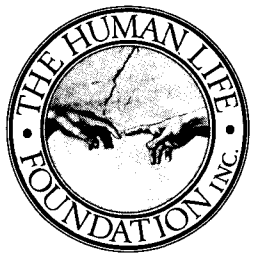
the HUMAN LIFE REVIEW



FALL 2000

Featured in this issue:

***Stenberg* v. *Carhart*—the Dissents**

Antonin Scalia • Anthony Kennedy • Clarence Thomas

Also in this issue:

Chris Weinkopf • George F. Will • Robert Bork • John Leo
Midge Decter

Published by:

The Human Life Foundation, Inc.

New York, New York

Vol. XXVI, No. 4 $5.00 a copy

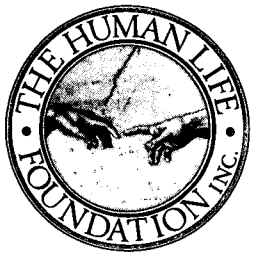
. . . abortion has yet to emerge as a high-profile "wedge issue" in this year's presidential campaign. Maybe it won't. George W. Bush, especially in the first debate, successfully re-framed the argument by pointing out where voters share "common ground"—the desire to promote adoption, pass parental notification and consent laws, and ban partial-birth abortion. As we go to press, Al Gore is laughably trying to soften his extremist position with a "common ground" pitch of his own. This from the man who thinks "a woman's right to choose" extends even to the death chamber (for more about this see Chris Weinkopf's article on page 130).

Nonetheless, much has happened in the last few months to keep abortion politics roiling, beginning with the Supreme Court's 5-4 decision in *Stenberg* v. *Carhart* which threw out Nebraska's partial-birth-abortion ban. We had originally thought to invite commentary on the dissents in the case, but after reading what Justices Scalia, Kennedy and Thomas had to say we thought readers would want the opportunity to read them also. (They begin on page 86.) It is, after all, *infanticide* that is being sanctioned by the Court. The House of Representatives, on the other hand, voted on Sept. 26 to extend full protection to any child who survives the abortion attempt. This has long been the project of the indefatigable pro-life crusader, Hadley Arkes of Amherst College. Again, so readers can get the story straight from the source, we have included Professor Arkes Congressional testimony in support of Rep. Charles Canady's Born-Alive Infants Protection Act (page 15). The news about RU-486 came just as the issue closed, but we did manage to find room for one more appendix, Midge Decter's "A Revealing Pill" (page 143) and will certainly be revisiting the subject soon.

David Quinn ("Ireland's Abortion Impasse," page 38) has been keeping us up on Irish abortion politics for several years. Should anyone be interested in reading his past articles, let us know and we'll forward you the relevant back issues while our supplies last. We can also make the same offer for articles by Mary Meehan and Wesley Smith. In "What's Wrong with the Science Establishment"? (page 63) Meehan further develops themes she explored in her two-part series on eugenics: *The Road to Abortion* (Fall, '98, Winter, '99). Smith ("The Dehumanization of Robert Wendland," page 55) is one of the country's most visible anti-euthanasia activists, and a frequent *Review* contributor. His new book, *Culture of Death: The Destruction of Medical Ethics in America*, will be published soon (Encounter Books).

Finally, thanks to *National Review* magazine for permission to reprint Robert Bork's "Here Come the Judges: The courts in the balance" (page 135). By next time, we'll have some idea in which direction future "life" decisions will tip.

ANNE CONLON
MANAGING EDITOR



Published by THE HUMAN LIFE FOUNDATION, INC. Editorial Office, 215 Lexington Avenue, 4th Floor, New York, N.Y. 10016. The editors will consider all manuscripts submitted, but assume no responsibility for unsolicited material. Editorial and subscription inquiries, and requests for reprint permission, should be sent directly to the editorial office. Subscription price: $20 per year; Canada and foreign $25 (U.S. currency).

the HUMAN LIFE REVIEW

Fall 2000

Vol. XXVI, No. 4

INTRODUCTION

This last issue of the year 2000 finds us in the final heat of the presidential election season. Due to our publishing schedule, by the time you read this the elections may be over—but not to fear: that won't diminish the importance of anything written here. The *Review* strives to be not only *the* quarterly of intelligent writing on abortion and related life isues, but also an historical record; these pages contain incisive observations and commentary on the political scene essential to understanding where we are as Americans in 2000.

We begin with a lively essay by Senior Editor William Murchison, whose signature style never fails to provide delightful reading even when his subject is somber. Murchison doesn't find much "presidential" about the current political scene, but observes instead that "the insincerity of political discourse on abortion is among the most notable features of modern politics." Candidate Gore and the Democrats endlessly repeat the mantra of support for *Roe* v. *Wade* and a "woman's right to choose" without acknowledging the "choice" for what it is: "the extinction of unborn life. Hey, that doesn't sound like what a party of the People should plausibly affirm—the eradication of people." George W. Bush supports (as does the Republican platform) an unborn child's "fundamental right to life." But, say the Republicans, the country needs a constitutional amendment, all the while knowing that "the ratification of such an amendment is about as likely as a Presidential Medal of Freedom for Ms. Lewinsky." Murchison views both parties as operating in the same political context: "A politician's job, most of the time, is to disagree without being so disagreeable as to forfeit a lot of votes." Meanwhile, as to the reality, "to that point—the point of looking intently at sonograms—we rarely come in the political process." (Murchison's deadline fell before the recent debates, in which it might be said that George W. and Dick Cheney at least *peeked* at sonograms in declaring themselves pro-life and supporting bans on partial-birth abortions.)

Murchison does not see much immediate hope for the pro-life movement in politics—as you will see, he advises a "combined legal-political strategy aimed unashamedly at ending the *Roe* regime—or rolling it back . . . through explicit findings of the U.S. Supreme Court that the Constitution after all imposes some limit to one human's control over other humans." (Of course, who becomes our next president is crucial to how much we can hope to restore the Court's respect for the Constitution; more about that later on.)

We go next to an issue which exactly addresses this: a Congressional bill which would impose limits on one human's control over other humans, the Born-Alive Infants Protection Act, introduced by Rep. Charles Canady (R-Fla.), and passed by the House (with a stunning margin of 380-15) on September 26th. This bill, which would mandate the protection of babies who survive abortion procedures, is something on which those who are pro-life *and* pro-abortion can and do agree—though, predictably, pro-abortion organizations lobbied against even this, saying it concerned "pre-viable fetuses" and thus was in conflict with *Roe* v. *Wade*. Not true—the bill would protect babies born *alive* after attempted abortions, by definition no longer "fetuses" or "pre-viable" (unless *any* infant who can't take care of himself upon birth is pre-viable!). The bill addresses not hypothetical situations but reality: babies in clinics and hospitals who survive abortions have been left to die—after all, they are "unwanted."

We have reprinted here, in full, the eloquent Congressional testimony before Congress of one of the bill's main proponents, Hadley Arkes, the Edward Ney Professor of Jurisprudence and American Institutions at Amherst College and a tireless advocate for the unborn. Arkes describes the bill as "the most modest and the gentlest step that is imaginable" in dealing with abortion, yet "at the same time it is the approach that goes most deeply to the root of things"; he points out that there is actually a "remarkable measure of consensus in this country on abortion" ("even people who call themselves 'pro-choice' do not think that all abortions should be permitted") but "the opinions of the public have not been allowed to shape the laws that the courts will permit." And now, because of the *Stenberg* v. *Carhart* Supreme Court decision, which struck down Nebraska's ban on partial-birth abortion, "the Court has brought us to the threshold of outright infanticide"—it is critical a line be drawn. Arkes' testimony is a powerful plea for Congress to protect "the child born alive, the child who survives abortion": not only to "rescue, from that ocean of deaths, a handful of lives," but to establish a consenus in recognizing that a person's worth cannot be contingent on whether he or she is "wanted"—otherwise there will be no stopping legal infanticide and actual *homicide* in our deathly progression.

We turn now to a different kind of legal battle over abortion—the civil case of *NOW* v. *Scheidler*. In 1986, the National Organization for Women joined two abortion clinics to sue several anti-abortion activists—including Joseph Scheidler of the Chicago-based Pro-Life Action League—for conspiracy to shut down abortion clinics, under the Racketeer Influenced and Corrupt Organizations (RICO) statute. *NOW* v. *Scheidler* was heard in the spring of 1998, but it's by no means over yet, as journalist Dick Goldkamp makes clear in "The Scheidler Case: Conning a Court with RICO." Goldkamp examines the case which "has forced the pro-life movement to take a hit no other social movement in America has had to endure in decades." And he makes *his* case

that there were *glaring* inconsistencies between court testimony and factual events which were never explored by the media, much less the presiding federal judge. Moreover, not only were some accounts of clinic violence apparently exaggerated or downright fabricated, but "there was no clear and convincing evidence to link" the defendants to such violence; the jury found Scheidler and his co-defendants "guilty" by "vaguely associating them with those incidents." Goldkamp also stresses the important underlying question, and one that may be headed back to the Supreme Court: whether the use of RICO is at all appropriate. Its author, Robert Blakey, and many others say it *isn't*: a law aimed at combatting organized crime should not be used to go after social protesters for "extortion." (For more on the Scheidler case, see our special section "THE RICO Outrage: Are 'Pro-lifers' Really Mafia Mobsters?" in the Summer '98 isssue.)

Some of you may remember the Miss X case in Ireland in 1992? She was the pregnant 14-year-old girl whose parents said had been raped by a neighbor and wanted permission to take her to England for an abortion. "Our man" in Ireland, newspaper journalist David Quinn, wrote about the case for us (in "The New Ireland vs. God," Spring 1995). Quinn gives us now an update on the abortion situation in his homeland: as he explains, a result of the X case was that, in theory (although this hasn't been reported as happening in *fact*) if a woman in Ireland can get a psychologist to declare she is suicidal, she can get an abortion (abortion itself is of course still illegal). Pro-lifers are concerned about this possibility and have "been putting pressure on a succession of reluctant governments" to hold a new referendum on abortion. The current government, in order to stall such a referendum, set up a parliamentary committee to examine the abortion question. Hearings, at which interested parties might make their case, were held. Quinn closely followed the hearings, and came away convinced that abortion is "the flashpoint in the culture wars." His lively account is informative and particularly interesting because of the complexities in Irish politics and culture.

Next, philosopher Donald DeMarco gives us a break from the political and legal world. The professor takes as his subject *The Reality of Motherhood*: in examining the deconstruction, the "despiritualization," of motherhood which has taken place especially in feminist academic circles, he finds it inextricably linked to the concept of absolute individualism and abortion. "Abortion would not take place," he writes, "except for mothers abandoning their motherhood": there are mothers who claim there is no intrinsic bond between a woman and the child in her womb. Yet, he reminds us, this state of non-relatedness is artificial: "choice" may mean the destruction of a child, but a mother cannot "reject the unrejectable"—the reality of motherhood remains, and its acceptance is the basis of our civilization.

Our next article shifts to matters of life and death for adult citizens: in this

case, the disabled. Frequent contributor Wesley J. Smith, who has become one of this country's most tireless anti-euthanasia activists, writes for us about a case that will soon be heard by the California Supreme Court. It concerns Robert Wendland, a man cognitively disabled by a car accident, whose wife wants to discontinue his tube feeding. She asked doctors to do so over five years ago, and the hospital "ethics" committee was in full agreement with her wish, even though her husband is not only conscious but capable of some communication. Wendland's mother and sister sued to keep him alive, and the case has now been through several appeals. Smith clues us in to the significant details of this case as well as other current U.S. cases of similar nature; as he makes clear, the California Supreme Court's decison will be "a matter of life and death—not just for Robert but for tens of thousands of people who are or will become cognitively disabled and require others to make their medical decisions for them."

In our final article, pro-life journalist and researcher *par excellence* Mary Meehan takes on the science establishment, in a continuation of her unique and compelling research into the intricate connections between population control, eugenics and the world of science. As regular readers know, Meehan's work in this field has been substantial, and much of what she has done first appeared in this journal—such as her two-part series (Fall '98 and Winter '99) "The Road to Abortion: How Eugenics Birthed Population Control." This new article follows thematically upon one written by Meehan's colleague Rebecca Messall (see *The Evolution of Genocide*, in the Winter 2000 *Review*).

In "What's Wrong with the Science Establishment?" Meehan asks why scientists, who "cannot have too many facts . . . ignore certain facts of life as they line up to support abortion and to engage in destructive fetal and embryo research?" Part of the answer, she says, lies in ideology, and Meehan points again to the ideas of eugenics, which, once apparent in the mainstream science of the early century, have gone under-cover. By the 1970's, she writes, "While the *label* of eugenics was in hiding, the basic *ideas* of eugenics marched on." Meehan takes an historical look at two pillars of the science establishment: The American Association for the Advancement of Science (AAAS) and the National Academy of Sciences (NAS). Although scientists today (as some interviewees made very clear) are quick to denounce eugenics and recoil at the notion that eugenics has anything to do with their organizations, Meehan summons much evidence to suggest that its ideas have at the very least tainted, if not directed, the policies of the science establishment. One has only to look at the hot new field of genetic engineering, with its emphasis on avoiding disease and "improving" the "quality" of babies born. Or consider how abortion and sterilization are promoted for population control, with an emphasis on controlling the population of the poor and minorities, and, again, to prevent the births of children with handicaps or disabilities. Doesn't all this sound like the basic thrust of eugenics, in Meehan's words "classifying people as supe-

rior and inferior—and phasing out the 'inferior' to the extent possible . . . ."?

We next have a special section with its own brief introduction (p. 86), in which we reprint in full the Dissenting Opinions from the Supreme Court's *Stenberg* v. *Carhart* decision of June, 2000.

* * * * *

Our appendices section leads with "A 'Teachable Moment' Lost on Gore," in which Chris Weinkopf dissects Al Gore's embarrassing performance on Tim Russert's *Meet the Press* in July. Asked three times to say when life begins, Gore's non-answers evaded the truth and "embraced the cant." His confusion in response to Russert's question about a pregnant woman on death row was the "teachable moment"—he eventually resorted again to "a woman's right to choose," even though he might have seen that "executing an unborn baby for the crimes of her condemned mother is, on its face, a grotesque proposition."

Appendix B is a column by George Will, written immediately after the *Stenberg* v. *Carhart* decision, and it remains one of the strongest indictments we've seen. The title, "An Act of Judicial Infamy," sums up well his (and our) reading of the decision. It is followed by an article by Judge Robert H. Bork, reprinted from *National Review*, on a subject inextricably linked to the decision—the "question of judges," what's at stake in this election, and why "Judicial selection merely goes to the heart of democratic ability: the ability of Americans to govern themselves."

In *Appendix D*, we've reprinted two columns by John Leo: in the first, he writes powerfully on the horrific realities behind the Born-Alive Infants Protection Act, and why this bill is "more than a gambit in the abortion wars. We live in a time when the intellectual groundwork for the promotion of infanticide is already in place and spreading. . . ."; the second is a look at Judith Wallerstein's new book on the "sleeper effect" of divorce on children. And finally, *Appendix E*: a column by Midge Decter on the other major news in the abortion war, sad news again for pro-life forces, the approval by the FDA of the abortion "pill," RU-486. Decter deftly outlines the medical realities of abortion by toxic cocktail (not simple or painless by any means) and gets to the real reasons for the "sigh of happiness in the abortion community" over this new method of killing the unborn.

With that, we complete this issue, and the *Review* for 2000. We've added, as usual, some cartoons, mostly from the incomparable Nick Downes; my late father once wrote that his "is an hilarious talent based on the greatest simplicity of both imagination and artistry." We hope you enjoy them, and we'll be back in 2001.

MARIA MCFADDEN
EDITOR

Rolling Back *Roe*

William Murchison

It was long ago, in a country far away, and still the legend resonates. King Gordius of Phrygia, by means of an intricate knot, lashed his chariot to a pole. And he left, in the keeping of his descendants, a prophecy; or maybe the prophecy just evolved—no matter. Whoever untied the knot, Gordius was said to have prophesied, would conquer Asia. Understandably, many tried, but none succeeded until—do I grow redundant?—along came Alexander of Macedon, a man of, you might say, businesslike instincts. Untie the thing—hell! What was wrong with whacking right through it, using a hunk of Greek steel? Right then and there Alexander won Asia (in theory at least). Another thing he did was create a metaphor for swift, no-nonsense action.

It is an image we might ponder in this political season. I will supply some reasons for this—after a few moments of weary reflection on the abortion debate, as conducted in the 2000 presidential election. Anyway as conducted through August. There is after all such a thing as a deadline, and my present one fell shortly after Labor Day.

Prior to the conventions, not much, regarding abortion, went on. Bush's pro-life convictions were respectfully noted by religious conservatives, who found him less intense but more plausible than Alan Keyes. Which made him, in their eyes, worthy of support. Dr. James Dobson, of Focus on the Family, did feel obliged to waggle a finger at Bush as he contemplated running mates. No pro-choicers (such as Pennsylvania Gov. Tom Ridge), was Dobson's warning. Dick Cheney's pro-life voting record swept aside further cavils. The Republican platform affirmed an unborn child's "fundamental right to life." No quarter was offered exponents of the we-recognize-differing-viewpoints school. That was that.

As for the Democrats, Al Gore, who long ago shed like a snake's skin such stray pro-life thoughts and actions as used to become ordinary Tennessee congressmen, held firmly to his more fashionable set of convictions. At the Los Angeles convention, the right to choose seemed as inarguable as the right to a ham-and-cheese on rye. Invoking God's blessing upon the Democratic convention, Roger Cardinal Mahony of Los Angeles made headlines by imploring the Maker to "keep us ever committed to protect the life and well-being of

William Murchison, our senior 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. His latest book is *There's More to Life than Politics* (1998, Spence Publishing Company, Dallas).

all people, but especially unborn children, the sick, and the elderly." There was no flap. Democrats may have recalled that not even Mother Teresa's open appeal to President Clinton, concerning the sanctity of unborn life, took visible lodgment in Democratic consciences. What a prospective saint had proved unable to accomplish, no mere cardinal was likely to achieve.

The abortion debate in 2000—as in 1996, 1992, 1988, and so on, to that time whereof the memory of man runneth not back to the contrary—has been a non-event, in keeping with abortion's status as a political non-issue. Democrats continue to express shock that anyone would question a woman's hard-earned (and way overdue, got that, buster?) right to choose. Republicans for the most part are gently remonstrative: eager to put forth alternatives such as adoption while talking dreamily of a constitutional amendment that no one, including those who talk about it, believes likely to be ratified, short of the Second Coming.

The impression could arise that Democratic politicians regard "the right to choose" as one of those high imperatives toted down from Mt. Sinai by Moses —save that to acknowledge religious revelation would be to Blow Up the Wall of Separation Between Church and State. The party platform would have it in any case that Democrats firmly back "the right of every woman to choose, consistent with *Roe* v. *Wade*, and regardless of ability to pay." This is not exactly language that celebrates the taking of unborn life; nor is it language that sees in the issue enough moral content to remark. It is political language, uttered in a political context.

Republicans operate in the very same context. A politician's job, most of the time, is to disagree without being so disagreeable as to forfeit a lot of votes. Republicans scoff at the Democratic claim of a fundamental right to do away with unborn children. What the country needs, they assert by way of contrast (as they have formally asserted since 1980), is a constitutional amendment to protect human life.

Now an amendment of this nature, from a pro-life standpoint, would be an almost unambiguous good. (Its downside would be the federalization of an issue that, prior to *Roe*, was legitimately reserved to the states.) The whole problem is, Republicans know that the ratification of such an amendment is about as likely as a Presidential Medal of Freedom for Ms. Lewinsky. The amendment process is too lengthy and complicated and politically charged to accommodate controversial changes in social policy.

A couple of decades ago, the *Zeitgeist* itself, with all its huffing and puffing, failed to blow away crucial opposition to the Equal Rights Amendment. If feminists—far harder-nosed and more brutal (when it comes to political tactics at least) than conservatives—could not get their way via politics, how

much more is to be expected of gentle Catholic nuns and the ladylike followers of [Concerned Women for America founder] Beverly LaHaye? To this observer the Human Life Amendment—excellent and unimpeachable in philosophical grounding—seems a non-starter; necessary perhaps to assert but, under present circumstances, unattainable. As if to clinch the matter, polls show about two-thirds of Americans hostile to such an amendment, with just barely a fourth in favor.

Meanwhile the Democrats, knowing on what side of the bread the butter is slathered, make righteous noises about a right that has existed less than three decades—the right "to choose." Note the delicacy—even the nervousness—with which these exercises are conducted. The right to choose what? Oh—the extinction of an unborn life. Why, that doesn't sound like what a Party of the People should plausibly affirm—the eradication of people.

But to that point—the point of looking intently at sonograms—we rarely come in the political process. We are cautious, careful. Complexities entangle us. You know what you can always do about complexities, don't you? That's right: ignore them; save them for another day, like the Sunday *New York Times*.

The insincerity of political discourse on abortion is among the most notable features of modern politics—as the campaign of 2000 amply reminds us. Around and around and around the human-life question the politicians circle: wagging fingers, for the most part, casting nervous or terrified glances at favorite constituencies. Are folks nodding happily? Whew.

We began this discussion talking of long-dead Greeks and sharp, shiny swords. What have abortion controversies to do with such matters? They have chiefly to do with the need for an end to stultifying complexities—such complexities as are the specialty of the political process and, as we should recognize by now, are blocking any progress on this question.

Roe v. *Wade* itself was a major demonstration of the butcher's art. With a judicial meat cleaver, seven justices whacked straight through the tangle of state laws that in 1973 forbade abortion. (Only New York had legal abortion.) Getting at these laws was the clear intention of a small but nonetheless determined minority that could never have effected a national policy on abortion without the Supreme Court's help. The matter was too complex, the political process a swamp ready to swallow up the unwary. "Liberal"—or anyway liberal-run—states like Minnesota and Vermont would have come, probably sooner rather than later, to accept some "right to choose" premises. However, lawmakers in conservative states in the South and Midwest would have shut down the debate as quickly as possible. In Texas, I can tell you, Baptist preachers outnumber high-school football quarterbacks, and talk a lot more.

Slicing through these Gordian difficulties—which had been prepared prophetically by long-dead advocates of a truly federal system—the *Roe* majority achieved what no end of political exhortation could have won.

Pro-life advocates have ever since focused on purely political means of retaliating against the Supreme Court's handiwork. We are getting on toward the 28th anniversary of *Roe* v. *Wade*. It is apparent that the political means have not availed—for just such reasons as I have endeavored to outline in this essay. Politics—notorious as the art of compromise—is an unlikely venue in which to win reversal of a social and moral revolution. There are by now too many voters with a vested interest in preserving that revolution's fruits. They will not easily be argued into mildly handing back those fruits.

What do we need at this point? I would venture that what we need is a combined legal-political strategy aimed unashamedly at ending the *Roe* regime—or rolling it back, if no more than that can be achieved—through judicial measures; through explicit findings of the U. S. Supreme Court that the Constitution after all imposes some limit to one human's control over other humans.

A quickening, so to speak, conviction is that nothing else will get the job done—and manifestly the job needs doing. Further, I would suggest that, by diverting political energy to other ends, such as constitutional amendments and funding cut-offs and laws against partial-birth abortion, we squander at least a portion of that energy.

Now is it that objectives such as these are unworthy? Nothing could be further from the truth. The idea of surgically collapsing an unborn child's skull, then sucking out its brains—to the extent that such an idea fails to sicken, it shows how far we are gone in cultural decay. Should taxpayer money fund the taking of future taxpayers' lives? That would seem a cruel absurdity (a perception almost never noted by those who vote for distributing the funds). To mitigate an otherwise unmitigated evil is virtuous. But eyes must be kept on the ball. The ball is overthrow of the *Roe* v. *Wade* regime—the one thing we hardly ever hear about except from Democrats. "This year's Supreme Court rulings [on partial-birth abortion]," the Democratic platform asserts, "show to us that eliminating a woman's right to choose is only one justice away."

Really? Just one more good justice, and bye-bye, *Roe* v. *Wade*? You might expect pro-life Republicans to find this very good news indeed. If so, they keep their rejoicings very much in check. One can see why—looking at the matter in a pragmatic sort of way. Don't create an issue that's likely to come back and bite you, is a piece of conventional political wisdom. Would this one come back, with fangs exposed? Most likely.

Would that be bad? I think it would be good. The judicial overthrow of *Roe* v. *Wade*—or, if nothing else avails, its serious modification—is the only relatively short-term hope for untold numbers of lives. Reformation of the culture, as I have insisted before in this journal, is the long-term solution—the solution that will entrench any anti-*Roe* decision a future Supreme Court might make.

Calling for a Gordian solution is far from the same thing as effecting one. You can *say* (because this remains a free country) that *Roe* v. *Wade* is inexcusably bad constitutional law, but saying so does not persuade judges, who have a way of making up their own minds on legal questions. Indeed, there arises this question: Where do you get the judges who will agree? Don't we get them via the political process? We do indeed. Presidents nominate members of the Supreme Court; the Senate confirms or rejects those nominees. You need the right kind of president, and you need the right kind of Senate. This proves immediately (it might be said) that pro-life folk may not for the life of them—and of others—be excused from the political battlefield. This is undoubtedly true. They may not be.

What we should consider excusing them from is facile expectations, of which there are a lot going around. One such is that legislative action is the key to the job. The presidential campaign has written this matter in excruciatingly large letters. Here in late August there is no saying whether George Bush or Al Gore will win the presidency. If Gore wins, we know what will happen—nothing; at any rate, nothing useful, that is, from the pro-life standpoint. If Bush, on the other hand, were to win, something might come of it. He promises that, if elected, he would name to the Supreme Court judges who strictly construe the Constitution.

Note that we are talking here in code. From Bush headquarters there issues no explicit call to overturn *Roe;* we see instead a wink; i.e., the suggestion that the Kind of Judges I, George Bush, Favor are the Kind Who Won't Take Kindly to Rulings that Overturn the Constitutional Balance. Speculating on these matters, without knowing the outcome of the election, could be deemed a lame enterprise. I deny it. We need to talk of these things whenever possible —for realism's sake.

Realism compels us to examine how this prized goal—the extinction of *Roe* v. *Wade*—is most likely to be accomplished. Not inevitably but *most* likely.

What the Democratic platform affirmed, the National Abortion Action Rights League's Kate Michelman underscored: the narrowness of the judicial consensus protecting *Roe.* "With the appointment of just two justices hostile to *Roe* v. *Wade*," Michelman told Democratic delegates, "the freedom to choose

will be lost. One election is all it takes." (Mr. Justice Blackmun, author of *Roe*, made the same point in 1992 as the court struck down the best features of a Pennsylvania parental-notification law in *Planned Parenthood* v. *Casey.*)

This degree of stress, concerning prospects for *Roe's* intact survival, is heartening indeed. It shows the Gordian knot may be fraying. Why would that be? Let us ponder.

First, it could be fraying because *Roe,* as interpreted by its most boisterous backers, e.g., Michelman, comes near to absolutizing a "right" that makes many Americans nervous and others quite ill. (It makes others quite dead, but the Supreme Court as of now views their plight as judicially irremediable.)

The polls routinely show Americans much more divided on abortion than the Supreme Court revealed itself in 1973. The Gallup Organization, for instance, finds about three fourths of respondents support laws requiring women seeking abortions to wait 24 hours or notify their husbands if any—or, should the women be under 18, obliging them to get parental consent. The National Opinion Research Center, at the University of Chicago, regularly asks respondents "whether or not you think it should be possible for a pregnant woman to obtain a legal abortion if she wants one for any reason." Consistent majorities answer no. There clearly is something amiss in people's minds with the notion of "Hey, so it's a life—big deal." Yet *Roe,* to all intents and purposes, seats that same notion in the midst of the splendor formerly reserved for freedom of speech and worship.

A second reason the Gordian knot may be fraying is that the philosophical consequences of Roe have produced political and even judicial consequences. *Roe* came along before the court had renounced the acquired habit of doing things in a big way, judicially speaking. Chief Justice Earl Warren, ably seconded by Justices Brennan and Douglas, had helped to form this habit with decisions like *Brown* v. *Board of Education*, *Baker* v. *Carr* (one man, one vote), and the school-prayer decisions (*Abington School District* vs. *Schempp, Murray* v. *Curlett*). *Roe* was of a piece with that era's jurisprudence: dismissive of precedent, often high-handed and patronizing. Strikingly, no such decision has come down from Judicial Olympus since *Roe*: a ruling virtually the last of its kind, albeit with consequences that outshine all other trophies of the era. With Richard Nixon's presidency began an attempt to curb the court through virtually the only effective and simultaneously constitutional method available—appointment of "the right kind" of justices.

"The right kind" can be difficult to discern, or, in particular political situations, seemingly not worth the trouble of discerning. It was President George H. W. Bush who appointed, in some sense, the most conservative and most

liberal members of the court—respectively, Clarence Thomas and David Souter. Harry Blackmun was a Nixon judge. John Paul Stevens, nominated to the court by Gerald Ford, and Sandra Day O'Connor, who was Ronald Reagan's first choice for the high court, both voted in June 2000 (*Stenberg* v. *Carhart*) to strike down Nebraska's law against partial-birth abortion.

"The right kind" of justice, at all events, is normally willing to defer to the judgment of authorities more prepossessing than his own tear ducts, or his family experiences, or the divine light (no, "divine" couldn't be right . . . maybe "the profound perception") that suddenly floods his thought processes.

What might happen, with five or more justices persuaded that *Roe* v. *Wade* went too far, expressed too much? Might *Roe* itself fall? That seems a consummation more to be wished than expected. If "swing" justices like O'Connor cannot persuade themselves to uphold laws meant to stop the suctioning of fetal brains, why should anyone expect them to take a deep breath and lay the axe to *Roe*? Society's lack of a fixed, agreed-upon position on abortion likely forecloses that possibility. Anyway, absent the cultural change to which I have alluded before, and which, in the age of Clinton and Gore, seems for now a ways off. My guess is that judicial moderates, as they edged nearer and nearer the overturn of *Roe,* would take fright, fearing that a constitutional crisis might ensue were *Roe* to be knocked out. It might—though many might deem that preferable to a state of affairs wherein government honors and protects the dismemberment of babies.

We might have to hope that, rather than dispose of *Roe* at a single swoop (certainly, in this case, not a "fell" one) the court might begin removing its assumed protections, one by one; narrowing its scope; confining abortion rights to smaller and smaller quarters. It all sounds sub-Gordian: a hunk of knot here, another hunk there. What's this? How about Alexander the Great and the quick cleaving of nasty obstructions?

Alexander, it might be remembered, was an autocrat, with a liking for simplicity and directness (more akin to Earl Warren, in that sense, than to Sandra Day O'Connor). Democracy is not set up for the convenience of would-be Alexanders; rather, for their inhibition.

It may be that the right image is not swordplay at all. What about football, with its varied strategical combinations? Three yards and a cloud of dust—the political approach—has brought the pro-life movement little so far to write home about. It is time surely to try something new: a combination offense; a cloud of dust and still another cloud of balls flying over the defenders' heads—legal attacks, that is to say, aimed at extending *Roe*'s protections, for once, to the unborn.

The importance of politics endures. Without a president to nominate "the

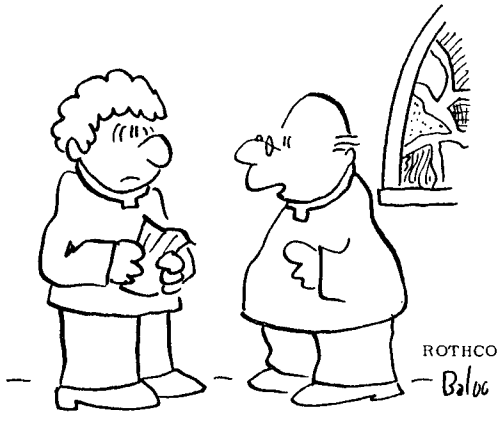
right kind" of judges to the Supreme Court, and a Senate to wave such nominees onto the bench, no legal attack on *Roe* is going anywhere. It may not go anywhere anyhow. Whether it does or not, it seems certain to go further than any human life amendment thus far framed or envisioned.

Judicial setbacks and discouragements like *Stenberg* and *Casey* weaken rather than strengthen the case for purely political intervention. Politicians love the winning side. Public favor keeps them in business; a lack of it invites career reassessment. Where is the fun and profit, a politician will want to know, in passing laws the courts are going to strike down? Various politicians, driven by principle, will get off the floor and offer their chins for fresh smiting. This is not, however, the common approach.

That means the action—the real action—is not on Capitol Hill at all. It is in voting booths and courtrooms, party caucuses and law offices; it is wherever presidential candidacies and judicial nominations are vetted and party policy is shaped. The objective: constant pressure on the Supreme Court, from within and without, to mend its pro-choice ways. And never mind how loudly Kate Michelman howls.

There can be no shame in this. "Pro-choicers" glory, if a little uneasily, in their present influence over a diminished Supreme Court majority. What is sauce for pro-choice geese is surely sauce for pro-life ganders. As much as anything else, it is all a matter of insisting, demanding, sometimes pounding a fist on the table. For a good cause, naturally.

Alexander would understand that kind of gesture. He would acknowledge from experience that when a thing really needs doing, a fellow better get it done—no hemming or hawing, no checking the precedents, no glances to right or left, beseeching approval.



"THAT WAS A PRETTY GOOD FIRST SERMON, EXCEPT I THINK YOU MEANT 'PHILISTINES' INSTEAD OF 'PHILIPPINES.'"

On the Born-Alive Infants Protection Act of 2000

Hadley Arkes

Chairman Canady, Members of the Committee:

My name is Hadley Arkes. I am currently the Edward Ney Professor of Jurisprudence and American Institutions at Amherst College. I've taught at Amherst since 1966, with the exception of several years in which I have been in Washington on leave and visiting at places like the Brookings Institution and the Woodrow Wilson Center at the Smithsonian Institution. My main interests as a writer and a teacher have been focussed on political philosophy, public policy, and constitutional law. I have written, in that vein, several books, published by Princeton University Press, including *The Philosopher in the City* (1981), *First Things* (1986), *Beyond the Constitution* (1990), and *The Return of George Sutherland* (1994). I have had a strong interest in the so-called "life issues," of abortion and euthanasia, but those interests spring from the central concern in my work, which involves the moral ground on which the laws would have to find their justification.

The bill introduced by Congressman Canady, HR-4292, the "Born-Alive Infants Protection Act," offers the most modest and the gentlest step that is imaginable in dealing with the question of abortion; and at the same time it is the approach that goes most deeply to the root of things. That combination, of the gentlest measure, and the measure running deepest, offers the best chance we have seen, over the past 27 years, to draw all sides into a conversation, and achieve the kind of settlement of this issue in our politics that can only be achieved by the political branches. The political branches are more sensitive than the Supreme Court to the range of opinions in the country on this vexing issue of abortion, and yet the issue has been more explosive and troubling in our politics precisely because it has been kept under the exclusive control of the courts. It has been detached then from the political arena, the arena of ordinary discourse, among ordinary people, about the things that are right or wrong.

The refrain has been heard, at every turn, that abortion is one of the most emotional and divisive issues in our politics. That cliche happens to conceal the fact that there has been, for years, a remarkable measure of consensus in this country on abortion, a consensus that draws in Democrats as well as Republicans, pro-choicers as well as pro-lifers. But that consensus has not

Hadley Arkes appeared before the House Committee on the Judiciary on July 20, 2000, in support of HR-4292, the Born-Alive Infants Protection Act of 2000. We include here his full testimony.

been able to manifest itself in our laws, because the opinions of the public have not been allowed to shape the laws that the courts will permit. At the same time, I've made the argument over the years that our problems here would not be solved even if the elves could come in the middle of the night and remove *Roe* v. *Wade* from the records of our law. Even if that decision were overruled overnight, the distemper and rancor in our political life would not be removed. For many people would feel themselves dispossessed of something they have been encouraged to regard by now as one of their first freedoms under the Constitution, a right that anchors all of their other rights to privacy and sexual freedom.

Evidently, we would need a conversation before we could begin to legislate on this question. But what makes that conversation possible is the fact that there has been, as I say, a surprising degree of consensus that has not been allowed to manifest itself on this matter of abortion. We know, for example, that even people who call themselves "pro-choice" do not think that all abortions should be permitted. Indeed, they have expressed a willingness to restrict, through the law, a large number of abortions that are now permitted in the law. The news that took years finally to break through to the American public is that the laws on abortion in this country, fashioned by the courts, permit abortion for any reason at all, through all stages of the pregnancy—and even, as we have seen, at the time of a live birth, with the partial-birth abortion. But the surveys, on all sides, have shown for years that only about 22–27 percent of the public supports this policy of abortion on demand, for any reason, at any time. Even many people who call themselves pro-choice do not think that abortions should be performed in the late stages of pregnancy, and for less than weighty reasons. People may support a right to abortion under some circumstances (most notably, when the life of the mother is endangered), but many of them still hold that a human life should not be taken for the sake of removing financial strain in the family, removing barriers to the career of a woman, or serving the convenience of the parents.[1] Most people do not think that abortions should be performed because the child is likely to be deaf or blind, and the opposition to abortion for these reasons is often quite independent of the age of the unborn child. My own surmise here is that most people think it would be wrong to take the life of *any* person because he happens to be deaf or blind or handicapped. And if they think this kind of killing would be wrong at any age of the victim, they may well conclude that the principle would be indifferent, in the same way, to the age of the child in the womb.

I could go on, but these points have been documented well by now in the public surveys. And yet, this constellation of opinion, rather stable over 25

years, has had no significant impact on the laws on abortion, shaped and sustained by the courts. Congressman Canady's bill offers the chance finally to let that opinion of the public manifest itself in our laws. It does that, also, in the gentlest and most powerful way by beginning the conversation at the place that should command the most overwhelming consensus across our political divisions: the place where we act simply to preserve the life of the child born alive, the child who *survives* an abortion. That moment marks the earliest possible time, associated with an abortion, when the interests of the pregnant woman can be separated entirely from the interests of the child. Even if *Roe* v. *Wade* articulated an unqualified right on the part of a woman to end her pregnancy, the pregnancy would now be over. No right to end the pregnancy would require at this moment the death of the child.

