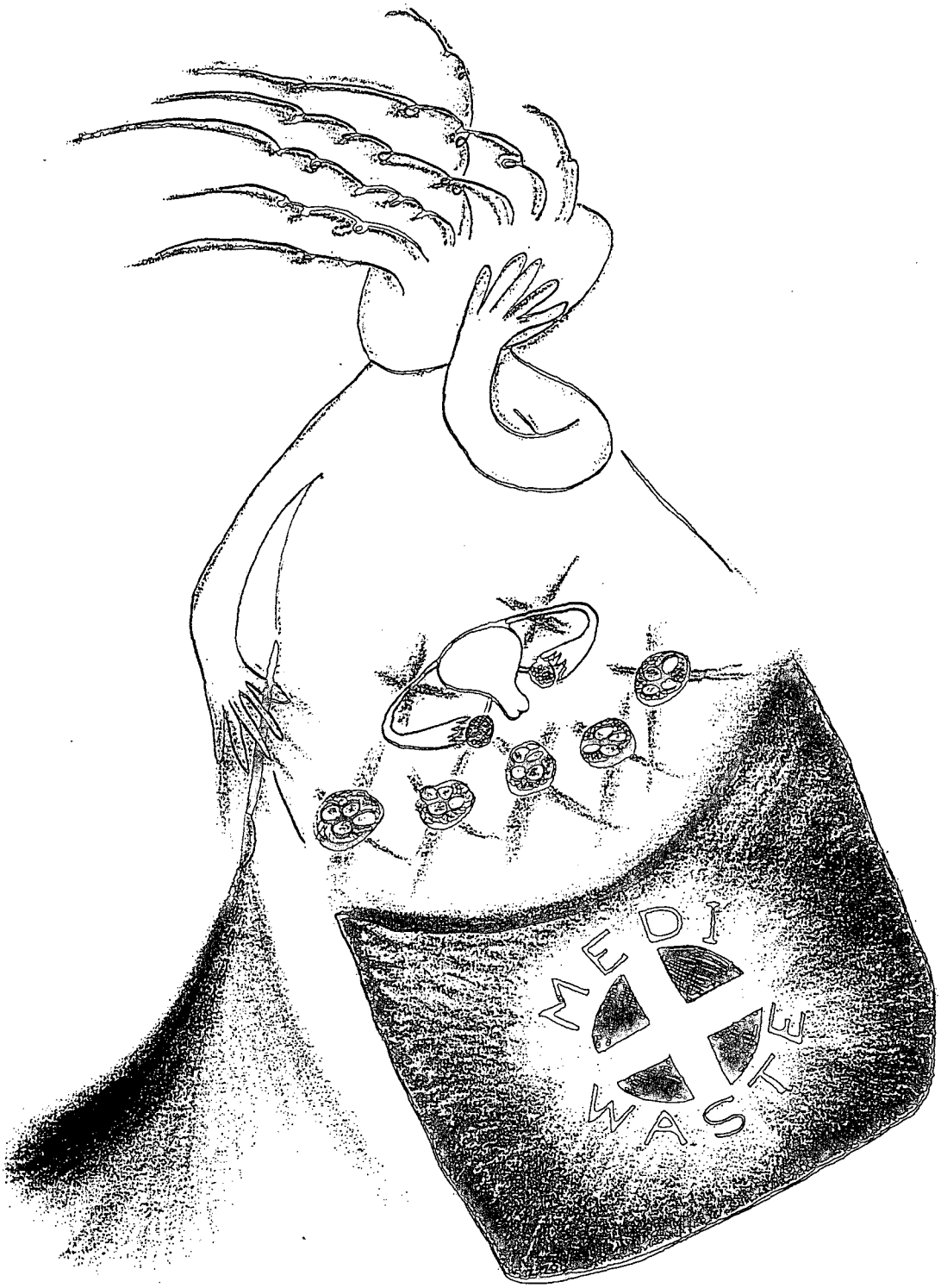
"After our daughter was settled for the night my partner and I had a long talk about my meeting with the counsellor, and about our embryos. Was deciding to have the embryos destroyed the same as requesting an abortion? Logically it didn't seem that it was but emotionally it felt like it. (I feel as though I have to choose to ask for five abortions, all at once, and nobody is asked to do that.) We talked about the requirement of having the disposal form witnessed and the difficulty that that presented. None of our family or friends knew that we had stored embryos. We were having enough difficulties coping with the situation and we had been on the IVF program. How could we expect family and friends to understand our decision? The frozen embryo debate reminded me of what it was like when we started on the IVF program. Many people had strong views about IVF and there was always the risk of giving offence if you talked about it. I remembered being at lunch with colleagues and one of them (who had children) saying that society should spend the money on helping infertile couples accept and value their lives without children instead of on IVF. Nowadays most people know someone, or know of someone, who has been on the IVF program, so it has become less of a polarising issue. Not so, the frozen embryo topic. We decided to ask our GP."

That night I drew a sketch in my journal of our five embryos crossed out falling into a mediwaste bag. Above the embryos was a drawing of our daughter (their guardian angel?) and I titled it "Five other (my daughter's name)." I made notes on the sketch about making a collage using a yellow medical waste bag, Petri dishes, and photos.

Saturday 16th August 1997: "What size is an embryo's soul?"

"On the way home tonight I heard Professor Peter Singer, of the Monash University Centre for Human Bioethics, on 3LO talking about genetics. He briefly touched on the subject of embryos when he talked to a caller who had a genetic kidney disease. He suggested that one of the caller's options was to have a child by IVF. The embryos could be tested for the disease and those without the disease gene could be implanted. Does this mean that he thinks that discarding embryos is ethically acceptable (or only those that are carrying the imperfect gene)?"

Thursday 21st August 1997: "I've been reading about the embryo in some human bioethics books. The books broadened my interest in this area, but were theoretical rather than practical and so were not of as much assistance as I'd hoped."


MEDIA
WASTE

Saturday 23rd August 1997: "I watched part one of a TV series called 'The myths of childhood.' In it, one of the experts, Thomas Moore said, 'The child carries most of the soul of the culture.'"

Sunday 24th August 1997: In my journal I made a sketch of a strange mathematical formula that could be used to measure the weight of an embryo's soul. The idea made me think of the Medieval (?) debate on the number of angels that could fit on the head of a pin.

Tuesday 2nd September 1997: "Today I decided to contact Professor Singer to see if he could assist me. He had spoken to people on a talkback session on the radio so I thought that he might be willing to offer some suggestions. I feel as though I am not getting anywhere; that I'm close to an understanding but I just can't reach it. I found his e-mail address on the Web and sent him a message."

Wednesday 3rd September 1997: "I received an e-mail reply today from Professor Singer, which was great, as I wasn't sure that I'd even get a reply (he is a famous academic after all and must get lots of correspondence). He gave me his opinion on the right-to-life of embryos, talked about donation and disposal and recommended some articles and books."

Thursday 4th September 1997: "Tonight we saw our GP and he witnessed the embryo disposal form. I'll post it tomorrow. While I was there we talked about the embryos and how I was coping with our decision."

Thursday 11th September 1997: "While I was seeing my gynaecologist/obstetrician today we talked about the frozen embryos and the decision my partner and I had made to have them destroyed. I became upset while we were talking about it but I still managed to convey my thoughts and feelings about the embryos."

Thursday 23rd October 1997: I did a sketch in my journal today of my uterus, ovaries and fallopian tubes with our five embryos below. The embryos are crossed out; it is a variation of the sketch of 12 August.

Monday 27th October 1997: Over the weekend I did an A3 drawing in black ink and pastels. My upper body is in the top half of the drawing. My head is turned to the side and one hand is partially covering my face in an attempt to hide my shame and guilt. The other hand is holding a bloodied scalpel that has cut crosses in the embryos. My reproductive organs are below my torso, followed by the five embryos, then the mediwaste bag at the bottom.

"In one of the bioethics books that I have been reading was a chapter by Peter Singer in which he said that the embryo could not develop a capacity to

feel pain earlier than six weeks. This opinion was pivotal for me in gaining some acceptance of our decision. I had been concerned about the disposal method and at least now I knew that they would not suffer pain."

Tuesday 30th December 1997: "I phoned our IVF counsellor today as I needed to talk with her about our embryos. I told her that I was having trouble coping with our decision, which of course was very much on my mind, as it was nearly 1 January 1998. She talked about ways of remembering the embryos. She said that some couples had bought something special to remind them. I told her that I'd try to think of something associated with the time when the embryos were formed."

Wednesday 31 December 1997: "Today I was phoned by my IVF doctor and asked if I would be willing to talk to an Age reporter for an article on the frozen embryo debate. I was initially hesitant but on thinking about it I realized that I felt passionately about the issue and so agreed to do the interview after ensuring that my partner was not opposed to the idea. After having only spoken to a few health professionals about our frozen embryos I had now agreed to let it become public knowledge. After this interview I thought about the fact that couples on the IVF program would now know that embryos could only be stored for five years and that they could now choose to have their unused embryos discarded when they left the program. This was such a different situation to all of the couples, like ourselves, who had had to make a decision about their five-year-old embryos. I now felt that it was appropriate that we made the decision about the fate of our embryos; they were part of us and were our responsibility."

Thursday 1st January 1998: "I have decided to write a personal article about our embryos for possible publication in Monash Bioethics Review. Professor Singer suggested this back in September but at the time I didn't feel up to it. Today my GP asked if I had reconsidered doing it, now that I had talked to the Age. This prompted my decision today."

Friday 6th February 1998: "At work today I came across an article on co-firing of medical waste. I hadn't thought about the next step after the mediwaste bag. How could I have not thought of this? After all we went through to get our embryos and all of the effort put into it by many others, they were just thrown out with the garbage. I made a sketch in my journal for a collage showing medical waste (limbs, foetuses, organs, fluids, swabs, bandages, teeth, and embryos) falling through the bottom of the mediwaste bag into flames."

APPENDIX A

[*Mary Ann Glendon is the Learned Hand Professor of Law at Harvard and a prolific author—her latest book is* A Nation Under Lawyers *(Harvard University Press)—she also led the Vatican's delegation to the 1995 Beijing women's conference. This article first appeared in* The Wall Street Journal *(May 5, 1998) and is reprinted here with her permission.*]

On Abortion, It's Clinton vs. the U.N.

Mary Ann Glendon

Those who hold hopes for the United Nations, especially in the developing world, must be baffled and disappointed by President Clinton's announced intent to veto a bill that provides, at long last, for payment of U.S. arrears to that organization. What great principle justifies the sacrifice of such an important goal of this administration? The U.N. has a well-established policy that "abortion is never to be promoted as a means of family planning." Mr. Clinton is threatening a veto over a provision of the bill that would prevent federal money from going to organizations that lobby against the U.N.'s longstanding abortion policy.

Watered Down

The U.N.'s position on abortion was adopted at its 1984 International Population Conference in Mexico City by the votes of an overwhelming majority of member states. It was reaffirmed at the 1994 Cairo population conference and again at the 1995 Beijing women's conference. The Reagan and Bush administrations accepted the U.N.'s Mexico City policy; their policy was that abortion would not be part of the population programs sponsored by or through the U.S. Agency for International Development. President Reagan issued an executive order barring the use of federal money for international organizations, such as the International Planned Parenthood Federation, that perform abortions as a family planning method or that lobby for unrestricted abortion overseas. That remained U.S. policy until 1993, when, in one of his first acts on his first day in office, Mr. Clinton reversed Mr. Reagan's executive order.

The current bill on U.N. dues contains a watered-down version of the Reagan-Bush policy. It would bar federal funding for groups that perform abortions in violation of foreign laws (late-term abortions, for example) or that lobby for abortion in foreign countries.

Though hotly contested, this modest restriction is no threat to family planning groups. Organizations like Planned Parenthood, the world's largest abortion provider, are hardly suffering from a lack of funds. They are bankrolled by foundations such as Rockefeller and Packard with assets that dwarf the budgets of most countries. They already exert great influence, within U.N. agencies and upon domestic political processes in many member states.

Much of their political energy is aimed at population control on the cheap, through programs in developing countries that pressure poor women into abortion, sterilization

or the use of risky contraception methods. The U.N.'s chronic financial distress, together with the relative distance of its agencies from public scrutiny, has rendered it especially vulnerable to the influence of such special-interest groups.

A case in point is CNN founder Ted Turner's $1 billion gift to the U.N., announced last fall. Many who remain committed to the original purposes of the U.N.—promoting peace, freedom and humanitarian aid—were overcome with joy when Mr. Turner announced his donation "to help the poorest of the poor." Paid out in annual installments of $100 million for 10 years, the Turner gift would rank behind the annual contributions of only the U.S., Japan and Germany.

It seemed too good to be true. It was. It now appears that the U.N. will not have control over the funds. Rather, its agencies must submit proposals for approval by a foundation headed by a man Mr. Turner chose because "he thinks as I do." the individual who will have the chief say in allocating the Turner millions is Timothy Wirth, a Democrat who has served as a senator from Colorado and as Mr. Clinton's undersecretary of state for global affairs.