And of course no one, at that moment, claims to be suffering any doubt that we are dealing with a human being—as though the offspring of homo sapiens could have been anything less than human at any phase in its life. This is the first moment then, under our current law, when we should be able to declare, with unchecked conviction, that the law may extend its protections over that child. Or to put it more precisely, that is a moment in which it could be said for that child engaged in an abortion what could be said for any other child, or person, in the country: namely, that the claim of the child to the protections of the law could not possibly pivot on the question of whether anyone happens to "want" her. At this moment we are invited to consider whether we could not in fact say then of the child, as we would of any other person, that she bears an intrinsic significance as a human being; that any right on the part of that child to live cannot hinge any longer on the interests or convenience of any other person.

We would be in a condition truly miserable if we could not count on certain natural human sympathies at work to protect the child, and there seems to be a normal tendency on the part of parents and hospitals to supply that care to the child who surprises everyone by surviving the abortion. And yet, the law frequently comes into play precisely because parents do not always have this inclination to protect their children. As we have ample reason by now to know, some parents may be inclined to abuse or even kill their born children. In the case of abortion, the matter is complicated for us by the fact that the very logic of "abortion rights" seems to create a momentum in principle to let the child die. Jill Stanek, who is joining us today in this hearing, offers a report from a respectable hospital in our own time where that logic has been allowed to play itself out in real cases. She reports on the so-called "live birth" abortions, where children are delivered and simply left unat-

tended, to die. I take it as a blessing that we are still capable of reacting with shock, when these cases spring up, but they should have ceased long ago to have caused surprise. From the logic of abortion rights, after all, the case for letting the child die could be eminently plausible. Under the common law, for centuries, well before *Roe* v. *Wade*, it was understood that a woman did not have to keep an unwanted child. She could give that child up for adoption. Even now, we may contend, the "remedy" for an unwanted child should not be found in destroying the person who is unwanted, but putting that child into hands that would nurture her. The passion for abortion is fed in no small part by the sense, commonly felt, that it would be far easier for a woman to kill an embryo or fetus than to give up what is so evidently a child, and a child who is *hers*.

The Marxists would find here an expression of bourgeois attitudes on property—that it is easier to kill the unborn child than to give up what is "yours." No matter how we phrase it, the passion is quite evidently there, and without it, as I say, one cannot account for why women would seek their remedy in abortion rather than adoption. It was that sense of the mattter, I think, that lay behind Judge Clement Haynsworth's move, in 1977, to take that passion and restate it as a doctrine of law. In a case called *Floyd* v. *Anders*,[2] in 1977, a child of about 25 weeks of gestation had survived an abortion, had undergone one surgery, and lived for 20 days before he died. The question had been posed as to whether there had been an obligation to preserve the life of that child. And the answer, tendered by Haynsworth, was no. After all, the mother had decided on an abortion, and therefore, as Haynsworth said, "the fetus in this case was not a person whose life state law could protect." To put it another way, the right exercised by the mother should not be frustrated, or negated, by the accident that the child happened to live. Or to put it more baldly, the right to an abortion must entail nothing less than the right to an "effective abortion," or a dead child.

Several years later, in *Planned Parenthood* v. *Ashcroft* (1983), Justice Powell noted, in a footnote, a doctor who had made that argument quite explicitly: that the right to an abortion meant an effective abortion or a dead child. Justice Powell pronounced that opinion "remarkable."[3] From that comment, offered in passing in a footnote, even some pro-life lawyers have drawn the inference that the Supreme Court has rejected that argument. One lawyer also recalls, in this vein, that the Supreme Court actually reversed the holding in *Floyd* v. *Anders*, or rather sent the case back for a reconsideration. But in an opinion *per curiam* the Supreme Court sent the case back on the ground that "the District Court *may* have reached [its] conclusion on the basis of an

erroneous concept of 'viability,' which refers to potential, rather than actual, survival of the fetus outside the womb."[4] In all strictness, none of these comments, or moves, marks an explicit rejection of the claim that the right to abortion entails the right to an "effective abortion." As any lawyer should know, to state that this claim is "remarkable" is not exactly the same as pronouncing it "wrong," and still less is it to explain the grounds of its wrongness.

That question, simple but primary, becomes the subject of our business here, with the "Born-Alive Infants Protection Act." As any philosopher or social scientist knows, a description of an outward act hardly serves as an explanation or an account of that act. "Smith goes to the garage of his neighbor, Jones, and takes the hose hanging on the wall." From that description of the outward act, we cannot say just yet whether the sentence describes a theft, or whether Smith had permission for taking the hose. Even if he didn't have permission, he might have been borrowing it, to put out a fire in his home, and with the intention of returning the hose. In a similar way, we can draw no inferences about the understandings at work in our law when we are told say, that "the dominant practice, among parents, doctors, and hospitals, is to preserve the life of a child who survives an abortion." The fact that they do this, or do it most of the time, does not reveal anything to us about the grounds on which they are acting, or the principles that actually govern their actions. That is the question posed in this simple move by Congressman Canady: The bill gives us the chance to fix in the law the principle that actually protects the child. And if that is not in fact the principle that explains the motivations of people on all sides, then that is something quite important for all of us to learn.

For those of us who have advocated this bill, the principle would run, as I have suggested, in this way: We think that the inclination to protect the child with the law must imply that the child has a claim to the protection of the law that cannot pivot on the question of whether anyone "wants" her. The child, that is, has an *intrinsic* dignity, which must in turn be the source of rights of an intrinsic dignity, which cannot depend then on the interests or convenience of anyone else. When parents commit infanticide with a child two or three years old, we no longer ask whether the child was straining the parents, or whether the child was unwanted. If we understand that we are dealing with a human being, reasons of convenience and self-interest become radically inadequate in supplying a "justification" for the killing of the child. We would think that the same understanding must come into place for the child who survives the abortion. Now if such a principle cannot be invoked on behalf of that child—if our friends on the other side of the issue of abortion

would protect the child but not share these premises of ours—then we would earnestly invite them to explain the principle they would put in its place. If we haven't stated here the reasons that we cast over the child the protections of the law, then what are those reasons?

We are in fact anxious to hear them if people contend in this case that we have it wrong. But we should lodge a proper warning: Any attempt to finesse, or fudge, the question at this point is bound to bear tell-tale signs, and what it would "tell" would be quite ominous for anyone that the law protects now with any kind of a right, including that "right to abortion." For example, let us suppose that someone says, "I would protect the child because the child elicits in me a sense of sympathy." But if that were the ground, the explanation has to do more with *ourselves*, with *our* feelings, and with *our* sense of what is pleasing or satisfying to *us*, or agreeable to our own interests. By implication, of course, there would be no obligation to protect the child when that course of action did not serve our interests or convenience.

My own sense is that people on either side of the controversy over abortion would not be satisfied with that kind of rationale, and that they would see instantly that there is something deeply wrong in it. But if that is the case, does it not become clear, by implication, as to what we must say instead? Must we not be moved to say that there is something of an intrinsic dignity in the child, or any other human being, something that compels our respect, quite apart from anything in our self-interest? If that cannot be said for the child, newborn, at these first moments, then what can be said for any of the rest of us at any other time, for any other right? If we cannot speak those words, we would seem to imply that none of us has a claim to be respected, or a claim to be the bearers of rights, unless our presence, or our rights, suit the interests of those around us. What would even a "right to abortion" mean under those circumstances? Would it not be then a "right" that depends on the sufferance of others—a right that can be abridged or removed when it no longer suits the interests of a majority, or of those who exercise power?

Frankly, I don't see how we can refuse to protect the child at this point without producing a revolution in our law and deciding that, from this day forward, we will treat as a nullity the laws on infanticide. And of course we cannot say, in an offhand way, that infanticide has ceased to be a big deal without backing into the claim that homicide itself has ceased to be a big deal. People may try to finesse the matter by saying that we should wait perhaps a few days, or a week or two, before we extend the protection of the law to the newborn. But that would simply be a thinly disguised way of saying that we

will wait in protecting the child until we are clear that the child is acceptable to someone, that it is in someone's *interest* to keep or "want" that child.

If I am right, and there is no way of getting around this matter, then Rep. Canady's modest bill does the service of compelling us to face this elementary question about the human person, the question that stands at the heart of the thing. I would not conceal my own hope or expectation here: Once this first premise is planted, it must project itself back into the situation of the child even while still in the womb. After all, if we come to the understanding that the child has an *intrinsic* significance as a human being; that her claim to be protected by the law does not pivot on whether anyone wants her; then how could that intrinsic significance be affected by anything as contingent or "extrinsic" as whether she is only two days or two weeks before birth, or whether she is attached by an umbilical cord to her natural mother? How could it hinge on the question of just where she happens for the moment to be lodged or where she is receiving her nourishment? Nothing in her intrinsic significance could be affected by things of this kind when she leaves the womb; by the same logic, it cannot be affected by such things a few days or weeks earlier, when she is still in the womb.

I happen to think myself that, once that first premise is granted, the argument to justify abortion can probably be unravelled step by step. It would be my own purpose to keep taking those steps, one at a time, and keep putting the question to people on the other side, who would be reluctant to waive the right to abortion under any set of circumstances. I would indeed raise the question of the child in late term, the child of the "wrong" sex, the child afflicted with handicaps. But that is to say, I would earnestly press the question with people on the other side, and attempt to persuade them step by step. None of us can foresee just how far that process may run. It is still open to people on the other side to refuse to go along, to insist that they have not been persuaded. They may not in fact see that the willingness to protect the child at birth bears implications for the protection of the child even earlier. But if so, what can we do except keep the conversation going? Yet, with each step we would have succeeded in saving another cluster of lives, even a handful of lives. And for those lives that are saved, the whole project must be eminently worth doing.

In the meantime, our friends on the other side must be affected by this burden: Over the last few years, we have seen a controversy in Australia over the treatment of children who survive abortions, and we have seen the most chilling statement on this matter put out in South Africa by the Department of Health, the agency that oversees the practice of medicine in that

country. In 1997, the Department put out new guidelines, instructing doctors and nurses that "if an infant is born who gasps for breath, it is advised that the foetus does not receive any resuscitation measures."[5] In Australia, this past April, a controversy was ignited when doctors, and certain agencies, actually registered their opposition when an agency of the government advised that babies who survive abortions should be given medical care. Mr. Gab Kovacs, the chairman of Family Planning Australia, insisted that babies born at an early gestational age had no realistic chance of survival, and they should be left to succumb. Those are civilized countries, with legal systems based on the British model. But what seems to be at work in both places is a vibrant strand of opinion, holding that the logic of abortion rights entails that right to an "effective abortion" or a dead child.

And anyone who follows the decisions of the Supreme Court in this country would know that the Court took us just a step shy of that threshold at the end of June with its decision in *Stenberg v. Carhart*. Justice Breyer, in his opinion for the Court, argued that the partial-birth abortion (Dilation and Extraction [D&X]), as grisly as it is, could still be estimated as safer for the pregnant woman than the more familiar method of dismembering the child in the womb. As Breyer explained:

> The use of instruments within the uterus creates a danger of accidental perforation and damage to neighboring organs. Sharp fetal bone fragments create similar dangers, and fetal tissue accidently left behind can cause infection and various other complications.[6]

Is the implication not obvious? The avoidance of the usual method of abortion now warrants killing a child with 70 per cent of the body dangling out of the birth canal. On the same premises, would it not be even safer to deliver the child whole and simply let it die? For the doctor could then wholly avoid the insertion of instruments into the uterus or the dismembering that would allow fetal parts to be left behind, where they could be the cause of infection. With these steps, the Court has brought us to the threshold of outright infanticide, and it takes but the shortest step to cross that threshold. One must wonder then whether the majority in *Stenberg v. Carhart* is preparing us for a holding even more advanced and astounding. But the point is that it will have ceased to be astounding if we offer no response and permit no line to be drawn finally at infanticide.

To our friends then who say that this bill is not needed, we would have to say: Look about you, and see plainly what is there. People who share your position think there is not the slightest inconsistency in claiming that there is a right to a dead child, and that the child who survives the abortion has no claim to the protection of the law. The people who make this argument,

unashamedly, think that it is not only consistent, but virtually entailed, or made necessary, by the logic of "abortion rights." As you look about you in this country, can we not see, in fact, a notable drift in the same direction, with hospitals such as Christ Hospital in Oaklawn, Illinois, or with the appointment of Prof. Peter Singer to Princeton University? That a leading university would appoint to a prestigious chair an outright defender of infanticide is but one sign in a drift of some parts of liberal opinion, to be far more accepting of infanticide, or at least to break down our moral reservations about infanticide. This is a problem, then, for the liberal contingent in our politics. The new acceptance of infanticide is being absorbed now in the body of their doctrines and their commitments as a political party. If they think that the refusal of care to the child who survives the abortion is, as we say, "over the top," then it has become a matter of high urgency for them finally to say that—and to do something now, both modest and emphatic, to draw that line.

In making that decision, there is no way gentler than the one Congressman Canady and his colleagues have put before us. Still, I am sure that we shall encounter people who would try to steer around the question by saying, "We agree with you, but these are rare cases, and as modest as this measure is, it is the first step that allows the Congress to be legislating on abortion. It is the first step toward involving the government in these private questions of abortion."

There are several layers of fallacies involved in this argument, and I don't expect the least acknowledgement that arguments of this kind will emanate from some of the same people who were passionate, several years ago, in advocating the passage of the Freedom of Choice Act. That was an effort to codify in our statutes the holding in *Roe* v. *Wade*. The political figures and professors who championed that measure apparently did not think that there was anything in the Constitution that barred the Congress from legislating on the matter of abortion, when it came to protecting and promoting abortion. Toward that end, the full resources of the federal government could indeed reach that private matter of abortion, whether it involved the performing of abortions in the military outposts of this country, or providing counseling and support of abortion in private facilities with federal funds.

But there is a curious screening that comes along with this argument when we turn to restrictions on abortion. And what is screened out, most notably, are the powers of Congress and the very design of the Constitution in the separation of powers. When people argue that the federal government should not be involved in these decisions, I usually ask whether they mean that

some effort should be made under Art. III, Section 2, to keep the federal courts from intervening in these questions. But that is not what they mean, and one nearly has the impression that the federal courts are somehow not part of the federal government. The federal courts intervened decisively in this matter of abortion in the early 1970's, and in *Roe* v. *Wade* the Supreme Court virtually swept away the laws that restricted abortion in the fifty States. Was that not an intervention of the federal government?

The federal courts have addressed the question of abortion in all of its dimensions, from the use of prostaglandins, and the methods of abortion, to the facilities in which these surgeries may be performed. But we may earnestly ask: How could the judicial branch of the government have the authority to deal with abortion in all of its dimensions, while the legislative branch would not have the slightest authority to address it in any dimension? A contention of that kind simply wars with the most fundamental things that should be understood about the American Constitution, especially by lawyers and members of Congress. Chief Justice Marshall once remarked on this axiom of the Constitution in *Cohens* v. *Virginia*, in 1821: "[T]he judicial power of every well constituted government," he said, "must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws."[7] To put it another way, any issue that arose under the Constitution and laws of the United States had to come within the jurisdiction of the federal courts. And yet, even jurists are persistently taken by surprise by the corollary of that axiom: Any issue that comes within the competence of the judicial branch must come, presumptively at least, within the reach of the legislative and executive branches. After all, if the Court can articulate new implications of the Fourteenth Amendment—if the Court can proclaim, say, a deeper right on the part of black people not to suffer discriminations based on race—did Congress not have the power to act on the same clause in the Constitution in vindicating those rights? Congress did exactly that in 1964, and it acted with the wider range of flexibility that a legislative body can summon, when it is not confined, in the style of courts, to the task of addressing cases in controversy between two parties.

We might put the matter finally in this way: If the Court can articulate new rights under the Constitution—including a right to abortion—the legislative branch must be able to act, on the same ground in the Constitution, in filling out those rights. But in filling them out, the legislature must have the power to mark their limits or their borders. It should be as plain as anything could be that what is not tenable under the Constitution is that the Supreme Court can articulate new rights—and then assign to itself a monopoly of the legis-

lative power in shaping those rights.

The genius of the separation of powers is that no one branch can be in complete control over the laws or its own powers. The provision on bills of attainder, for example, means that Congress may not legislate guilt or direct prosecutions under the laws it passes. Congress must work by defining in impersonal terms the nature of the wrong it would forbid, and it must work with the awareness that the law it passes will be placed in other hands to be administered. That is to say, the power to prosecute under the laws may be placed in hands unfriendly to those men and women in Congress who frame the laws. But as John Locke pointed out, that state of affairs provides a wholesome caution to the legislators: "[T]hey are themselves subject to the law they have made; which is a new and near tie upon them to take care that they make them for the public good."[8] In other words, they have an inducement not to pass laws that they would not willingly see enforced even against themselves. In that respect the logic of the separation of powers draws on the logic of a moral principle: do not legislate for other people a rule that you would not see applied universally, to yourself as well as others.

That is a wholesome principle governing the government in general—which means that it is no less wholesome when applied to the judicial branch as well as the legislative.

The Congress did not inject the federal government into the matter of abortion; it was the Supreme Court that did that with crashing cymbals, and reverberations continuing to our day. Since *Roe* v. *Wade*, the Congress has not exercised its legislative authority to restrict or cabin or scale down in any way the rights that were proclaimed in that landmark case. But now we are at a point at which the Court has struck down the effort of legislatures in 30 States to protect children at the point of birth from one of the most grisly abortions. The Court has brought us to the very threshold of infanticide, and we are asked now to take a deep breath, avert our eyes, and simply get used to the notion that the right to abortion will be spilling past the child in the womb, to order the deaths of children outside the womb. It has become more critical than ever, at this moment, that a line be drawn. Any right must have its limit, including the right to abortion, and if that limit is not found in outright infanticide, we must ask: where could it possibly be? Congress is acting here in the most modest way simply to establish that limit. As a practical matter, it will affect only a handful of cases, but as I say, it will convey lessons running deep.

As we have come to understand, important principles may be vindicated even in a single case. Ollie's Barbecue in Birmingham, Alabama, was one

family restaurant, but the Civil Rights Act of 1964 was tested and vindicated in the case of that one, local establishment. There may be a score of cases facing us here, with the infants who survive the abortion; and yet the principle has an import that goes well beyond the number of cases. But even so, even if we have but a handful of cases, would there not be a vast good contained in the move to save this handful of lives? From the massive volume of abortions in this country—from that 1.3 million carried out each year—why should we not take even this small gesture and rescue, from that ocean of deaths, a handful of lives? Why should we disdain that project as an undertaking too small for this Congress? Let us not confuse the modest with the insignificant.

Lincoln once remarked, in a famous line, that "in *giving* freedom to the slave, we *assure* freedom to the *free*—honorable alike in what we give, and what we preserve."[9] In this case, we might say that, in setting in place these most elementary protections for human life, we are securing the ground for all of our rights, for the born as well as the unborn. This is the gentlest step to take, and to paraphrase Lincoln from another occasion, let the vast future not lament our having failed to take it.

NOTES

1. See "Abortion and Moral Beliefs: A Survey of American Opinion," Washington, D.C., February 28, 1991, p. 38. The study was conducted in the field by the Gallup organization, and commissioned by Americans United for Life, a pro-life group. But the survey was designed by Profs. James Davison Hunter (University of Virginia), Carl Bowman (Bridgewater College), Robert Wuthnow (Princeton). And more recently, see CNN/USA Today/Gallup poll: April 30-May 2, 1999.
2. 440 F. Supp. 535, at 539 (1977).
3. 462 U.S. 476, at 485, n. 7 (1983).
4. *Anders* v. *Floyd*, 440 U.S. 445 (1979); emphasis added.
5. See "Abortion Babies 'Should be Left to Die,'" by Angella Johnson, African News Service, March 17, 1997. One female doctor declared that the directive was "inhuman and against all my principles." Other reports suggested that as many as 50 percent of the nurses and "health workers" in the country would refuse to comply.
6. Slip opinion, Section I B.
7. 6 Wheaton 264, at 384.
8. John Locke, *Second Treatise on Civil Government*, Sec. 143.
9. Lincoln, Message to Congress (December 1, 1862), in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler (New Brunswick, N.J.: Rutgers University Press, 1953), Vol. V, p. 537.

The *Scheidler* Case:

Conning a Court with RICO

Richard J. Goldkamp

There's an adage that has long served activists in the anti-abortion movement: "There are no heroes in this battle, only foot soldiers."

For many pro-lifers this was the hard-headed and humbling self-assessment they needed to sustain them during their time in jail for abortion-clinic sit-ins. During the late 1980's, a small wave of clinic interventionists adopted a John and Jane Doe kind of anonymity upon arrest to show their solidarity with the anonymous, voiceless infants victimized by abortion.

Yet regardless of who may or may not be a hero, the movement could not have survived without a few high-profile leaders, one of them Joseph M. Scheidler of Chicago. Because of his long-standing commitment to sidewalk counseling of women and "rescue missions" at abortion clinics, Scheidler is widely perceived as one of the savvier field generals in the nation's abortion struggle. He is grudgingly respected even by those who hate what he does—which did not deter them from filing suit against him in what has become one of the strangest cases on record in the federal court system.

It was mid-1986 when the National Organization for Women joined forces with two abortion clinics in a legal challenge to the activities of Scheidler and his cohorts. Legally, *NOW* v. *Scheidler* is a civil suit, but at times it has borne the earmarks of a criminal proceeding. A full assault on abortion-clinic protests across the country, this 14-year-old lawsuit has forced the pro-life movement to take a hit no other social movement in America has had to endure in recent decades.

On July 16, 1999, Scheidler and two co-defendants with the Pro-Life Action League, Tim Murphy and Andy Scholberg, were assessed $257,780 in a treble-damage order by a federal judge in Chicago, in the wake of a six-week jury trial in the spring of 1998. The court ordered the money paid to Delaware Women's Health Organization Inc. in Wilmington, Del., one of the original plaintiffs, and to the Summit Women's Health Organization Inc. of Milwaukee, which had joined the suit later on. Defendants were given an early-autumn deadline, later extended, to post a $440,000 bond with the court, to be held in escrow to cover damages, lawyers' fees, and court costs while their appeal proceeded.

Richard Goldkamp edits *Gateway Lifeline*, a pro-life Catholic newsletter published in St. Louis, Missouri. His articles have also appeared in *Our Sunday Visitor* and the *National Catholic Register*.

Witnesses in the case gave extensive, and sometimes contradictory, testimony about incidents of violence and near-violence that took place or allegedly took place at clinics in Pensacola, Fla., Los Angeles, Atlanta, and elsewhere. While the suit was originally filed by clinic operators in Wilmington and Pensacola, the Florida litigants later dropped out for reasons known only to them. Along the way, some well-known earlier defendants—among them Randall Terry of Operation Rescue and clinic interventionists Joan Andrews Bell, John Ryan, and Monica Migliorino Miller—either agreed to a settlement imposed by the court (in Terry's case) or were dismissed from the case for various reasons.

Judge David Coar's July 1999 order had sweeping implications. It may also have stirred up a legal hornet's nest. The court order barred all three remaining individual defendants and two organizations—Scheidler's Pro-Life Action League and Terry's Operation Rescue and all their members—from threatening violence against doctors or patients for the next 12 years, and ordered them to stop interfering with clinic operations anywhere in the country.

"This injunction is marvelous," NOW attorney Fay Clayton said gleefully. "It's nationwide, it's powerful, it's long-lasting and it's clear."

Her reaction was understandable, but it may have been premature. Defense lawyer Tom Brejcha has good reason to believe the verdict could eventually get overturned on appeal—not because of a sudden change of heart about *Roe* v. *Wade* in the federal judiciary, but because of the NOW suit's dubious use of RICO, the federal Racketeer-Influenced and Corrupt Organizations statute. Brejcha is not alone in that assessment.

In one of its more bizarre findings, the jury in *NOW* v. *Scheidler* held the defendants liable for operating a nationwide racketeering enterprise that practiced "extortion." Brejcha contends that this is a widening of the definition of extortion far beyond the statute's original intent, a view shared by Notre Dame law professor G. Robert Blakey, who drafted the law in 1970. Blakey, who served as counsel to John McClellan, RICO's chief sponsor in the Senate, points out that RICO was enacted to help the government deal with "enterprise criminality": It was aimed at organized crime, the operations of mob bosses, corruption in labor/management relations, and other infractions with an economic motive.

The offense of extortion was included in the statute, but only in the old common-law sense of "obtaining of property by fear." According to Blakey, it was never intended to mean "depriving" others of property in the sense of forcing them to give up doing something. In fact, says Blakey, to protect

anti-Vietnam demonstrators, the statute deliberately did not cover any offense related to trespass or vandalism in the course of public protests.

Why, then, has the *Scheidler* case gone this far under an apparently irrelevant law? The answer lies in a preliminary review of the case by the U.S. Supreme Court six years ago. In a unanimous ruling in early 1994, the high court held RICO was written so broadly that its use could not be excluded in social protest cases.

Historically, three of the nine current justices have regularly supported the pro-life side, with two others sometimes leaning that way. In *Scheidler*, even these three pro-life justices felt their hands were tied by certain provisions of RICO itself. The case was allowed to proceed to trial in the lower court.

It is not only anti-abortionists who should be concerned. This case merits the attention of social activists linked to any cause in the country—from animal-rights activists to affirmative action protesters to demonstrators in utility-rate cases. Unless this ruling is overturned, the rights of anyone going public with a grievance are in jeopardy.

Judge Coar's order was promptly appealed to the 7th U.S. Circuit Court of Appeals, but one thing was already clear: *Scheidler* has been driven more by ideology and power politics than by a dispassionate pursuit of justice on the part of the plaintiffs.

Or by the dispassionate pursuit of truth on the part of the nation's top news-gathering agencies. Pro-lifers have pointed out for some time that these organizations have consistently favored one side in reporting this hotly contested issue. The double standard shows up regularly in the very semantics used to define the terms of battle.

The phrase "abortion rights," for instance, has now become commonplace for the mainstream media when describing the pro-choice position. Compare that with how rarely you hear the phrase "right to life," on the nightly news or see it appear in print (except as part of an organizational title). The notion of abortion rights, of course, can be rationalized on the grounds that it mirrors a legal right created by *Roe*. But there is an even stronger moral basis for the right-to-life concept, despite the media's stubborn reluctance to recognize it. Worse yet, the pre-born baby is usually described in abortion stories only as a "fetus"—an abstract scientific word that robs the child of its flesh-and-blood humanity.

Despite the myth that objectivity still prevails, it is hard to find a reporter today who has *not* accepted the institutionalization of choice. Even the facts used for an abortion story can be selected, consciously or otherwise, to reinforce ideology instead of testing that ideology against information that might

contradict it. My educated guess at the psychological dynamic at work here is that calling the child a fetus allows a reporter to serve as an information conduit in this debate without getting upset about abortion's devastating impact—on the baby *and* the mother. "Fetal language" thus became the language of choice to protect the Ideology of Choice.

NOW's lawyers knew they could depend on the media's help when they went to court. They were also smart enough to know how hard it can be to test certain claims made by witnesses in court against the reality of what actually took place. That has enormous significance in the *Scheidler* case, which has plunged the nation ever deeper into what Father Richard Antall has called America's cultural "war for the truth."

There were any number of details—from the conflicting testimony of witnesses to a series of appallingly fuzzy findings of fact by the jury—that should have set off alarm bells for any reasonably impartial trial reporter. On the basis of an *Associated Press* account of the judge's July 1999 ruling, in fact, even a casual observer might have entertained serious doubts about the authenticity of the testimony of a key witness: an attractive young Los Angeles woman who portrayed herself as a victim of anti-abortion violence. The woman, who was allowed to remain unidentified in court, testified that she was accompanied to a Los Angeles clinic on Feb. 11, 1989, by a minister-friend, a Rev. Joseph "Pops" Johnson of Compton, Calif. It turned out to be the date of the first major intervention at an L.A. abortion clinic by Operation Rescue. The purpose of her visit, she told the court, was not to get an abortion, but to get a follow-up gynecological exam for prior surgery.

When she arrived at the clinic, our mystery woman testified, she was rudely yanked from her car by a group of angry demonstrators, her hair was pulled, and, in her scenario for what followed, she was roughed up and began to bleed profusely. Her friend then drove her to a "nearby hospital."

As Judge Coar put it in his opinion: "The patient lost consciousness as she began to bleed from her abdomen, for protesters had caused her surgical incision to open. Protesters rocked and beat her car as clinic personnel rushed the patient to the trauma unit of a nearby hospital."

The opinion made it clear that the judge had bought the Los Angeles woman's story—lock, stock, and barrel. Moreover, Judge Coar's opinion "connected" the organizational efforts of the defendants to a host of reputedly hostile actions by countless anti-abortionists in other cities.

Since the lady's testimony in court was accompanied by some strategically shed but very persuasive tears on the witness stand, even the defendants had to admit their lawyers faced an unenviable task in persuading

jurors to look closely at the discrepancies in her story. They failed to do so.

Among the gnawing doubts raised by her testimony, however, just for starters, was this: Why would a minister-friend, presumably a responsible man, drive a hemorrhaging woman through crowded Los Angeles streets in an emergency situation to a medical center in Inglewood—fully 14 miles away—instead of seeking help at a hospital that truly fit the judge's description of "nearby"? (The witness conceded, under cross-examination, that there were numerous hospitals with emergency rooms in the vicinity of the clinic.)

Now far be it from me to encourage lawyerly abuse of distressed women in court. But an anonymous woman's testimony at a politically charged trial ought to have called for a few pointed questions. If her story sounded almost rehearsed to the defendants, it may have been because it *was*—in effect, a story that seemed so persuasive that it was just too good to be true.

Let us return to court for a moment, to review some pertinent testimony from the trial record. The following exchange took place after Ms. Clayton, as lawyer for the plaintiffs, asked her star witness "what was going on in your life" at the time of the 1989 demonstration:

> **A:** I was undergoing many surgeries, and I had just undergone the seventh surgery, which was a major surgery, and I was very weak, very sick, and bedridden.
>
> **Q:** What was the purpose of the surgeries that you had been going through at that time in 1989?
>
> **A:** We were trying to save my reproductive organs. I had cystic ovaries, so I had a multitude of surgeries, and eventually I had a partial hysterectomy.
>
> **Q:** Did you have any children who had been born to you by that time?
>
> **A:** Yes, I had an 18-year-old daughter at that time.
>
> **Q:** How long before Feb. 11th had you had your previous surgery for this condition?
>
> **A:** I had surgery every month for six months.
>
> **Q:** And approximately how many weeks before Feb. 11th had you had your last surgery?
>
> **A:** It was maybe within three to four weeks.
>
> **Q:** Would you please tell us what your physical condition was on that day, Feb. 11th?
>
> **A:** I was very weak. I had just had major surgery two weeks prior to that day. There was still some slight bleeding. I was medicated, and I was in a lot of pain.

Surely, it must have struck some jurors as odd that the witness who knew she was going to testify about the alleged opening of her incision had trouble remembering exactly when a major surgery had taken place—had it been "two weeks," or "three to four weeks," prior to her visit to the abortion clinic? The jury may have been willing to set that aside as a minor discrepancy, but

let us continue. The mystery woman went on to testify that the man she endearingly called "Pops"—her minister—agreed to accompany her to the clinic because she was unable to drive. Ms. Clayton resumed the interrogation:

> **Q:** Had Rev. Johnson and the members of his congregation assisted you in dealing with your condition before that date?
>
> **A:** Oh, yeah.
>
> **Q:** How?
>
> **A:** They stuck by me all the way. They cleaned my house. The women of the church cooked my meals. They did my laundry. They had prayer services at my house because I couldn't make it to church.

Now carefully piece all that together with the scene at the clinic parking lot, as described by the witness.

After finding a large crowd milling about, the minister helped the woman out of the car, she testified, then left her propped against the passenger door (because of her weakened condition) while he returned to "secure the driver's side of the car." All of a sudden, she told the court, a crowd of people, some carrying posters, rushed the car, and surrounded her and the Reverend, shouting things like "murderer, baby murderer." The woman, who feared "they were going to kill me," recalled on the witness stand that she passed out; when she regained consciousness she became aware of being lifted physically above the crowd to safety only by her minister and by "people in orange vests."

The orange-vested folks were soon identified, with the lawyer's help, as clinic escorts. (Taking her cue from the lawyer, NOW's *femme fatale* would later describe them in particularly glowing terms.) After going out of her way to re-establish that the witness had *not* gone to the clinic for an abortion ("No, I wasn't pregnant"), and asking her explicitly whether she was an advocate for abortion ("No"), Ms. Clayton returned to the clinic escorts:

> **Q:** During your interaction with the people with the yellow-orange vests, how did those escorts, or how did those people treat you?
>
> **A:** They were very nice. They sheltered me. They put their arms around me. They kept telling me that I was okay, that I was safe, that no one was going to hurt me, and that I would get medical help. They asked me, was I okay, and did I need water, and they assured me that I was safe...

Taking all this at face value, we get the picture of a poor, God-fearing woman who was on her way to a clinic for an innocent medical checkup, only to be accosted by a crazed band of anti-abortion extremists. Terrified and victimized by people who didn't even trouble to find out why she came there, this upright woman was heroically rescued from danger by a team of

dedicated caregivers, the angels of mercy who were there for the most altruistic of reasons: to help "keep abortion safe and legal" in America.

Forgive a skeptical old curmudgeon for asking: Were there not even a couple of jurors who harbored doubts about this story? What the jury was asked to believe was that this beautiful young church-going woman, who spent much of her time in prayer at home with friends while she recovered from surgery, was also dedicated to "saving her ovaries," yet the medical help she sought (so help her, God) was at a facility that regularly trafficked in decimating the natural fruits of reproductive power.

Was this story *real*? Or was it designed to disguise the premier "service" provided at *any* "women's health" clinic, by focusing on their other services and presenting a marvelously compassionate image of clinic personnel filled with empathy for the women who sought their help? Wasn't this the benign image of clinics that the entire abortion industry wants America to believe in?

The defendants conceded that NOW's star witness probably did go to the clinic that day for a follow-up examination. They had no reason to believe otherwise. But based on the media's own record of events in L.A., there was strong evidence—extremely strong evidence—that the rest of her story was largely fabricated. In an attempt to force Scheidler and his associates permanently to the sidelines in the nation's abortion struggle, NOW had good reason to keep its star witness anonymous.

The defendants of course knew they couldn't depend on even a minimal degree of benign skepticism from the wire services, or on a single major daily willing to go back to original sources for what had actually happened that day in Los Angeles.

The Pro-Life Action League's Tim Murphy decided to do the research himself. It was not an easy undertaking for someone lacking media connections; but bear in mind what was at stake for him and the other two defendants: Their reputations and motives had been repeatedly smeared in court—witnesses linked them to alleged acts of harassment, intimidation, and outright violence all over the country. The plaintiff's lawyers portrayed Scheidler in particular as a kind of nationwide godfather for anti-abortion "terrorism."

In fact, Scheidler was a longtime admirer of Martin Luther King's strategy for civil disobedience; he had even participated in the 1965 civil-rights march from Selma to Montgomery. Those who knew him best viewed Joe Scheidler as a person of admirable restraint in tense situations, a devoted Catholic family man—the father of seven children—with a long-standing record of being personally committed to nonviolence at clinic interventions,

and of encouraging this commitment in others. He had dedicated himself not just to defending the gospel of life outlined by Pope John Paul II in *Evangelium Vitae*, but to living it to the hilt.

Murphy and several friends returned to Los Angeles for an extensive check on the story told by the plaintiffs' star witness and on the background of her minister friend. They collected copies of news accounts of the 1989 clinic "rescue mission" from the *L.A. Times* and *Herald-Examiner*, from the *Orange County Register,* and even from smaller regional papers. They visited UCLA's TV archives to view news footage from all five television stations that covered the event. And they reviewed police records and local voting rolls for pertinent information. The results were astonishing, to put it mildly:

• Though the mystery woman testified that she had seen herself on a televised news report of the event immediately after it happened, the UCLA archives had no footage of her at all. She was nowhere to be seen on camera.

• Neither was there any reference in print to a violent confrontation between pro-lifers and anyone visiting the clinic. It's a virtual certainty that an incident of the sort the woman so graphically described would have been seen as a key news event by the many reporters present.

• The police had no report of any violent confrontation (or arrests) at the scene.

• Voting records turned up the names of seven "Joseph Johnsons" in Compton. None was listed as an ordained minister. Further checking identified another Joseph Johnson only as a "business agent" for a local church, located about a mile from the abortion clinic site. In a personal phone call to his residence by Murphy, this Joe Johnson denied ever escorting anyone to the clinic.

Let us review for a moment those TV archives at UCLA. Here's the way reporter Warren Wilson set the scene for viewers of the nightly news on KTLA, Channel 5:

"Several times during the morning-long confrontation, each side tried to drown out what the other was either chanting or singing. It was part of the escalating national dispute *involving the right of a woman to decide what happens to her body* [emphasis mine] and anti-abortionists who say they must have a voice during the prenatal period."

Notice the tilt in the way the abortion conflict was portrayed—pitting a woman's *objective* "right to decide" against anti-abortionists' merely *subjective* claims. In fact, *Roe v. Wade*, which laid the groundwork for legalized abortion, offers no support for a woman's "right" to do with her body whatever she will. On the contrary, *Roe*'s most telling reference to "body lan-

guage" is this: "The privacy right involved . . . cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past."