Mr. Wirth's main claim to fame is that he led an unsuccessful attempt at the U.N.'s 1994 Cairo population conference to make abortion part of "reproductive rights" and therefore an integral part of family planning. Mr. Wirth's lengthy paper trail, forging links between population, the environment and immigration, epitomizes the world view of those who see the poor as a threat to their own consumption, a menace to the ecosystem and a portent of social unrest.

As its details have unfolded, Mr. Turner's massive donation looks less like a gift and more like an offer to acquire the services of U.N. agencies with privileged access to target populations. In view of Mr. Turner's challenge to his fellow philanthropists to follow his lead, this will be a time of testing for the U.N. Are its prestige and organizational resources literally for sale?

Given the power of private groups bent on channeling humanitarian and development aid into "reproductive services," the funding restrictions in the dues bill before the president would likely have little practical impact on aggressive population controllers. But the restrictions would send an important message from an affluent nation to the poorest and most vulnerable citizens of the world: that American taxpayers do not endorse a program to reduce the size of the world's poor population by any means possible.

The congressional bill, which has bi-partisan support, reinforces both the great purposes for which the U.N. was founded in the aftermath of World War II and the largely sensible population-stabilization efforts to which the U.N. has long been committed—family planning, education of women and development aid. All these measures respect the freedom of people to decide for themselves how many children to have and when.

To reject the bill's restrictions would send a very different message to peoples and nations without political clout. Oxford economist and social philosopher Amartya Sen described it best when he noted a "dangerous tendency" on the part of affluent nations to search for solutions to overpopulation that "treat the people

involved not as reasonable beings, allies faced with a common problem, but as impulsive and uncontrolled sources of great social harm, in need of strong discipline."

Women Flatly Opposed

Adding injury to insult, the president is apparently ready to sacrifice the payment of U.N. dues rather than endorse the U.N.'s own policy established 14 years ago in Mexico City.

What principle is important enough to justify his veto? It is the one principle from which Mr. Clinton has never wavered: unrestricted abortion, up to and including birth itself. That principle, let it be said, has nothing to do with women's rights. The majority of women are flatly opposed to it—more so than men. As with his veto of the ban on partial-birth abortions, the president is preparing to demonstrate his loyalty once again to the only constituency he has never disappointed—a loose-knit coalition of abortion extremists whose "solution" to poverty is to get rid of poor people.

"Your medication comes with a booklet of precautions."

APPENDIX B

[Benjamin J. Stein is, among other things, a writer, actor, lawyer and economist who lives in Hollywood, where his anti-abortion views are as unusual as his talents. The following item is the Monday *entry in his "Ben Stein's Diary," his regular feature in* The American Spectator *(May, 1998), and is reprinted with permission (Copyright The American Spectator, 1998).]*

A Golden Age for Thugs

Benjamin J. Stein

Monday

Here I am cleaning up my son's room watching a talk show and they are talking about our time—to the effect that we are now living in "The Golden Age" or at least "A Golden Age" in the history of America. This talk is based on the performance of the United States economy since about the end of 1991 until now, when we have had an uninterrupted economic expansion accompanied by rates of inflation that are low by the standards of the Vietnam and post-Vietnam era.

The Golden Age metaphor seems to apply especially to corporate earnings, which have risen very fast since 1987, more than doubling in that time period. This rise, combined with low interest rates, has powered a breathtaking rise in prices on the nation's stock markets, which I like a lot, and have talked about before. The S&P 500, for example, has roughly tripled just since 1991, and the S&P 500 has more than doubled just since the beginning of 1996.

More Americans than ever are millionaires, and while precise numbers are hard to come by, estimates from the Northern Trust Company are that more than one in every hundred Americans is a millionaire, and families with more than $5 million in assets are no longer rare.

I keep thinking of numbers like this and the idea of the Golden Age.

Then I think about some other numbers. Since 1973, when the United States Supreme Court, with no precedent before it at all, decided that it was not constitutionally permissible for states to restrict abortions for most women, there have been an estimated 37 million or more abortions performed on United States women and their babies.

Every single one of these abortions violently ended the life of an American baby, as I see it. Last year, the Golden Age year of 1997, saw abortion "clinics" and hospitals end the lives of about 1.4 million American babies.

Now, I want to be the first to admit that not everyone sees abortion as the ending of a life. There are probably some people who still see a baby in the womb as unfeeling tissue, like a mole or subcutaneous fat. They see the baby in the sonogram looking like a baby and they don't believe it's a baby. They see the baby reacting to a needle and moving away from it and they don't think it's a life. They know that a baby in the womb relaxes when she or he hears soothing music and they don't think there's a baby there. There are people who know that babies look just like

postpartum babies very soon after conception, when they are still in the womb, and have a strong sense of pain, but those people can still call an abortion something other than the violent killing of a baby. None so blind as those who will not see, goes the adage.

Of course, there are also people who realize very well that a baby is a life in being, but honestly say that these lives are silent, have no votes, and are entitled to less legal and moral protection than the lives of grownups. If these pre-born lives are inconvenient, goes the reasoning of this group, then it is the right of the mother to kill her child. This is a brutal, but honest, approach.

And, of course, there are those who believe that the killing of about a million and a half babies per year is worthwhile if it saves a handful of women from being killed or maimed in illegal abortions. Never mind that every one of those babies is maimed and killed in an abortion, so that you really have a calculus in which the lives of about a hundred thousand babies are traded for the lives of one grown woman. But this quantum of people who see abortion as something other than gruesome, who believe it is justified for the convenience of adults and adolescents, and who will kill any number to save a tiny number, are in an interesting position: they cannot look at their handiwork or the handiwork they defend.

Across the country, they shrink from photos of the babies killed in abortions. Through their mighty political groups, the pro-abortionists compel TV stations to refuse advertisements showing partial birth and other abortion artifacts. They will not even allow viewers (or themselves, I suspect) to see what their policies have wrought. They are, at least to my mind, like the Germans who refused to think about what was happening at Dachau and then vomited when they saw—and never wanted to see again.

For the rest of us, who see abortion as the violent taking of innocent life, it is hard indeed to see our era as a Golden Age. How would we feel if a disease claimed a million and a half unborn lives every year? Would we think we were in a Golden Age? How would we feel if an enemy invader killed a million and a half of our unborn every year?