What Mr. Wilson had done was to borrow one of the favorite ideological buzz phrases of radical feminism and impose it on KTLA viewers as an impartial view of a national debate. A "woman's right to control her own body" is the phrase of choice for abortion supporters to endow a vague half-truth, a nonexistent right, with the force of law. Where an attack by a would-be rapist or a physically abusive boyfriend is concerned, any woman does indeed have the right to exercise absolute personal autonomy over her body and defend herself by whatever means necessary. But where abortion is concerned, a scientific fact always intrudes: A *second* body with a life of its own is involved in any decision she might make.

In any case, when Mr. Wilson had finished setting the stage and turned to a physical description of the clinic scene, he found no sign of a heated clash between pro-lifers and any of the women who came there that day. To quote from the concluding segment of KTLA coverage: "After some tense moments over the highly emotional issue of abortion, the demonstration broke up with no violence and no one arrested."

Every other TV reporter whose coverage Murphy reviewed observed the same thing: No arrests. No violence. Nothing but a sometimes noisy squaring off between the two opposing sides.

Clearly the *Scheidler* case has sparked the interest of the mainstream media, but the details of its court proceedings cried out for a good deal more of that famed "second source" skepticism that has traditionally helped probing reporters get at the truth.

Furthermore, the prestige press and network TV have demonstrated shockingly little concern for the free-speech rights of defendants in this case, about the steady tightening of restrictions imposed by judges and even by Congress on what anti-abortionists are allowed to do, where they can do it, and even what they can say.

In short, First Amendment freedoms were as much on trial in Chicago as the civil liability of three pro-life activists.

One would like to imagine that the U.S. Justice Department was dedicated to the impartial pursuit of justice. But this is the Clinton era. This White House has worked overtime to establish abortion clinics as "no-fly

zones," while targeting abortion foes for periodic strafing attacks by legal stealth bombers. In May 1994, Congress itself jumped on the Clinton bandwagon with the passage of FACE—the Freedom of Access to Clinic Entrances Act. By ratcheting upward the definition of what might constitute "obstruction" of such access, FACE dramatically increased the constraints that could be imposed on pro-life demonstrators. The Supreme Court's recent *Hill v. Colorado* decision only served to reinforce the new mindset.

In theory, Coar's 36-page opinion upheld the defendants' right to express views they saw as protected by the Constitution; but in fact, it asserted that "a number of their means—destroying property and threatening violence—are not." This was a civil case; but notice the criminal behavior the judge imputed to the defendants.

Yet there was *no clear and convincing evidence* to link the three people on trial personally to the alleged violence at clinic sites. Nor was there any proof they had ever threatened the safety of anyone—except under the plaintiffs' incredibly convoluted definition of what might put a doctor, a patient, or abortion-clinic personnel at risk. Consider just one small example of what that meant in practice. Scheidler's exhortation to a clinic worker in Wilmington in early 1986 to heed the divine command, "Thou shalt not kill," was later treated in court as a "threat" to the worker involved.

The defendants had walked into a bed of legal quicksand. NOW's own ideological tilt bubbled to the surface to shape Coar's heavy-handed opinion.

Much like the man who had to answer "yes" or "no" to the question whether he had stopped beating his wife, Scheidler, Murphy, and Scholberg were told, in effect, that they must agree to cease doing things they had never done in the first place. Ironically, the jury's own findings hinted at the overreaching character of Coar's order. Its final report to the court referred to just four instances of "physical violence or threats of violence" at clinic sites—among a grand total of nearly 150 incidents under review. Furthermore, although the jury found all three defendants "guilty," it did so by vaguely *associating* them with those incidents, without clearly tying them to any specific acts. Jurors were equally vague in holding the defendants liable for some two dozen alleged acts of extortion.

Instead of being jailed for their beliefs, the defendants faced the threat of economic ruin under court order for the same reason. (Joe Scheidler and his wife, Ann, recently put up their own home as security for an appeal bond in court.) Scheidler and his cohorts had gone up against an ugly reality of the '90s: This was the most volatile decade yet in the abortion struggle. Jurors

knew some clinic sites *had* been targeted by violence. What they ignored was the fact that the incidents, including the very worst—the slaying or wounding of doctors and clinic personnel in Pensacola, Boston, Buffalo, and elsewhere—were invariably carried out by a tiny handful of fanatics acting on their own, without the support of the pro-life movement as a whole.

Most right-to-life leaders were quick to denounce clinic violence, but their willingness to isolate lone wolves like Paul Hill and John Salvi by blowing the whistle on their deeds was not reciprocated. For the abortion-rights absolutists at NOW, NARAL, and Planned Parenthood, the public-relations war was everything: Let the public believe *all* anti-abortionists were fanatics. NOW and its followers seized on the *Scheidler* case, in fact, to foster the *anti*-anti-abortion sentiment that has long dominated the prestige media and now colors the thinking of much of the mainstream media as well. Guilt-by-association was not simply the *easiest* way to herd peaceable interventionists into the "terrorist" camp. It was the *only* way to do so.

The topical coverage of the *Scheidler* case, sad to say, has had a decidedly ambiguous influence on public perceptions of combatants in the abortion battle. For the casual observer, the media's indifference to probing NOW's manipulation of RICO in this case reduced the Chicago trio to pariahs.

Those long familiar with the case knew better. Scheidler and his co-defendants remain a discomforting reminder of something that much of the media would dearly like to sweep under the rug: A life-and-death struggle to recognize the humanity of the unborn child is still being fought in U.S. courts. *Scheidler* should be reversed on factual grounds alone, but that may never happen. The defendants' best hope now may lie in one key point: Sharp doubts have been raised about RICO's use in other cases. The chances are good, therefore, that *NOW v. Scheidler* will wind its way back to the Supreme Court —simply because either side in a losing appeal is almost certain to press its case all the way to the top. If RICO itself, in whole or in part, fails to pass muster in the High Court, this malignant case could very well end right there. Otherwise, unless the Scheidler defendants are vindicated, the seeds of confusion sown at the trial will continue to grow like a moral and cultural blight on the conscience of a nation.

Ireland's Abortion Impasse

David Quinn

Before proceeding with the main subject matter of this article, a little refresher course as to the abortion situation in Ireland is in order. In 1992 Ireland was faced with the case of "Miss X," a 14-year-old made pregnant by her neighbour, a friend of her parents who was eventually found guilty of "unlawful carnal knowledge."

To cut a long story short, the parents of the girl contacted the Irish police. They wished to take their daughter to England for an abortion and wanted to return with a DNA sample from the fetus, so they could prove that their neighbour was the father of the child.

The police drew the case to the attention of Ireland's Director of Public Prosecutions who in turn alerted the Attorney-General. The Attorney General decided that since the Irish Constitution includes a ban on abortion—there since a referendum in 1983—Miss X could not travel to England for the purposes of having an abortion, much less return with a DNA sample from the aborted foetus. When news of this decision broke, there was uproar. The case became an international *cause célèbre*. Ireland was preventing a 14-year-old rape victim from travelling abroad for an abortion. The pressure on the government of the day was immense. What was it to do? It would have to turn to the courts for help. The decision of the Attorney-General was referred first of all to the High Court, which upheld it. The pressure on the government from pro-choice forces in Ireland and worldwide continued to mount. In desperation it referred the case on to the Supreme Court.

Based on the testimony of a psychologist who said Miss X was "suicidal," the judges decided that since this was so, the pregnancy represented a threat to her life; and because the Constitution allows a woman to have an abortion in such an eventuality, she could have her unborn child destroyed. In the event, no abortion was carried out since the girl miscarried—a great mercy under the circumstances.

This decision of the Supreme Court still stands. It means that abortion is legal in Ireland where a woman can convince the relevant authorities that being pregnant has made her suicidal. Based on the decision of 1992, all she need do is find a psychologist who will declare that she is indeed suicidal, and if she can find an Irish doctor to perform it, under the law she can have

David Quinn is the editor of the weekly newspaper, *The Irish Catholic*. He is also a columnist for *The Sunday Times* as well as a frequent participant in TV and radio discussions about current affairs.

an abortion. So far none has been performed, perhaps chiefly because the governing body for Irish doctors, the Irish Medical Council, forbids its members from doing so.

However, pro-lifers fear that one day a doctor will work up the nerve to challenge the Council and will perform an abortion using the suicide exception, and then the floodgates will open. To prevent this from happening the Irish pro-life movement wants another pro-life referendum, similar to the one which was held in 1983, to overturn the X-case decision and remove the suicide exception from the law.

To this end pro-lifers have been putting pressure on a succession of reluctant governments to hold such a referendum. The reason the current Fianna Fail-led government does not want to hold one is because it knows it will face the ire of a mostly liberal media if it does so, and because it fears alienating the middle ground of voters who might be persuaded by the media that abortion should be allowed in certain circumstances.

Now we reach the main subject matter of this article. In order to put off for as long as possible the day when it is going to have to make a decision on this issue, the government set up a parliamentary committee to investigate how best to resolve Ireland's abortion impasse. The committee consists of members of all the main Irish political parties. Its work has been divided into three stages. During the first, it invited all interested groups and individuals to make submissions recommending how they think the issue can best be resolved. A summary of these submissions was made public in a "Green Paper," which was released last year.

In the second stage it held hearings during which some of the groups and individuals who had made written submissions could make their case in person.

During the third stage, the point we have now reached, the Committee is reviewing the written and oral submissions presented to it and is considering its options. These range from an absolute ban on abortion, enshrined in the Constitution and copperfastened by legislation, to abortion on demand.

The mere fact that the government has taken this approach shows the extent to which it has already sold the pass. If its approach were based on principle, the principle that all human life from conception to natural death is worthy of protection, then it would not countenance abortion, whether under wide or limited circumstances. If it had to set up a committee to examine the issue, then the committee, based on this principle, would have limited itself to considering what constitutional wording, and what kind of legislation, would best secure the rights of the unborn.

All the same, the committee hearings in particular were fascinating, much more so than the written submissions, because the committee members had

a chance to cross-examine those who appeared before them. The hearings demonstrated yet again that abortion is about so much more than abortion—which is why it is the flashpoint in the culture wars. It is about abortion. It is about the nature and knowability of the moral law. It is about the relationship between Church and State. It is about the rights of minorities and dissenters in a society where a given moral view holds sway. It is about the state of modern medicine. It is about the limits and extent of personal autonomy.

All of these issues, and more, were considered at the hearings, often in a deeply confused way. Unfortunately that confusion is the great hope of the pro-choice movement in Ireland. If a majority of people are confused about the exact nature of abortion, they just might vote for it. Among those confused were some of the doctors who appeared before the committee. First and foremost there was confusion about what exactly constitutes an abortion. In common parlance an abortion means the deliberate and direct destruction of the unborn child. However, as some of the gynecologists and obstetricians who appeared before the Committee would have it, an abortion is anything that ends a pregnancy. Therefore a natural miscarriage is an abortion, in the sense that the pregnancy has been aborted, even if in this case not deliberately. So is the death of the unborn child as an indirect and unintended effect of medical treatment she is receiving. So is childbirth!

Obviously a legal ban on abortion can't prevent what occurs in the natural course of things; miscarriage and childbirth. However, the doctors feared that an outright and badly worded ban on abortion would prevent them giving mothers life-saving medical treatment. For example, if a pregnant woman had cancer of the uterus, would a ban on abortion prevent them from removing the uterus since to do so would unavoidably result in the death of the baby if it was pre-viability? Other life-threatening conditions were mentioned, and some of the doctors who testified feared that a ban on abortion would prohibit all of the procedures necessary to save pregnant women. Here is where the confusion set in. Some of the doctors could not seem to distinguish between *direct* and *indirect* abortion (terms we'll use for the want of better ones).

As the various pro-life groups that testified were at pains to point out, there is a world of difference between the two. If a cancerous uterus must be removed from a woman in order to save her life, and the baby dies as a result, the death of the baby has not been directly intended by the doctors or the mother. It was an unavoidable and terrible "side-effect" of the treatment necessary to save her life.

Direct abortion, on the other hand, involves purposely targeting the baby

with the sole intention of ending its life. No medical condition mentioned by the doctors needed to be "treated" by the use of direct abortion. Pro-lifers stressed that they desired a ban only on direct abortion. They told the Committee that under the present regime Ireland already has the best maternal-safety record in the world, along with Australia. According to World Health Organisation figures, just one mother in 50,000 dies as a result of complications arising from pregnancy. No mother who has died in an Irish hospital has done so because of a ban on direct abortion. (Contrast this with Britain, which has twice the maternal death rate of Ireland despite having a liberal abortion regime.)

It could perhaps be thought that the reason Ireland has a very good maternal safety record is because Irish women needing a "life-saving" abortion can go to England to obtain one. This is not the case. British records show that no Irish women obtain abortions there for that reason. This being so, the Irish maternal-safety record is a wonderful riposte pro-lifers the world over can offer those who insist that abortion is necessary to save the lives of women.

In fact, one wonders whether abortion would ever have become so commonplace if it had not been able to gain a foothold in society on the basis that it must be available in order to save women's lives. It is unlikely that it will be legalised in Ireland for some years, so long as people can clearly distinguish in their minds between direct and indirect abortion. Unfortunately, educating voters to make this distinction will be no easy task when even some doctors can't make it. One of the hearing's most fascinating sessions was the one at which delegations from the various religions in Ireland testified. One of the trump cards played by liberals against having laws in any way, shape, or form based on Catholic morality, or indeed upon any form of religious morality, has been the argument that in a pluralist society you cannot have laws which favour the ethos of one religion over another. In a liberal, pluralist society—so the argument goes—the laws must, insofar as is possible, respect the rights of all religious believers, as well as those who have no religion. The way to do this is to abolish all laws based on religious morality.

In reply Catholics have said that the law should reflect Catholic morality only to the extent that it helps and promotes the common good. This has not impressed liberals who maintain that since there are many visions of the common good, the Catholic one should not be allowed to trump all others. The answer to this is that it should not be allowed to do so simply because it is Catholic, but because it can be rationally demonstrated that it is superior to all others.

In any case, if the sort of argument that is employed against religious-

based morality were to be employed against, say, socialism, or social democracy, the liberal-left would find itself with little justification for its egalitarian social programmes, or the high taxes necessary to fund them. After all, what is egalitarianism but one more version of the common good? The liberal-left should be aware that the arguments they use against having laws based on a *religious* view of morality can as easily be used against laws based on a *secular* vision of morality. If all visions of the common good, secular as well as religious, were to be banished from the public arena then we would end up by default with a radically libertarian society, and what is libertarianism in the final analysis than the view that the best kind of society is the one which allows maximum personal freedom? So no matter what, someone's view of morality ends up dominating society and other views get sidelined.

In practice, however, it is religious and not secular morality that gets sidelined, and in Ireland at any rate it is being sidelined by using one religion to neutralise another. On the abortion issue liberals love it when the various Churches disagree with one another about when abortion should and should not be permitted. That enables them to tell the public that while Catholics may want to ban abortion in all circumstances, Presbyterians or Anglicans or Methodists do not, and therefore the Catholic view cannot be allowed to prevail since this would discriminate against the other Churches.

The Presbyterian delegation presented a view of abortion that was not so different from the Catholic one, except that it would be allowed in the case of a threat of suicide—which is exactly what pro-choicers in Ireland want for now, and what the Pro-Life Campaign fears. The Methodists allowed so many exceptions that it amounted in practice to favouring abortion on demand. The Anglican delegation offered no less than three different positions, ranging from one that was indistinguishable from the Catholic teaching to a far more liberal one. Of course, to talk about an Anglican, or a Presbyterian, or a Methodist "position" on abortion at all is deeply misleading. There are Anglican, Presbyterian and Methodist *positions* on this and other issues, but no *one* position as such. This is because of the nature of authority and governance in these Churches. Lacking a court of final appeal like the Catholic magisterium, which can say definitively, "this is our teaching," the "position" these Churches work out on a given issue is whatever is agreed at this year's assembly or synod. This is not a criticism. It is simply the way these Churches work. One year a more-or-less liberal position on abortion might be agreed upon, another year a more-or-less conservative one might get the nod. Much would depend on who made the most persuasive arguments that

year, and whether the assembly or synod was made up mostly of liberals or conservatives. In fact, at the latest Presbyterian Assembly, which took place in Belfast in May, the subject of abortion wasn't discussed at all. Instead, what was presented to the Committee as the Presbyterian position was one that had been cobbled together for the abortion referendum of 1983. The most recent General Synod of the Anglican Church in Ireland (the Church of Ireland) became deadlocked on the issue, which is why three different positions were offered.

The Methodist Church offered a liberal position, although it is possible that in 10 or 20 years' time conservatives may gain the upper hand in that Church once more.

What is noteworthy about the various submissions made by the Churches was that they didn't appear to be always properly thought out: Their conclusions often didn't follow logically from their first principles. This is partly because positions agreed at assemblies and synods are often, by their nature, compromises and therefore have little to do with logic. But it is also, I suspect, because among evangelicals certainly a concentration on the Bible has meant that moral theology is often neglected. (In the Catholic Church the reverse is frequently the case.)

This suspicion was confirmed by a conversation I had following one of the sessions with members of one of the delegations. I asked its leader, one of the most stand-out Protestant ministers in Ireland, whether his Church accepted the principle that the direct and intentional taking of innocent life is always wrong. He said it did. In this case, I asked him, why did it countenance abortion under certain circumstances? He replied that sometimes killing is justified, for example in self-defence, or—as when bombing an industrialised part of a city in wartime—innocent civilians near targets are unavoidably killed. In neither case, I suggested, was he talking about the direct and intentional taking of innocent life. In the first example he gave, the person trying to take your life is not innocent. In the second the civilians are indirectly killed, not directly targetted. It made me think that the pro-life position has never been properly sold to his Church. If it maintains, along with the Catholic Church, that the direct and intentional taking of innocent life is always wrong, then logically it should agree that direct abortion is always wrong too. The conversation gave me some hope that his Church can be turned around on the issue. The unfortunate thing is that some of the delegations, whether knowingly or not, were giving hostages to fortune to Irish pro-choicers. All they want for now is to see abortion allowed under certain "limited" circumstances. After that they can widen the breach.

Not alone did they give hostages to fortune by saying that abortion

should be allowed under certain circumstances; they gave more by stating their opposition to another constitutional ban on abortion. All of the Church delegations said they would prefer the issue to be dealt with through legislation. Again, they said they were reflecting the wishes of their Churches as voted upon at synod and assembly. But they are attended by delegates not only from the Republic of Ireland, but also from the North; in fact, *overwhelmingly* from the North because most Protestants, of whatever denomination, live in Northern Ireland. This being so, we had the odd spectacle of mostly Northern delegates voting about the best legal approach to the abortion issue in what is to them a foreign jurisdiction, and Irish Senators and MPs in the South taking their advice. This would be rather like a House of Commons Committee in Britain taking advice from the Irish bishops. A valid question to ask is: How well informed are Northern delegates at these assemblies and synods about the abortion situation in the South? In addition, do delegates from a jurisdiction that does not have a written constitution fully appreciate the arguments favouring the constitutional approach? These questions were not asked, probably because they did not even occur to the Committee members.

Other delegations from the North, other than Church groups, were invited to give their opinions to the Committee. One reason for this was to tease out whether we in the South have anything to learn from how abortion is dealt with in the North.

The law pertaining to abortion in the North differs from the law in the rest of the United Kingdom, where it is governed by the 1967 Abortion Act which—to all intents and purposes—legalised abortion-on-demand. This Act supplanted the Bourne judgement of 1938 which up to that point dictated when abortion could and could not take place in the UK. In Northern Ireland the Bourne judgement still holds sway because most Northern politicians, whether Catholic or Protestant, have resisted all attempts to have the 1967 Act extended to Northern Ireland. The Bourne judgement allows abortion where carrying the baby to term would reduce the mother to a "physical and mental wreck."

Some of the Committee members wondered why the Bourne judgement could not be interpreted to allow abortion in almost all circumstances. After all, "physical and mental wreck" is quite a nebulous term. They wanted to know how it was that the North was able to keep the number of abortions performed there so low. (A figure that is actually unknown but is estimated to range from a few dozen to a few hundred). What lay behind this question was almost certainly a desire to defeat a key argument of pro-life groups

in the South, namely that if you allow abortion in supposedly "limited" circumstances, in practice those limited circumstances will become very wide. If in the North the "limited" circumstances allowed by the Bourne judgement had remained limited, surely this defeated the pro-life argument?

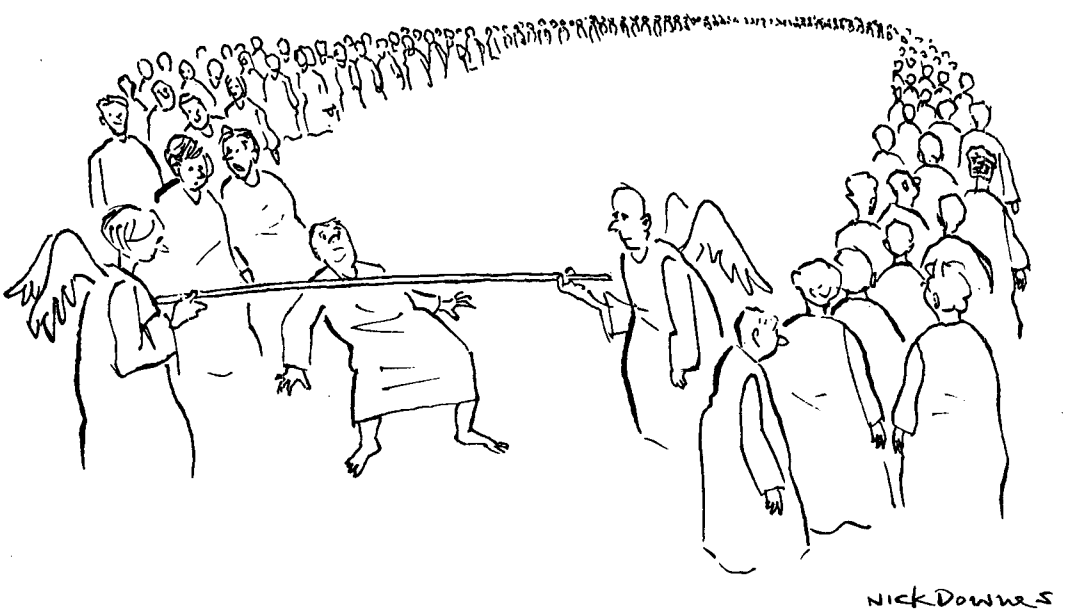
The question is an interesting one and the answer can only be guessed at. My own guess is that the real reason the Bourne judgment hasn't been interpreted in such a way as to allow abortion-on-demand is because there is tremendous cultural resistance there to it happening; it would quite simply be socially unacceptable. Also, as yet there is little push to widen the meaning of the Bourne judgement because most political energy in the North has been absorbed not by social issues as in the South, but by the national question.

In the South, on the other hand, something like the Bourne judgement would be quickly interpreted so as to allow abortion-on-demand because there are strong forces—including in the media—dedicated to this purpose. Unlike in the North, abortion is a frequent topic of discussion in the papers, on radio, and on television, and it is almost invariably presented in a "non-judgemental" manner. The signal this sends to people is that abortion is a matter of choice, and therefore it is inevitable that an increasing number are choosing it. The number of Irish women going to England each year for an abortion now stands at over 6,000. Five years ago it was not much more than 4,500. That is an increase of one-third in a fairly short period of time.

Northern Ireland women, too, travel to England for abortions because they are relatively difficult to obtain at home. Five years ago the number making the journey was 1,548. Last year it had dropped to 1,429 and is now just a quarter of the figure in the South. Maybe the number has dropped because it is not being talked up all the time by "sympathetic" journalists. (For the purposes of comparison, the population of the Republic of Ireland is roughly 3.5 million as against roughly 1.5 million in Northern Ireland. The birth rates are similar).

The hearings actually stripped away many of the excuses offered for legalising abortion. Cross-examination of the doctors showed that direct abortion is never necessary to save the life of a mother, including in the case of threatened suicide. The "positions" of the Protestant Churches are confused and subject to change. The Northern situation does not show that a law can be introduced which keeps abortion limited. And yet the Committee is still drawing back from allowing another pro-life referendum. This can only be because abortion is becoming more and more socially and culturally acceptable and because such powerful forces are arrayed in favour of it; forces

politicians are loath to resist. Provided the Irish public can be convinced that direct abortion is not necessary to save the life of the mother, a majority would probably vote for another pro-life amendment to the Constitution. The real problem is not the arguments, as the committee hearings demonstrated: It is a lack of political will. This issue is finely balanced in Ireland. The pro-life lobby is just about strong enough to force the government's hand, but if the government can resist holding another referendum, it will do so because it thinks it isn't worth the bother. On this issue, above all others, its principles stretch no further than the next opinion poll.



"SO THIS IS LIMBO."

The Reality of Motherhood

Donald DeMarco

Part of popular magician David Copperfield's repertoire of engaging illusions is making the Statue of Liberty disappear. He performs this stunt in the presence of a horde of "witnesses," and it takes him only 20 minutes or so to accomplish his feat, a reasonable allotment of time considering the size and bulk of his vanishing object: 305 feet tall and 450,000 pounds. The best and most gratifying part of his theatrics, however, is making the colossus reappear.

Copperfield's "witnesses" are seated in a makeshift grandstand on Bedloe's Island in full view of Lady Liberty. A retractable curtain covers them, allegedly, to prevent them from observing the precise application of Mr. Copperfield's patented magic. The grandstand rotates, slowly and silently, 180°. When the curtain retracts, the "witnesses," to their collective astonishment, have an unobstructed view of New York Harbor. The Statue of Liberty has disappeared! Once more the curtain descends and the puzzled spectators are rotated 180° back to their original viewpoint, so that they can go home with the happy reassurance that the Golden Torch is still burning brightly to welcome immigrants and entertain tourists.

Making motherhood disappear may be out of even David Copperfield's league, but a number of illusionists in the academic professions are working hard at it. They do not possess the same kindly spirit of restoration of Copperfield, however—they want to get rid of it, for good!

Unique events stick in the memory. Only once in my life has a pro-abortion writer done me the honor of inviting me to critique his work. I have a clear recollection of the event, as I do of the day I proposed to my wife and the day we married, where I was when JFK was shot, and what I was doing when the lights went out on the East Coast. I remember opening the package that a certain professor of philosophy from a distinguished university in the United States had mailed to me. Poring through the 350-plus page manuscript seemed to be a meager enough tribute to his presumed openness of mind in soliciting my response.

The lengthy tome was a sustained defense of an argument that is the brain daughter of Judith Jarvis Thomson, a professor of philosophy at the Massachusetts Institute of Technology. The article in which her argument initially

Donald DeMarco, professor of philosophy at St. Jerome's University in Waterloo, Ontario (Canada), is a member of the American Bioethics Advisory Commission. The author of 17 books, his latest is titled *New Perspectives on Contraception*, with an introduction by Dr. John and Evelyn Billings.

appeared has achieved a certain distinction. It is now the most widely reprinted essay not only on the subject of abortion, but in all of contemporary philosophy. It is, one would gather, a presentation of the pro-abortion case in its finest, sharpest, and most compelling form. My American confrere had found sufficient merit in it to dedicate an impressive amount of time, energy, and paper to defending and further promulgating it.

The celebrated argument is based on the following arresting scenario. You wake up one morning to find yourself in unfamiliar surroundings, connected by tubes to another person. It turns out you have been kidnapped by the Society of Music Lovers because the person to whom you are hooked up is a famous violinist who has a serious kidney disorder; he needs to use someone else's kidneys for a period of nine months or he will die. No person in the world but you has a fully compatible blood type.[1]

Professor Thomson contends that you would be morally justified in unplugging yourself from the violinist. She then asserts that the situations of the kidnap victim hooked up to the violinist and of the woman carrying an unwanted child are, from a moral point of view, in perfect parallel. She has fashioned, in her own view and the view of many others, an illuminating and irresistible similitude.

I wrote a lengthy response to my inquiring colleague, which boiled down to this: Neither my colleague nor Professor Thomson has the slightest appreciation for the fundamental and incontrovertible reality of *motherhood.* I tried to be as gracious and restrained as I could be, but it was akin, I imagined, to writing to the absolute idealist G. W. F. Hegel and saying: "I enjoyed your philosophical disquisition, Herr Hegel, and found it to be well structured and quite entertaining, but I humbly bring to your attention the fact that you have omitted all of external reality."

I can only guess how my colleague took my criticism. He has not replied, and more than two years have elapsed since he received it. He did leave a message on my voice mail acknowledging its receipt, but explained that his busy schedule had not as yet given him a chance to read it. Perhaps he is convinced that the concept of the mother is merely a relic of the past and has been superseded by the autonomous individual who is able to dissolve a woman-child relationship without compromising her moral identity. Professor Thomson herself does not seem to grasp the fundamental reality of motherhood. Although she is willing to grant that "the fetus is a person from the moment of conception," she holds that "having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body."[2] One has the right to travel, but without a ticket; not the right to board a train. A woman's body is her own;

the fetus is an outsider. If the fetus wants to live, let him get his own life-support system.

Being linked, kidney-to-kidney, to another human being establishes no intrinsic relationship. Tony Curtis and Sidney Poitier were manacled to each other in the 1958 film *The Defiant Ones*. No one thought that the chains that joined them together made them brothers. The odiousness of the chains lay precisely in the fact that they were binding together two individuals who had no spiritual or fraternal bond with each other. Their bonds, therefore, constituted bondage. Conceiving new human life with one's own ovum which contains one's own DNA, by contrast, does establish a relationship. The bond that unites the woman and her child is the bond of maternity, not enslavement. The unfortunate kidnap victim is not pregnant with the violinist. He is simply connected with him by artificial means. There is neither a logical parallel, nor a moral similitude between being yoked to a stranger and pregnant with your own child.

Abortion has absolutized individualism and, in the process, produced a philosophy that requires the dissolution of all spiritual relationships. One of the most quixotic of twentieth-century philosophers, Ludwig Wittgenstein, anticipated this absolutization when he reduced reality to a collection of isolated facts and formulated the principle that "any one fact can either be the case, or not be the case, and everything else remains the same."[3] In other words, if my two factual parents had never existed, I would remain unaffected. Their non-being would have no bearing on my being. We are all, so to speak, cosmic orphans, monads without windows, selves without relationships. Wittgenstein was the philosophical high priest of non-relationship. (To his credit, we may note, he did retract this completely schizoid view in his later years.)

Motherhood is not a conjunction or a connection or a concoction. It is the relationship *par excellence* that unites the beings of two separate humans in a manner that is simultaneously biological and spiritual, inter-personal and life-giving. Motherhood is our most convincing testament to the fact that we are spiritual persons and not merely material beings. We thrive as persons thanks to relationships. The essence of Martin Buber's personalism, and that of the entire personalist movement of the twentieth century, is to show that the "I" of the "I-Thou" relationship is truly human, whereas the "I" standing alone is a self-contradiction. "All reality," writes Buber, "is an activity in which I share without being able to appropriate for myself. Where there is no sharing there is no reality."[4]

The despiritualization of motherhood is simply the obverse of the

absolutization of the individual. Professor Thomson's argument is not so much an argument for abortion as it is a reflection of our despiritualized, de-relationalized society. Abortion would not take place except for mothers abandoning their motherhood.

Gary Bell founded Dads for Life after he learned that abortion had robbed him of his paternal affiliation with his own child. When his wife told him she had aborted their first child, he was "shocked"; he felt "used, unimportant, betrayed, and so very alone." When she was arranging to have their second child similarly dispatched, she said to him, "There's nothing you can do about it." His protest, "Please don't kill my baby," fell upon deaf ears in the absence of any supporting law.[5]

For Mr. Bell, fatherhood is as real as are both his own flesh and bones and those of his children. Neither fatherhood nor motherhood is a theoretical value. Each describes aspects of the human identity that are as palpable as love and as real as life itself. Bell knew, with utmost certainty, that his wife was not merely unhooking herself from unwanted intruders. He understood, viscerally as well as intellectually, that she was striking a blow not only against their children, but also against motherhood, fatherhood, parenthood, and family. Dads for Life is an attempt to re-establish moms for life and to restore the recognition and appreciation of motherhood as a concrete reality.

The state of non-relatedness, as psychiatrists have long understood, is unnatural. What the current despiritualization of motherhood has done is to elevate a pathology to the status of an ideal. Pure individuality is not commensurate with freedom; it is a radical deprivation of one's fundamental personhood. To be a mere individual is to be cut off not only from others but from one's self.

One may call abortion a "choice" or a strike for "freedom," but such naming avoids abortion's essence. The willful denial that the bond between the pregnant woman and her unborn child is maternal is a choice and a strike against motherhood and a reduction of the person to a truncated individual.

It could be said that the great Yankee first baseman, known as the "Iron Horse," would never have died of Lou Gehrig's disease had his parents named him Friedrich. Had they so named him, of course, he would have died of Friedrich Gehrig's disease. Then people could have protested that he would not have died of Friedrich Gehrig's disease had his parents named him Lou. The disease, however, would have remained just as real and just as devastating whatever it was named. So, too, one does not dissolve the implications of death, the despiritualization of motherhood, and the diminishment of personhood, by naming abortion "choice" or "freedom." Verbal spinning affects the reader, not the reality.

Martin Buber's classic, *I and Thou*, calls attention to the fact that the "I" of the "I–Thou" relationship is radically different from the "I" of its counterpart, "I–It". The former is rooted in one's being as a person. The latter is not. As Buber writes, "without It man cannot live. But he who lives by *It* alone is not a man."[6] It is only through the I–Thou relationship that a person lives authentically, being in touch with his own being as well as with that of the other to whom he is related. The I–Thou relationship is one, not only of personal authenticity, but also of justice inasmuch as it acknowledges the reality and the personal claims of the other. "Selfishness," as Oscar Wilde once observed, "is not living as one wishes to live, it is asking others to live as one wishes to live."

An excessive preoccupation with the self is essentially unrealistic. Ferdinand Ebner states that from a psychological point of view, insanity is the end product of "*Icheinsamkeit*" (I-alone-ness), of what he refers to as the complete closedness of the I to the Thou.[7] We find a similar explanation of insanity in Henrik Ibsen's *Peer Gynt*. Mr. Begriffenfeldt, the superintendent of an insane asylum, says to Peer: "It's here that men are most themselves— themselves and nothing but themselves—sailing with outspread sails of self. Each shuts himself in a cask of self, the cask stopped with the bung of self and seasoned in a well of self. None has a tear for others' woes or cares what any other thinks."[8]

That is why radical feminists who promote abortion are unwittingly placing their followers on a path that leads, not to liberty, but to lunacy. Judith Wilt states in her book *Abortion, Choice, and Contemporary Fiction: The Armageddon of Maternal Instinct*, that we are experiencing the last days of maternity as an instinct.[9] Elisabeth Badinter, disciple of Simone de Beauvoir, proclaims in her book, *The Unopposite Sex: The End of the Gender Battle,* that "the categorical imperative no longer sets out the conditions of the relationship between Ego and Other People, but of my relationship to myself." For Badinter, the direction of ethics has shifted from the Other to Oneself, from I–Thou to I–Me.

In this model, then, a woman is not a being who has profound relationships of an I–Thou character with others. She is an island of liberty whose primary responsibility is to her self-contained individuality. Any affiliations she may have with others do not rise from the deeply rooted core of generosity that exists in her reality as a person. She merely makes choices. Her attachments are subservient to her will. This point is made clearly enough in *The Choices We Made,*[10] a collection of first-person confessions of women who chose abortion.

One encounters again and again in these accounts a cool detachment from the child in the womb. Actress Polly Bergen, for example, notes: "I don't remember giving an abortion a lot of thought. That was what I had to do . . . I couldn't have that baby. That baby would ruin my life. It would ruin my mother and father; it would ruin me; it would ruin everybody who had ever known me and loved me." The metaphorical and hypothetical sense of "ruin" takes precedence over the only too real ruin of the aborted child. Margot Kidder (Lois Lane in *Superman I, II,* and *IV*) writes: "Abortion might be killing a life; I don't know. If there is a sin, it is the sin that we adults perpetrate on the children of the earth who are truly innocent and defenseless by bringing those children into the world when they will not be cared for"—again, as if killing a child were not a form of not caring for it. One reviewer assessed the mindset of these women who wrote about their abortions as a "cavalier disregard of the claims of the aborted life, the self-centered sweeping away of the possibility of adoption . . . a single-minded egotism."[11]

The confessions are intended to evoke sympathy. Our therapeutic culture tends to be most sympathetically inclined to anyone who experiences the least amount of frustration or disappointment. At the same time, even in the world of psychotherapy, a point is reached when the analyst must change from the consoler who takes the side of the subject against the other to one who advises the subject to honor the claims of the other.[12]

Abortion is made more acceptable to the degree that motherhood is made less real. The more the child in the womb is regarded as an alien, the easier it is to rationalize abortion as merely a choice. The child is an "attachment" (Judith Jarvis Thomson) or a "parasite" (Simone de Beauvoir) or a "vampire" (Camille Paglia). Such a being would surely not make its victim a mother. The despiritualization of motherhood, then, is the dissolution of the spiritual nature of a human being as a person who finds fulfillment through relationships.

A strictly materialistic philosophy denies the spiritual order it cannot understand. A musical melody is real and recognizable, yet it will not be found in any of the individual notes. It cannot be discerned if the notes are examined singly or independently of each other. The melody that unites the pregnant woman with her child is spiritual and defines her motherhood.

Family relationships are not chosen. One does not choose one's brothers and sisters, one accepts them. Brotherhood and sisterhood precede choice. Parenthood, which is the wellspring of brotherhood and sisterhood, is also a reality in which nature precedes choice. It is a consequence of lovemaking, which *is* a choice. But it is not a direct object of choice. One cannot choose

but only *try* to become a parent. A woman *becomes* a mother, just as a man becomes a father, in the sense of realizing an inherent potentiality, not by attaching herself to something external.

Choice, thererfore, is the choice whether to accept something that is already there, that is part of one's identity. Abortion extinguishes the life of the child. But it does not extinguish the reality, both physical and spiritual, of the aborting mother's motherhood. She is still a mother. Her choice to abort is an attempt to deny the undeniable, to reject the unrejectable. In this regard, choice is not nearly as powerful and decisive as acceptance. To accept one's own reality, as a particular person, as a mother, or father, or sister, or brother, is the boldest and most creative act of the will that we can execute.

If I accept who I am in my reality, then I am free to realize my inherent potentialities. On the other hand, if I venture to "choose" something I am not, my choice is sterile and impotent.

In the early years of the nineteenth century, in Stratford, Virginia, Ann Hill Carter, daughter of the distinguished Charles Carter, was distressed and unhappy. Her husband's financial misfortunes and indiscretions had gradually brought the couple to a state of genteel poverty. In 1806, while pregnant, she went to visit her beloved father, but—to her intense grief—he died soon after her arrival. After returning home, she contracted a cold which settled in her chest. She did little that whole winter but sit huddled over a charcoal brazier in the gloomy great hall of her home and await the arrival of her child.

Sick and depressed and worried about her sister Mildred, who was very ill, Ann was (in the words of a biographer) "in no condition to face the imminent arrival of her fifth child with any cheerfulness."[13] On January 19, 1807, "the unwanted child came."[14] It was a boy and he was named after Ann's two brothers, Robert and Edward. History remembers him by the name Robert E. Lee, who, according to Theodore Roosevelt, was "without question the greatest of all the great captains that the English-speaking peoples have brought forth."[15]

In 1995, during a civil war in the former Yugoslavia, a young nun was raped by soldiers and left pregnant. The shame, outrage, and anguish she experienced are indescribable. "What will you do with the life that has been forced into your womb?" asked her Mother Superior in a trembling voice. She had already decided. "I will be a mother . . . though I neither asked for him nor expected him—he has a right to my love as his mother."

Acceptance. Honoring what is: life, another human being, and motherhood. But acceptance with love. "Someone has to begin to break the chain of

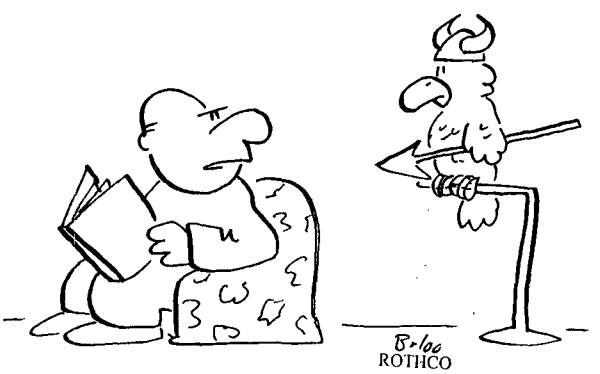
hatred that has always destroyed our countries. And so, *I will teach my child one thing: love.*"[16]

Her choice to love and honor that which is, was indeed a choice. But it is a choice that followed an acceptance of the unbarterable reality of her own motherhood. What new and bolder leader might the violated nun give back to the world?

The relationship between mother and child is not an artificial link that freedom must dissolve, but the first and indispensable step on the path to civilization.

NOTES

1. Judith Jarvis Thomson, "A Defense of Abortion," M. Cohen, T. Nagel, and T. Scanlon (eds.), *The Rights and Wrongs of Abortion*, (Princeton, NJ: Princeton University Press, 1974), pp. 4-5.
2. *Ibid.*, p. 4; 12.
3. Cited in William Barrett, *The Illusion of Technique* (Garden City, NY: Doubleday, 1979), p. 36.
4. Martin Buber, *I and Thou*, tr. by Ronald Gregor Smith (New York, NY: Scribner's Sons, 1958), p. 63.
5. Cited in Monica Migliorino Miller, "Severed Ties," *Crisis*, Nov. 1991, pp. 21-2.
6. Buber, *Op Cit.*, p. 34.
7. Ferdinand Ebner, *Das Wort und die geistigen Realitäten, Pneumatologische Fragmente* (Innsbruck: Brenner-Verlag, 1921), pp. 47f, 81, 155.
8. Henrik Ibsen, *Peer Gynt* (New York, NY: Airmont Publishing, 1967), p. 109.
9. Judith Wilt, *Abortion, Choice, and Contemporary Fiction: The Armageddon of Maternal Instinct* (Chicago, IL: University of Chicago Press, 1990), p. 34.
10. *The Choices We Made: 25 Women and Men Speak Out About Abortion,* ed. by Angela Bonavoglio, foreword by Gloria Steinem (New York, NY: Random House, 1991).
11. Ellen Wilson Fielding, "True Confessions," *Crisis*, Nov. 1991, pp. 49-50.
12. See Maurice S. Friedman, "Healing Through Meeting: Martin Buber and Psychotherapy," *Cross Currents*, Vol. V, No. 4, Fall 1955, p. 308.
13. Stanley F. Horn (ed), *A Robert E. Lee Reader* (New York, NY: Grosset & Dunlop, 1949), p. 23.
14. *Ibid.*, p. 24.
15. Cited in *ibid.*
16. "Testimony of a Nun," tr. by Peter Hopkins, L. C., *Human Life Review*, Winter 2000, pp. 26-8.



"I'LL SURE BE GLAD WHEN YOUR WAGNER PERIOD IS OVER!"

The Dehumanization of Robert Wendland

Wesley J. Smith

"We conclude," the California Court of Appeals ruled, that "there should be no [legal] presumption in favor of continued existence."

The man whose life was at stake in the court's ruling is Robert Wendland, age 46. He is cognitively disabled after a terrible auto accident, and was unconscious for the first 16 months. Doctors told his wife, Rose Wendland, that he would never awaken. But after those 16 months Robert stirred, and with the help of rehabilitation progressed to the point where he could perform many neurologically complex activities, including:

- Maneuver a manual wheelchair, and drive an electronic wheelchair, down a hospital corridor;
- Retrieve and return colored pegs into a peg-board when asked;
- Take and return a ball when asked;
- Write the letter "R" of his first name when asked (as well as some other letters of his name);
- Use buttons to accurately answer yes and no questions some of the time. (Is your name Robert? Yes. Is your name Michael? No.)

Despite these remarkable achievements, Rose decided to order doctors to stop her husband's tube feeding so that he would dehydrate to death, which would take a period of about two weeks. The ethics committee at Lodi Memorial Hospital unanimously agreed with that decision. Robert would be dead today but for an anonymous whistle-blower who called one of Robert's sisters to advise her of Rose's plan. Robert's mother, Florence, and one sister sued to save his life, thus beginning a bitter contest that continues nearly six years later.

Creating a disposable caste of people

Twenty years ago, the act of removing a feeding tube from unconscious patients—much less conscious people with Robert's capacities–was virtually unthinkable. Indeed, it might even have been a crime. But trouble was brewing. Hippocratic medical ethics and the sanctity-of-life presumptions that presuppose the moral equality of all living people came under increasing assault. Influential advocates of a "new medicine"—philosophers, academics, lawyers, doctors, and other members of the medical intelligentsia

Wesley J. Smith, a frequent contributor, is an attorney for the International Anti-Euthanasia Task Force. His next book, *Culture of Death: The Destruction of Medical Ethics in America,* will soon be released by Encounter Books.

known as bioethicists—argued that the time had come to terminate medicine's "do no harm" tradition of the Hippocratic Oath in favor of creating an explicit hierarchy of human worth founded upon a so-called "quality of life" standard.

In bioethics ideology, individual humans must earn their moral and legal rights by having certain cognitive capacities. Those who have these capacities are usually referred to as "persons" and those who do not as "non-persons." While the exact criteria for establishing personhood were—and still are—a matter of debate within the bioethics movement, a general consensus has been reached that rejects personhood status for newborn infants, those with dementia, and people like Robert Wendland who have severe brain damage.

As bioethicists were busily constructing their hierarchy of human worth, *autonomy* became the selling point of the movement. Reacting to patients being hooked up to medical machines against their will, bioethicists argued (appropriately in my view) that people should be permitted to refuse unwanted medical treatment even if this would likely lead to death. Most people believed (and still believe) that this argument exclusively concerned "extraordinary care"—the dreaded medical machines such as kidney dialysis and ventilators. But bioethicists went far beyond the intensive care unit, insisting that food and water supplied through a feeding tube should also be deemed "medical treatment" that could ethically be withdrawn or withheld. As the bioethicist Daniel Callahan bluntly put it in 1983, "a denial of nutrition may in the long run become the only effective way to make certain that a large number of biologically tenacious patients actually die. Given the increasingly large pool of superannuated, chronically ill, physically marginalized elderly it could well become the non-treatment of choice."

By the mid 1980s, a strong consensus had been forged in bioethics that tube-supplied food and water should be considered medical treatment. This led, in 1986, to the American Medical Association issuing a momentous ethical opinion. While asserting that doctors should never "intentionally cause death," the AMA's committee with jurisdiction over ethics issues opined that it was ethical to terminate life support, even if "death is not imminent but a patient's coma is beyond doubt irreversible." Most significant: for the first time, the AMA listed "artificially supplied . . . nutrition and hydration" as a form of medical treatment.

The ultimate legal blow came in the landmark 1990 United States Supreme Court case of Nancy Beth Cruzan. The Court upheld Missouri's right to require "clear and convincing evidence" that removing life support from an unconscious person was in the patient's "best interests." That much was

fine. But the court, by implication, also ruled that tube-supplied food and water is medical treatment rather than "humane care" (care which can never be withheld or withdrawn) such as turning immobile patients to avoid bedsores and keeping patients warm. A Missouri trial court subsequently ruled, based on astonishingly thin evidence, that Nancy Cruzan would want her food and water withdrawn. Twelve days later, Nancy died. The cause of death listed on her death certificate: dehydration.

With Cruzan's death came the collapse of virtually all institutional and legal opposition to dehydrating unconscious people at the request of their caregivers. The laws of all fifty states now permit unconscious people to be dehydrated, usually without any prior approval by the courts. If other family members dispute the caregiver's decision to withdraw food and water, it will rarely be to any avail. Indeed, they will often be accused of "bad faith" meddling or religious fanaticism and roundly castigated in the media. And it only took about ten years from the beginning of the bioethics debate about the propriety of dehydrating unconscious people for them to be viewed in medicine, law, and theology, and among the general public, as a disposable caste whose intentional killing is proper and compassionate. If nothing else, the Cruzan case certainly demonstrated the power of philosophers and activist physicians to redefine medical ethics, public policy, and popular opinion.

Targeting the Conscious

The culture of death is never static: It restlessly strives to expand. Thus, it didn't take long for the dual emphasis in bioethics (on the alleged nonpersonhood of people with profound brain damage and the view that tube-supplied food and water is medical treatment) to cast the dark shadow of intentional dehydration over the lives of *conscious* patients. And thus, in 1993, the American Medical Association expanded its 1986 ethical opinion, ruling, "Even if the patient is not . . . permanently unconscious . . . it is not unethical to discontinue all means of life-sustaining treatment." Today, all over the country, the lives of conscious people are ended by intentional dehydration almost as a matter of medical routine—so long as no family members object.

But what if other family members disagree? Unlike cases involving unconscious people, those dealing with conscious patients can still be won in court. Indeed, the issue of how to decide the question of whether to dehydrate or not dehydrate a conscious person when family members disagree has become one of the most intensely contested areas nationally in the field of biomedical ethics.

So far, two state supreme courts have weighed in on the topic, both providing strong protections of the lives of conscious, cognitively disabled people. *In re Edna M.F.*, a case out of Wisconsin, provides the strongest protection for defenseless cognitively disabled people. Edna's sister and legally appointed guardian petitioned the supervising court for permission to withdraw Edna's medically supplied food and fluids based on the contention that Edna would not want to live in such a dependent condition. *Unlike* Robert Wendland, Edna was terminally ill with Alzheimer's disease. *Like* Robert, she was profoundly cognitively disabled but not unconscious.

In rejecting the guardian's request, the Wisconsin Supreme Court established what it called a "bright-line rule," limiting the right of Wisconsin guardians to withhold food and fluids to people who are diagnosed with permanent unconsciousness. The principal reason cited by the court for refusing to extend similar power to guardians of conscious, incapacitated patients was the worry that conscious people undergoing dehydration would "likely feel the pain and discomfort of starving to death." But the court also worried that permitting Edna's dehydration would lead down a slippery slope to active euthanasia. (Edna was eventually dehydrated after she slipped into permanent unconsciousness.)

In Michigan, a case remarkably similar to the Wendland case also culminated with strong court protections for the disabled patient. Michael Martin is a disabled middle-aged man who became brain-damaged in an auto accident. Like Rose Wendland, Michael's wife, Mary, decided to dehydrate her husband: The decision was based, she said, on her belief that he would prefer to be dead than profoundly disabled. (It is worth noting, however, that trial testimony proved that Mary would have benefited financially from Michael's death and that she had moved on with her life romantically.) Like Robert Wendland, Michael Martin had relatively high levels of functioning. He enjoyed watching television and listening to country-and-western music, and was also able to nod his head yes and no and respond to simple requests. In April 1992, he learned how to use a communication augmentation system in which he pointed to letters to express himself. Through the system, he was able to communicate "My name is Mike."

When Michael's mother and sister were told of Mary's plans, they sued to prevent his dehydration. Despite Michael's relatively high level of functioning (disputed by Mary) the Martin trial court and the court of appeals ruled that the removal of his feeding tube should proceed. But the Michigan Supreme Court saved the day, ruling 6-1 that a conscious cognitively disabled person, unlike an unconscious patient, can be dehydrated only if it is demon-

strated by clear and convincing evidence—the most stringent evidentiary standard in civil court—that the patient would not want to live with his disability and that he would want to die in the manner caused by removing food and fluids. Unlike the Court of Appeals in the Wendland case, the Michigan Supreme Court ruled wisely, "If we are to err . . . we must err in preserving life."

Cut to California: As the Martin case was ending, the Robert Wendland saga was beginning. Once again a conscious human being was threatened with death by intentional dehydration. Once again, it was a wife versus her husband's mother and sister. Once again a court was asked to decide the criteria by which contested decisions to remove tube-supplied food and water should be made.

For those who believe in the sanctity and moral equality of Robert Wendland's life, the trial went very well. Following the clear and convincing evidence standard set forth in *Martin*, California Superior Court Judge Bob McNatt ruled that, while he found Rose's motives beyond reproach:

> In our society, the rules under which Rose must make surrogate decisions are the same ones that someone less compassionate, less ethical would also operate . . . . To allow termination of Robert's life over the objections of other family members and on the legal basis of the evidence presented would allow the opening of a door that other families with less noble motives might follow through . . . . To allow it would be to start down a treacherous road.

Rose Wendland and the public defender appointed to represent Robert, who also supported the dehydration, appealed. The Appellate Court reversed Judge McNatt, making the shocking ruling that "there should be no presumption in favor of continued existence" in California law. The appeals court ordered the trial to recommence with the life-or-death decision to be made upon a determination (as provided in a California statute) of whether Rose made her decision in "good faith" based on "medical advice." In other words, what is factually best for Robert is not determinative. Nor is the life-or-death decision to be based necessarily on what he would have wanted. Rather, the *subjective motive* of Rose is what counts in determining whether Robert lives as a disabled man or dies by intentional dehydration.

Florence Wendland's attorney, Janie Siess, quickly petitioned the California Supreme Court to review the appellate decision. In a clear indication of the case's import, the high court agreed to hear the case. Oral arguments are likely to be heard by the Court at the end of this year. Thus, more than five years after Robert awakened and relearned how to use his body in limited ways, the ultimate issue of whether he will be allowed to live out his life or will be dehydrated to death remains up in the air. Indeed, the United States

Supreme Court might ultimately determine Robert Wendland's fate.

The importance of the Wendland case

The law not only reflects societal values, it molds them. If our largest state, California, permits courts to abdicate their protective responsibilities toward the weakest and most vulnerable people among us by permitting medical decision-makers to order the dehydration deaths of cognitively disabled people so long as they act "in good faith," it sends the message that some lives are less worthy than other lives of being lived. It also creates the paradigm that privacy in end-of-life medical decision-making is somehow more important than life itself. If you think that is harsh, consider this: In California, if a medical decision-maker wants a cognitively disabled person sterilized, he or she must prove "beyond a reasonable doubt" that the operation is in the patient's best interests. Yet, if the Court of Appeals' thinking in the Wendland case prevails, the same cognitively-disabled person could be dehydrated to death regardless of the patient's actual best interests, so long as the decision-maker's heart was in the right place.

The viability of bioethical theories of personhood, a major subtext of the Wendland case, heightens the case's import. The arguments against Robert's continued existence relied heavily on his systemic dehumanization, in shockingly demeaning terms, by Rose's retained "expert" bioethics witnesses, who testified at the trial that Robert's substantial accomplishments (when compared to his previous comatose state) were akin to those of a "trained animal." Rather than being put off by these arguments as many observers were, the Court of Appeals *adopted them* as its own. The Court ruled:

> Robert's activity [is a]... "very low-level cognitive response"—like a trained response where an animal or child is trained on a primitive level to perform an action in response to a direct specific stimulus. It gives the appearance that the actor grasps the significance of what he is doing, but he does not understand it at all. He has been trained to do it through visual cuing or other maneuvers. *Robert is unable to think in the manner we conceive humans do*, and his responses are simply a matter of rote response to an outside stimulus, or rote execution of exceedingly simple tasks. [Emphasis added.]

The underlying message of the Court of Appeals' decision is not only that Robert is less human than the rest of us but also that his very existence is *in and of itself* demeaning. Thus, his life is almost beside the point. What matters to the court is the autonomy and privacy of the decision-maker. Moreover, following the reasoning of the Court of Appeals it is easy to conclude that Robert's present moral worth is lower than that of a dog, cat, horse, or pig. After all, if one of these were intentionally dehydrated to death, the

perpetrator would go to jail for cruelty to animals.

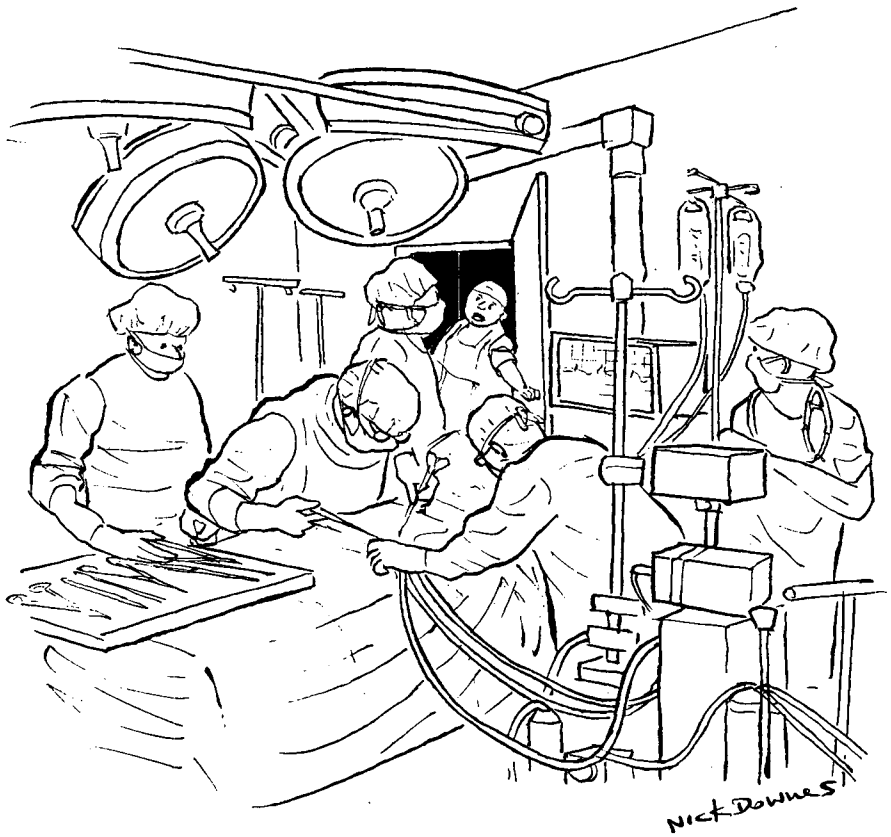
This leads us to another crucial point: The planned dehydration of Robert Wendland is ultimately not about what is best for him but rather *what is deemed to be best for his family and society.* This ugly truth is clear in the testimony of Dr. Ronald Cranford, a neurologist who came to national attention when he testified that Nancy Cruzan should be dehydrated (Cranford has often testified in favor of dehydrating other cognitively disabled people, including conscious patients such as Michael Martin):

> MS. SIESS: Why in your opinion as a clinical ethicist should . . . the error not be on the side of caution . . . and just let Robert live?
>
> (Objection and the Court's overrule omitted)
>
> THE WITNESS: The harm to continuing treatment . . . is, first of all, there wouldn't be a lot of harm to per se as he is now because he has a minimal level of cognition. It's hard to talk about harm although he has some suffering.
>
> It's harmful *to the family* because . . . they know his wishes are not being observed. They know he is in limbo or living death if you want to call it that. That's not what *they* want for Robert.
>
> I think it's very harmful *for a family* to again feel like they're prisoners of medical technology about his treatment. So—you can go on and on about the psychological harm *to the family. I think the family should be able to go through the grieving process. Four years is enough.*
>
> And so I think for people to start functioning again—because it is *really harmful to families* when you get into a situation like this—that *the family should be allowed to live their lives.*
>
> They can still love Robert and remember Robert, *but Robert should be allowed to die so the family can grieve* and go through the normal grieving and knowing that Robert's wishes were respected. . . .
>
> I think it is counterproductive to what medicine should be doing in an era *where we have to look at resources.* Not just money and everything, but to give futile treatment like we do in the United States in situations like this which doesn't benefit the patient and doesn't benefit the family is one major problem for health care costs. So, *I think it is harmful to society to do it.*
>
> I think there's a lot of harm that's done by erring on the side of caution. I think it's ridiculous to err on the side of caution when there's [no] doubt in my mind and any reputable person will say he's never going to recover. He's beyond that point. (Emphases added.)

Much of Dr. Cranford's testimony is colored by his obvious bias against providing care for conscious, cognitively disabled people like Robert Wendland. Yet he would undoubtedly insist that he developed his opinion that Robert should die—in large part, to benefit Rose and society—in good

faith. And that is telling: such biases and prejudices are widely shared and run in swift unconscious currents like underground streams. Should they receive the imprimatur of the law, society could readily enter a season of medical cleansing against our most dependent and vulnerable citizens, not because such acts would benefit them but because it would allegedly be best for the rest of us.

The California Supreme Court's decision in the Wendland case is a matter of life and death—not just for Robert but also for the tens of thousands of people who are or will become cognitively disabled and require others to make their medical decisions for them. The justices can either choose the path that protects the lives, welfare, and autonomy of cognitively-disabled people as moral equals as the *Martin* Court did, or they can cast the vital check-and-balance oversight protection of the courts aside by ruling that "good faith" is good enough when dehydrating cognitively disabled people. Whatever the Court decides, it will set an important precedent. California is the nation's trendsetter. If the Golden State jumps into the abyss, the rest of the nation is likely to follow.



"SNACK TRUCK'S OUT FRONT!"

What's Wrong With the Science Establishment?

Mary Meehan

Scientists, it seems, should be the last people to need reminders about the importance of facts. A good scientist cannot have too many facts, because they are grist for the scientific mill as it grinds out explanations and theories about the world around us.

Why, then, do so many scientists ignore certain facts of life as they line up to support abortion and to engage in destructive fetal and embryo research? Why do they obscure or deny the fact that human life begins at fertilization? Why are so many involved in population control? Why do some have a deep prejudice against people with disabilities and people of color?

Part of the answer lies in personal experience and ideology, and part in the usual human problems of greed for glory and money. The American Establishment—with its foundations and universities, its research grants and prestigious awards—opted for population control and abortion decades ago. Scientists do know on which side their bread is buttered. They also know that there will be much honor and glory for the scientist who conquers cancer or finds a cure for Parkinson's disease, and some are willing to cut ethical corners to find such cures. Researchers also want to help suffering humanity, of course, but it is not always easy to sort out motives. Is it 80 percent for suffering humanity, and only 20 percent for glory? Or perhaps vice-versa? Headlines about ethical problems in medical research make one suspect that too often it is vice-versa.[1]

Rebecca Messall, writing recently in these pages on "The Evolution of Genocide" (Winter, 2000), dealt with another major factor affecting scientists: the deep-rooted ideology of eugenics, the effort to breed a "better" human race. The English inventor of modern eugenics, Sir Francis Galton, had prestige among scientists for his contributions in statistics, weather-mapping and fingerprinting. Unfortunately, he was able to transfer that prestige to eugenics, which is not actually a science but rather a hard-line political ideology. Also unfortunately, as Messall noted, his cousin Charles Darwin was sympathetic to the general viewpoint of eugenics. While Darwin doubted the possibility of implementing it in the low-tech nineteenth century, he left behind some dreadful words that have influenced generations of scientists. He favored the abolition of slavery, but endorsed the idea that Negroes are inferior to Caucasians. He also accepted his cousin's habit of

Mary Meehan, a freelance writer living in Maryland, is a long-time contributor to the *Review*.

classifying people generally, regardless of race, as "inferior" or "better." He quoted approvingly a nasty statement about the "careless, squalid, unaspiring Irishman." He remarked that "excepting in the case of man himself, hardly any one is so ignorant as to allow his worst animals to breed."[2] Darwin's intellectual bigotry had terrible effects in the real world. When powered by the activist engine of eugenics, it encouraged practices that might have appalled Darwin himself; for, like some other intellectuals, he was better and kinder as a person than his ideas suggested.

Scientists in the United States, supported by wealthy families who adopted eugenics as a hobby, helped build the activist engine of eugenics. They were not on a crackpot fringe of science, but in its mainstream and often in its leadership. They had great respectability, as well as access to large fortunes, and they succeeded in making eugenics a fad of the early twentieth century. Professors taught it in many colleges and universities, and it was especially strong in Ivy League institutions that trained the "power elite" who largely ran the country from 1930 onward. Besides its racial and class bias, eugenics involved a deep and relentless prejudice against people with mental and physical disabilities. Its bias against the disabled was—and is—even deeper than its racial bias.

In the 1970s, eugenicists learned to avoid using the "eugenics" label and to soften their language generally. But the basic ideas of classifying people as superior and inferior—and of phasing out the "inferior" to the extent possible—remained a part of elite culture. While the *label* of eugenics was in hiding, the basic *ideas* of eugenics marched on. Many people were eugenicists without realizing it, and many still are. If they were to realize this, they might be like the Molière character who said, "Good heavens! For more than forty years I have been speaking prose without knowing it."[3]

Many scientists belonged to U.S. eugenics groups established in the early twentieth century: the American Eugenics Society, the Eugenics Research Association, the Galton Society. Indeed, many prominent scientists were leaders or advisers of eugenics groups at the same time that they were leaders of two giants of the science establishment—the American Association for the Advancement of Science and the National Academy of Sciences. Their influence has been deep and lasting.

The American Eugenics Society outlasted the other eugenics groups and, in late 1972, decided to change its name to Society for the Study of Social Biology (SSSB).* This group still exists; it is an affiliate of one of the key science groups; and many of its members still pursue traditional eugenics areas such as population control and genetics. Yet the Society's current president recently claimed that "the whole concept of eugenics is as foreign and

distasteful to us as it is to anyone else."[4] He and other Society leaders declare that the group now has nothing to do with eugenics. To call such statements puzzling would be a vast understatement.

A Key Pillar of the Science Establishment

The American Association for the Advancement of Science ("the Association" or AAAS) is the prestigious group that in 1975 accepted the Society for the Study of Social Biology as an affiliate. The Association, called "Triple-A-S" by insiders, is a huge umbrella group of scientific and engineering societies and individuals. Its latest annual meeting, held in Washington, D.C., last February, drew several thousand people to hear lectures and symposia on everything from "The Drosophila Genome" to "The Science of Baseball." Career and money interests were obvious in workshops such as "Research Grants: Trolling for Dollars." Public-policy concerns appeared in sessions on population, stem-cell research, and other issues.

Established in the 1840s, when science in the United States was a tiny enterprise, the Association now has a staff of 300, includes nearly 300 scientific and engineering societies as affiliates, and claims about 140,000 individual members. One need not be a laboratory scientist, or an engineer, in order to join; the group also accepts "science educators, policymakers, and interested citizens." Perhaps more "interested citizens" should join and keep an eye on what this powerful group does. It is deeply involved in science education, as Rebecca Messall noted, and it also has substantial influence on Congress. Its large headquarters is conveniently based in Washington, D.C. Besides its lobbying operation, AAAS has eight fellowship programs that place scientists and engineers on congressional staffs and in governmental agencies such as the State Department.[5]

Presidents of the Association serve only a one-year term and then chair the group's board in the following year. In the twentieth century, at least fourteen AAAS presidents had eugenics links at some point in their careers. That is, they were members, advisers, board members, and/or officers of a eugenics group; or they attended a eugenics congress; or both. They included leaders in their professional fields, such as William H. Welch in medicine, J. McKeen Cattell and Edward L. Thorndike in psychology, Laurence H. Snyder and H. Bentley Glass in genetics.[6] The list of Association presidents with eugenics links may well be incomplete, since the American Eugenics Society/Society for the Study of Social Biology has not published a membership list since 1956. The latest unpublished list I have found in an archive is from 1974-75.

Eugenicists have also served on the AAAS board of directors and various

panels and committees. Many have been active in Section K—which deals with the social, economic and political sciences and has often placed heavy emphasis on population control. Bentley Glass and several other eugenicists served on the editorial board of the AAAS flagship publication, *Science*.[7] For many years, that publication showed an obsessive interest in population control. In a 1967 *Science* article, eugenicist Kingsley Davis:

- complained that population controllers were opposing abortion, which he called "one of the surest means of controlling reproduction, and one that has been proved capable of reducing birth rates rapidly";
- said that "sterilization and unnatural forms of sexual intercourse usually meet with similar silent treatment or disapproval, although nobody doubts the effectiveness of these measures in avoiding conception";
- suggested that "women could be required to work outside the home, or compelled by circumstances to do so," so that they would have fewer children;
- remarked that governments could use "a catalogue of horrors" to reduce birth rates ("squeeze consumers through taxation and inflation; make housing very scarce by limiting construction . . . encourage migration to the city by paying low wages in the country and providing few rural jobs . . .");
- then slyly recommended a velvet glove for the iron hand, that is, developing "attractive substitutes for family interests, so as to avoid having to turn to hardship as a corrective."[8]

The Davis article had significant influence on population controllers. It helps explain much that has happened in both the United States and poor countries in the past thirty-three years. Abortion and sterilization have become key methods of population control. The "unnatural forms of sexual intercourse," besides avoiding conception, help spread AIDS and other sexually-transmitted diseases, which depress birth rates by causing the sterility or early death of potential parents. And the population controllers use the epidemics of such diseases to promote massive use of condoms, which prevent many births but by no means all AIDS transmission. (They have a knack for using each of their disasters to produce a new one.) Harsh economic policies, such as the "structural adjustment" promoted by the World Bank, restrain population growth in poor countries.The positive goal of opening more careers to women has been corrupted by pressures to keep them in the workforce full-time at all costs, regardless of effects on themselves and their children. "Attractive substitutes for family interests" have resulted in the prolonging of adolescence to middle age or later, the obsessive pursuit of "fun" by adults, and the institutionalization of couples living together without marriage—and without children.

Kingsley Davis and friends had much help in their war against children. In 1969, for example, AAAS set up a Commission on Population and Reproduction Control under the chairmanship of Garrett Hardin, a eugenicist and hardline population controller. In an Association symposium that year, Hardin and others were quite frank about the way they wanted to manipulate other people's fertility. Ernst Mayr, a noted evolutionary biologist who would later serve on the SSSB board, declared: "Poverty, environmental deterioration, and anti-social behavior in urban slums are, to a very large extent, ultimately caused by excessive human reproduction." He believed that "voluntary birth control is not enough," but that governmental coercion probably would not work, either. He suggested building incentives for small families—and disincentives for large ones—into the tax and welfare systems. He also used some chilling language about human beings as "mistakes" requiring the "correction" of abortion:

> Many of the matters that we are discussing, many of the incentives in tax and everything else, will not do us any good unless the abortion laws are changed. In the 1930's I lived on a street in the suburbs of New York where every family except one had two children. With all the very insufficient contraceptives, just by social pressure, they succeeded in having small families. The one family that had four children always said that they had two children and two "mistakes." So I think a correction of mistakes is a very important thing.

Alan Guttmacher, the physician who led Planned Parenthood and had been vice president of the American Eugenics Society, certainly agreed. Advocating "the wisdom of carrying out safe non-discriminatory abortion," he said it would lead to "a rather dramatic drop in birth rate," and declared that: "We must become pragmatists. In order to meet the population problem, we have to overcome some of our squeamish ethical concepts." He particularly wanted to make legal abortion "available to the people who need it most, because today safe abortion can be afforded only by the affluent." This, of course, was eugenics shorthand for aborting the poor and minorities. While he said this, liberal and feminist groups were campaigning for legal and publicly-funded abortion for poor women. Their rationale was different, but they certainly furthered the eugenicists' goals. Perhaps most liberals and feminists did not notice the strange company they were keeping? (Certainly, Guttmacher and his colleagues did not proclaim, "We're from the American Eugenics Society, and we're here to help you.") But by campaigning for abortion, the left betrayed the poor and minorities whom in many other ways it championed.

Garrett Hardin suggested six stages for "tackling the population problem." He wanted to start with legal abortion, which he said would "lower the

birth rate considerably"; then use education and persuasion to lower it further; then progress to "rather small social engineering adventures"; and finally reach "some sort of coercion." He was quite clear about his philosophy: "The act of having a child is an act of warfare against society if it is one child too many . . . we will finally come to the realization that, in a deep sense, children belong to the community rather than the parents."

Guttmacher liked the idea of coercion, but felt that Planned Parenthood should not lead that particular parade:

> Other groups can bring coercion about much more wisely and better than we can. I applaud the things Dr. Hardin is doing in the Echo Groups and the other groups that are taking a much tougher line. We've had significant success. We have been able, in one of the groups, to persuade our government to much more activity. We are courting the goodwill of the militants from the minority groups. If we were to take a very tough line and lead the country—two children only or 2.3 children only—we would jeopardize the position we now have. Strategically and diplomatically it would be unwise for our group to do it.[9]

Bentley Glass, completing his term as AAAS president in late 1970, was worried about population quality as well as quantity. He was blunt in saying that the "once sacred rights of man must alter in many ways." The right to have as many children as one wants should, he felt, be among the first to go. If "my own additional child deprives someone else of the privilege of parenthood," Glass said, "I must voluntarily refrain, or be compelled to do so." He foresaw a world "where each pair must be limited, on the average, to two offspring" and where no parents would have "a right to burden society with a malformed or a mentally incompetent child." Glass favored prenatal testing and abortion of the handicapped unborn. He believed that laboratory (*in vitro*) fertilization of humans could and would be put to eugenic use. He remarked that

> if every couple were permitted to have only two children, or to exceed that number only upon special evidence that the first two are physically and mentally sound, a mild eugenic practice would be introduced that is probably all mankind is prepared to accept at this time.[10]

At a 1970 Association genetics symposium, Prof. James F. Crow asked, "How far should we defend the right of a parent to produce a child that is painfully diseased, condemned to an early death, or mentally retarded?" He said the U.S. eugenics movement "was mixed, often confused, and sometimes simply wrong—but a large element of idealism persisted." While he claimed not to be an advocate of eugenics, he said he wanted to see the issue discussed. "If eugenics is a dirty word," Crow added, "we can find something else that means the same thing."[11]

Perhaps the word "choices"? If we fast-forward to 1999, we find that an AAAS publication called *Your Genes, Your Choices* presents a consumer's approach to prenatal testing, abortion, artificial insemination, laboratory fertilization, and so on. Reproductive technology, the book notes, "has spared thousands of couples the tragedy of giving birth to a baby with a terrible genetic disorder." Perhaps the Association thinks we should mourn a birth and celebrate a funeral—if the person is disabled?

Using a hypothetical couple named Carlos and Mollie, the book tells us that Carlos is a carrier for cystic fibrosis and wants Mollie to be tested to see if she is also a carrier, but that Mollie does not want to be tested. It outlines a dizzying series of choices the couple could make if she refuses to be tested, or consents to testing and is found to be a carrier:

- splitting up, with each finding another mate
- deciding to have no children, or to adopt children
- prenatal testing (the book describes several different kinds)
- abortion if the child is found to have cystic fibrosis
- continuing the pregnancy (the book concedes that prenatal testing "can't always tell how severe the disease will be" and that "medical research may well lead to better treatments")
- use of artificial insemination with "donor" sperm
- use of laboratory fertilization with "donor" eggs.

Actually, of course, the "donor" of sperm or eggs is often a *seller* of same. The word "donor" is used to make everyone feel better about the commercial side of high-tech reproduction. The AAAS book does admit, though, that such reproduction "may not be a very romantic way to have children." It also acknowledges that Mollie and Carlos could go through high-tech gymnastics and "still end up with a sick baby." After all, it remarks, cystic fibrosis is just "one of many possible genetic disorders. It would be far too costly and time consuming to test for all of them."[12]

Another recent Association publication supports public funding for both embryonic and fetal stem-cell research. It recognizes that "segments of American society" disagree with this, but then lectures the reader that "it is important to recall that public policy in a pluralistic democracy cannot hope to incorporate all of the viewpoints and ethical priorities of the many ethical and religious perspectives that compose the body politic."[13] The reader who is still awake by the end of that sentence may realize that it means: "We're talking *power*, buddy, and we have it."