I know that there are intelligent people who disagree strongly with what I say here. I used to disagree strongly myself—before we had our own adopted son, before we saw what might have been sucked out and ground up in a "clinic" or "women's health centers" (most absurd terms for killing rooms for little girls and boys), before we learned what everyone now knows about just how alive a baby in the womb is. But I think any intelligent man or woman who thinks about just the possibility that abortion is murder will have a hard time stopping before the terminus of the notion that it is murder. And for those who don't care to make the trip down that road, perhaps you can imagine the feelings of tens of millions of us who see clearly that abortion is a violent killing of the most innocent of humans. Perhaps you can see why some of us don't see this as "A Golden Age"—and why we won't see it that way as long as the killing goes on, no matter how high the market goes. I love the high market, but it's dirt compared with life.

APPENDIX C

[The following column first appeared in the New York Post *(June 25, 1998) and is reprinted here with the author's permission. Mr. Gelernter, a professor at Yale, is of course well known for his book* Drawing Life: Surviving the Unabomber *(The Free Press); he was the subject of "No Bomb, No Book" by Faith Abbott in our* Winter *1998 issue.]*

The Great Anti-Truth Campaign

David Gelernter

A basic duty of citizenship is to read your country like a book, day by day, and try to puzzle out the meaning. When you read a novel or poem, certain passages remind you of others. Such relationships can yield clues about the underlying theme. Here are some related passages from Modern American Culture, a work in progress. Each one tells a different story; the common thread is dishonesty. What do they mean when you add them up?

In a recent National Review, two stories appeared back-to-back. The first is by John Lott, whose book on crime and gun control has just appeared. Lott studied FBI crime data for every county in America between 1977 and 1992. He found that, statistically speaking, if you allow law-abiding citizens to carry concealed handguns, you substantially reduce violent crime (without causing any significant increase in the rate of accidental shooting deaths).

Which is interesting but hardly surprising; if a criminal is bent on bad deeds, it's common sense to imagine that pointing a gun at him is a good way to change his mind. But the Establishment loves gun control and gets angry when nasty boys pick on it. The reaction to these findings accordingly amounted to "a case study," Lott writes, "in dishonesty among gun-control advocates." His research study was attacked as "flawed" by people who had never seen it. Newspapers eagerly spread rumours about Lott (that he was in the pay of the gun industry, for example), and few of them bothered to print retractions when the lies were exposed.

Next is an update on partial-birth abortion, roughly a year after Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, admitted to "lying through my teeth" on the topic. According to abortion-rights supporters, "doctors resort to this rare procedure only for late-term abortions if fetuses have severe abnormalities and no chance of survival"—thus spoke a reporter on National Public Radio's Morning Edition.

Abortion groups claimed that only a few hundred were performed every year. But when a New Jersey reporter called a local abortion clinic, it developed that this one clinic alone performed at least 1,500 a year. It also turned out that in the vast majority of cases, the mother's life is not at risk and the fetus is perfectly normal; a perfectly normal surgeon punches a hole in the skull of a perfectly normal fetus, and then sucks out the brain.

Dishonesty is the common thread: If you are a true-blue leftist ideologue, you believe because you have faith, not because you have facts. It's generally thought that if you are looking for religious believers in the traditional sense, they are a lot

more plentiful on the right than the left. But that doesn't mean that leftists aren't religious. It means that leftism *is* a religion.

We don't expect Jews or Christians to renounce their faith because of factual objections to some aspect of the Bible; faith operates in a realm beyond facts. Perhaps it is equally unreasonable to expect gun-control or abortion-rights enthusiasts to renounce their beliefs merely because the facts don't support them.

You have to wonder nevertheless whether honesty might not be losing ground in modern America. Are today's cultural elites just too "committed" to be honest?

The question arises again in another recent piece, by Helen Vendler in The New Republic. Vendler is a respected scholar and literary critic. In discussing a newly-published anthology of world poetry, she finds all sorts of editorial misjudgments; when the anthologizers explain their strategies, it sounds like "the purest lisping of multiculturalism." She patiently points out the book's good points too, but when the editors turn medieval Latin poetry into a wholly secular category, without a single Christian poem, Vendler has had it: "this seems to me dishonest."

Truth doesn't get the respect it used to; truths are disposable. If they don't fit the ideological master plan, you simply chuck them out. But why should that be? It's not as if there were some sort of concerted anti-truth campaign underway . . .

Whoops, strike that. There is. On the great sand beach of modern culture, prestigious universities man the lifeguard chairs. They lay down the rules and show the way. Everyone looks up to them.

Here is the distinguished scholar Gertrude Himmelfarb's description of the "ultimate aim" of today's postmodernist academic historians: "to liberate us all from the coercive ideas of truth and reality." The defining postmodern attitude is "disdain for the truth, not only as an ultimate philosophical principle but as a practical, guiding rule of historical scholarship."

Today's history students are taught—if they are lucky enough to get the hot trendy profs—not that the truth is often hard to get, and sometimes impossible. They are taught that there *is* no truth, and if you think otherwise, you're a prig. Specifically a "metaphysical prig," according to Richard Rorty, and Rorty ought to know; he is one of America's best respected philosophers. "Metaphysical prigs" is his term for sad sacks "who will solemnly tell you that they are seeking *the truth*."

Truth is not the only virtue, and doesn't necessarily trump every other virtue. Jimmy Carter never lied; case closed. But I don't see any important moral distinction between teaching students "there's no such thing as truth" and teaching them that "blacks are inferior to whites and ought to be second-class citizens." Both teachings are protected by the law of free speech. Both are false, and can have pernicious consequences.

We don't have the right to suppress either one, but we have a duty to *respond* to both. But our national conversation has broken down, and it's rare that we respond seriously to anything any more.

APPENDIX D

[The following syndicated column appeared in the New York Post *(May 11, 1998) and is reprinted here with permission. (© 1998. Distributed by Universal Press Syndicate. All rights reserved.) Maggie Gallagher is the author of* The Abolition of Marriage *(Regnery Publishing, Washington, D.C.); she's currently working (with Linda Waite) on a new book titled* The Case for Marriage, *which will be published in 1999 by Harvard University Press.]*

What About the *Embryos'* Rights?

Maggie Gallagher

Eerily frozen in the very act of conception, at least until New York Chief Judge Judith Kaye ruled Thursday they are dead meat, five embryos lay in a vault in Mather Memorial Hospital on Long Island. Five microscopic question marks waiting for an answer: Are we property or are we human life?

One thing we know they are not is part of a woman's body.

Years ago, Steven Kass ejaculated into a little cup while doctors removed his wife Maureen's eggs. The two pieces of themselves were mixed in the lab, and at the moment the sperm penetrated the egg, the act of union was halted—a developing human being's life put on hold.