Indeed, they do. Members of the scientific/medical community have already won federal funding of some research using aborted fetal tissue. Trying to extend that victory, they use promises of federal "safeguards" and

dangle hopes for the cure of terrible diseases before the public and members of Congress. This strategy worked for them before; why not again? Those who wrote the AAAS publication try to reduce opposition by separating—in a technical, financial way—embryonic stem-cell research from the destruction of embryos that provides the cells for that research. They also suggest that careful records be kept, so that patients who have conscience problems about using embryonic stem cells may avoid doing so.[14] In other words, they would compel patients, as taxpayers, to support unethical research—but then magnanimously allow those patients to decline the supposed benefits of such research! Is this sensitive and kind? Or cruel and perhaps a tad sadistic?

In the area of population control, the Association no longer publishes the candid, hard-line sort of material that it did in the early 1970s. Like many other groups, it has moderated its language. But it still has a population program, now called Ecology and Human Needs. Last January the Association Web site noted that the program "collaborates closely" with the International Planned Parenthood Federation (IPPF). The Web site did not say—indeed, the Association may not realize—that IPPF was started by eugenicists and that it used to be housed in the headquarters of England's Eugenics Society.[15]

There has been, though, some anti-eugenics influence within the Association. Starting in 1969, political radicals ran a series of protests at its annual meetings. A group called Science for the People was especially active, criticizing AAAS for condoning the use of science and technology in the Vietnam War, but also criticizing some aspects of population control. Science for the People, which was decidedly anti-racist, eventually changed its tactics from abrasive confrontation to negotiating for literature tables and caucus space at AAAS meetings. By the time of the 1976 annual meeting, the radicals "were arrangers and participants in several sessions on the regular program."[16]

The SSSB Connection

While some radicals gradually worked their way into the Association establishment, the old American Eugenics Society—now doing business as the Society for the Study of Social Biology (SSSB)—did the same thing more quickly and with much less fuss.

Frederick Osborn, strategist of the American Eugenics Society for decades, wrote publicly that the 1972 decision to change the Society's name to SSSB reflected a broadened vision of eugenics. Privately, though, he acknowledged that the Society had never completely overcome the association of eugenics with Adolf Hitler and with the racist material produced by some

of its own members in the past. He also noted that after the Society had changed the name of its journal from *Eugenics Quarterly* to *Social Biology* (a change made in 1969), the journal enjoyed an increase both in subscriptions and in articles by able scientists.[17] Osborn had much experience in moderating the old language of eugenics and in working through organizations with bland names to achieve eugenic goals. His friend and English counterpart, C. P. Blacker, had once suggested that England's Eugenics Society consider pursuing "eugenic ends by less obvious means, that is by a policy of crypto-eugenics, which was apparently proving successful with the US Eugenics Society . . ."[18]

Most board members stayed with the American Eugenics Society when it changed its name to SSSB by amending its certificate of incorporation. Osborn remained as treasurer, and *Social Biology* told its readers: "The change of name of the Society does not coincide with any change of its interests or policies."[19]

In January, 1975, the AAAS Council elected six groups, including SSSB, as new Association affiliates. In an interview early this year, current SSSB president S. Jay Olshansky said that no one within the Association has ever objected to SSSB's affiliation with the group, "nor would I expect them to do so." He added that the Association "recognizes our society as a scientific society composed of researchers and investigators." In a formal letter, Dr. Olshansky called eugenics "a discredited science" and added: "In fact, the notion of eugenics was never a legitimate science. The Society for the Study of Social Biology does not support eugenics as a science or as a social policy."

Olshansky, a University of Chicago demographer who specializes in aging issues, said he has been thinking of writing a manuscript about his Society's history and "rather colorful background." He remarked that he "would love nothing more than to expose all the skeletons. Because there's nothing more refreshing than seeing all of these skeletons in the closet . . . and to know how we've changed, how things have changed since then."[20]

If it deals with all the skeletons, this would have to be a very *long* manuscript, perhaps an encyclopedia. And, alas, there is much in the closet that, too recent to have reached the skeleton stage, is decomposing and definitely odoriferous. If Dr. Olshansky writes that manuscript, he will have to deal with the Society's overt racism in its early decades and its many 1930s contacts with German eugenicists who served the Nazi regime. He will face the embarrassment of explaining why Otmar von Verschuer–who received for his research human body parts from Auschwitz scientist Josef Mengele–was accepted as a Society foreign member after World War II. He will have to explain why so many Society members have promoted and administered

population control that targets people of color. (His suggestion that developing countries are targeted simply because that is "where population growth is the most rapid" is unlikely to convince anyone who has really delved into the archival record.) He will have to deal with the many SSSB members who are intrigued by old eugenic questions about race and intelligence. (The Society's journal *Social Biology*, by the way, recently ran an article of worry about "dysgenic fertility" in females.)[21] He will have to explain Kingsley Davis, Alan Guttmacher, and Garrett Hardin.

Dr. Olshansky can make a great contribution to human welfare by writing a complete exposé of his Society—and then persuading his colleagues to vote it out of existence. If they agree with him in repudiating eugenics, what reason is there for the group to continue?

The AAAS also needs a full-scale exposé. Dr. James Miller, an Association staff member, said in an interview that he had not observed "what I would call any strong influence of the eugenics movement within AAAS. . . . In fact, if anything, what I *have* seen are those who raise questions about the potential eugenic implications of certain kinds of scientific and technological development."[22] Certainly, there are people who raise such questions within the Association. But the history of eugenics in recent decades is one of much verbal worry and hand-wringing, sometimes by eugenicists themselves, about every new eugenic practice—artificial insemination, *in vitro* fertilization, eugenic abortion, Depo Provera and Norplant for population control, "surrogate" motherhood—followed by gradual acceptance of the practice and sometimes by public funding of it. Hand-wringing and crocodile tears are part of the eugenics game. Someone like Dr. Miller can be quite sincerely worried about abuses of science and technology and never realize that others feign such concern because they want the public to believe that scientists observe ethical boundaries. But by the time the public finds itself at the bottom of the slippery slope, it may be unable to climb back up.

Ironies abound, though. Not long after accepting SSSB as an affiliate, the Association had a big fight over an SSSB member. In 1977-78 there were protests over the AAAS Council's approval of psychologist Arthur Jensen as an AAAS fellow. (Only about 14 percent of the group's members then held that honorific title.) It is not clear whether the protesters knew that Jensen was an SSSB member or understood what that implied. They protested because Jensen was a prominent advocate of the theory that blacks, on average, are genetically inferior to whites in intelligence. While they failed to prevent his election as a fellow, their protest resulted in a statement that the Association "wants it understood that we have never supported and do not support

doctrines based on the supposed superiority or inferiority of races, or sexes, or national groups . . ."[23]

This kind of protest, added to the Science for the People ones, probably helped moderate Association-sponsored language in the areas of population control and genetics. But it seemed to have no effect on the abortion issue, probably because of the political left's blinders on links between eugenics and abortion. In 1982, abortion foes were trying to put through Congress a bill declaring that human life begins at conception. In response, the AAAS Council passed a resolution that confused the scientific issue with the philosophical/legal issue of personhood. It expressed "great concern that the Congress should attempt to use science to support a position which is not in the competency of science to affirm or deny."[24]

Science does not have credentials in philosophy and law, but it certainly has competence in the question of when each human life begins. Honest embryologists say that, under normal circumstances, a human being begins at fertilization. In the case of twinning, a second human being begins a short time later when fission (twinning) is completed. But it is in the interest of scientists who support abortion—or who want to use human embryos for their research—to claim that the question cannot be answered. The late Sen. John East (R-N.C.), chairing a 1981 hearing on a human-life bill, listened to the obfuscations of various scientists and doctors, and then responded this way:

> It strikes me that there is a tendency here simply to deny the obvious. It is like saying the Earth is not round, it is flat, because one is uncomfortable with the result that comes from acknowledging it is round.[25]

The recent AAAS publications on stem-cell research and *Your Genes, Your Choices* suggest little change in Association policy. There has been improvement, though, in the AAAS journal *Science*. A scan of *Science* issues from July 1999 through June 2000 showed little coverage of population (although an article suggesting that *50 percent* of African land should be set aside to protect "biodiversity" was frightening). There was some bias in favor of embryonic stem-cell research, but increasing acknowledgement of ethical problems with such research. There were good articles on other aspects of research ethics—and even a guest editorial suggesting "a sort of Hippocratic oath" for scientists.[26]

The immediate past president of AAAS, paleontologist Stephen Jay Gould, is now serving his year as chairman of the group's board. Gould has written excellent criticism of eugenics as applied to race, class, and ethnic groups, yet he seems to have the typical blinders of the left on disability and abortion. In an essay criticizing the old, race-based term of "Mongolian idiocy"

for Down's syndrome, Gould remarked that we "know very little about the causes" of this condition, but added that "at least it can be identified *in utero* by counting the chromosomes of fetal cells, thus providing an option for early abortion." This suggests that it is wrong to call unborn Down's children "Mongolian idiots," but right to abort them because of their disability. Let us be very careful about our language as we kill them.

Gould, though, has shown the ability to change his mind when he learns more about an issue. He once wrote that Clarence Darrow had exposed William Jennings Bryan as "a pompous fool" during the Scopes Trial on the teaching of evolution. More recently, while still disagreeing with Bryan on key points, he acknowledged that the old populist had good reason to worry about the use of "natural selection" to justify militarism and social repression.[27] If Gould does some in-depth research on eugenics with reference to population control and abortion, he might become a full-scale critic.

Certainly, Gould and other Association leaders should, as Rebecca Messall says, fund "objective historians so that honest, arms-length research and writing (not an inside white-wash) can be conducted on the history of the AAAS membership during the twentieth century's wars on 'population.'"[28] Historians and others, though, should not wait for the AAAS establishment to move. They should go right ahead with their own research and exposés. Association members, too, should demand complete accounts of the group's links with eugenics—and a fresh look at policies based on those links.

Another Pillar of the Science Establishment

The National Academy of Sciences has historic eugenics links so similar to those of AAAS that one might invoke Yogi Berra ("It's déjà vu all over again!") and leave it at that.[29]

But the National Academy needs special attention because it has major impact on public policy. Chartered by Congress and headquartered in Washington, D.C., the Academy is official adviser to the federal government on science and technology. Although technically a private group, it does a huge amount of contract work for government agencies.

The "alphabet soup" becomes a bit complicated here, because the Academy is linked with three other groups: the National Academy of Engineering, the National Research Council (operating agency of the science and engineering academies), and the Institute of Medicine. The four groups together are called the "National Academies" and have about 1,100 staff members. Their annual budget is over $190 million; more than eighty percent of that comes from the federal government.[30] I will deal here mainly with the National Academy of Sciences ("the Academy" or NAS), with some

reference to the Institute of Medicine.[31]

The Academy's twentieth-century leaders included many who were members, officers, board members and/or advisers of eugenics groups, for example: William Wallace Campbell, James McKeen Cattell, Edwin G. Conklin, Kingsley Davis, Herbert S. Jennings, Frank R. Lillie, John C. Merriam, Henry Fairfield Osborn, Raymond Pearl, Harry L. Shapiro, William H. Welch.[32] Some were also AAAS leaders, for there was much leadership overlap between the two top science groups.

Both, of course, had close contacts with "power elite" individuals and foundations. When John D. Rockefeller III wanted to start a major population-control effort, a Rockefeller associate suggested starting with that favorite establishment device, a conference. "It could be put together under the aegis of the National Academy of Sciences," he told Rockefeller. "Det Bronk [Dr. Detlev Bronk] is president, and I'm sure he'll be happy to sponsor it if we give them money to do it." Rockefeller liked the idea and, as usual, got what he wanted. Many scientists—including a bumper crop of eugenicists—attended the 1952 conference, which led to establishment of the Population Council. Frederick Osborn, the old eugenics war-horse, was the Council's first administrator; and other eugenicists have served as staff and board members. No one should be surprised that the Council has been a major instrument for controlling population in the Third World and among people of color within the United States. It has been the key U.S. backer of intrauterine devices, Norplant, and the French abortion pill, RU-486.[33]

Finding eugenicists on National Academy of Sciences committees and panels is like shooting fish in a barrel. In 1965, for example, the Academy and its operating agency published a report on U.S. population. It recommended more money for population research, more propaganda (although not calling it that) for birth control, and birth-control instruction by welfare agencies. The committee which produced the report included several later SSSB associates and received financial support from the Population Council, whose vice president also served on the committee.[34] Phrases such as "dealing from a stacked deck" and "you can't fight city hall" come to mind here.

Academy population reports seldom had input from critics of population control, and the occasional critic was overwhelmed by enthusiastic advocates. A 1971 Academy report, supported by the U.S. Agency for International Development (a major and consistently hawkish leader of population control), proposed specific targets for birthrate reduction around the world and the legalization of both sterilization and abortion. It even suggested that "various types of compulsory or voluntary national service" could be "directed toward reducing fertility." The committee that produced the report

included two or three eugenicists and received research papers from five more. A research paper by ethicist Arthur J. Dyck raised good questions about some aspects of population control, yet accepted some of its key instruments, including national fertility goals and the idea that "compulsory measures to curb birth rates might be justified as a last resort."[35] Such concessions set up a Katie-bar-the-door situation. Katie *cannot* bar the door because the experts are in control; *they* calculate the national fertility goals and decide when coercion is needed.

Anyone who thinks that these committees were off on their own, outside of Academy control, should review the work of Philip Handler, National Academy of Sciences president from 1969-1981. He edited a 1970 book that

- asked whether society is "justified in keeping the aged alive when those mental functions which distinguish human beings from vegetating bodies have ceased"
- declared that the survival of a seriously handicapped baby "is an emotional and economic burden to its parents and a drain on the society"
- proposed prenatal testing and sex-selection abortion as a method of birth control, so that a family with one boy could "abort the next fetus if it is not a girl" when they wanted a girl.

The chapter containing these appalling statements was drafted by an Academy panel chaired by one eugenicist, Dr. Curt Stern, and including at least two others. But two other committees and Dr. Handler himself edited and revised the chapter. They knew *exactly* what they were doing.[36]

In 1971 Handler complained that medical advances threatened the human gene pool by keeping alive people who could pass genetic diseases on to the next generation. According to the Baltimore *Sun*, he suggested that

> the time may come when there will have to be a national policy to eliminate all genetically unfit babies before they are born....
>
> "The environment is now shaped by ourselves, [and] the process of natural selection which used to weed out the unfit, if you will, has been removed," he remarked.
>
> In this new environment and with a potential genetic threat, it may be necessary for doctors to re-evaluate their Hippocratic oath in terms of the species and not in terms of individuals, he said.[37]

In 1999 the National Academies told Congress that world population may increase to a "staggering" nine billion within the next fifty years. (They neglected to say that experts foresee a significant population decline after the peak is reached.) They added that reducing the projected nine billion by ten percent "is a desirable and attainable goal," thus casually suggesting preventing the births of nearly *one billion persons*.[38] The world's miserable experience with population-growth reduction targets suggests that, if taken

seriously, this one will result in much manipulation, pressure and outright coercion.

But that's not all. The National Academy of Sciences and its operating agency have a Committee on Population, currently headed by Prof. Jane Menken, a sociology professor who works on a population program at the University of Colorado at Boulder. She is also a longtime SSSB member and has served on the SSSB board. Dr. Menken declared, however, that "I have nothing to do with eugenics; I repudiate the entire orientation of the eugenics movement; and belong to no society or organization that supports eugenics." She said that "I had no idea" that SSSB was the old eugenics group when she joined it. While she later learned about the connection, she said, she understood that the group had rejected eugenics. But SSSB president Olshansky, interviewed several days later, said that "I don't know" if the group had ever made a statement repudiating eugenics. Dr. Olshansky later issued his own formal statement rejecting eugenics (quoted above) *after* he was contacted by a National Academy of Sciences officer who was worried by questions about SSSB.[39]

At least six SSSB associates are involved in an intriguing project of the Academy's population committee called the Workshop on Collecting Biological Indicators and Genetic Information in Household Surveys. What is *that* all about? Dr. Menken said that, given the interest in the human genome and genetic disease, the National Institutes of Health and other organizations are concerned about collecting such information. There is need, she said, for discussion "about when and where such collection is appropriate."[40]

Citizens already concerned about the way in which the once-simple U.S. Census has become highly intrusive should realize that fertility and health surveys are often worse. Now the experts are talking about using household surveys to collect blood samples, hair follicles, cheek swabs, and tissue from surgery in order to obtain genetic markers. One workshop paper also suggests taking urine specimens, nail clippings, skin scrapings, autopsy specimens, and "cytology specimens (e.g., pap smears)" and using "stored ova or semen that could be retrieved and analyzed."[41] The experts have already experimented with some of this in Third World countries and in Denmark. Who knows what will happen if governments institutionalize such incredible invasions of privacy—and if citizens stand for it?[42]

The Committee on Population has great interest in what it used to call "demographic surveillance." Now it uses a euphemism, "longitudinal data collection," for the same thing. It takes time, though, for everyone to catch up with the word police. A background paper for one committee meeting de-

scribed "a software package that has been used for the rapid development of seven surveillance systems in sub-Saharan Africa and Asia." It said that field stations "are established where individuals in populations can be observed in laboratory fashion . . ."[43] One wants to ask: Like laboratory rats?

A journal article, used as background for another Committee on Population meeting, suggested using people at a South African field site for a laboratory experiment in abortion:

> On 1st February 1997, South Africa signed into law a progressive Termination of Pregnancy Act. Since services are not yet available in Agincourt [a field site for demographic and health surveillance], this creates the unusual opportunity to assess the feasibility of introducing abortion services into conservative rural areas, then evaluating the impact of such services on unwanted births and the incidence of complications from unsafe abortion practices.[44]

This is where decades of eugenics and population control have led us.

The Academy's sister group, the Institute of Medicine, was headed by Dr. David A. Hamburg from 1975 to1980. Dr. Hamburg is a psychiatrist and former foundation executive. He is also a former SSSB board member, but did not respond to requests for an interview. A flock of other SSSB associates have served on the Institute's Council (its basic governing unit) or its panels.[45] The same policy pattern appears in the Institute of Medicine as in the Academy and AAAS: support of population control and prenatal testing.

At least some embarrassing truth occasionally makes its way into Institute publications on such subjects. A workshop report on other groups' work with Norplant, for example, admitted that Indonesian women who sought removal of the birth-control implant "encountered resistance." Indeed, at one point there seemed to be a backlog of 350,000 to 500,000 "implants awaiting removal" there—a problem solved by having nurse/midwives do many removals, "although it was illegal for them to do so at the time." It seems that many people who had been trained to put Norplant rods into women's arms had not been "appropriately trained in removal skills." This amounted to coercive population control. The workshop acknowledged a potential (*potential?*) for abuse and suggested an "informed decision-making" remedy. It also acknowledged Norplant's nasty side-effects for many women—primarily excessive or irregular menstruation, but also "headache, vaginal discharge, weight gain, acne, pelvic pain, and mood alterations." Yet Norplant ranked "very high in terms of cost-effectiveness." The workshop could find "no good scientific reasons" against making it "available to all women for whom its use is not counterindicated in labeling."[46]

Another embarrassing comment appeared in the Institute's official history when it dealt with a report from a genetics committee headed by SSSB board

member Arno G. Motulsky. Dr. Motulsky's committee, dealing with prenatal testing for genetic problems, declared that people who could not afford it should still have "appropriate access to prenatal diagnosis or termination of pregnancy of an affected fetus." Yet it also said that "reproductive genetic services should not be used to pursue eugenic goals . . ." The Institute's historian noted that the committee's distinction "often proved elusive." He added that eliminating "the population of Down's syndrome children was, after all, an eugenic goal."[47]

Dr. E. William Colglazier, executive officer of the National Academy of Sciences, was indignant when first asked about eugenics influence on his organization. Calling the idea "totally outrageous," he asked for claims in writing. After receiving over 100 pages of documentation—none of which he challenged—Dr. Colglazier issued the following statement in a letter:

> Eugenics, defined as the study of hereditary improvement of the human race by controlled selective breeding, is a discredited science. The National Academies, which includes the National Academy of Sciences, the Institute of Medicine, and the National Research Council, have no connection with and do not support eugenics as a science or as a social policy.

In the interview, Colglazier had said he was not familiar with SSSB. After receiving the documentation, he remarked in his letter: "Because a number of distinguished Academy members currently belong to this scientific society, I doubt very much that it promotes or encourages eugenics."[48]

Whoa, Dr. Colglazier, not so fast! The issues involved here are far too serious to be quickly dismissed because one trusts scientific colleagues. Many leaders and members of the National Academies—and of AAAS, for that matter—may have been unaware of the eugenics influence on their organizations. Those who have not understood that modern population control, for example, is an invention of eugenics, would not have known that nearly any population expert they chose for a committee was likely to be either a conscious eugenicist or else strongly influenced by the eugenics ideology. But it is time for them to take a serious look at their own histories. In the case of the National Academy of Sciences, which receives so much federal money and has such great influence on public policy and science education, a congressional investigation may be in order.

What Scientists Should Fear

Scientists should worry about whether eugenics has affected their own work, their integrity, and their tradition of detached inquiry.

Even scientists far removed from biology—physicists and astronomers, for example—should worry because the eugenics connection could under-

mine public support for science in general. Scientists have great prestige and enormous financial support for at least two reasons. First, the public believes that science is fact-based and objective, unsullied by political or ideological concerns. Second, the public believes that science offers great hope of a better life for humanity.

Scientific links with eugenics erode the tradition of objectivity. There is a long and sorry record of sloppy—and sometimes fraudulent—work by eugenicists, including ones who were leading scientists of their time. A few examples: 1) Although Dr. Joseph Goldberger had shown by 1916 that pellagra was caused by poor nutrition, eugenicist C. B. Davenport insisted—against Goldberger's strong evidence—that pellagra was an infectious disease to which some people had a hereditary susceptibility. Davenport's influence on a pellagra-commission report helped suppress the truth about the devastating disease. Many disabilities and deaths among poor people in the South could have been prevented had Davenport accepted Goldberger's evidence.[49] 2) Harry Laughlin, a Davenport associate, and other eugenicists used highly biased material to convince Congress to restrict immigration severely in 1924. That meant that millions of Europeans threatened by the Nazis in the 1930s and 1940s could not take refuge in the United States; many died in the Nazi concentration camps instead.[50] 3) Laughlin, an ardent advocate of coercive sterilization, provided expert testimony in the crucial test case of Carrie Buck, an allegedly retarded Virginia girl whose sterilization was approved by the U.S. Supreme Court in 1927. Laughlin relied heavily on information given to him by the superintendent of the state institution where Buck lived, apparently not even bothering to examine Buck. (Some people who knew her later denied that she was retarded.) If he had examined her, she probably would have told him that the unwed pregnancy for which she had been institutionalized had resulted from rape.[51] 4) A *sympathetic* biographer of Sir Cyril Burt, a British eugenicist and leading psychologist, concluded that Burt had "falsified the early history of factor analysis . . . produced spurious data on MZ [monozygotic or identical] twins . . . fabricated figures on declining levels of scholastic achievement."[52]

No one should be too surprised by such behavior, given the deeply political nature of eugenics. And its promotion of surveillance and manipulation tends to corrupt the social sciences it uses for surveys and propaganda.[53]

Science has done much to make life better and happier for us. It has shown us how to prevent or cure many diseases, to grow food more abundantly, to improve housing and transportation and communications. Yet many advances have side-effects that adversely affect our everyday lives, leading some to

refrain from the worship of science that so often appears in media and stock markets. "Boom boxes" enable people to enjoy music wherever they are; but they often impose on other people a cacophony of violent sound. The convenience of "fast food" produces endless litter on our streets and highways. Cellular telephones lead to omnipresent towers that scar the magnificent American landscape. Past scientific triumphs have produced much of today's air and water pollution.

On a far more serious level, scientific "advances" have produced such horrific weapons as napalm and anti-personnel bombs, which inflict excruciating pain and terrible deaths on soldiers and civilians alike. (This is not an issue for pacifists alone, because just-war theory forbids the use of weapons that are cruel and indiscriminate.) But Louis Fieser, the Harvard professor who led the team that developed napalm, declared: "I have no right to judge the morality of napalm just because I invented it."[54] Many lay people might be shocked to find how many scientists share this attitude; but Fieser was dead wrong. Scientists, like the rest of us, have both a right and an *obligation* to make moral judgments about their work. And they have an obligation to do so *before* unleashing terrible evil, not just in retrospect.

The eugenics connection has led scientists to harm many innocent people, primarily those least able to defend themselves. If scientists keep working the outer edges of human pride and evil, finally provoking a great public backlash, they will have no one to blame but themselves.

Yet they could decide to use their talents only for the good of humanity. Thomas Jefferson said that the "care of human life and happiness, and not their destruction, is the first and only legitimate object of good government."[55] Why not use the same high standard for science?

NOTES

* Here are abbreviations for organizations mentioned in the text or in these notes:

AAAS American Association for the Advancement of Science
AES American Eugenics Society
IOM Institute of Medicine
IPPF International Planned Parenthood Federation
NAE National Academy of Engineering
NAS National Academy of Sciences
NRC National Research Council
SSSB Society for the Study of Social Biology (current name of the group formerly called American Eugenics Society)

1. "Agency Faults a UCLA Study for Suffering of Mental Patients," New York *Times*, March 10, 1994; "Clinton Apologizes for U.S. Radiation Tests, Praises Panel Report," Washington *Post*, Oct. 4, 1995; "CDC Says It Erred in Measles Study," Los Angeles *Times*, June 17, 1996; "In the Name of Healing" and other articles in series, Cleveland *Plain Dealer*, Dec. 15-18, 1996;

"Medical Group Condemns U.S. AIDS Drug Tests in Africa for Using Placebo," Washington *Post*, April 23, 1997; "Ethics of Drilling Holes in Head Doubted," Washington *Times*, March 27, 1998; "Volunteers at Risk in Medical Studies," Washington *Post*, Aug. 1, 1998; "N.Y. Research Centers Faulted in Child Study," ibid., June 12, 1999; "Teen Dies Undergoing Experimental Gene Therapy," ibid., Sept. 29, 1999; "U.S. Halts Cancer Tests in Oklahoma," ibid., July 11, 2000.

2. Charles Darwin, *The Descent of Man and Selection in Relation to Sex* (Princeton, N.J., 1981), vol. 1, 167-180 & 201. I am indebted to Rebecca Messall, "The Evolution of Genocide," *Human Life Review*, vol. 26, no. 1 (Winter, 2000), 48-49, for information on Darwin's views related to eugenics. On his opposition to slavery, see John Bowlby, *Charles Darwin* (New York, 1990), 74-75, 134, 155 & 262*n*.; and Stephen Jay Gould, *Eight Little Piggies* (New York, 1993), 262-274.
3. [Jean Baptiste Poquelin] Molière, *Le Bourgeois Gentilhomme*, act 2, scene 4, as translated in Bartlett's *Familiar Quotations*, 15th ed. (1980).
4. Writer's interview with S. Jay Olshansky, Feb. 7, 2000. (All interviews cited in these notes were by telephone.)
5. American Association for the Advancement of Science (hereafter AAAS), *Science in an Uncertain Millennium: 2000 AAAS Annual Meeting and Science Innovation Exposition* (Washington, 2000), 28, 30 & 17; AAAS, *AAAS Directorate for Science Policy Programs* (Washington, Feb., 2000), inside front cover & 1-7.
6. *AAAS Handbook, 1999-2000*, 135-139; *Report of the Second International Congress of Eugenics* (Baltimore, 1923), 3-20; *List of Members of the American Eugenics Society* (New Haven, Conn., Aug., 1930), in Margaret Sanger Papers, Library of Congress, Washington, D.C., microfilm reel 41; *A Decade of Progress in Eugenics: Scientific Papers of the Third International Congress of Eugenics* (Baltimore, 1934), 511-520; "Members-Eugenics Research Association, June 1, 1938," in Frederick Henry Osborn Papers, folder on "Assoc. for Research in Human Heredity—Membership, 1938-41," American Philosophical Society Library, Philadelphia, Pa.; Barry Alan Mehler, *A History of the American Eugenics Society, 1921-1940* (Ph.D. thesis, University of Illinois at Urbana-Champaign, 1988), 306-449; "Membership List, 1956, American Eugenics Society, Inc.," in *Eugenics Quarterly*, vol. 3, no. 4 (December, 1956), 243-252; Richard H. Osborne, Memo to G. Allen and others, Feb. 3, 1975, with attached mailing list for Summer, 1974, issue of *Social Biology* (journal of the Society for the Study of Social Biology, hereafter SSSB); various issues of *Eugenics Quarterly* and *Social Biology* with lists of officers and board members; Eugenics Watch, "The American Eugenics Society," posted on the Internet (www.africa2000.com).
7. Ibid.; *Science*, 1950-1999; and AAAS Web site (www.aaas.org) on the Internet. The following SSSB associates (members, board members and/or officers) have been active in Section K: Philip M. Hauser, Kingsley Davis, Matilda W. Riley, David L. Sills, Nathan Keyfitz, Kenneth Prewitt, and Michael S. Teitelbaum.
8. Kingsley Davis, "Population Policy: Will Current Programs Succeed?" *Science*, vol. 158 (Nov. 10, 1967), 730-739.
9. Dael Wolfle, "AAAS Council Meeting, 1969," *Science*, vol. 167 (Feb. 20, 1970), 1151; Preston N. Williams, ed., *Ethical Issues in Biology and Medicine: Proceedings of a Symposium on the Identity and Dignity of Man* (Cambridge, Mass., 1973), 117-118, 156, 147-148, 162-164 & 171. The symposium took place in December, 1969, at an AAAS annual meeting. On the liberals and feminists: Some people on the political left have been conscious eugenicists; see Diane Paul, "Eugenics and the Left," *Journal of the History of Ideas*, vol. 45, no. 4 (Oct.-Dec., 1984), 567-590. Others have been influenced by eugenic ideas without realizing it; still others are politically naive. And many, I suspect, do not want to think about links between eugenics and abortion because they support abortion for other reasons and fear *any* opposition to it.
10. Bentley Glass, "Science: Endless Horizons or Golden Age?" 1970 AAAS presidential address, published in *Science*, vol. 171, (Jan. 8, 1971), 23-29.
11. James F. Crow in Daniel Bergsma, ed., "Advances in Human Genetics and Their Impact on Society," *Birth Defects: Original Article Series*, vol. 8, no. 4 (July, 1972), pp. 116-118. The symposium apparently took place in December, 1970, according to *Science*, vol. 170 (Nov. 20, 1970), 893. Crow was a board member of AES in 1972. After the group changed its name, he was still a board member in 1973-74 & 1979-1981 (see *Social Biology* issues).
12. Catherine Baker, *Your Genes, Your Choices* (n.p., 1999), from the AAAS Web site on the Internet,

op. cit. (n. 7), Jan. 7, 2000.

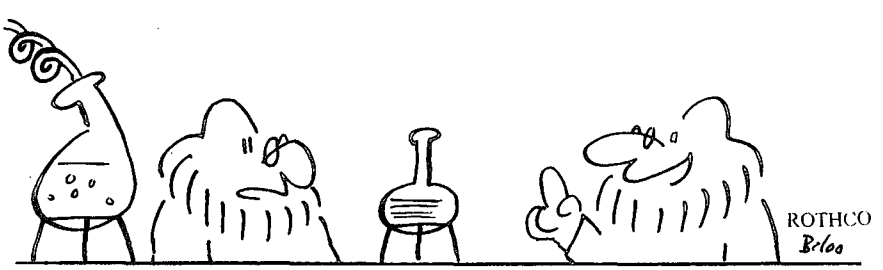
13. AAAS and Institute for Civil Society, *Stem Cell Research and Applications* (Washington, 1999), viii-xi & 30.
14. Ibid., 22-25 & 31-32.
15. "PSD Program," AAAS Web site, op. cit. (n. 7), Jan. 7, 2000; "EHN Program," ibid., July 12, 2000. C. P. Blacker, veteran leader of the Eugenics Society (England), and Margaret Sanger, eugenicist and birth-control pioneer in the U.S., were among key founders of IPPF. The Brush Foundation, a U.S. eugenics group, gave IPPF financial support in its early years. See Beryl Suitters, *Be Brave and Angry: Chronicles of the International Planned Parenthood Federation* (London, 1973) for more information on IPPF's eugenics links.
16. John Walsh, "Science for the People: Comes the Evolution," *Science*, vol. 191 (March 12, 1976), 1033-1035.
17. Frederick Osborn, "History of the American Eugenics Society," *Social Biology*, vol. 21, no. 2 (Summer, 1974), 125-126; and Frederick Osborn to Elissa Krauss, May 2, 1973, AES Archives, folder on "AES: Correspondence, May-June 1973," American Philosophical Society Library, Philadelphia, Pa.
18. Quoted in Faith Schenk and A. S. Parkes, "The Activities of the Eugenics Society," *Eugenics Review*, vol. 60, no. 3 (Sept., 1968), 154. Blacker was referring to the *American* Eugenics Society.
19. Minutes of AES annual members meeting, Nov. 17, 1972, AES Archives, folder on "A E S : Minutes of Meetings, 1972-1973," American Philosophical Society Library, Philadelphia, Pa.; *Social Biology*, 1973 & 1974; "A New Name," ibid., vol. 20, no. 1 (March, 1973), 1. The *Encyclopedia of Associations* (35th ed., 1999), vol. 1, part 1, 677, still identifies SSSB as "Formerly: American Eugenics Society."
20. Catherine Borras, "AAAS Council Meeting, 1975," *Science*, vol. 187 (March 21, 1975), 1115; Olshansky Interview, op. cit. (n. 4); S. Jay Olshansky, letter to the writer, March 31, 2000.
21. Stefan Kühl, *The Nazi Connection* (New York, 1994), 102-103; "Membership List, 1956, American Eugenics Society, Inc.," op. cit. (n. 6), 252; Mary Meehan, "How Eugenics Birthed Population Control," *Human Life Review*, vol. 24, no. 4 (Fall, 1998), 76-89, and "How Government Got Hooked," ibid., vol. 25, no. 1 (Winter, 1999), 68-82; Olshansky interview, op. cit. (n. 4); Richard Lynn, "New Evidence for Dysgenic Fertility for Intelligence in the United States," *Social Biology*, vol. 46, nos. 1-2 (Spring-Summer, 1999), 146-153.
22. Author interview with James Miller, Jan. 28, 2000.
23. Philip M. Boffey, "Dispute over Jensen Election as Fellow Flares in Council," *Science*, vol. 195 (March 11, 1977), 965; John Walsh, "Briefing," ibid., vol. 199, (March 3, 1978), 954-955; Richard H. Osborne, op. cit. (n. 6).
24. U.S. Senate, Committee on the Judiciary, Subcommittee on Separation of Powers, Hearings on *The Human Life Bill*, 97th Cong., 1st Sess., April-June, 1981, vol. 1, 1117-1124; Catherine Borras, "AAAS Council Meeting, 1982," *Science*, vol. 215 (Feb. 26, 1982), 1072. The AAAS resolution was also confusing in that it cited only the first version of the "human life bill," not the revised version.
25. U.S. Senate, op. cit. (n. 24), 114. See, also, pp. 14-17 of this hearing; and C. Ward Kischer and Dianne N. Irving, *The Human Development Hoax: Time to Tell the Truth* (n.p., 1997, 2nd ed., rev.).
26. C. J. M. Musters and others, "Can Protected Areas Be Expanded in Africa?" *Science*, vol. 287 (March 10, 2000), 1759-1760; special section on "Stem Cell Research and Ethics," ibid., vol. 287 (Feb. 25, 2000), 1417 ff.; Joseph Rotblat, "A Hippocratic Oath for Scientists," ibid., vol. 286 (Nov. 19, 1999), 1475.
27. Stephen Jay Gould, "Dr. Down's Syndrome," in his *The Panda's Thumb* (New York, 1980), 161. For Gould criticism of eugenics, see his *The Mismeasure of Man* (New York, 1981); *Dinosaur in a Haystack* (New York, 1995), 285-319; and *Hen's Teeth and Horse's Toes* (New York, 1983), 291-302. On Bryan and the Scopes Trial, see ibid., 272; Gould's *Bully for Brontosaurus* (New York, 1991), 416-430; and his *Rocks of Ages* (New York, 1999), 133-139 & 150-170.
28. Messall, op. cit. (n. 2), 68.
29. Yogi Berra, *The Yogi Book* (New York, 1998), 30, says this was his comment "after Mickey Mantle and Roger Maris hit back-to-back home runs for the umpteenth time."
30. See Rexmond C. Cochrane, *The National Academy of Sciences: The First Hundred Years, 1863-1963* (Washington, 1978); and the National Academies' Web site on the Internet (www.national-

academies.org).

31. The National Research Council has also been deeply involved in issues related to eugenics. Its Committee for Research in Problems of Sex (1921-1962), funded largely by Rockefeller money, supported key research in reproductive endocrinology and much of Alfred C. Kinsey's sex research. See Adele E. Clarke, *Disciplining Reproduction* (Berkeley, Calif., 1998); compare her list of committee members (281-282) with eugenics lists in n. 6 above. See, also, James H. Jones, *Alfred C. Kinsey* (New York, 1997).
32. See n. 6 above and Cochrane, op. cit. (n. 30), 634-643.
33. Peter Collier and David Horowitz, *The Rockefellers* (New York, 1976), 287; John Ensor Harr and Peter J. Johnson, *The Rockefeller Conscience* (New York, 1991), 31-45; Elaine Moss, *The Population Council: A Chronicle of the First Twenty-Five Years, 1952-1977* (New York, 1978), 155-158; Population Council annual reports; eugenics lists in n. 6 above. See, also, Mary Meehan, "Eugenics and the Power Elite," *Social Justice Review*, vol. 88, nos. 11-12 (Nov./Dec., 1997), 167-170.
34. Committee on Population, NAS/NRC, *The Growth of U.S. Population* (Washington, 1965); n. 6 above; Elaine Moss, op. cit. (n. 33), 158. "SSSB associates" means people who at some point have been SSSB members, board members and/or officers.
35. Office of the Foreign Secretary, NAS, *Rapid Population Growth* (Baltimore, 1971), 93-99, vii, xi-xii & 627-634; eugenics lists in n. 6 above.
36. Philip Handler, ed., *Biology and the Future of Man* (New York, 1970), 916, 919, 922, 934-935 & viii; and n. 6 above. See, also, the eugenics viewpoint in Philip Handler, "Can Man Shape His Future?" *Perspectives in Biology and Medicine*, vol. 14, no. 2 (Winter, 1971), 207-227. Ironically, I have not so far found Handler's name on any eugenics membership list.
37. Frederick P. McGehan, "Policy of Aborting 'Unfit' Predicted," Baltimore *Sun*, Oct. 22, 1971, A-3.
38. National Academies, *1999 Report to Congress*, from their Web site, op. cit. (n. 30), June 23, 2000.
39. N. 6 above; Jane Menken, letter to the writer, Feb. 4, 2000; writer's interview with Dr. Menken, Feb. 2, 2000; Olshansky interview and letter, op. cit. (n. 4 & n. 20). In the Feb. 7 interview, Olshansky asked, "Why do you have to repudiate something that we all recognize is absolutely ridiculous?"
40. Six workshop participants with SSSB links are: Eileen Crimmins, Douglas Ewbank, Gerald E. McClearn, Jane Menken, James W. Vaupel & Maxine Weinstein. National Academies Web site, op. cit. (n. 30), June 23, 2000; n. 6 above; letterhead of Olshansky letter, op. cit. (n. 20); Agenda Book for Feb. 10-11, 2000, meeting of Workshop on Collecting Biological Indicators and Genetic Information in Household Surveys, NRC, Washington, D.C.; writer's second interview with Dr. Menken, Feb. 4, 2000.
41. Draft book chapter by Robert Wallace in workshop Agenda Book, op. cit. (n. 40).
42. Workshop papers speak of obtaining informed consent and guaranteeing confidentiality. Some may find this reassuring; this writer does not.
43. Barney Cohen, "Leveraging Longitudinal Data," memo to Committee on Population, Jan. 11, 1999, Agenda Book for Jan. 21-22, 1999, committee meeting, Public Access Records Office, National Academies, Washington, D.C.; James F. Phillips and Bruce B. MacLeod, "The Household Registration System: Computer Software for the Rapid Dissemination of Demographic Surveillance Systems" [1 & 4], Agenda Book for Sept. 23-24, 1999, Committee on Population meeting, Public Access Records Office, National Academies, Washington, D.C.
44. Stephen Tollman and Kathleen Kahn, "Report on the Meeting 'Strengthening Ties: the Agincourt Field Site in its African Context,'" *Tropical Medicine and International Health*, vol. 2, no. 9 (Sept., 1997), 921, in Agenda Book for Jan. 21-22, 1999 Committee on Population meeting, Public Access Records Office, National Academies, Washington, D.C.
45. David A. Hamburg, Gardner Lindzey, Arno G. Motulsky, Gilbert S. Omenn and Robert F. Murray, Jr.—all SSSB board members at some point—served on the Institute's Council. See n. 6 and NAS/NAE/IOM/NRC *Organization and Members*, various years. Dr. Hamburg also served as AAAS president in 1985-86 (*AAAS Handbook, 1999-2000*, 139). SSSB associates who served on Institute panels included Beatrix A. Hamburg, Michael Kaback, Mary-Claire King and Christopher Tietze. Dr. Motulsky chaired–and Kaback and King served on—the genetics committee referred to below. On Kaback's SSSB membership, see U.S. Senate, Committee on Labor and Public Welfare, Subcommittee on Health, Hearing on *Amendments to Revise Programs for Sickle*

Cell Anemia and Other Disorders, 1975, 94th Cong, 1st Sess., July 15, 1975, 201.

46. Polly F. Harrison and Allan Rosenfield, ed., *Contraceptive Research, Introduction, and Use: Lessons from Norplant* (Washington, 1998), 24, 54n., 30, 39, 41.
47. Lori B. Andrews and others, ed., *Assessing Genetic Risks* (Washington, 1994), iii & 8; Edward D. Berkowitz, *To Improve Human Health: A History of the Institute of Medicine* (Washington, 1998), 259.
48. Author interview with E. William Colglazier, Jan. 28, 2000; E. William Colglazier, letter to the author, Feb. 2, 2000.
49. Allan Chase, *The Legacy of Malthus* (New York, 1977), 201-225.
50. Ibid., 289-301; John Higham, *Strangers in the Land* (New York, 1972), 300-324; Mehler, op. cit. (n. 6), 196-218; William H. Tucker, *The Science and Politics of Racial Research* (Urbana, Ill., 1994), 93-97 & 126-127.
51. Ibid., 100-101; J. David Smith and K. Ray Nelson, *The Sterilization of Carrie Buck* (Far Hills, N.J., 1989), 55-63 & 167-172.
52. L. S. Hearnshaw, *Cyril Burt, Psychologist* (Ithaca, N.Y., 1979), 229-261. There are Burt defenders, but even they tend to say that he was sometimes deceptive. See Ronald Fletcher, *Science, Ideology, and the Media: The Cyril Burt Scandal* (New Brunswick, N.J., 1991); and N. J. Mackintosh, ed., *Cyril Burt: Fraud or Framed?* (Oxford, England, 1995).
53. The Kingsley Davis article mentioned above (n. 8) is an excellent example of the way eugenics corrupts sociology. There are many others, particularly in writing on population control.
54. Quoted in *Time*, Jan. 5, 1968, 67. See, also, Patrick P. McDermott, "The Case Against Prometheus," *Worldview*, vol. 16, no. 12 (Dec., 1973), 42-46. McDermott noted that a newer version of napalm was even worse than the one Fieser invented, because thickening agents had been added so that "it will adhere to the flesh and cause deeper wounds" (44).
55. Thomas Jefferson, "To the Republican Citizens of Washington County, Maryland," March 31, 1809, *The Writings of Thomas Jefferson* (Washington, 1903), vol. 16, 359.



"Scientific truth is objective." "For *you*, maybe."

Stenberg v. *Carhart*

The Supreme Court's *Stenberg* v. *Carhart* decision, handed down on June 28 2000, though not unexpected, was nonetheless a terrible blow for those who would defend the life of the unborn. The Court had been asked to review the State of Nebraska's ban on partial-birth, which had passed with an overwhelming majority. The specific procedure in question is often called dilation and extraction (D&X): the live baby is three-quarters delivered, feet first; with only its head remaining in the birth canal, the doctor forces a scissors into the back of the skull and then vacuums out the contents of the brain. With this "reduction of the cranium," the delivery of a now-dead baby is completed.

The Court ruled 5-4 that Nebraska's ban was unconstitutional, because it would place an "undue burden on a woman's right to make an abortion decision." Furthermore it stated that this legislation, which would prohibit the D&X procedure, could also be used to criminalize the most commonly-used second trimester abortion method, dilation and evacuation. The D&E method involves the abortionist grabbing hold of one of the fetus' extremities and dragging it into the birth canal, for "traction"; the baby is then torn limb from limb *in utero* and is delivered in pieces. The Court worried that if Nebraska's ban were let stand, doctors who perform D&E's would "fear prosecution, conviction, and imprisonment."

Thus the Court, with full and unflinching admission of the (in Justice Stevens' words) "gruesome nature of partial-birth abortion procedures" has found *any* protection for live babies who suffer brutal, excruciating executions inappropriate. Rather, they decided in favor of Dr. Leroy Carhart, who makes his living doing such executions. As Justice Kennedy wrote in his dissent: " . . . it is now Dr. Leroy Carhart who sets abortion policy for the state of Nebraska, not the legislature or the people."

The only glimpses of hope to be found in this shameful decision are in the bitterly eloquent dissents, and for this reason we decided to reprint them in full. We can only hope, with Justice Scalia, that ". . . one day, *Stenberg* v. *Carhart* will be assigned its rightful place in the history of this Court's jurisprudence with *Korematsu* and *Dred Scott*."

THE EDITORS

Stenberg v. *Carhart*—The Dissents

DON STENBERG, ATTORNEY GENERAL OF NEBRASKA, ET AL., PETITIONERS
v.
LEROY CARHART
No. 99-830

[JUNE 28, 2000]

Scalia, J., dissenting
SUPREME COURT OF THE UNITED STATES
No. 99—830

Justice Scalia, dissenting.

I am optimistic enough to believe that, one day, *Stenberg* v. *Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*. The method of killing a human child–one cannot even accurately say an entirely unborn human child–proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion. And the Court must know (as most state legislatures banning this procedure have concluded) that demanding a "health exception"–which requires the abortionist to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others (how can one prove the contrary beyond a reasonable doubt?)–is to give live-birth abortion free rein. The notion that the Constitution of the United States, designed, among other things, "to establish Justice, insure domestic Tranquility, . . and secure the Blessings of Liberty to ourselves and our Posterity," prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.

Even so, I had not intended to write separately here until the focus of the other separate writings (including the one I have joined) gave me cause to fear that this case might be taken to stand for an error different from the one that it actually exemplifies. Because of the Court's practice of publishing dissents in the order of the seniority of their authors, this writing will appear in the reports before those others, but the reader will not comprehend what follows unless he reads them first.

* * *

The two lengthy dissents in this case have, appropriately enough, set out to establish that today's result does not follow from this Court's most recent pronouncement on the matter of abortion, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833 (1992). It would be unfortunate, however, if those who disagree with the result were induced to regard it as merely a regrettable misapplication of *Casey*. It is not that, but is *Casey*'s logical and entirely predictable

consequence. To be sure, the Court's construction of this statute so as to make it include procedures other than live-birth abortion involves not only a disregard of fair meaning, but an abandonment of the principle that even ambiguous statutes should be interpreted in such fashion as to render them valid rather than void. *Casey* does not permit *that* jurisprudential novelty–which must be chalked up to the Court's inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue. It is of a piece, in other words, with *Hill* v. *Colorado*, *ante*, p. ___, also decided today.

But the Court gives a second and independent reason for invalidating this humane (not to say anti-barbarian) law: That it fails to allow an exception for the situation in which the abortionist believes that this live-birth method of destroying the child might be safer for the woman. (As pointed out by Justice Thomas, and elaborated upon by Justice Kennedy, there is no good reason to believe this is ever the case, but–who knows?–it sometime *might* be.)

I have joined Justice Thomas's dissent because I agree that today's decision is an "unprecedented expansio[n]" of our prior cases, *post*, at 35, "is not mandated" by *Casey*'s "undue burden" test, *post,* at 33, and can even be called (though this pushes me to the limit of my belief) "obviously irreconcilable with *Casey*'s explication of what its undue-burden standard requires," *post*, at 4. But I never put much stock in *Casey*'s explication of the inexplicable. In the last analysis, my judgment that *Casey* does not support today's tragic result can be traced to the fact that what I consider to be an "undue burden" is different from what the majority considers to be an "undue burden"–a conclusion that can not be demonstrated true or false by factual inquiry or legal reasoning. It is a value judgment, dependent upon how much one respects (or believes society ought to respect) the life of a partially delivered fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave it life to kill it. Evidently, the five Justices in today's majority value the former less, or the latter more, (or both), than the four of us in dissent. Case closed. There is no cause for anyone who believes in *Casey* to feel betrayed by this outcome. It has been arrived at by precisely the process *Casey* promised–a democratic vote by nine lawyers, not on the question whether the text of the Constitution has anything to say about this subject (it obviously does not); nor even on the question (also appropriate for lawyers) whether the legal traditions of the American people would have sustained such a limitation upon abortion (they obviously would); but upon the pure policy question whether this limitation upon abortion is "undue"–*i.e.*, goes too far.

In my dissent in *Casey*, I wrote that the "undue burden" test made law by the joint opinion created a standard that was "as doubtful in application as it is unprincipled in origin," *Casey*, 505 U.S., at 985; "hopelessly unworkable in practice," *id.*, at 986; "ultimately standardless," *id.*, at 987. Today's decision is the proof. As long as we are debating this issue of necessity for a health-of-the-mother exception on the basis of *Casey*, it is really quite impossible for us dissenters to contend that the majority is *wrong* on the law–any more than it could be said that one is *wrong in*

law to support or oppose the death penalty, or to support or oppose mandatory minimum sentences. The most that we can honestly say is that we disagree with the majority on their policy-judgment-couched-as-law. And those who believe that a 5-to-4 vote on a policy matter by unelected lawyers should not overcome the judgment of 30 state legislatures have a problem, not with the *application* of *Casey*, but with its *existence*. *Casey* must be overruled.

While I am in an I-told-you-so mood, I must recall my bemusement, in *Casey*, at the joint opinion's expressed belief that *Roe* v. *Wade* had "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," *Casey*, 505 U.S., at 867, and that the decision in *Casey* would ratify that happy truce. It seemed to me, quite to the contrary, that "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since"; and that, "by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court's new majority decrees." *Id.*, at 995—996. Today's decision, that the Constitution of the United States prevents the prohibition of a horrible mode of abortion, will be greeted by a firestorm of criticism–as well it should. I cannot understand why those who *acknowledge* that, in the opening words of Justice O'Connor's concurrence, "[t]he issue of abortion is one of the most contentious and controversial in contemporary American society," *ante*, at 1, persist in the belief that this Court, armed with neither constitutional text nor accepted tradition, can resolve that contention and controversy rather than be consumed by it. If only for the sake of its own preservation, the Court should return this matter to the people–where the Constitution, by its silence on the subject, left it–and let *them* decide, State by State, whether this practice should be allowed. *Casey* must be overruled.

Kennedy, J., dissenting
SUPREME COURT OF THE UNITED STATES
No. 99—830

Justice Kennedy, with whom The Chief Justice joins, dissenting.

For close to two decades after *Roe* v. *Wade*, 410 U.S. 113 (1973), the Court gave but slight weight to the interests of the separate States when their legislatures sought to address persisting concerns raised by the existence of a woman's right to elect an abortion in defined circumstances. When the Court reaffirmed the essential holding of *Roe*, a central premise was that the States retain a critical and legitimate role in legislating on the subject of abortion, as limited by the woman's right the Court restated and again guaranteed. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833 (1992). The political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential. *Id.*, at 871 (joint opinion of O'Connor,

Kennedy, and Souter, JJ.). The State's constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus.

The Court's decision today, in my submission, repudiates this understanding by invalidating a statute advancing critical state interests, even though the law denies no woman the right to choose an abortion and places no undue burden upon the right. The legislation is well within the State's competence to enact. Having concluded Nebraska's law survives the scrutiny dictated by a proper understanding of *Casey*, I dissent from the judgment invalidating it.

I

The Court's failure to accord any weight to Nebraska's interest in prohibiting partial-birth abortion is erroneous and undermines its discussion and holding. The Court's approach in this regard is revealed by its description of the abortion methods at issue, which the Court is correct to describe as "clinically cold or callous." *Ante*, at 3—4. The majority views the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life. Words invoked by the majority, such as "transcervical procedures," "[o]smotic dilators," "instrumental disarticulation," and "paracervical block," may be accurate and are to some extent necessary, *ante*, at 5—6; but for citizens who seek to know why laws on this subject have been enacted across the Nation, the words are insufficient. Repeated references to sources understandable only to a trained physician may obscure matters for persons not trained in medical terminology. Thus it seems necessary at the outset to set forth what may happen during an abortion.

The person challenging Nebraska's law is Dr. Leroy Carhart, a physician who received his medical degree from Hahnemann Hospital and University in 1973. App. 29. Dr. Carhart performs the procedures in a clinic in Nebraska, *id.*, at 30, and will also travel to Ohio to perform abortions there, *id.*, at 86. Dr. Carhart has no specialty certifications in a field related to childbirth or abortion and lacks admitting privileges at any hospital. *Id.*, at 82, 83. He performs abortions throughout pregnancy, including when he is unsure whether the fetus is viable. *Id.*, at 116. In contrast to the physicians who provided expert testimony in this case (who are board certified instructors at leading medical education institutions and members of the American Board of Obstetricians and Gynecologists), Dr. Carhart performs the partial-birth abortion procedure (D&X) that Nebraska seeks to ban. He also performs the other method of abortion at issue in the case, the D&E.

As described by Dr. Carhart, the D&E procedure requires the abortionist to use instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina. *Id.*, at 61. Dr. Carhart uses the traction created by the opening between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body. *Ibid.* The traction between the uterus and vagina is essential to the procedure because attempting to abort a fetus without using that traction is described by Dr.

Carhart as "pulling the cat's tail" or "drag[ging] a string across the floor, you'll just keep dragging it. It's not until something grabs the other end that you are going to develop traction." *Id.*, at 62. The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn from limb from limb. *Id.*, at 63. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. Dr. Carhart agreed that "[w]hen you pull out a piece of the fetus, let's say, an arm or a leg and remove that, at the time just prior to removal of the portion of the fetus, ... the fetus [is] alive." *Id.*, at 62. Dr. Carhart has observed fetal heartbeat via ultrasound with "extensive parts of the fetus removed," *id.*, at 64, and testified that mere dismemberment of a limb does not always cause death because he knows of a physician who removed the arm of a fetus only to have the fetus go on to be born "as a living child with one arm." *Id.*, at 63. At the conclusion of a D&E abortion no intact fetus remains. In Dr. Carhart's words, the abortionist is left with "a tray full of pieces." *Id.*, at 125.

The other procedure implicated today is called "partial-birth abortion" or the D&X. The D&X can be used, as a general matter, after 19 weeks gestation because the fetus has become so developed that it may survive intact partial delivery from the uterus into the vagina. *Id.*, at 61. In the D&X, the abortionist initiates the woman's natural delivery process by causing the cervix of the woman to be dilated, sometimes over a sequence of days. *Id.*, at 492. The fetus' arms and legs are delivered outside the uterus while the fetus is alive; witnesses to the procedure report seeing the body of the fetus moving outside the woman's body. Brief for Petitioners 4. At this point, the abortion procedure has the appearance of a live birth. As stated by one group of physicians, "[a]s the physician manually performs breech extraction of the body of a live fetus, excepting the head, she continues in the apparent role of an obstetrician delivering a child." Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 27. With only the head of the fetus remaining in utero, the abortionist tears open the skull. According to Dr. Martin Haskell, a leading proponent of the procedure, the appropriate instrument to be used at this stage of the abortion is a pair of scissors. M. Haskell, Dilation and Extraction for Late Second Trimester Abortion (1992), in 139 Cong. Rec. 8605 (1993). Witnesses report observing the portion of the fetus outside the woman react to the skull penetration. Brief for Petitioners 4. The abortionist then inserts a suction tube and vacuums out the developing brain and other matter found within the skull. The process of making the size of the fetus' head smaller is given the clinically neutral term "reduction procedure." 11 F. Supp. 2d 1099, 1106 (Neb. 1998). Brain death does not occur until after the skull invasion, and, according to Dr. Carhart, the heart of the fetus may continue to beat for minutes after the contents of the skull are vacuumed out. App. 58. The abortionist next completes the delivery of a dead fetus, intact except for the damage to the head and the missing contents of the skull.

Of the two described procedures, Nebraska seeks only to ban the D&X. In light of the description of the D&X procedure, it should go without saying that Nebraska's

ban on partial-birth abortion furthers purposes States are entitled to pursue. Dr. Carhart nevertheless maintains the State has no legitimate interest in forbidding the D&X. As he interprets the controlling cases in this Court, the only two interests the State may advance through regulation of abortion are in the health of the woman who is considering the procedure and in the life of the fetus she carries. Brief for Respondent 45. The Court, as I read its opinion, accedes to his views, misunderstanding *Casey* and the authorities it confirmed.

Casey held that cases decided in the wake of *Roe* v. *Wade*, 410 U.S. 113 (1973), had "given [state interests] too little acknowledgment and implementation." 505 U.S., at 871 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). The decision turned aside any contention that a person has the "right to decide whether to have an abortion without 'interference from the State,' " *id.*, at 875, and rejected a strict scrutiny standard of review as "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy." *Id.*, at 876. "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted." *Ibid.* We held it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion. *Id.*, at 877.

Casey is premised on the States having an important constitutional role in defining their interests in the abortion debate. It is only with this principle in mind that Nebraska's interests can be given proper weight. The State's brief describes its interests as including concern for the life of the unborn and "for the partially-born," in preserving the integrity of the medical profession, and in "erecting a barrier to infanticide." Brief for Petitioners 48—49. A review of *Casey* demonstrates the legitimacy of these policies. The Court should say so.

States may take sides in the abortion debate and come down on the side of life, even life in the unborn:

"Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself." 505 U.S., at 872 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus. Abortion, *Casey* held, has consequences beyond the woman and her fetus. The States' interests in regulating are of concomitant extension. *Casey* recognized that abortion is, "fraught with consequences for ... the persons who perform and assist in the procedure [and for] society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life." *Id.*, at 852.

A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others. *Ibid.; Washington* v. *Glucksberg,* 521 U.S. 702, 730—734 (1997).

Casey demonstrates that the interests asserted by the State are legitimate and recognized by law. It is argued, however, that a ban on the D&X does not further these interests. This is because, the reasoning continues, the D&E method, which Nebraska claims to be beyond its intent to regulate, can still be used to abort a fetus and is no less dehumanizing than the D&X method. While not adopting the argument in express terms, the Court indicates tacit approval of it by refusing to reject it in a forthright manner. Rendering express what is only implicit in the majority opinion, Justice Stevens and Justice Ginsburg are forthright in declaring that the two procedures are indistinguishable and that Nebraska has acted both irrationally and without a proper purpose in enacting the law. The issue is not whether members of the judiciary can see a difference between the two procedures. It is whether Nebraska can. The Court's refusal to recognize Nebraska's right to declare a moral difference between the procedure is a dispiriting disclosure of the illogic and illegitimacy of the Court's approach to the entire case.

Nebraska was entitled to find the existence of a consequential moral difference between the procedures. We are referred to substantial medical authority that D&X perverts the natural birth process to a greater degree than D&E, commandeering the live birth process until the skull is pierced. American Medical Association (AMA) publications describe the D&X abortion method as "ethically wrong." AMA Board of Trustees Factsheet on HR 1122 (June 1997), in App. to Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 1 (AMA Factsheet). The D&X differs from the D&E because in the D&X the fetus is "killed *outside* of the womb" where the fetus has "an autonomy which separates it from the right of the woman to choose treatments for her own body." *Ibid.*; see also App. 639—640; Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 27 ("Intact D&X is aberrant and troubling because the technique confuses the disparate role of a physician in childbirth and abortion in such a way as to blur the medical, legal, and ethical line between infanticide and abortion"). Witnesses to the procedure relate that the fingers and feet of the fetus are moving prior to the piercing of the skull; when the scissors are inserted in the back of the head, the fetus' body, wholly outside the woman's body and alive, reacts as though startled and goes limp. D&X's stronger resemblance to infanticide means Nebraska could conclude the procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect. The Court is without authority to second-guess this conclusion.

Those who oppose abortion would agree, indeed would insist, that both procedures are subject to the most severe moral condemnation, condemnation reserved for the

most repulsive human conduct. This is not inconsistent, however, with the further proposition that as an ethical and moral matter D&X is distinct from D&E and is a more serious concern for medical ethics and the morality of the larger society the medical profession must serve. Nebraska must obey the legal regime which has declared the right of the woman to have an abortion before viability. Yet it retains its power to adopt regulations which do not impose an undue burden on the woman's right. By its regulation, Nebraska instructs all participants in the abortion process, including the mother, of its moral judgment that all life, including the life of the unborn, is to be respected. The participants, Nebraska has determined, cannot be indifferent to the procedure used and must refrain from using the natural delivery process to kill the fetus. The differentiation between the procedures is itself a moral statement, serving to promote respect for human life; and if the woman and her physician in contemplating the moral consequences of the prohibited procedure conclude that grave moral consequences pertain to the permitted abortion process as well, the choice to elect or not to elect abortion is more informed; and the policy of promoting respect for life is advanced.

It ill-serves the Court, its institutional position, and the constitutional sources it seeks to invoke to refuse to issue a forthright affirmation of Nebraska's right to declare that critical moral differences exist between the two procedures. The natural birth process has been appropriated; yet the Court refuses to hear the State's voice in defining its interests in its law. The Court's holding contradicts *Casey*'s assurance that the State's constitutional position in the realm of promoting respect for life is more than marginal.

II

Demonstrating a further and basic misunderstanding of *Casey*, the Court holds the ban on the D&X procedure fails because it does not include an exception permitting an abortionist to perform a D&X whenever he believes it will best preserve the health of the woman. Casting aside the views of distinguished physicians and the statements of leading medical organizations, the Court awards each physician a veto power over the State's judgment that the procedures should not be performed. Dr. Carhart has made the medical judgment to use the D&X procedure in every case, regardless of indications, after 15 weeks gestation. 11 F. Supp. 2d, at 1105. Requiring Nebraska to defer to Dr. Carhart's judgment is no different than forbidding Nebraska from enacting a ban at all; for it is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska, not the legislature or the people. *Casey* does not give precedence to the views of a single physician or a group of physicians regarding the relative safety of a particular procedure.

I am in full agreement with Justice Thomas that the appropriate *Casey* inquiry is not, as the Court would have it, whether the State is preventing an abortionist from doing something that, in his medical judgment, he believes to be the most appropriate course of treatment. *Post,* at 32—36. *Casey* addressed the question "whether the State can resolve ... philosophic questions [about abortion] in such a definitive way that a woman lacks all choice in the matter." 505 U.S., at 850. We decided the

issue against the State, holding that a woman cannot be deprived of the opportunity to make reproductive decisions. *Id.*, at 860. *Casey* made it quite evident, however, that the State has substantial concerns for childbirth and the life of the unborn and may enact laws "which in no real sense depriv[e] women of the ultimate decision." *Id.*, at 875 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). Laws having the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" are prohibited. *Id.*, at 877. Nebraska's law does not have this purpose or effect.

The holding of *Casey*, allowing a woman to elect abortion in defined circumstances, is not in question here. Nebraska, however, was entitled to conclude that its ban, while advancing important interests regarding the sanctity of life, deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman. The American College of Obstetricians and Gynecologists (ACOG) "could identify no circumstances under which [D&X] would be the only option to save the life or preserve the health of the woman." App. 600—601. The American Medical Association agrees, stating the "AMA's expert panel, which included an ACOG representative, could not find 'any' identified circumstance where it was 'the only appropriate alternative.' " AMA Factsheet 1. The Court's conclusion that the D&X is the safest method requires it to replace the words "may be" with the word "is" in the following sentence from ACOG's position statement: "An intact D&X, however, may be the best or most appropriate procedure in a particular circumstance." App. 600—601.

No studies support the contention that the D&X abortion method is safer than other abortion methods. Brief for Respondent 36, n. 41. Leading proponents of the procedure acknowledge that the D&X has "disadvantages" versus other methods because it requires a high degree of surgical skill to pierce the skull with a sharp instrument in a blind procedure. Haskell, 139 Cong. Rec. 8605 (1993). Other doctors point to complications that may arise from the D&X. Brief for American Physicians and Surgeons et al. as *Amici Curiae* 21—23; App. 186. A leading physician, Frank Boehm, M. D., who has performed and supervised abortions as director of the Fetal Intensive Care Unit and the Maternal/Fetal Medicine Division at Vanderbilt University Hospital, has refused to support use of the D&X, both because no medical need for the procedure exists and because of ethical concerns. *Id.*, at 636, 639—640, 656—657. Dr. Boehm, a fellow of ACOG, *id.*, at 565, supports abortion rights and has provided sworn testimony in opposition to previous state attempts to regulate abortion. *Id.*, at 608—614.

The Court cannot conclude the D&X is part of standard medical practice. It is telling that no expert called by Dr. Carhart, and no expert testifying in favor of the procedure, had in fact performed a partial-birth abortion in his or her medical practice. *E.g.*, *id.*, at 308 (testimony of Dr. Phillip Stubblefield). In this respect their opinions were courtroom conversions of uncertain reliability. Litigation in other jurisdictions establishes that physicians do not adopt the D&X procedure as part of standard medical practice. *E.g.*, *Richmond Medical Center for Women* v.

Gilmore, 144 F.3d 326, 328 (CA4 1998); *Hope Clinic* v. *Ryan*, 195 F.3d 857, 871 (CA7 1999); see also App. 603—604. It is quite wrong for the Court to conclude, as it seems to have done here, that Dr. Carhart conforms his practice to the proper standard of care because he has incorporated the procedure into his practice. Neither Dr. Boehm nor Dr. Carhart's lead expert, Dr. Stubblefield (the chairman of the Department of Obstetrics and Gynecology at Boston University School of Medicine and director of obstetrics and gynecology for the Boston Medical Center) has done so.

Substantial evidence supports Nebraska's conclusion that its law denies no woman a safe abortion. The most to be said for the D&X is it may present an unquantified lower risk of complication for a particular patient but that other proven safe procedures remain available even for this patient. Under these circumstances, the Court is wrong to limit its inquiry to the relative physical safety of the two procedures, with the slightest potential difference requiring the invalidation of the law. As Justice O'Connor explained in an earlier case, the State may regulate based on matters beyond "what various medical organizations have to say about the *physical* safety of a particular procedure." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 467 (1983) (dissenting opinion). Where the difference in physical safety is, at best, marginal, the State may take into account the grave moral issues presented by a new abortion method. See *Casey*, 505 U.S., at 880 (requiring a regulation to impose a "significant threat to the life or health of a woman" before its application would impose an undue burden (internal quotation marks omitted)). Dr. Carhart does not decide to use the D&X based on a conclusion that it is best for a particular woman. Unsubstantiated and generalized health differences which are, at best, marginal, do not amount to a substantial obstacle to the abortion right. *Id.*, at 874, 876 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). It is also important to recognize that the D&X is effective only when the fetus is close to viable or, in fact, viable; thus the State is regulating the process at the point where its interest in life is nearing its peak.

Courts are ill-equipped to evaluate the relative worth of particular surgical procedures. The legislatures of the several States have superior factfinding capabilities in this regard. In an earlier case, Justice O'Connor had explained that the general rule extends to abortion cases, writing that the Court is not suited to be "the Nation's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." 462 U.S., at 456 (dissenting opinion) (internal quotation marks omitted). "Irrespective of the difficulty of the task, legislatures, with their superior factfinding capabilities, are certainly better able to make the necessary judgments than are courts." *Id.*, at 456, n. 4. Nebraska's judgment here must stand.

In deferring to the physician's judgment, the Court turns back to cases decided in the wake of *Roe*, cases which gave a physician's treatment decisions controlling weight. Before it was repudiated by *Casey*, the approach of deferring to physicians had reached its apex in *Akron, supra,* where the Court held an informed consent

requirement was unconstitutional. The law challenged in *Akron* required the abortionist to inform the woman of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide assistance and information. *Id.*, at 442. The physician was also required to advise the woman of the risks associated with the abortion technique to be employed and other information. *Ibid.* The law was invalidated based on the physician's right to practice medicine in the way he or she saw fit; for, according to the *Akron* Court, "[i]t remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." *Id.*, at 443. Dispositive for the Court was that the law was an "intrusion upon the discretion of the pregnant woman's physician." *Id.*, at 445. The physician was placed in an "undesired and uncomfortable straitjacket." *Ibid.* (internal quotation marks omitted). The Court's decision today echoes the *Akron* Court's deference to a physician's right to practice medicine in the way he sees fit.

The Court, of course, does not wish to cite *Akron*; yet the Court's holding is indistinguishable from the reasoning in *Akron* that *Casey* repudiated. No doubt exists that today's holding is based on a physician-first view which finds its primary support in that now-discredited case. Rather than exalting the right of a physician to practice medicine with unfettered discretion, *Casey* recognized: "Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position." 505 U.S., at 884 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). *Casey* discussed the informed consent requirement struck down in *Akron* and held *Akron* was wrong. The doctor-patient relation was only "entitled to the same solicitude it receives in other contexts." 505 U.S., at 884. The standard of medical practice cannot depend on the individual views of Dr. Carhart and his supporters. The question here is whether there was substantial and objective medical evidence to demonstrate the State had considerable support for its conclusion that the ban created a substantial risk to no woman's health. *Casey* recognized the point, holding the physician's ability to practice medicine was "subject to reasonable ... regulation by the State" and would receive the "same solicitude it receives in other contexts." *Id.*, at 884 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). In other contexts, the State is entitled to make judgments where high medical authority is in disagreement.

The Court fails to acknowledge substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests are at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature. In *Kansas* v. *Hendricks*, 521 U.S. 346 (1997), we held that disagreements among medical professionals "do not tie the State's hands in setting the bounds of ... laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude." *Id.*, at 360, n. 3. Instead, courts must exercise caution (rather than require deference to the physician's treatment decision) when medical uncertainty is present. *Ibid.* ("[W]hen a legislature

'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation' ") (quoting *Jones* v. *United States,* 463 U.S. 354, 370 (1983)); see also *Collins* v. *Texas,* 223 U.S. 288, 297—298 (1912) (Holmes, J.) (declaring the "right of the state to adopt a policy even upon medical matters concerning which there is difference of opinion and dispute"); *Lambert* v. *Yellowley,* 272 U.S. 581, 596—597 (1926) (rejecting claim of distinguished physician because "[h]igh medical authority being in conflict ... , it would, indeed, be strange if Congress lacked the power [to act]"); *Marshall* v. *United States,* 414 U.S. 417, 427 (1974) (recognizing "there is no agreement among members of the medical profession" (internal quotation marks omitted)); *United States* v. *Rutherford,* 442 U.S. 544 (1979) (discussing regulatory approval process for certain drugs).

Instructive is *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1905), where the defendant was convicted because he refused to undergo a smallpox vaccination. The defendant claimed the mandatory vaccination violated his liberty to "care for his own body and health in such way as to him seems best." *Id.*, at 26. He offered to prove that members of the medical profession took the position that the vaccination was of no value and, in fact, was harmful. *Id.*, at 30. The Court rejected the claim, establishing beyond doubt the right of the legislature to resolve matters upon which physicians disagreed:

"Those offers [of proof by the defendant] in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety." Ibid.

The *Jacobson* Court quoted with approval a recent state-court decision which observed, in words having full application today:

"The fact that the belief is not universal [in the medical community] is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to common belief of the people, are adapted to [address medical matters]. In a free country, where government is by the people, through their chosen representatives,

practical legislation admits of no other standard of action.' " *Id.*, at 35 (quoting *Viemester* v. *White*, 179 N. Y. 235, 241, 72 N. E. 97, 99 (1904)).

Justice O'Connor assures the people of Nebraska they are free to redraft the law to include an exception permitting the D&X to be performed when "the procedure, in appropriate medical judgment, is necessary to preserve the health of the mother." *Ante*, at 5. The assurance is meaningless. She has joined an opinion which accepts that Dr. Carhart exercises "appropriate medical judgment" in using the D&X for every patient in every procedure, regardless of indications, after 15 weeks' gestation. *Ante*, at 18—19 (requiring any health exception to "tolerate responsible differences of medical opinion" which "are present here."). A ban which depends on the "appropriate medical judgment" of Dr. Carhart is no ban at all. He will be unaffected by any new legislation. This, of course, is the vice of a health exception resting in the physician's discretion.

In light of divided medical opinion on the propriety of the partial-birth abortion technique (both in terms of physical safety and ethical practice) and the vital interests asserted by Nebraska in its law, one is left to ask what the first Justice Harlan asked: "Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature?" *Jacobson*, *supra,* at 31. The answer is none.

III

The Court's next holding is that Nebraska's ban forbids both the D&X procedure and the more common D&E procedure. In so ruling the Court misapplies settled doctrines of statutory construction and contradicts *Casey*'s premise that the States have a vital constitutional position in the abortion debate. I agree with the careful statutory analysis conducted by Justice Thomas, *post*, at 10—27. Like the ruling requiring a physician veto, requiring a State to meet unattainable standards of statutory draftsmanship in order to have its voice heard on this grave and difficult subject is no different from foreclosing state participation altogether.

Nebraska's statute provides:

"No partial birth abortion shall be performed in this state unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." Neb. Rev. Stat. Ann. §28—328(1) (Supp. 1999).

The statute defines "partial birth abortion" as

"an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." §28—326(9).

It further defines "partially delivers vaginally a living unborn child before killing the unborn child" to mean

"deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill

the unborn child." Ibid.

The text demonstrates the law applies only to the D&X procedure. Nebraska's intention is demonstrated at three points in the statutory language: references to "partial-birth abortion" and to the "delivery" of a fetus; and the requirement that the delivery occur "before" the performance of the death-causing procedure.

The term "partial-birth abortion" means an abortion performed using the D&X method as described above. The Court of Appeals acknowledged the term "is commonly understood to refer to a particular procedure known as intact dilation and extraction (D&X)." *Little Rock Family Planning Servs.* v. *Jegley*, 192 F.3d 794, 795 (CA8 1999). Dr. Carhart's own lead expert, Dr. Phillip Stubblefield, prefaced his description of the D&X procedure by describing it as the procedure "which, in the lay press, has been called a partial-birth abortion." App. 271—272. And the AMA has declared: "The 'partial birth abortion' legislation is by its very name aimed exclusively [at the D&X.] There is no other abortion procedure which could be confused with that description." AMA Factsheet 3. A commonsense understanding of the statute's reference to "partial-birth abortion" demonstrates its intended reach and provides all citizens the fair warning required by the law. *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931).