It was done with good intentions: the normal passionate human desire of a married couple to have children of their own—to fling their very beings together into an unknown future. Several miscarriages and a divorce action later, the future has arrived.

Steven Kass has no desire to be turned into a dad, years after the divorce, by his ex-wife. Who can blame him? They had a deal, dammit, a contract drawn up by lawyers and signed by them both stating that, in the event of divorce, the "ownership" of the embryos would be determined by a property settlement, or else by the courts.

What right does she have to renege now?

Meanwhile, Maureen Kass' heart is breaking; what mother's wouldn't? Her babies, her would-be babies. At 40, they are her only shot (unlike her ex-husband) at having children of her own body. All these tiny possibilities will be destroyed, turned over to the scientists who created them, turned into experiments to be used and discarded, by order of the court.

Traditionally men and women "consent" to parenthood by having sex. For men, the law still insists that "you play, you pay." You have sex, and you voluntarily assume the risk of 18 years of child support (not to mention creating one sad, father-hungry kid).

But for women, Roe vs. Wade transformed having children from an act of the body to an act of the will: Now women (but not men) can decide not to be parents right up until the very moment the baby's head passes through the birth canal. The theory of human personhood enshrined in Roe can thus be best described as: If it's inside you, it's your body. If you can see it, it's your baby.

But what happens when pregnancy takes place outside the woman's body? What

do the Kasses as co-creators, or we as accomplices in these high-tech conceptions, owe these tiny beings?

The court in this case might have done many things. It might have ruled, as a lower court did, that the true meaning of Roe is that procreation is a woman's choice. Maureen Kass has as much right as a naturally pregnant woman to decide the fate of her embryos.

Or, striking a blow for gender neutrality, it might have ruled that both men and women have a right to decide whether they want to become parents.

Instead the court said, in essence, unborn children are property, as properly subject to contract law as a set of dishes or the family bank account. Of course, what the law might have said, but didn't, is this: These are developing human beings who didn't ask to be created, certainly not in this unconventional and (to them) dangerous manner. The best interests of these developing children should be our highest priority.

Trump the desires and interests of the parents who have chosen to place them in this precarious position. Give them a shot at life *and* a family. Donate them to another infertile couple. Case dismissed.

APPENDIX E

[The following editorial commentary first appeared in National Review *(June 22, 1998), and is reprinted here with permission. Mr. Scully, a former literary editor at the magazine, is now a free-lance writer living in Herndon, Va. (Copyright 1998 by National Review Inc.)]*

Partial Truth

Matthew Scully

In late 1996 and early 1997, reporters and commentators went through one of their little rituals of shock, self-disgust, confession, and atonement. The occasion was the debate over partial-birth abortion.

The most abject confession came from *Washington Post* columnist Richard Cohen, who admitted he had been parroting data from "the usual pro-choice groups." He had been "led to believe that these late-term abortions were extremely rare and performed only when the life of the mother was in danger or the fetus irreparably deformed," he wrote in September 1996. "I was wrong." The *Post* itself editorialized the following March about the pro-abortion groups that "lied about the real reasons women seek this particular kind of abortion." The *Chicago Tribune* noted that "this was not the first misinformation peddled by pro-choice organizations." Jonathan Alter in *Newsweek* admitted the incident had "even managed to rouse the consciences of basically pro-choice types like me."

This was fine as far as it went. But the indignation seemed to arise more from the injury to professional pride than from the lie itself. Thus, a year later, the matter has basically been put behind us, the liars still called upon for information on the very matter they lied about.

It all began, you will recall, with Dr. James McMahon. Unearthed in 1990 by Los Angeles Times reporter Karen Tumulty, he was the fellow who first figured out how to deliver all but the head of a baby, apply scissors and suction tube, and still enjoy the protection of our abortion laws. His colleague, Ohio abortionist Martin Haskell, in 1992 composed an instructional monograph, *Dilation and Extraction for Late Second Trimester Abortion*, explaining the method step by step, and also the reason: "Most surgeons find dismemberment at 20 weeks and beyond to be difficult due to the toughness of fetal tissues at this stage of development." Hence the advantage of "intact abortion" by means of crushing the baby's head.

Haskell's how-to manual was distributed by the National Abortion Federation for study by other abortionists, one copy making its way to the National Right to Life Committee. Adding medically accurate line drawings of each step, the NRLC reprinted the monograph as a brochure. In July 1993 reporter Diane Gianelli of *American Medical News* picked up the story, confirming each point in interviews with McMahon and Haskell. The NAF accused her of falsifying quotes, such as Haskell's estimate that 80 per cent of partial-birth abortions are "purely elective." American Medical News responded with a transcript of the taped interviews. The NAF was forced to concede its misrepresentations. There the matter stayed until

July 1995, when Rep. Charles Canady (R., Fla) introduced the Partial Birth Abortion Ban Act.

What followed was the greatest disinformation campaign in American journalism since the *New York Times*'s Walter Duranty earned a Pulitzer covering up for Stalin. For the next several months a series of urgent "fact sheets" landed in newsrooms across America. Sorting through the press clips, it isn't hard to tell which reporter was reading from which fact sheet.

Planned Parenthood, Nov. 1: "The procedure, extremely rare and done only in cases when the woman's life is in danger or in cases of extreme fetal abnormality . . ." Fox News, Nov. 2: "It's a procedure used only when the mother's life is at stake or when the fetus has severe abnormalities." Reporter Edwin Chen of the *Los Angeles Times*, Nov. 2: "The controversial abortion technique is typically performed when a woman's life is in danger or to abort a fetus that is not expected to survive."

Planned Parenthood, June 15: "The D&X [partial-birth] abortion procedure is a rare and difficult medical procedure. It is usually performed in the most extreme cases to save the life of the woman or in cases of severe fetal abnormalities." The *New York Times*, June 19: "[The Canady bill] would outlaw one of the rarest types of abortions—a highly specialized procedure that is used in the latter stages of pregnancy to abort fetuses with severe abnormalities or no chance of surviving long after birth." Reporter Chitra Ragavan of National Public Radio's *Morning Edition*, July 14: "Anti-abortion groups call it 'partial-birth' abortion. Doctors resort to this rare procedure only for late-term abortions if the fetuses have severe abnormalities and no chance of survival."

Fact sheet courtesy of the National Abortion Federation: "This procedure is used only in about 500 cases per year." *Time* magazine the following week: "Experts estimate that partial-birth abortion accounts for perhaps 600 of the 1.5 million abortions performed in the U.S. each year."