The statute's intended scope is demonstrated by its requirement that the banned procedure include a partial "delivery" of the fetus into the vagina and the completion of a "delivery" at the end of the procedure. Only removal of an intact fetus can be described as a "delivery" of a fetus and only the D&X involves an intact fetus. In a D&E, portions of the fetus are pulled into the vagina with the intention of dismembering the fetus by using the traction at the opening between the uterus and vagina. This cannot be considered a delivery of a portion of a fetus. In Dr. Carhart's own words, the D&E leaves the abortionist with a "tray full of pieces," App. 125, at the end of the procedure. Even if it could be argued, as the majority does, *ante*, at 25—26, that dragging a portion of an intact fetus into the vagina as the first step of a D&E is a delivery of that portion of an intact fetus, the D&E still does not involve "completing the delivery" of an intact fetus. Whatever the statutory term "completing the delivery" of an unborn child means, it cannot mean, as the Court would have it, placing fetal remains on a tray. See *Planned Parenthood of Wis.* v. *Doyle*, 9 F. Supp. 2d 1033, 1041 (WD Wis. 1998) (the statute is "readily applied to the partial delivery of an intact child but hardly applicable to the delivery of dismembered body parts").

Medical descriptions of the abortion procedures confirm the point, for it is only the description of the D&X that invokes the word "delivery." App. 600. The United States, as *amicus*, cannot bring itself to describe the D&E as involving a "delivery," instead substituting the word "emerges" to describe how the fetus is brought into the vagina in a D&E. Brief for United States as *Amicus Curiae* 10. The Court, in a similar admission, uses the words "a physician pulling" a portion of a fetus, *ante*, at 20, rather than a "physician delivering" a portion of a fetus; yet only a procedure involving a delivery is banned by the law. Of all the definitions of "de-

livery" provided by the Court, *ante*, at 25—26, not one supports (or, more important for statutory construction purposes, requires), the conclusion that the statutory term "completing the delivery" refers to the placement of dismembered body parts on a tray rather than the removal of an intact fetus from the woman's body.

The operation of Nebraska's law is further defined by the requirement that the fetus be partially delivered into the vagina "before" the abortionist kills it. The partial delivery must be undertaken "for the purpose of performing a procedure that the person ... knows will kill the unborn child." Neb. Rev. Stat. Ann. §28—326(9) (Supp. 1999). The law is most naturally read to require the death of the fetus to take place in two steps: First the fetus must be partially delivered into the vagina and then the defendant must perform a death-causing procedure. In a D&E, forcing the fetus into the vagina (the pulling of extremities off the body in the process of extracting the body parts from the uterus into the vagina) is also the procedure that kills the fetus. *Richmond Medical Center for Women* v. *Gilmore*, 144 F.3d, at 330 (order of Luttig, J.). In a D&X, the fetus is partially delivered into the vagina before a separate procedure (the so-called "reduction procedure") is performed in order to kill the fetus.

The majority rejects this argument based on its conclusion that the word "procedure" must "refer to an entire abortion procedure" each time it is used. *Ante*, at 25. This interpretation makes no sense. It would require us to conclude that the Nebraska Legislature considered the "entire abortion procedure" to take place after the abortionist has already delivered into the vagina a living unborn child, or a substantial portion thereof. Neb. Rev. Stat. Ann. §28—326(9) (Supp. 1999). All medical authorities agree, however, that the entire abortion procedure begins several days before this stage, with the dilation of the cervix. The majority asks us, in effect, to replace the words "for the purpose of performing" with the words "in the course of performing" in the portion of §28—326(9) quoted in the preceding paragraph. The reference to "procedure" refers to the separate death-causing procedure that is unique to the D&X.

In light of the statutory text, the commonsense understanding must be that the statute covers only the D&X. See *Broadrick* v. *Oklahoma*, 413 U.S. 601, 698 (1973). The AMA does not disagree. It writes: "The partial birth abortion legislation is by its very name aimed exclusively at a procedure by which a living fetus is intentionally and deliberately given partial birth and delivered for the purpose of killing it. There is no other abortion procedure which could be confused with that description." AMA Factsheet 3 (internal quotation marks omitted). *Casey* disavows strict scrutiny review; and Nebraska must be afforded leeway when attempting to regulate the medical profession. See *Kansas* v. *Hendricks*, 521 U.S., at 359 ("[W]e have traditionally left to legislators the task of defining terms of a medical nature that have legal significance"). To hold the statute covers the D&E, the Court must disagree with the AMA and disregard the known intent of the legislature, adequately expressed in the statute.

Strained statutory constructions in abortion cases are not new, for Justice

O'Connor identified years ago "an unprecedented canon of construction under which in cases involving abortion, a permissible reading of a statute is to be avoided at all costs." *Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U.S. 747, 829 (1986) (dissenting opinion) (internal quotation marks omitted). *Casey* banished this doctrine from our jurisprudence; yet the Court today reinvigorates it and, in the process, ignores its obligation to interpret the law in a manner to validate it, not render it void. *E.g.*, *Johnson* v. *Robison,* 415 U.S. 361, 366—367 (1974); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575 (1988). Avoidance of unconstitutional constructions is discussed only in two sentences of the Court's analysis and dismissed as inapplicable because the statute is not susceptible to the construction offered by the Nebraska Attorney General. *Ante*, at 26. For the reasons here discussed, the statute is susceptible to the construction; and the Court is required to adopt it.

The Court and Justice O'Connor seek to shield themselves from criticism by citing the interpretations of the partial-birth abortion statutes offered by some other federal courts. *Ante*, at 23. On this issue of nationwide importance, these courts have no special competence; and of appellate courts to consider similar statutes, a majority have, in contrast to the Court, declared that the law could be interpreted to cover only the D&E. See *Hope Clinic*, 195 F.3d, at 865—871; *Richmond Medical Center, supra,* at 330—332 (order of Luttig, J.). Thirty States have enacted similar laws. It is an abdication of responsibility for the Court to suggest its hands are tied by decisions which paid scant attention to *Casey*'s recognition of the State's authority and misapplied the doctrine of construing statutes to avoid constitutional difficulty. Further, the leading case describing the deference argument, *Frisby* v. *Schultz,* 487 U.S. 474, 483 (1988), declined to defer to a lower court construction of the state statute at issue in the case. As *Frisby* observed, the "lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." See also *Webster* v. *Reproductive Health Services,* 492 U.S. 490, 514 (1989) (opinion of Rehnquist, C. J.); *id.*, at 525 (O'Connor, J., concurring in part and concurring in judgment).

The majority and, even more so, the concurring opinion by Justice O'Connor, ignore the settled rule against deciding unnecessary constitutional questions. The State of Nebraska conceded, under its understanding of *Casey*, that if this law must be interpreted to bar D&E as well as D&X it is unconstitutional. Since the majority concludes this is indeed the case, that should have been the end of the matter. Yet the Court and Justice O'Connor go much farther. They conclude that the statute requires a health exception which, for all practical purposes and certainly in the circumstances of this case, allows the physician to make the determination in his own professional judgment. This is an immense constitutional holding. It is unnecessary; and, for the reasons I have sought to explain, it is incorrect. While it is not clear which of the two halves of the majority opinion is *dictum*, both are wrong.

The United States District Court in this case leaped to prevent the law from

being enforced, granting an injunction before it was applied or interpreted by Nebraska. Cf. *Hill* v. *Colorado*, *ante,* p. ___. In so doing, the court excluded from the abortion debate not just the Nebraska legislative branch but the State's executive and judiciary as well. The law was enjoined before the chief law enforcement officer of the State, its Attorney General, had any opportunity to interpret it. The federal court then ignored the representations made by that officer during this litigation. In like manner, Nebraska's courts will be given no opportunity to define the contours of the law, although by all indications those courts would give the statute a more narrow construction than the one so eagerly adopted by the Court today. *E.g., Stenberg* v. *Moore*, 258 Neb. 199, 206, 602 N. W. 2d 465, 472 (1995). Thus the court denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute. This cannot be what *Casey* meant when it said we would be more solicitous of state attempts to vindicate interests related to abortion. *Casey* did not assume this state of affairs.

IV

Ignoring substantial medical and ethical opinion, the Court substitutes its own judgment for the judgment of Nebraska and some 30 other States and sweeps the law away. The Court's holding stems from misunderstanding the record, misinterpretation of *Casey*, outright refusal to respect the law of a State, and statutory construction in conflict with settled rules. The decision nullifies a law expressing the will of the people of Nebraska that medical procedures must be governed by moral principles having their foundation in the intrinsic value of human life, including life of the unborn. Through their law the people of Nebraska were forthright in confronting an issue of immense moral consequence. T he State chose to forbid a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life, while the State still protected the woman's autonomous right of choice as reaffirmed in *Casey*. The Court closes its eyes to these profound concerns.

From the decision, the reasoning, and the judgment, I dissent.

Thomas, J., dissenting
SUPREME COURT OF THE UNITED STATES
No. 99—830

Justice Thomas, with whom The Chief Justice and Justice Scalia join, dissenting.

In 1973, this Court struck down an Act of the Texas Legislature that had been in effect since 1857, thereby rendering unconstitutional abortion statutes in dozens of States. *Roe* v. *Wade,* 410 U.S. 113, 119. As some of my colleagues on the Court, past and present, ably demonstrated, that decision was grievously wrong. See, *e.g.*, *Doe* v. *Bolton*, 410 U.S. 179, 221—223 (1973) (White, J., dissenting); *Roe* v. *Wade, supra,* at 171—178 (Rehnquist, J., dissenting). Abortion is a unique act, in which a woman's exercise of control over her own body ends, depending on one's view,

human life or potential human life. Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so.

In the years following *Roe*, this Court applied, and, worse, extended, that decision to strike down numerous state statutes that purportedly threatened a woman's ability to obtain an abortion. The Court voided parental consent laws, see *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U.S. 52, 75 (1976), legislation requiring that second-trimester abortions take place in hospitals, see *Akron* v. *Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 431 (1983), and even a requirement that both parents of a minor be notified before their child has an abortion, see *Hodgson* v. *Minnesota,* 497 U.S. 417, 455 (1990). It was only a slight exaggeration when this Court described, in 1976, a right to abortion "without interference from the State." *Danforth, supra,* at 61. The Court's expansive application of *Roe* in this period, even more than *Roe* itself, was fairly described as the "unrestrained imposition of [the Court's] own, extraconstitutional value preferences" on the American people. *Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U.S. 747, 794 (1986) (White, J., dissenting).

It appeared that this era of Court-mandated abortion on demand had come to an end, first with our decision in *Webster* v. *Reproductive Health Services,* 492 U.S. 490 (1989), see *id.*, at 557 (Blackmun, J., concurring in part and dissenting in part) (lamenting that the plurality had "discard[ed]" *Roe*), and then finally (or so we were told) in our decision in *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U.S. 833 (1992). Although in *Casey* the separate opinions of The Chief Justice and Justice Scalia urging the Court to overrule *Roe* did not command a majority, seven Members of that Court, including six Members sitting today, acknowledged that States have a legitimate role in regulating abortion and recognized the States' interest in respecting fetal life at all stages of development. See 505 U.S., at 877 (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *id.*, at 944 (Rehnquist, C. J., joined by White, Scalia, Thomas, JJ., concurring in judgment in part and dissenting in part); *id.,* at 979 (Scalia, J., joined by Rehnquist, C. J., and White and Thomas, JJ., concurring in judgment in part and dissenting in part). The joint opinion authored by Justices O'Connor, Kennedy, and Souter concluded that prior case law "went too far" in "undervalu[ing] the State's interest in potential life" and in "striking down ... some abortion regulations which in no real sense deprived women of the ultimate decision." *Id.,* at 875.[1] *Roe* and subsequent cases, according to the joint opinion, had wrongly "treat[ed] all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted," a treatment that was "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy." *Id.*, at 876. Accordingly, the joint opinion held that so long as state regulation of abortion furthers legitimate interests–that is, interests not designed to strike at the right itself–the regulation is

invalid only if it imposes an undue burden on a woman's ability to obtain an abortion, meaning that it places a *substantial obstacle* in the woman's path. *Id.*, at 874, 877.

My views on the merits of the *Casey* joint opinion have been fully articulated by others. *Id.*, at 944 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); *id.*, at 979 (Scalia, J., concurring in judgment in part and dissenting in part). I will not restate those views here, except to note that the *Casey* joint opinion was constructed by its authors out of whole cloth. The standard set forth in the *Casey* joint opinion has no historical or doctrinal pedigree. The standard is a product of its authors' own philosophical views about abortion, and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the standard it purported to replace. Even assuming, however, as I will for the remainder of this dissent, that *Casey*'s fabricated undue-burden standard merits adherence (which it does not), today's decision is extraordinary. Today, the Court inexplicably holds that the States cannot constitutionally prohibit a method of abortion that millions find hard to distinguish from infanticide and that the Court hesitates even to describe. *Ante*, at 4. This holding cannot be reconciled with *Casey*'s undue-burden standard, as that standard was explained to us by the authors of the joint opinion, and the majority hardly pretends otherwise. In striking down this statute–which expresses a profound and legitimate respect for fetal life and which leaves unimpeded several other safe forms of abortion–the majority opinion gives the lie to the promise of *Casey* that regulations that do no more than "express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose" whether or not to have an abortion. 505 U.S., at 877. Today's decision is so obviously irreconcilable with *Casey*'s explication of what its undue-burden standard requires, let alone the Constitution, that it should be seen for what it is, a reinstitution of the pre-*Webster* abortion-on-demand era in which the mere invocation of "abortion rights" trumps any contrary societal interest. If this statute is unconstitutional under *Casey*, then *Casey* meant nothing at all, and the Court should candidly admit it.

To reach its decision, the majority must take a series of indefensible steps. The majority must first disregard the principles that this Court follows in every context but abortion: We interpret statutes according to their plain meaning and we do not strike down statutes susceptible of a narrowing construction. The majority also must disregard the very constitutional standard it purports to employ, and then displace the considered judgment of the people of Nebraska and 29 other States. The majority's decision is lamentable, because of the result the majority reaches, the illogical steps the majority takes to reach it, and because it portends a return to an era I had thought we had at last abandoned.

II

In the almost 30 years since *Roe*, this Court has never described the various methods of aborting a second- or third-trimester fetus. From reading the majority's sanitized description, one would think that this case involves state regulation of a

widely accepted routine medical procedure. Nothing could be further from the truth. The most widely used method of abortion during this stage of pregnancy is so gruesome that its use can be traumatic even for the physicians and medical staff who perform it. See App. 656 (testimony of Dr. Boehm); W. Hern, Abortion Practice 134 (1990). And the particular procedure at issue in this case, "partial birth abortion," so closely borders on infanticide that 30 States have attempted to ban it. I will begin with a discussion of the methods of abortion available to women late in their pregnancies before addressing the statutory and constitutional questions involved.[2]

1. The primary form of abortion used at or after 16 weeks' gestation is known as "dilation and evacuation" or "D&E." 11 F. Supp. 2d 1099, 1103, 1129 (Neb. 1998). When performed during that stage of pregnancy, the D&E procedure requires the physician to dilate the woman's cervix and then extract the fetus from her uterus with forceps. *Id.*, at 1103; App. 490 (American Medical Association (AMA), Report of the Board of Trustees on Late-Term Abortion). Because of the fetus' size at this stage, the physician generally removes the fetus by dismembering the fetus one piece at a time.[3] 11 F. Supp. 2d, at 1103—1104. The doctor grabs a fetal extremity, such as an arm or a leg, with forceps and "pulls it through the cervical os ... tearing ... fetal parts from the fetal body ... by means of traction." *Id.*, at 1104. See App. 55 (testimony of Dr. Carhart). In other words, the physician will grasp the fetal parts and "basically tear off pieces of the fetus and pull them out." *Id.*, at 267 (testimony of Dr. Stubblefield). See also *id.*, at 149 (testimony of Dr. Hodgson) ("[Y]ou grasp the fetal parts, and you often don't know what they are, and you try to pull it down, and its ... simply all there is to it"). The fetus will die from blood loss, either because the physician has separated the umbilical cord prior to beginning the procedure or because the fetus loses blood as its limbs are removed. *Id.*, at 62—64 (testimony of Dr. Carhart); *id.*, at 151 (testimony of Dr. Hodgson).[4] When all of the fetus' limbs have been removed and only the head is left in utero, the physician will then collapse the skull and pull it through the cervical canal. *Id.*, at 106 (testimony of Dr. Carhart); *id.*, at 297 (testimony of Dr. Stubblefield); *Causeway Medical Suite* v. *Foster*, 43 F. Supp. 2d 604, 608 (ED La. 1999). At the end of the procedure, the physician is left, in respondent's words, with a "tray full of pieces." App. 125 (testimony of Dr. Carhart).

2. Some abortions after the 15th week are performed using a method of abortion known as induction. 11 F. Supp. 2d, at 1108; App. 492 AMA, Report of the Board of Trustees on Late-Term Abortion). In an induction procedure, the amniotic sac is injected with an abortifacient such as a saline solution or a solution known as a "prostaglandin." 11 F. Supp. 2d, at 1108. Uterine contractions typically follow, causing the fetus to be expelled. Ibid.

3. A third form of abortion for use during or after 16 weeks' gestation is referred to by some medical professionals as "intact D&E." There are two variations of this method, both of which require the physician to dilate the woman's cervix. Gynecologic, Obstetric, and Related Surgery 1043 (D. Nichols & D. Clarke-Pearson

eds., 2d ed. 2000); App. 271 (testimony of Dr. Stubblefield). The first variation is used only in vertex presentations, that is, when the fetal head is presented first. To perform a vertex-presentation intact D&E, the doctor will insert an instrument into the fetus' skull while the fetus is still in utero and remove the brain and other intracranial contents. 11 F. Supp. 2d, at 1111; Gynecologic, Obstetric, and Related Surgery, *supra,* at 1043; App. 271 (testimony of Dr. Stubblefield). When the fetal skull collapses, the physician will remove the fetus.

The second variation of intact D&E is the procedure commonly known as "partial birth abortion."[5] 11 F. Supp. 2d, at 1106; Gynecologic, Obstetric, and Related Surgery, *supra,* at 1043; App. 271 (testimony of Dr. Stubblefield). This procedure, which is used only rarely, is performed on mid- to late-second-trimester (and sometimes third-trimester) fetuses.[6] Although there are variations, it is generally performed as follows: After dilating the cervix, the physician will grab the fetus by its feet and pull the fetal body out of the uterus into the vaginal cavity. 11 F. Supp. 2d, at 1106. At this stage of development, the head is the largest part of the body. Assuming the physician has performed the dilation procedure correctly, the head will be held inside the uterus by the woman's cervix. *Ibid*; H. R. 1833 Hearing 8. While the fetus is stuck in this position, dangling partly out of the woman's body, and just a few inches from a completed birth, the physician uses an instrument such as a pair of scissors to tear or perforate the skull. 11 F. Supp. 2d, at 1106; App. 664 (testimony of Dr. Boehm); Joint Hearing on S. 6 and H. R. 929 before the Senate Committee on the Judiciary and the Subcommittee on the Constitution of the House Committee on the Judiciary, 105th Cong., 1st Sess., 45 (1995) (hereinafter S. 6 and H. R. 929 Joint Hearing). The physician will then either crush the skull or will use a vacuum to remove the brain and other intracranial contents from the fetal skull, collapse the fetus' head, and pull the fetus from the uterus. 11 F. Supp. 2d, at 1106.[7]

Use of the partial birth abortion procedure achieved prominence as a national issue after it was publicly described by Dr. Martin Haskell, in a paper entitled "Dilation and Extraction for Late Second Trimester Abortion" at the National Abortion Federation's September 1992 Risk Management Seminar. In that paper, Dr. Haskell described his version of the procedure as follows:

"With a lower [fetal] extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities.

"The skull lodges at the internal cervical os. Usually there is not enough dilation for it to pass through. The fetus is oriented dorsum or spine up.

"At this point, the right-handed surgeon slides the fingers of the left hand along the back of the fetus and 'hooks' the shoulders of the fetus with the index and ring fingers (palm down).

"[T]he surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his

middle finger.

"[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.

"The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient." H. R. 1833 Hearing 3, 8—9.

In cases in which the physician inadvertently dilates the woman to too great a degree, the physician will have to hold the fetus inside the woman so that he can perform the procedure. *Id.,* at 80 (statement of Pamela Smith, M. D.) ("In these procedures, one basically relies on cervical entrapment of the head, along with a firm grip, to help keep the baby in place while the practitioner plunges a pair of scissors into the base of the baby's skull"). See also S. 6 and H. R. 929 Joint Hearing 45 ("I could put dilapan in for four or five days and say I'm doing a D&E procedure and the fetus could just fall out. But that's not really the point. The point here is you're attempting to do an abortion .... Not to see how do I manipulate the situation so that I get a live birth instead") (quoting Dr. Haskell).

II

Nebraska, along with 29 other States, has attempted to ban the partial birth abortion procedure. Although the Nebraska statute purports to prohibit only "partial birth abortion," a phrase which is commonly used, as I mentioned, to refer to the breech extraction version of intact D&E, the majority concludes that this statute could also be read in some future case to prohibit ordinary D&E, the first procedure described above. According to the majority, such an application would pose a substantial obstacle to some women seeking abortions and, therefore, the statute is unconstitutional. The majority errs with its very first step. I think it is clear that the Nebraska statute does not prohibit the D&E procedure. The Nebraska partial birth abortion statute at issue in this case reads as follows:

"No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." Neb. Rev. Stat. Ann. §28—328(1) (Supp. 1999).

"Partial birth abortion" is defined in the statute as

"an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." §28—326(9).

A

Starting with the statutory definition of "partial birth abortion," I think it highly doubtful that the statute could be applied to ordinary D&E. First, the Nebraska statute applies only if the physician "partially *delivers* vaginally a living unborn child," which phrase is defined to mean "deliberately and intentionally *delivering* into the vagina a living unborn child, or a substantial portion thereof." §28—326(9) (emphases added). When read in context, the term "partially delivers" cannot be fairly interpreted to include removing pieces of an unborn child from the uterus one at a time.

The word "deliver," particularly delivery of an "unborn child," refers to the process of "assist[ing] in giving birth," which suggests removing an intact unborn child from the womb, rather than pieces of a child. See Webster's Ninth New Collegiate Dictionary 336 (1991) (defining "deliver" as "to assist in giving birth; to aid in the birth of"); Stedman's Medical Dictionary 409 (26th ed. 1995) ("To assist a woman in childbirth"). Without question, one does not "deliver" a child when one removes the child from the uterus piece by piece, as in a D&E. Rather, in the words of respondent and his experts, one "remove[s]" or "dismember[s]" the child in a D&E. App. 45, 55 (testimony of Dr. Carhart) (referring to the act of removing the fetus in a D&E); *id.*, at 150 (testimony of Dr. Hodgson) (same); *id.*, at 267 (testimony of Dr. Stubblefield) (physician "dismember[s]" the fetus). See also H. R. 1833 Hearing 3, 8 (Dr. Haskell describing "delivery" of part of the fetus during a D&X). The majority cites sources using the terms "deliver" and "delivery" to refer to removal of the fetus and the placenta during birth. But these sources also presume an intact fetus, rather than dismembered fetal parts. See Obstetrics: Normal & Problem Pregnancies 388 (S. Gabbe, J. Niebyl, & J. Simpson eds. 3d ed. 1996) ("After delivery [of infant and placenta], the placenta, cord, and membranes should be examined"); 4 Oxford English Dictionary 421, 422 (2d ed. 1989) ("To disburden (a woman) of the foetus, to bring to childbirth"); B. Maloy, Medical Dictionary for Lawyers 221 (2d ed. 1989) ("To aid in the process of childbirth; to bring forth; to deliver the fetus, placenta"). The majority has pointed to no source in which "delivery" is used to refer to removal of first a fetal arm, then a leg, then the torso, etc. In fact, even the majority describes the D&E procedure without using the word "deliver" to refer to the removal of fetal tissue from the uterus. See *ante*, at 20 ("*pulling* a 'substantial portion' of a still living fetus") (emphasis added); *ibid.* ("portion of a living fetus has been *pulled* into the vagina") (emphasis added). No one, including the majority, understands the act of pulling off a part of a fetus to be a "delivery."

To make the statute's meaning even more clear, the statute applies only if the physician "partially delivers vaginally a living unborn child *before* killing the unborn child and completing the delivery." The statute defines this phrase to mean that the physician must complete the delivery "*for the purpose of* performing a procedure" that will kill the unborn child. It is clear from these phrases that the procedure that kills the fetus must be subsequent to, and therefore separate from,

the "partia[l] deliver[y]" or the "deliver[y] into the vagina" of "a living unborn child or substantial portion thereof." In other words, even if one assumes, *arguendo*, that dismemberment–the act of grasping a fetal arm or leg and pulling until it comes off, leaving the remaining part of the fetal body still in the uterus–is a kind of "delivery," it does not take place "before" the death-causing procedure or "for the purpose of performing" the death-causing procedure; it *is* the death-causing procedure. Under the majority's view, D&E is covered by the statute because when the doctor pulls on a fetal foot until it tears off he has "delivered" a substantial portion of the unborn child and has performed a procedure known to cause death. But, significantly, the physician has not "delivered" the child *before* performing the death-causing procedure or "for the purpose of" performing the death-causing procedure; the dismemberment "delivery" is itself the act that causes the fetus' death.[8]

Moreover, even if removal of a fetal foot or arm from the uterus incidental to severing it from the rest of the fetal body could amount to delivery *before,* or *for the purpose of,* performing a death-causing procedure, the delivery would not be of an "unborn child, or a substantial portion thereof." And even supposing that a fetal foot or arm could conceivably be a "substantial portion" of an unborn child, both the common understanding of "partial birth abortion" and the principle that statutes will be interpreted to avoid constitutional difficulties would require one to read "substantial" otherwise. See *infra*, at 18—20.

B

Although I think that the text of §28—326(9) forecloses any application of the Nebraska statute to the D&E procedure, even if there were any ambiguity, the ambiguity would be conclusively resolved by reading the definition in light of the fact that the Nebraska statute, by its own terms, applies only to "partial birth abortion," §28—328(1). By ordinary rules of statutory interpretation, we should resolve any ambiguity in the specific statutory definition to comport with the common understanding of "partial birth abortion," for that term itself, no less than the specific definition, is part of the statute. *United States* v. *Morton*, 467 U.S. 822, 828 (1984) ("We do not ... construe statutory phrases in isolation; we read statutes as a whole").[9]

"Partial birth abortion" is a term that has been used by a majority of state legislatures, the United States Congress, medical journals, physicians, reporters, even judges, and has never, as far as I am aware, been used to refer to the D&E procedure. The number of instances in which "partial birth abortion" has been equated with the breech extraction form of intact D&E (otherwise known as "D&X")[10] and explicitly contrasted with D&E, are numerous. I will limit myself to just a few examples.

First, numerous medical authorities have equated "partial birth abortion" with D&X. The American Medical Association ("AMA") has done so and has recognized that the procedure is "different from other destructive abortion techniques because the fetus ... is killed *outside* of the womb." AMA Board of Trustees Factsheet on H. R. 1122 (June 1997), in App. to Brief for Association of American

Physicians and Surgeons et al. as *Amici Curiae* 1. Medical literature has also equated "partial birth abortion" with D&X as distinguished from D&E. See Gynecologic, Obstetric, and Related Surgery, at 1043; Sprang & Neerhof, Rationale for Banning Abortions Late in Pregnancy, 280 JAMA 744 (Aug. 26, 1998); Bopp & Cook, Partial Birth Abortion: The Final Frontier of Abortion Jurisprudence, 14 Issues in Law and Medicine 3 (1998). Physicians have equated "partial birth abortion" with D&X. See *Planned Parenthood* v. *Doyle*, 44 F. Supp. 2d 975, 999 (WD Wis. 1999) (citing testimony); *Richmond Medical Center for Women* v. *Gilmore*, 55 F. Supp. 2d 441, 455 (ED Va. 1999) (citing testimony). Even respondent's expert, Dr. Phillip Stubblefield, acknowledged that breech extraction intact D&E is referred to in the lay press as "partial birth abortion." App. 271.

Second, the lower courts have repeatedly acknowledged that "partial birth abortion" is commonly understood to mean D&X. See *Little Rock Family Planning Services* v. *Jegley*, 192 F.3d 794, 795 (CA8 1999) ("The term 'partial-birth abortion,' ... is commonly understood to refer to a particular procedure also known as intact dilation and extraction"); *Planned Parenthood of Greater Iowa, Inc.* v. *Miller*, 195 F.3d 386, 387 (CA8 1999) ("The [Iowa] Act prohibits 'partial-birth abortion,' a term commonly understood to refer to a procedure called a dilation and extraction (D&X)"). The District Court in this case noted that "[p]artial-birth abortions" are "known medically as intact dilation and extraction or D&X." 11 F. Supp. 2d, at 1121, n. 26. Even the majority notes that "partial birth abortion" is a term "ordinarily associated with the D&X procedure." *Ante*, at 24.

Third, the term "partial birth abortion" has been used in state legislation on 28 occasions and by Congress twice. The term "partial birth abortion" was adopted by Congress in both 1995 and 1997 in two separate pieces of legislation prohibiting the procedure.[11] In considering the legislation, Congress conducted numerous hearings and debates on the issue, which repeatedly described "partial birth abortion" as a procedure distinct from D&E. The Congressional Record contained numerous references to Dr. Haskell's procedure. See, *e.g.*, H. R. 1833 Hearing 3, 17, 52, 77; S. 6 and H. R. 929 Joint Hearing 45. Since that time, debates have taken place in state legislatures across the country, 30 of which have voted to prohibit the procedure. With only two exceptions, the legislatures that voted to ban the procedure referred to it as "partial birth abortion."[12] These debates also referred to Dr. Haskell's procedure and D&X. Both the evidence before the legislators and the legislators themselves equated "partial birth abortion" with D&X. The fact that 28 States adopted legislation banning "partial birth abortion," defined it in a way similar or identical to Nebraska's definition,[13] and, in doing so, repeatedly referred to the breech extraction form of intact D&E and repeatedly distinguished it from ordinary D&E, makes it inconceivable that the term "partial birth abortion" could reasonably be interpreted to mean D&E.

C

Were there any doubt remaining whether the statute could apply to a D&E procedure, that doubt is no ground for invalidating the statute. Rather, we are bound

to first consider whether a construction of the statute is fairly possible that would avoid the constitutional question. *Erznoznik* v. *Jacksonville,* 422 U.S. 205, 216 (1975) ("[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts"); *Frisby* v. *Schultz,* 487 U.S. 474, 482 (1988) ("The precise scope of the ban is not further described within the text of the ordinance, but in our view the ordinance is readily subject to a narrowing construction that avoids constitutional difficulties"). This principle is, as Justice O'Connor has said, so "well-established" that failure to apply is "plain error." *Id.*, at 483. Although our interpretation of a Nebraska law is of course not binding on Nebraska courts, it is clear, as *Erznoznik* and *Frisby* demonstrate, that, absent a conflicting interpretation by Nebraska (and there is none here), we should, if the text permits, adopt such a construction.

The majority contends that application of the Nebraska statute to D&E would pose constitutional difficulties because it would eliminate the most common form of second-trimester abortions. To the extent that the majority's contention is true, there is no doubt that the Nebraska statute is susceptible of a narrowing construction by Nebraska courts that would preserve a physicians' ability to perform D&E. See *State* v. *Carpenter,* 250 Neb. 427, 434, 551 N. W. 2d 518, 524 (1996) ("A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done"). For example, the statute requires that the physician "deliberately and intentionally delive[r] into the vagina a living unborn child, or a substantial portion thereof" before performing a death causing procedure. The term "substantial portion" is susceptible to a narrowing construction that would exclude the D&E procedure. One definition of the word "substantial" is "being largely but not wholly that which is specified." Webster's Ninth New Collegiate Dictionary, at 1176. See *Pierce* v. *Underwood,* 487 U.S. 552, 564 (1988) (describing different meanings of the term "substantial"). In other words, "substantial" can mean "almost all" of the thing denominated. If nothing else, a court could construe the statute to require that the fetus be "largely, but not wholly," delivered out of the uterus before the physician performs a procedure that he knows will kill the unborn child. Or, as I have discussed, a court could (and should) construe "for the purpose of performing a procedure" to mean "for the purpose of performing a separate procedure."

III

The majority and Justice O'Connor reject the plain language of the statutory definition, refuse to read that definition in light of the statutory reference to "partial birth abortion," and ignore the doctrine of constitutional avoidance. In so doing, they offer scant statutory analysis of their own. See *ante*, at 20—21 (majority opinion); cf. *ante*, at 22—26 (majority opinion); *ante*, at 3 (O'Connor, J., concurring). In their brief analyses, the majority and Justice O'Connor disregard all of the statutory language except for the final definitional sentence, thereby violating the fundamental canon of construction that statutes are to be read as a whole. *United States* v. *Morton,* 467 U.S., at 828 ("We do not ... construe statutory phrases

in isolation; we read statutes as a whole. Thus, the words [in question] must be read in light of the immediately following phrase") (footnote omitted)); *United States* v. *Heirs of Boisdoré,* 8 How. 113, 122 (1849) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy"); *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps").[14] In lieu of analyzing the statute as a whole, the majority and Justice O'Connor offer five principal arguments for their interpretation of the statute. I will address them in turn.

First, the majority appears to accept, if only obliquely, an argument made by respondent: If the term "partial birth abortion" refers to only the breech extraction form of intact D&E, or D&X, the Nebraska Legislature should have used the medical nomenclature. See *ante*, at 25 (noting that the Nebraska Legislature rejected an amendment that would replace "partial birth abortion" with "dilation and extraction"); Brief for Respondent 4—5, 24.

There is, of course, no requirement that a legislature use terminology accepted by the medical community. A legislature could, no doubt, draft a statute using the term "heart attack" even if the medical community preferred "myocardial infarction." Legislatures, in fact, sometimes use medical terms in ways that conflict with their clinical definitions, see, *e.g.*, *Barber* v. *Director*, 43 F.3d 899, 901 (CA4 1995) (noting that the medical definition of "pneumoconiosis" is only a subset of the afflictions that fall within the definition of "pneumoconiosis" in the Black Lung Act), a practice that is unremarkable so long as the legal term is adequately defined. We have never, until today, suggested that legislature may only use words accepted by every individual physician. Rather, "we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Kansas* v. *Hendricks,* 521 U.S. 346, 359 (1997). And we have noted that "[o]ften, those definitions do not fit precisely with the definitions employed by the medical community." Ibid.

Further, it is simply not true that the many legislatures, including Nebraska's, that prohibited "partial birth abortion" chose to use a term known only in the vernacular in place of a term with an accepted clinical meaning. When the Partial-Birth Abortion Ban Act of 1995 was introduced in Congress, the term "dilation and extraction" did not appear in any medical dictionary. See, *e.g.*, Dorland's *Illustrated* Medical Dictionary 470 (28th ed. 1994); Stedman's Medical Dictionary, at 485; Miller-Keane Encyclopedia & Dictionary of Medicine, Nursing, & Allied Health 460 (6th ed. 1997); The Sloane-Dorland Annotated Medical-Legal Dictionary 204 (1987); I. Dox, J. Melloni, & G. Eisher, The HarperCollins Illustrated Medical Dictionary 131 (1993). The term did not appear in descriptions of abortion methods in leading medical textbooks. See, *e.g.*, G. Cunningham et al., Williams Obstetrics 579—605 (20th ed. 1997); Obstetrics: Normal & Problem Pregnancies, at 1249—1279; W. Hern, Abortion Practice (1990). Abortion reference books also omitted any reference to the term. See, *e.g.*, Modern Methods of Induc-

ing Abortion (D. Baird, D. Grimes, & P. Van Look eds. 1995); E. Glick, Surgical Abortion (1998).[15]

Not only did D&X have no medical meaning at the time, but the term is ambiguous on its face. "Dilation and extraction" would, on its face, accurately describe any procedure in which the woman is "dilated" and the fetus "extracted," including D&E. See *supra*, at 5—6. In contrast, "partial birth abortion" has the advantage of faithfully describing the procedure the legislature meant to address because the fact that a fetus is "partially born" during the procedure is indisputable. The term "partial birth abortion" is completely accurate and descriptive, which is perhaps the reason why the majority finds it objectionable. Only a desire to find fault at any cost could explain the Court's willingness to penalize the Nebraska Legislature for failing to replace a descriptive term with a vague one. There is, therefore, nothing to the majority's argument that the Nebraska Legislature is at fault for declining to use the term "dilation and extraction."[16]

Second, the majority faults the Nebraska Legislature for failing to "track the medical differences between D&E and D&X" and for failing to "suggest that its application turns on whether a portion of the fetus' body is drawn into the vagina as part of a process to extract an intact fetus after collapsing the head as opposed to a process that would dismember the fetus." *Ante,* at 21. I have already explained why the Nebraska statute reflects the medical differences between D&X and D&E. To the extent the majority means that the Nebraska Legislature should have "tracked the medical differences" by adopting one of the informal definitions of D&X, this argument is without merit; none of these definitions would have been effective to accomplish the State's purpose of preventing abortions of partially born fetuses. Take, for example, ACOG's informal definition of the term "intact D&X." According to ACOG, an "intact D&X" consists of the following four steps: (1) deliberate dilation of the cervix, usually over a sequence of days; (2) instrumental conversion of the fetus to a footling breach; (3) breech extraction of the body excepting the head; and (4) partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus. App. 599—600 (ACOG Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997)). ACOG emphasizes that "unless all four elements are present in sequence, the procedure is not an intact D&X." *Id.,* at 600. Had Nebraska adopted a statute prohibiting "intact D&X," and defined it along the lines of the ACOG definition, physicians attempting to perform abortions on partially born fetuses could have easily evaded the statute. Any doctor wishing to perform a partial birth abortion procedure could simply avoid liability under such a statute by performing the procedure, as respondent does, only when the fetus is presented feet first, thereby avoiding the necessity of "conversion of the fetus to a footling breech." *Id.,* at 599. Or, a doctor could convert the fetus without instruments. Or, the doctor could cause the fetus' death before "partial evacuation of the intracranial contents," *id.,* at 600, by plunging scissors into the fetus' heart, for example. A doctor could even attempt to evade the statute by chopping off two fetal toes prior to completing delivery, pre-

venting the State from arguing that the fetus was "otherwise intact." Presumably, however, Nebraska, and the many other legislative bodies that adopted partial birth abortion bans, were not concerned with whether death was inflicted by injury to the brain or the heart, whether the fetus was converted with or without instruments, or whether the fetus died with its toes attached. These legislative bodies were, I presume, concerned with whether the child was partially born before the physician caused its death. The legislatures' evident concern was with permitting a procedure that resembles infanticide and threatens to dehumanize the fetus. They, therefore, presumably declined to adopt a ban only on "intact D&X," as defined by ACOG, because it would have been ineffective to that purpose. Again, the majority is faulting Nebraska for a legitimate legislative calculation.