All this, mind you, was reported as simple fact, requiring no attribution. Another tack was to avoid any mention at all of the details, as when *CBS Evening News* anchor Dan Rather informed us that the House had voted "to make a rarely used type of late-term abortion a felony."

Other news outlets reported that anesthesia made the procedure painless to the fetus. (Planned Parenthood, Nov. 1: "The fetus dies of an overdose of anesthesia given to the mother intravenously.") It was a point easily enough checked with a call to the Society of Anesthesiologists (which debunked the claim after it was published, noting the millions of healthy babies delivered each year to mothers who have undergone anesthesia) or by looking at the original interviews with McMahon and Haskell. (Gianelli: "Let's talk first about whether or not the fetus is dead beforehand," Haskell: "No, it's not. No, it's really not.") As the Canady bill neared a vote, the Associated Press reported that "Opponents of the bill say the scissors method is very rare if it exists at all." (Haskell in his how-to monograph: "[T]he surgeon then forces the scissors into the base of the skull. Having safely entered the skull, he spreads the scissors to enlarge the opening.")

Then one day in September 1996 a reporter for *The Record* in Bergen County, New Jersey, Ruth Padawer, undertook an extremely rare and difficult procedure known as original research. She called the local abortion clinic to ask how many partial-birth abortions it performed: at least 1,500 a year, she learned. Of the 1,500 just at that clinic—three times the 450 to 500 said to occur nationwide—"a miniscule amount" were done to save the mother's life. Two days later the *Washington Post* did itself credit with a lengthy piece by medical writer Dr. David Brown and reporter Barbara Vobejda, essentially refuting all its previous reportage: "It is possible—and maybe even likely—that the majority of these abortions are performed on normal fetuses."

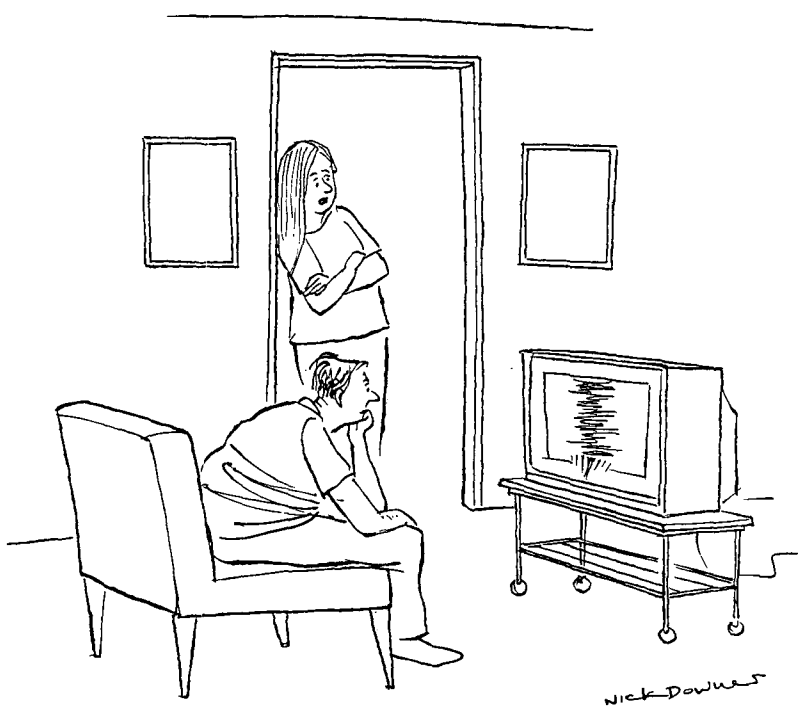
In February 1997 came the most striking confession. Interviewed the previous November on *Nightline*, Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, had used the 450-nationwide figure. He now wished to tell America that he had been "lying through my teeth." By far the majority of cases involve a healthy mother and a healthy fetus, he told *American Medical News*. "The abortion-rights folks know it, the anti-abortion folks know it, and so, probably, does everybody else." Abortion in general, he added, "is a form of killing. You're ending a life."

Some 14 months had passed, as Terry Eastland concluded in a 1997 edition of PBS's *Media Matters*, between the introduction of Canady's bill and the first sign of original reporting by all but a few in the major media. It took the *Bergen Record* to get the the *New York Times* moving, and an abortionist to prick the conscience of pro-choice America.

Notable in coverage since then is the absence of the usual paragraph reminding the reader of the story so far. If, let us say, Gary Bauer had been caught in an outright deception, it's a safe bet that that would be considered essential background in all future media coverage of his doings ("The controversial Bauer, who twenty years ago was revealed to have lied . . ."). One also notices, as in a March 23 AP dispatch, a return to the pre-Fitzsimmons line: "Abortion-rights advocates say the procedure is uncommon and used only when a fetus has severe abnormalities or the woman has serious health problems." Here and there you can even find outright denial. Listen to "news analyst" Cynthia Tucker of the *Atlanta Constitution*, appearing on PBS's *NewsHour with Jim Lehrer* three months after Fitzsimmons came clean: "Jim, abortion is a medical decision and Congress has absolutely no business in it. The late-term abortion that opponents call 'partial-birth' abortion—it is an obscure, very rarely practiced medical procedure, and most members of Congress don't know what they're talking about when they discuss it."

What we're hearing there is desperation. The term itself remains cordoned between quotation marks, as if beneath proper journalistic usage. But one by one the euphemisms are falling away and the hard nouns and verbs are breaking free, sometimes to surreal effect: "While proponents say such laws ban 'partial-birth' abortion," reported the *New York Times* on April 8, "nowhere do the statutes describe that procedure, which involves extracting all but the head of a living fetus

from the womb, then killing it by inserting a pair of scissors into the brain." Here are the editors of the newspaper of record fussing over "partial-birth," while *killing* breezes by without notice.



"I didn't even know there was an 'all seismograph' cable station."

APPENDIX F

[The following commentary first appeared in The Weekly Standard *(July 13, 1998), and is reprinted here with permission (© 1998, The Weekly Standard). Wesley J. Smith has a featured article in this issue which provides a biographical note.]*

The Serial Killer as Folk Hero

Wesley J. Smith

The body of homicide victim Joseph Tushkowski underwent "a bizarre mutilation," proclaimed Oakland County (Mich.) medical examiner L.J. Dragovic in mid-June. According to the autopsy findings, the mutilator, after killing Tushkowski with a lethal injection, crudely ripped out his kidneys. He didn't even bother to remove the dead man's clothes, but simply lifted up the sweater, did his dirty work, and tied off the blood vessels with twine.

This is not a bizarre plot twist from the new *X-Files* movie. The despicable and gruesome act was committed by a team that included that ghoulish poster boy for "assisted suicide," Jack Kevorkian. He announced the deed proudly in a news conference earlier this month, during which he and his lawyer offered Tushkowski's organs for transplant, "first come, first served." There were no takers.

No one who has followed Kevorkian's eight-year killing spree can be shocked at this latest outrage. In his 1991 book *Prescription: Medicide* and other writings Kevorkian long ago alerted the world that he would take human organs from his victims. Indeed, just a few months ago, he promised to hold a press conference with jars containing human organs at his side.

Most of this hasn't penetrated into the public's consciousness. Perhaps some evil acts are too grotesque to comprehend. Or perhaps, rather than accept the harsh truth—which would require an end to apathy and a rejection of assisted-suicide theory—it has been easier for the public to swallow the assertion of Kevorkian's minister of propaganda, lawyer Geoffrey Feiger, that Kevorkian's only aim is to relieve human suffering. But that isn't his aim at all. Jack Kevorkian is in this for his own twisted purposes—and his writings, public statements, and actions prove it.

Kevorkian has embarked on a three-pronged campaign to destroy traditional American medical ethics, a campaign that also gives him free rein to indulge his twisted obsessions. The first phase was to make "assisted suicide" seem routine and even banal, not so much to relieve suffering (which he called "an early distasteful professional obligation") as to make "possible the performance of invaluable experiments or other beneficial medical acts under conditions that this first unpleasant step can help establish." Phase Two, which he has now entered, is to harvest organs from his dead victims and offer them for use in transplants. This is intended to make the voluntary killing of despairing disabled and sick people seem beneficial to society. The third and final phase: Use assisted-suicide victims as experimental "subjects" before they die—in other words, human vivisection.

Phase One of Kevorkian's quest succeeded beyond even his own wild expectations.

Who would have believed in 1990, when Kevorkian committed his first assisted suicide, that he would go on to "assist" more than 100 victims without significant legal consequence, and be viewed by a bemused public as some village crank? It doesn't seem to have mattered to the jurors who have helped him escape prosecution—or to the part of the public that sees him as a social reformer—that approximately 80 percent of Kevorkian's victims were *not* terminally ill. Most of them have been people with disabilities, primarily multiple sclerosis but also arthritis and spinal-cord injury. Few care that two of the victims were not mentally competent, including a man who believed he was a KGB agent and a woman with late-stage Huntington's disease. Another six of Kevorkian's victims had no identifiable illness upon autopsy, including an 82-year-old woman who admitted in her suicide note that she just wanted to die. In Oakland County, Kevorkian's base of operations, prosecutor David Gorcyca won office in 1996 after promising to leave the one-time doctor alone.

Now a law unto himself, Kevorkian has opened his second phase, in which he intends to use disabled human beings as organ farms. There is purpose behind this madness. Kevorkian believes a disabled person who is not in suicidal despair to be "pathological." In an August 1990 court statement, Kevorkian wrote that "the voluntary self-elimination of individual and mortally diseased or crippled lives taken collectively can only enhance the preservation of public health and welfare." He views the organs of the disabled as having greater value than disabled people themselves. It is thus no coincidence that Tushkowski, Kevorkian's first "organ donor," was disabled with a spinal injury.

If Michigan law enforcement and public opinion swallow Phase Two—as seems likely, considering the blasé public reaction to Tushkowski's mutilation, the deafening silence about it from most of Michigan's and the nation's political leaders, and the shrug of the shoulders by prosecutor Gorcyca—look for Kevorkian to quickly implement Phase Three, "unfettered experimentation on human death."

In *Prescription: Medicide*, Kevorkian explicitly described his future plans. "Knowledge about the essence of human death," he wrote, "will of necessity require insight into the nature of the unique awareness . . . that characterizes cognitive human life. That is possible only through . . . research on living human bodies, and most likely by concentrating on the central nervous system." There is no reason to believe Kevorkian won't act on his desire to cut up people while they are still alive, just as he has acted on the first two phases of his campaign, which he also wrote about explicitly and in detail long before actually putting theory into practice.

Jack Kevorkian is a quack, a ghoul, and a fiend. He is a quack because, though once trained as a pathologist, he has no training or expertise in diagnosing or treating depression, and he has not treated a living patient, at least not one who survived his "treatment," since his residency and military service in the 1950s. (His license to practice medicine was lifted in 1991.) Yet he purports to advise despairing sick and disabled people about their medical prognoses. He is a ghoul because he is

obsessed utterly with death. Indeed, his "Dr. Death" moniker dates back to his medical-school days, when he would haunt hospital wards at night, staring into dying people's eyes. He is a fiend because his fondest dream is to slice open living people. He may also be the world's most clever serial killer, as one media observer once put it, since his victims come to him.

The ugliest truth in the Kevorkian story, though, is not about him but about us. In a decent and moral country, Kevorkian would long ago have been shunned as a pariah and jailed or forcibly confined to a mental institution. Instead, Jack Kevorkian has become the most unlikely folk hero in the United States. Earlier this year, he was feted at *Time* magazine's 75th-anniversary gala, where he was praised by attending celebrities like actor Tom Cruise, who rushed up to shake his hand. Andy Rooney interviewed him on *60 Minutes* and proclaimed him a "courageous pioneer." Larry King and Charles Grodin are admirers. Geoffrey Feiger, his longtime lawyer and confidant, has a good chance of becoming the Democratic nominee for governor of Michigan.

The ultimate horror of Jack Kevorkian lies not in the hollowed-out body of his latest victim, but in the hollowness he has exposed in the society that tolerates—and even celebrates—his increasingly gruesome killing spree.

"You don't by any chance sell a 'sixteen years after' pill, do you?"

Mac - Daily Mail, London

APPENDIX G

[*The following article first appeared in* National Review *(May 18, 1998), and is reprinted here with permission (© 1998 by National Review, Inc.). Miss Shalit is a contributing editor to New York's* City Journal.]

Whose Choice?

Abortion is supposed to empower women.
Tell that to a girl in trouble.

Wendy Shalit

"But oh, thrice guilty is he who drove her to the desperation which impelled her to the crime!"
—Susan B. Anthony, 1869

Much is known about the details of *Roe* v. *Wade* and *Planned Parenthood* v. *Casey*, about which Justices and politicians were in favor and which ones were opposed. Yet the woman who opts for an abortion, the circumstances leading up to her choice, what she is actually feeling at the time—all are murkier. Emotions tend to be messy, after all, and do not lend themselves especially well to ideology.

But a recent debate in—of all unlikely places—*Glamour* magazine lets us peer into this very private world. In the March issue, Diane Goldner explains why non-surgical abortions—using, for example, RU-486—are "more acceptable" to her than surgical abortions. Along the way, however, her essay, entitled "Ending My Pregnancy," tells a startling tale that sheds light on what choice really means for women.

Two years ago, when Miss Goldner discovered she was pregnant, she was happy: "I felt ready. I was 34, and although I might not have chosen to have a child right then, I wanted the baby. I also thought my boyfriend and I were in a solid relationship, though we were going through a tense period." Unfortunately, her boyfriend had different ideas. "I hoped he would embrace me and our child. But he couldn't. All he said when I told him the news was, 'You poor thing.'" Miss Goldner still did not give up, reminding him shyly, "We could get married." Her boyfriend, as it happens, couldn't have disagreed more.

"I am pro-choice," Miss Goldner continues, "but the decision to end a pregnancy was not a choice I ever wanted to make." She alludes to some nerve condition her then-boyfriend was suffering from, which he was vaguely concerned might be passed on to their child. In any case, it soon emerges that this was not the real point of contention between them. Miss Goldner explains: "I considered having the baby on my own; my boyfriend pleaded with me not to. In the end, I agreed with his viewpoint: My child should have a father. A good and loving father."

This once was an argument for a shotgun wedding. Today it has become a curious argument for abortion. Since our child should have a loving father, kill the

child, please, since I don't love you or our child enough.

Not surprisingly, the financial impossibility of being a single mother "overwhelms" Miss Goldner: "I couldn't do it." So she decides to have an abortion. But when she visits her gynecologist, she is horrified to learn that she will have to wait six weeks (an embryo typically has to be seven or eight weeks old before it is large enough for a surgical abortion to be performed). "I pleaded with her. How could I continue for more than a month into a pregnancy I knew I would terminate? The prospect was nightmarish. With each passing minute, I felt more connected to the life growing in me. In another six weeks . . . I felt my heart might really break by then."

Worse still. "To my own surprise, I had already found myself abstaining from medicine and alcohol—the things I would do if I were planning to continue the pregnancy. In the same way, I felt very loving toward my boyfriend, as if the baby were binding us together in some primal way—an unnerving feeling, since he and I had, by then, decided to cut our ties."

She feels "panic rising" in her. "I can't wait six weeks," she insists to her gynecologist. Richard Hausknecht, MD, then enters the picture. At the time, he happened to be testing a nonsurgical abortion drug, methotrexate, which is similar to mifepristone (commonly known as RU-486). So Dr. Hausknecht injected a series of drugs into Miss Goldner over several weeks. She experienced some contractions, and since she was only nine or ten days pregnant, she bled "what seemed like my period."

Events march, and in retrospect she is "grateful for the speed with which I was able to terminate my pregnancy." For "if I had had to wait weeks for an abortion, each moment would have been torture."

Stories like Diane Goldner's bolster the thesis of those, like Serrin Foster, executive director of Feminists for Life, who insist that women have abortions out of a lack of financial and emotional support. Any woman who had a meaningful choice, Miss Foster contends, would reject abortion. Even the famously pro-choice bible, *Our Bodies, Ourselves*, first issued in 1973 by the Boston Women's Health Collective, acknowledges that experiences like Miss Goldner's are quite common. On page 346, one woman laments, "My lover was opposed to having the child (as a team) and I didn't want another child without his help, so I decided on abortion. I was not happy with this because I wanted the child and was in love with the father."

In the end, the editors of *Our Bodies, Ourselves* dismiss such women, explaining that "Increasingly, younger women are vulnerable to right-wing or fundamentalist religious values and propaganda being disseminated in the wider society . . . From this pressure to carry a pregnancy to term you may become vulnerable to other pressures—to keep your baby or give it away." But it is painfully clear that the pressure to keep our babies is not coming from right-wing propaganda, but a little closer to home.

Take 27-year-old Carolyn C. Gargaro, for example, who calls herself "pro-woman

and pro-life" and runs a whimsical website expressing her views on the issues of the day (jttp://www.gargaro.com/political.html). Her abortion page is somber in tone, lamenting how abortion has promoted the "loving and leaving" philosophy among men of her generation.

And in the current (May) issue of *Glamour*, all but one of the letters to the editor express support for Miss Goldner, and share her ambivalence about abortion. One woman from Tucson writes: "I was very moved by Diane Goldner's 'Ending My Pregnancy.' At 21, I also decided to end my pregnancy early . . . Words can't describe the emotional trauma of knowing that a life was slowly forming inside me only to be eventually taken away. I understand Goldner's fear that her heart might break if she had to wait. Because in the end, mine did." Then a woman from Chicago notes that "when I got pregnant, my boyfriend and I decided the nonsurgical method was best because I could end my pregnancy at home." Nonetheless, "my nonsurgical procedure was not the quick fix I wanted—for my body or my heart."

The only unsympathetic letter is from a pro-lifer, a registered nurse who points out that "every year I see younger premature babies surviving." She scolds Miss Goldner: "Goldner writes that she felt she had to have the nonsurgical procedure, rather than waiting for a surgical abortion, because her growing connection to the life within her made her 'panic.' But early-term abortions are no more moral than later ones. . . . At what exact moment does the author consider unborn children to be more than just cells?"

This pro-lifer is right, and yet she misses the point. In this she displays what is wrong with the pro-life movement today, always winning the intellectual battle, but always losing the war. The central drama in Diane Goldner's article was not "When does life begin?" but rather, "You poor thing"—as Goldner's boyfriend put it when she told him what she thought was good news. Too many men now find it utterly inconceivable that their girlfriends' pregnancies could have the slightest thing to do with them.

For too long, the abortion debate has almost exclusively focused on women; the movie *Citizen Ruth*, for instance, was all about the battle between pro-choicers and pro-lifers for the mind of the pregnant Ruth—her baby's father was somewhere far off-stage. Pro-choicers make the issue a matter of the "woman's body," and too often all we see of pro-lifers is when they attempt to convert women at the clinic door.

But everyone may be targeting the wrong sex. We should start asking about all the dishonorable boyfriends behind these women's "choices." For the woman who seeks an abortion is not a woman lusting for baby-killing, nor is she typically a woman who delights in her opportunity to exercise this particular freedom. Instead, women like Diane Goldner have more often than not once said hopefully to their boyfriend, "we could get married . . . ?" and have been told: not in a million years. "You poor thing" indeed.

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