Third, the majority and Justice O'Connor argue that this Court generally defers to lower federal courts' interpretations of state law. *Ante*, at 22 (majority opinion); *ante,* at 3—4 (O'Connor, J., concurring). However, a decision drafted by Justice O'Connor, which she inexplicably fails to discuss, *Frisby* v. *Schultz,* 487 U.S. 474 (1988), makes clear why deference is inappropriate here. As Justice O'Connor explained in that case:

"[W]hile we ordinarily defer to lower court constructions of state statutes, we do not invariably do so. We are particularly reluctant to defer when the lower courts have fallen into plain error, which is precisely the situation presented here. To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Id.,* at 483 (citations omitted).

Frisby, then, identifies exactly why the lower courts' opinions here are not entitled to deference: The lower courts failed to identify the narrower construction that, consistent with the text, would avoid any constitutional difficulties.

Fourth, the majority speculates that some Nebraska prosecutor may attempt to stretch the statute to apply it to D&E. But a state statute is not unconstitutional on its face merely because we can imagine an aggressive prosecutor who would attempt an overly aggressive application of the statute. We have noted that " '[w]ords inevitably contain germs of uncertainty.' " *Broadrick* v. *Oklahoma,* 413 U.S. 601, 608 (1973). We do not give statutes the broadest definition imaginable. Rather, we ask whether "the ordinary person exercising ordinary common sense can sufficiently understand and comply with [the statute]." *Ibid. (*quoting *Civil Service Commission* v. *National Assn. of Letter Carriers, AFL—CIO*, 413 U.S. 548, 579 (1973)). While a creative legal mind might be able to stretch the plain language of the Nebraska statute to apply to D&E, "citizens who desire to obey the statute will have no difficulty in understanding it." *Colten* v. *Kentucky,* 407 U.S. 104, 110 (1972) (internal quotation marks omitted).

Finally, the majority discusses at some length the reasons it will not defer to the interpretation of the statute proffered by the Nebraska Attorney General, despite the Attorney General's repeated representations to this Court that his State will not apply the partial birth abortion statute to D&E. See Brief for Petitioners 11—13;

Tr. of Oral Arg. 10—11. The fact that the Court declines to defer to the interpretation of the Attorney General is not, however, a reason to give the statute a contrary representation. Even without according the Attorney General's view any particular respect, we should agree with his interpretation because is it undoubtedly the correct one. Moreover, Justice O'Connor has noted that the Court should adopt a narrow interpretation of a state statute when it is supported by the principle that statutes will be interpreted to avoid constitutional difficulties and well as by "the representations of counsel ... at oral argument." *Frisby* v. *Schultz, supra,* at 483. Such an approach is particularly appropriate in this case because, as the majority notes, Nebraska courts accord the Nebraska Attorney General's interpretations of state statutes "substantial weight." See *State* v. *Coffman*, 213 Neb. 560, 561, 330 N. W. 2d 727, 728 (1983). Therefore, any renegade prosecutor bringing criminal charges against a physician for performing a D&E would find himself confronted with a contrary interpretation of the statute by the Nebraska Attorney General, and, I assume, a judge who both possessed common sense and was aware of the rule of lenity. See *State* v. *White,* 254 Neb. 566, 575, 577 N. W. 2d 741, 747 (1998).[17]

IV

Having resolved that Nebraska's partial birth abortion statute permits doctors to perform D&E abortions, the question remains whether a State can constitutionally prohibit the partial birth abortion procedure without a health exception. Although the majority and Justice O'Connor purport to rely on the standard articulated in the *Casey* joint opinion in concluding that a State may not, they in fact disregard it entirely.

A

Though Justices O'Connor, Kennedy, and Souter declined in *Casey*, on the ground of *stare decisis*, to reconsider whether abortion enjoys any constitutional protection, 505 U.S., at 844—846, 854—869 (majority opinion); *id.*, at 871 (joint opinion), *Casey* professed to be, in part, a repudiation of *Roe* and its progeny. The *Casey* joint opinion expressly noted that prior case law had undervalued the State's interest in potential life, 505 U.S., at 875—876, and had invalidated regulations of abortion that "in no real sense deprived women of the ultimate decision," *id.*, at 875. See *id.*, at 871 ("*Roe* v. *Wade* speaks with clarity in establishing ... the State's 'important and legitimate interest in potential life.' That portion of the decision in *Roe* has been given too little acknowledgment" (citation omitted)). The joint opinion repeatedly recognized the States' weighty interest in this area. See *id.*, at 877 ("State ... may express profound respect for the life of the unborn"); *id.*, at 878 ("the State's profound interest in potential life"); *id.*, at 850 (majority opinion) ("profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage"). And, the joint opinion expressed repeatedly the States' legitimate role in regulating abortion procedures. See *id.*, at 876 ("The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted"); *id.*, at 875 ("Not all governmental intrusion [with abortion] is of necessity unwarranted"). According to the joint opin-

ion, "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.*, at 874.

The *Casey* joint opinion therefore adopted the standard: "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Ibid.* A regulation imposes an "undue burden" only if it "has the effect of placing a substantial obstacle in the path of a woman's choice." *Id.*, at 877.

B

There is no question that the State of Nebraska has a valid interest–one not designed to strike at the right itself–in prohibiting partial birth abortion. *Casey* itself noted that States may "express profound respect for the life of the unborn." *Ibid.* States may, without a doubt, express this profound respect by prohibiting a procedure that approaches infanticide, and thereby dehumanizes the fetus and trivializes human life. The AMA has recognized that this procedure is "ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed *outside* the womb. The 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body." AMA Board of Trustees Factsheet on H. R. 1122 (June 1997), in App. to Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 1. Thirty States have concurred with this view.

Although the description of this procedure set forth above should be sufficient to demonstrate the resemblance between the partial birth abortion procedure and infanticide, the testimony of one nurse who observed a partial birth abortion procedure makes the point even more vividly:

"The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

"The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp." H. R. 1833 Hearing 18 (statement of Brenda Pratt Shafer).

The question whether States have a legitimate interest in banning the procedure does not require additional authority. See *ante*, at 6—9 (Kennedy, J., dissenting).[18] In a civilized society, the answer is too obvious, and the contrary arguments too offensive to merit further discussion. But see *ante*, at 1—2 (Stevens, J., concurring) (arguing that the decision of 30 States to ban the partial birth abortion procedure was "simply irrational" because other forms of abortion were "equally gruesome"); *ante*, at 1 (Ginsburg, J., concurring) (similar).[19]

C

The next question, therefore, is whether the Nebraska statute is unconstitutional because it does not contain an exception that would allow use of the procedure

whenever " ' "necessary in appropriate medical judgment, for the preservation of the ... health of the mother." ' " *Ante*, at 11 (majority opinion) (quoting *Casey*, 505 U.S., at 879 in turn quoting *Roe*, 410 U.S., at 164—165) (emphasis omitted). According to the majority, such a health exception is required here because there is a "division of opinion among some medical experts over whether D&X is generally safer [than D&E], and an absence of controlled medical studies that would help answer these medical questions." *Ante*, at 18. In other words, unless a State can conclusively establish that an abortion procedure is no safer than other procedures, the State cannot regulate that procedure without including a health exception. Justice O'Connor agrees. *Ante*, at 1—2 (concurring opinion). The rule set forth by the majority and Justice O'Connor dramatically expands on our prior abortion cases and threatens to undo *any* state regulation of abortion procedures.

The majority and Justice O'Connor suggest that their rule is dictated by a straightforward application of *Roe* and *Casey*. *Ante*, at 11 (majority opinion); *ante*, at 1—2 (O'Connor, J., concurring). But that is simply not true. In *Roe* and *Casey*, the Court stated that the State may "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe, supra*, at 165; *Casey*, 505 U.S., at 879. *Casey* said that a health exception must be available if "*continuing her pregnancy* would constitute a threat" to the woman. *Id.*, at 880 (emphasis added). Under these cases, if a State seeks to prohibit abortion, even if only temporarily or under particular circumstances, as *Casey* says that it may, *id.*, at 879, the State must make an exception for cases in which the life or health of the mother is endangered by continuing the pregnancy. These cases addressed only the situation in which a woman must obtain an abortion because of some threat to her health from continued pregnancy. But *Roe* and *Casey* say nothing at all about cases in which a physician considers one prohibited method of abortion to be preferable to permissible methods. Today's majority and Justice O'Connor twist *Roe* and *Casey* to apply to the situation in which a woman desires–for whatever reason–an abortion and wishes to obtain the abortion by some particular method. See *ante*, at 11—12 (majority opinion); *ante*, at 1—2 (concurring opinion). In other words, the majority and Justice O'Connor fail to distinguish between cases in which health concerns require a woman to obtain an abortion and cases in which health concerns cause a woman who desires an abortion (for whatever reason) to prefer one method over another.

It is clear that the Court's understanding of when a health exception is required is not mandated by our prior cases. In fact, we have, post-*Casey*, approved regulations of methods of conducting abortion despite the lack of a health exception. *Mazurek* v. *Armstrong*, 520 U.S. 968, 971 (1997) *(per curiam)* (reversing Court of Appeals holding that plaintiffs challenging requirement that only physicians perform abortions had a " 'fair chance of success' "); *id.*, at 979 (Stevens, J., dissenting) (arguing that the regulation was designed to make abortion more difficult). And one can think of vast bodies of law regulating abortion that are valid, one would hope, despite the lack of health exceptions. For example, physicians are

presumably prohibited from using abortifacients that have not been approved by the Food and Drug Administration even if some physicians reasonably believe that these abortifacients would be safer for women than existing abortifacients.[20]

The majority effectively concedes that *Casey* provides no support for its broad health exception rule by relying on pre-*Casey* authority, see *ante*, at 12, including a case that was specifically disapproved of in *Casey* for giving too little weight to the State's interest in fetal life. See *Casey*, *supra,* at 869, 882 (overruling the parts of *Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986), that were "inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn," 505 U.S., at 870); *id.*, at 893 (relying on *Thornburgh*, *supra,* at 783 (Burger, C. J., dissenting), for the proposition that the Court was expanding on *Roe* in that case). Indeed, Justice O'Connor, who joins the Court's opinion, was on the Court for *Thornburgh* and was in dissent, arguing that, under the undue-burden standard, the statute at issue was constitutional. See 476 U.S., at 828—832 (arguing that the challenged state statute was not "unduly burdensome"). The majority's resort to this case proves my point that the holding today assumes that the standard set forth in the *Casey* joint opinion is no longer governing.

And even if I were to assume that the pre-*Casey* standards govern, the cases cited by the majority provide no support for the proposition that the partial birth abortion ban must include a health exception because some doctors believe that partial birth abortion is safer. In *Thornburgh*, *Danforth*, and *Doe*, the Court addressed health exceptions for cases in which *continued pregnancy* would pose a risk to the woman. *Thornburgh*, *supra*, at 770; *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U.S. 52 (1976); *Doe* v. *Bolton,* 410 U.S., at 197. And in *Colautti* v. *Franklin*, 439 U.S. 379 (1979), the Court explicitly declined to address whether a State can constitutionally require a tradeoff between the woman's health and that of the fetus. The broad rule articulated by the majority and by Justice O'Connor are unprecedented expansions of this Court's already expansive pre-*Casey* jurisprudence.

As if this state of affairs were not bad enough, the majority expands the health exception rule articulated in *Casey* in one additional and equally pernicious way. Although *Roe* and *Casey* mandated a health exception for cases in which abortion is "necessary" for a woman's health, the majority concludes that a procedure is "necessary" if it has any comparative health benefits. *Ante*, at 18. In other words, according to the majority, so long as a doctor can point to support in the profession for his (or the woman's) preferred procedure, it is "necessary" and the physician is entitled to perform it. *Id.* See also *ante*, at 2 (Ginsburg, J., concurring) (arguing that a State cannot constitutionally "sto[p] a woman from choosing the procedure her doctor 'reasonably believes' " is in her best interest). But such a health exception requirement eviscerates *Casey*'s undue burden standard and imposes unfettered abortion-on-demand. The exception entirely swallows the rule. In effect, no regulation of abortion procedures is permitted because there will always be *some*

support for a procedure and there will always be some doctors who conclude that the procedure is preferable. If Nebraska reenacts its partial birth abortion ban with a health exception, the State will not be able to prevent physicians like Dr. Carhart from using partial birth abortion as a routine abortion procedure. This Court has now expressed its own conclusion that there is "highly plausible" support for the view that partial birth abortion is safer, which, in the majority's view, means that the procedure is therefore "necessary." *Ante*, at 18. Any doctor who wishes to perform such a procedure under the new statute will be able to do so with impunity. Therefore, Justice O'Connor's assurance that the constitutional failings of Nebraska's statute can be easily fixed, *ante,* at 5, is illusory. The majority's insistence on a health exception is a fig leaf barely covering its hostility to any abortion regulation by the States–a hostility that *Casey* purported to reject.[21]

D

The majority assiduously avoids addressing the *actual* standard articulated in *Casey*–whether prohibiting partial birth abortion without a health exception poses a substantial obstacle to obtaining an abortion. 505 U.S., at 877. And for good reason: Such an obstacle does not exist. There are two essential reasons why the Court cannot identify a substantial obstacle. First, the Court cannot identify any real, much less substantial, barrier to any woman's ability to obtain an abortion. And second, the Court cannot demonstrate that any such obstacle would affect a sufficient number of women to justify invalidating the statute on its face.

1

The *Casey* joint opinion makes clear that the Court should not strike down state regulations of abortion based on the fact that some women might face a marginally higher health risk from the regulation. In *Casey*, the Court upheld a 24-hour waiting period even though the Court credited evidence that for some women the delay would, in practice, be much longer than 24 hours, and even though it was undisputed that any delay in obtaining an abortion would impose additional health risks. *Id.*, at 887; *id.*, at 937 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part) ("The District Court found that the mandatory 24-hour delay could lead to delays in excess of 24 hours, thus increasing health risks"). Although some women would be able to avoid the waiting period because of a "medical emergency," the medical emergency exception in the statute was limited to those women for whom delay would create "serious risk of substantial and irreversible impairment of a major bodily function." *Id.*, at 902 (internal quotation marks omitted). Without question, there were women for whom the regulation would impose some additional health risk who would not fall within the medical emergency exception. The Court concluded, despite the certainty of this increased risk, that there was no showing that the burden on any of the women was substantial. *Id.*, at 887.

The only case in which this Court has overturned a State's attempt to prohibit a particular form of abortion also demonstrates that a marginal increase in health risks is not sufficient to create an undue burden. In *Planned Parenthood of Central*

Mo. v. *Danforth,* 428 U.S. 52 (1976), the Court struck down a state regulation because the State had outlawed the method of abortion used in 70% of abortions and because alternative methods were, the Court emphasized, "significantly more dangerous and critical" than the prohibited method. *Id.,* at 76.

Like the *Casey* 24-hour waiting period, and in contrast to the situation in *Danforth*, any increased health risk to women imposed by the partial birth abortion ban is minimal at most. Of the 5.5% of abortions that occur after 15 weeks (the time after which a partial birth abortion would be possible), the vast majority are performed with a D&E or induction procedure. And, for any woman with a vertex presentation fetus, the vertex presentation form of intact D&E, which presumably shares some of the health benefits of the partial birth abortion procedure but is not covered by the Nebraska statute, is available. Of the remaining women–that is, those women for whom a partial birth abortion procedure would be considered and who have a breech presentation fetus–there is no showing that any one faces a significant health risk from the partial birth abortion ban. A select committee of ACOG "could identify no circumstances under which this procedure ... would be the only option to save the life or preserve the health of the woman." App. 600 (ACOG Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997)). See also *Hope Clinic* v. *Ryan*, 195 F.3d 857, 872 (CA7 1999) (en banc) (" 'There does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion' " (quoting Late Term Pregnancy Techniques, AMA Policy H—5.982 W. D. Wis. 1999)); *Planned Parenthood of Wis.* v. *Doyle*, 44 F. Supp. 2d, at 980 (citing testimony of Dr. Haskell that "the D&X procedure is never medically necessary to ... preserve the health of a woman"), vacated, 195 F.3d 857 (CA7 1999). And, an ad hoc coalition of doctors, including former Surgeon General Koop, concluded that there are no medical conditions that require use of the partial birth abortion procedure to preserve the mother's health. See App. 719.

In fact, there was evidence before the Nebraska Legislature that partial birth abortion *increases* health risks relative to other procedures. During floor debates, a proponent of the Nebraska legislation read from and cited several articles by physicians concluding that partial birth abortion procedures are risky. App. in Nos. 98—3245, 98—3300 (CA8), p. 812. One doctor testifying before a committee of the Nebraska Legislature stated that partial birth abortion involves three "very risky procedures": dilation of the cervix, using instruments blindly, and conversion of the fetus. App. 721 (quoting testimony of Paul Hays, M. D.).[22]

There was also evidence before Congress that partial birth abortion "does not meet medical standards set by ACOG nor has it been adequately proven to be safe nor efficacious." H. R. 1833 Hearing 112 (statement of Nancy G. Romer, M. D.); see *id.*, at 110—111.[23] The AMA supported the congressional ban on partial birth abortion, concluding that the procedure is "not medically indicated" and "not good medicine." See 143 Cong. Rec. S4670 (May 19, 1997) (reprinting a letter from the AMA to Sen. Santorum). And there was evidence before Congress that there is

"certainly no basis upon which to state the claim that [partial birth abortion] is a safer or even a preferred procedure." Partial Birth Abortion: The Truth, S. 6 and H. R. 929 Joint Hearing 123 (statement of Curtis Cook, M. D.). This same doctor testified that "partial-birth abortion is an unnecessary, unsteady, and potentially dangerous procedure," and that "safe alternatives are in existence." *Id.*, at 122.

The majority justifies its result by asserting that a "significant body of medical opinion" supports the view that partial birth abortion may be a safer abortion procedure. *Ante*, at 19. I find this assertion puzzling. If there is a "significant body of medical opinion" supporting this procedure, no one in the majority has identified it. In fact, it is uncontested that although this procedure has been used since at least 1992, no formal studies have compared partial birth abortion with other procedures. 11 F. Supp. 2d, at 1112 (citing testimony of Dr. Stubblefield); *id.*, at 1115 (citing testimony of Dr. Boehm); Epner, Jonas, & Seckinger, Late-term Abortion, 280 JAMA 724 (Aug. 26, 1998); Sprang & Neerhof, Rationale for Banning Abortion Late in Pregnancy, 280 JAMA 744 (Aug. 26, 1998). Cf. *Kumho Tire Co.* v. *Carmichael,* 526 U.S. 137, 149—152 (1999) (observing that the reliability of a scientific technique may turn on whether the technique can be and has been tested; whether it has been subjected to peer review and publication; and whether there is a high rate of error or standards controlling its operation). The majority's conclusion makes sense only if the undue-burden standard is not whether a "significant body of medical opinion," supports the result, but rather, as Justice Ginsburg candidly admits, whether *any* doctor could reasonably believe that the partial birth abortion procedure would best protect the woman. *Ante*, at 2.

Moreover, even if I were to assume credible evidence on both sides of the debate, that fact should resolve the undue-burden question in favor of allowing Nebraska to legislate. Where no one knows whether a regulation of abortion poses any burden at all, the burden surely does not amount to a "substantial obstacle." Under *Casey*, in such a case we should defer to the legislative judgment. We have said:

"[I]t is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes... . [W]hen a legislature undertakes to act in areas fraught with medical and scientific uncertainty, legislative options must be especially broadies... ." *Kansas* v. *Hendricks,* 521 U.S., at 360, n. 3 (internal quotations marks omitted).

In Justice O'Connor's words:

"It is ... difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area." *Akron* v. *Akron Center for Reproductive Health, Inc.,* 462 U.S., at 456 (dissenting opinion).

See *id.*, at 456, n. 4 ("Irrespective of the difficulty of the task, legislatures, with

their superior factfinding capabilities, are certainly better able to make the necessary judgments than are courts"); *Webster* v. *Reproductive Health Services,* 492 U.S., at 519 (plurality opinion) (Court should not sit as an "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States) (internal quotations marks omitted); *Jones* v. *United States,* 463 U.S. 354, 365, n. 13 (1983) ("The lesson we have drawn is not that government may not act in the face of this [medical] uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments"). The Court today disregards these principles and the clear import of *Casey.*

2

Even if I were willing to assume that the partial birth method of abortion is safer for some small set of women, such a conclusion would not require invalidating the Act, because this case comes to us on a facial challenge. The only question before us is whether respondent has shown that " 'no set of circumstances exists under which the Act would be valid.' " *Ohio* v. *Akron Center for Reproductive Health,* 497 U.S. 502, 514 (1990) (quoting *Webster* v. *Reproductive Health Services, supra,* at 524 (O'Connor, J., concurring in part and concurring in judgment)). Courts may not invalidate on its face a state statute regulating abortion "based upon a worst-case analysis that may never occur." 497 U.S., at 514.

Invalidation of the statute would be improper even assuming that *Casey* rejected this standard *sub silentio* (at least so far as abortion cases are concerned) in favor of a so-called " 'large fraction' " test. See *Fargo Women's Health Organization* v. *Schafer,* 507 U.S. 1013, 1014 (1993) (O'Connor, J., joined by Souter, J., concurring) (arguing that the "no set of circumstances" standard is incompatible with *Casey*). See also *Janklow* v. *Planned Parenthood, Sioux Falls Clinic,* 517 U.S. 1174, 1177—1179 (1996) (Scalia, J., dissenting from denial of certiorari). In *Casey,* the Court was presented with a facial challenge to, among other provisions, a spousal notice requirement. The question, according to the majority was whether the spousal notice provision operated as a "substantial obstacle" to the women "whose conduct it affects," namely, "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." 505 U.S., at 895. The Court determined that a "large fraction" of the women in this category were victims of psychological or physical abuse. *Id.,* at 895. For this subset of women, according to the Court, the provision would pose a substantial obstacle to the ability to obtain an abortion because their husbands could exercise an effective veto over their decision. *Id.,* at 897.

None of the opinions supporting the majority so much as mentions the large fraction standard, undoubtedly because the Nebraska statute easily survives it. I will assume, for the sake of discussion, that the category of women whose conduct Nebraska's partial birth abortion statute might affect includes any woman who wishes to obtain a safe abortion after 16 weeks' gestation. I will also assume (although I doubt it is true) that, of these women, every one would be willing to use

the partial birth abortion procedure if so advised by her doctor. Indisputably, there is no "large fraction" of these women who would face a substantial obstacle to obtaining a safe abortion because of their inability to use this particular procedure. In fact, it is not clear that *any* woman would be deprived of a safe abortion by her inability to obtain a partial birth abortion. More medically sophisticated minds than ours have searched and failed to identify a single circumstance (let alone a large fraction) in which partial birth abortion is required. But no matter. The "ad hoc nullification" machine is back at full throttle. See *Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U.S., at 814 (O'Connor, J., dissenting); *Madsen* v. *Women's Health Center, Inc.,* 512 U.S. 753, 785 (1994) (Scalia, J., concurring in judgment in part and dissenting in part).

* * *

We were reassured repeatedly in *Casey* that not all regulations of abortion are unwarranted and that the States may express profound respect for fetal life. Under *Casey*, the regulation before us today should easily pass constitutional muster. But the Court's abortion jurisprudence is a particularly virulent strain of constitutional exegesis. And so today we are told that 30 States are prohibited from banning one rarely used form of abortion that they believe to border on infanticide. It is clear that the Constitution does not compel this result.

I respectfully dissent.

NOTES

1. Unless otherwise noted, all subsequent cites of *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U.S. 833 (1992), are of the joint opinion of O'Connor, Kennedy, and Souter, JJ.

2. In 1996, the most recent year for which abortion statistics are available from the Centers for Disease Control and Prevention, there were approximately 1,221,585 abortions performed in the United States. Centers for Disease Control and Prevention, Abortion Surveillance–United States, 1996, p. 1 (July 30, 1999). Of these abortions, about 67,000–5.5%–were performed in or after the 16th week of gestation, that is, from the middle of the second trimester through the third trimester. *Id.*, at 5. The majority apparently accepts that none of the abortion procedures used for pregnancies in earlier stages of gestation, including "dilation and evacuation" (D&E) as it is practiced between 13 and 15 weeks' gestation, would be compromised by the statute. See *ante*, at 20—21 (concluding that the statute could be interpreted to apply to instrumental dismemberment procedures used in a later term D&E). Therefore, only the methods of abortion available to women in this later stage of pregnancy are at issue in this case.

3. At 16 weeks' gestation, the average fetus is approximately six inches long. By 20 weeks' gestation, the fetus is approximately eight inches long. K. Moore & T. Persaud, The Developing Human 112 (6th ed. 1998).

4. Past the 20th week of gestation, respondent attempts to induce fetal death by

injection prior to beginning the procedure in patients. 11 F. Supp. 2d, at 1106; App. 64.

5. There is a disagreement among the parties regarding the appropriate term for this procedure. Congress and numerous state legislatures, including Nebraska's, have described this procedure as "partial birth abortion," reflecting the fact that the fetus is all but born when the physician causes its death. See *infra*, at 7—8. Respondent prefers to refer generically to "intact dilation and evacuation" or "intact D&E" without reference to whether the fetus is presented head first or feet first. One of the doctors who developed the procedure, Martin Haskell, described it as "Dilation and Extraction" or "D&X." See The Partial-Birth Abortion Ban Act of 1995, Hearing on H. R. 1833 before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 5 (1995) (hereinafter H. R. 1833 Hearing). The Executive Board of the American College of Obstetricians and Gynecologists (ACOG) refers to the procedure by the hybrid term "intact dilation and extraction" or "intact D&X," see App. 599 (ACOG Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997)), which term was adopted by the AMA, see *id.*, at 492 (AMA, Report of the Board of Trustees on Late-Term Abortion). I will use the term "partial birth abortion" to describe the procedure because it is the legal term preferred by 28 state legislatures, including the State of Nebraska, and by the United States Congress. As I will discuss, see *infra*, at 21—23, there is no justification for the majority's preference for the terms "breech-conversion intact D&E" and "D&X" other than the desire to make this procedure appear to be medically sanctioned.

6. There is apparently no general understanding of which women are appropriate candidates for the procedure. Respondent uses the procedure on women at 16 to 20 weeks' gestation. 11 F. Supp. 2d, at 1105. The doctor who developed the procedure, Dr. Martin Haskell, indicated that he performed the procedure on patients 20 through 24 weeks and on certain patients 25 through 26 weeks. See H. R. 1833 Hearing 36.

7. There are, in addition, two forms of abortion that are used only rarely: hysterotomy, a procedure resembling a Caesarean section, requires the surgical delivery of the fetus through an incision on the uterine wall, and hysterectomy. 11 F. Supp. 2d, at 1109.

8. The majority argues that the statute does not explicitly require that the death-causing procedure be separate from the overall abortion procedure. That is beside the point; under the statute the death-causing procedure must be separate from the *delivery*. Moreover, it is incorrect to state that the statute contemplates only one "procedure." The statute clearly uses the term "procedure" to refer to both the overall abortion procedure ("partial birth abortion" is "an abortion procedure") as well as to a component of the overall abortion procedure ("for the purpose of performing a procedure ... that will kill the unborn child").

9. It is certainly true that an undefined term must be construed in accordance with its ordinary and plain meaning. *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994). But this does not mean that the ordinary and plain meaning of a term is wholly

irrelevant when that term is defined.

10. As noted, see n. 5, *supra,* there is no consensus regarding which of these terms is appropriate to describe the procedure. I assume, as the majority does, that the terms are, for purposes here, interchangeable.

11. Congressional legislation prohibiting the procedure was first introduced in June 1995, with the introduction of the Partial Birth Abortion Ban Act, H. R. 1833. This measure, which was sponsored by 165 individual House Members, passed both Houses by wide margins, 141 Cong. Rec. 35892 (1995); 142 Cong. Rec. 31169 (1996), but was vetoed by President Clinton, see *id.*, at 7467. The House voted to override the veto on September 19, 1996, see *id.*, at 23851; however, the Senate failed to override by a margin of 13 votes, see *id.*, at 25829. In the next Congress, 181 individual House cosponsors reintroduced the Partial Birth Abortion Ban Act as H. R. 929, which was later replaced in the House with H. R. 1122. See H. R. 1122, 105th Cong., 1st Sess. (1997). The House and Senate again adopted the legislation, as amended, by wide margins. See 143 Cong. Rec. H1230 (1997); *id.*, at S715. President Clinton again vetoed the bill. See *id.*, at H8891. Again, the veto override passed in the House and fell short in the Senate. See 144 Cong. Rec. H6213 (1998); *id.*, at S10564.

12. Consistent with the practice of Dr. Haskell (an Ohio practitioner), Ohio referred to the procedure as "dilation and extraction," defined as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain." Ohio Rev. Code Ann. §2919.15(A) (1997). Missouri refers to the killing of a "partially-born" infant as "infanticide." Mo. Stat. Ann. §565.300 (Vernon Supp. 2000).

13. For the most part, these States defined the term "partial birth abortion" using language similar to that in the 1995 proposed congressional legislation, that is "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." See H. R. 1833 Hearing 210. See, *e.g.*, Alaska Stat. Ann. §18.16.050 (1998); Ariz. Rev. Stat. Ann. §13—3603.01 (Supp. 1999); Ark. Code Ann. §5—61—202 (1997); Fla. Stat. §390.011 (Supp. 2000); Ill. Comp. Stat., ch. 720, §513/5 (1999); Ind. Code Ann. §16—18—2—267.5 (West Supp. 1999); Mich. Comp. Laws Ann. §333.17016(5)(c) (Supp. 2000); Miss. Code Ann. §41—41—73(2)(a) (Supp. 1998); S. C. Code Ann. §44—41—85(A)(1) (1999 Cum. Supp.). Other States, including Nebraska, see Neb. Rev. Stat. Ann. §28—326 (Supp. 1999), defined "partial-birth abortion" using language similar to that used in the 1997 proposed congressional legislation, which retained the definition of partial birth abortion used in the 1995 bill, that is "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery," but further defined that phrase to mean "deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion there of, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus." See Partial Birth Abortion Ban Act of 1997, H. R. 1122, 105th Cong., 1st Sess. (1997). See,

e.g, Idaho Code §18—613(a) (Supp. 1999); Iowa Code Ann. §707.8A(1)(c) (Supp. 1999); N. J. Stat. Ann. §2A:65A—6(e) (West Supp. 2000); Okla. Stat. Ann., Tit. 21, §684 (Supp. 2000); R. I. Gen. Laws §23—4.12—1 (Supp. 1999); Tenn. Code Ann. §39—15—209(a)(1) (1997).

14. The majority argues that its approach is supported by *Meese* v. *Keene,* 481 U.S. 465, 487 (1987), in which the Court stated that "the statutory definition of [a] term excludes unstated meanings of that term." But this case provides no support for the approach adopted by the majority and Justice O'Connor. In *Meese*, the Court addressed a statute that used the term "political propaganda." *Id.*, at 470. The Court noted that there were two commonly understood meanings to the term "political propaganda," *id.*, at 477, and, not surprisingly, chose the definition that was most consistent with the statutory definition, *id.*, at 485. Nowhere did the Court suggest that, because "political propaganda" was defined in the statute, the commonly understood meanings of that term were irrelevant. Indeed, a significant portion of the Court's opinion was devoted to describing the effect of Congress' use of that term. *Id.*, at 477—479, 483—484. So too, *Colautti* v. *Franklin,* 439 U.S. 379, 392—393, n. 10 (1979), and *Western Union Telegraph Co.* v. *Lenroot,* 323 U.S. 490 (1945), support the proposition that when there are two possible interpretations of a term, and only one comports with the statutory definition, the term should not be read to include the unstated meaning. But here, there is only one possible interpretation of "partial birth abortion"–the majority can cite no authority using that term to describe D&E–and so there is no justification for the majority's willingness to entirely disregard the statute's use of that term.

15. Nor, for that matter, did the terms "intact dilation and extraction" or "intact dilation and evacuation" appear in textbooks or medical dictionaries. See *supra* this page. In fact, respondent's preferred term "intact D&E" would compound, rather than remedy, any confusion regarding the statute's meaning. As is evident from the majority opinion, there is no consensus on what this term means. Compare *ante*, at 8 (describing "intact D&E" to refer to both breech and vertex presentation procedures), with App. 6 (testimony of Dr. Henshaw) (using "intact D&E" to mean only breech procedure), with *id.*, at 275 (testimony of Dr. Stubblefield) (using "intact D&E" to refer to delivery of fetus that has died in utero).

16. The fact that the statutory term "partial birth abortion" may express a political or moral judgment, whereas "dilation and extraction" does not, is irrelevant. It is certainly true that technical terms are frequently empty of normative content. (Of course, the decision to use a technical term can itself be normative. See *ante*, *passim* (majority opinion)). But, so long as statutory terms are adequately defined, there is no requirement that Congress or state legislatures draft statutes using morally agnostic terminology. See, *e.g.*, 18 U.S.C. § 922(v) (making it unlawful to "manufacture, transfer, or possess a semiautomatic assault weapon"); Kobayashi & Olson, *et al., In Re 101 California Street:* A Legal and Economic Analysis of Strict Liability For The Manufacture And Sale Of "Assault Weapons," 8 Stan. L. & Pol'y Rev. 41, 43 (1997) ("Prior to 1989, the term 'assault weapon' did not exist in

the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of 'assault rifles' so as to allow an attack on as many additional firearms as possible on the basis of undefined 'evil' appearance"). See also *Meese,* 481 U.S., at 484—485.

17. The majority relies on Justice Scalia's observation in *Crandon* v. *United States,* 494 U.S. 152 (1990) that "we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Id.*, at 177. But Justice Scalia was commenting on the United States Attorney General's overly broad interpretation of a federal statute, deference to which, as he said, would "turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Id.*, at 178. Here, the Nebraska Attorney General has adopted a *narrow* view of a criminal statute, one that comports with the rule of lenity (not to mention the statute's plain meaning).

18. I read the majority opinion to concede, if only implicitly, that the State has a legitimate interest in banning this dehumanizing procedure. The threshold question under *Casey* is whether the abortion regulation serves a legitimate state interest. 505 U.S., at 833. Only if the statute serves a legitimate state interest is it necessary to consider whether the regulation imposes a substantial obstacle to women seeking an abortion. *Ibid.* The fact that the majority considers whether Nebraska's statute creates a substantial obstacle suggests that the Members of the majority other than Justice Stevens and Justice Ginsburg have rejected respondent's threshold argument that the statute serves no legitimate state purpose.

19. Justice Ginsburg seems to suggest that even if the Nebraska statute does not impose an undue burden on women seeking abortions, the statute is unconstitutional because it has the *purpose* of imposing an undue burden. Justice Ginsburg's view is, apparently, that we can presume an unconstitutional purpose because the regulation is not designed to save any fetus from "destruction" or protect the health of pregnant women and so must, therefore, be designed to "chip away at ... *Roe*." *Ante*, at 1. This is a strange claim to make with respect to legislation that was enacted in 30 individual States and was enacted in Nebraska by a vote of 99 to 1, Nebraska Legislative Journal, 95th Leg., 1st Sess. 2609 (1997). Moreover, in support of her assertion that the Nebraska Legislature acted with an unconstitutional purpose, Justice Ginsburg is apparently unable to muster a single shred of evidence that the Nebraska legislation was enacted to prevent women from obtaining abortions (a purpose to which it would be entirely ineffective), let alone the kind of persuasive proof we would require before concluding that a legislature acted with an unconstitutional intent. In fact, as far as I can tell, Justice Ginsburg's views regarding the motives of the Nebraska Legislature derive from the views of a dissenting Court of Appeals judge discussing the motives of legislators of other States. Justice Ginsburg's presumption is, in addition, squarely inconsistent with *Casey*, which stated that States may enact legislation to "express profound respect for the life of the unborn," 505 U.S., at 877, and with our opinion in *Mazurek* v. *Armstrong,* 520 U.S. 968 (1997) *(per curiam),* in which we stated: "[E]ven assuming ...that a

legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right ... could render the Montana law invalid–there is no basis for finding a vitiating legislative purpose here. We do not assume unconstitutional legislative intent even when statutes produce harmful results, see, *e.g.*, *Washington* v. *Davis,* 426 U.S. 229, 246 (1976); much less do we assume it when the results are harmless." *Id.*, at 972 (emphases in original).

20. As I discuss below, the only question after *Casey* is whether a ban on partial birth abortion without a health exception imposes an "undue burden" on a woman seeking an abortion, meaning that it creates a "substantial obstacle" for the woman. I assume that the Court does not discuss the health risks with respect to undue burden, and instead suggests that health risks are relevant to the necessity of a health exception, because a marginal increase in safety risk for some women is clearly not an undue burden within the meaning of *Casey*. At bottom, the majority is using the health exception language to water down *Casey*'s undue-burden standard.

21. The majority's conclusion that health exceptions are required whenever there is any support for use of a procedure is particularly troubling because the majority does not indicate whether an exception for physical health only is required, or whether the exception would have to account for "all factors–physical, emotional, psychological, familial, and the woman's age–relevant to the well being of the patient." *Doe* v. *Bolton*, 410 U.S. 179, 192 (1973). See also *Voinovich* v. *Women's Medical Professional Corp.*, 523 U.S. 1036, 1037 (1998) (Thomas, J., joined by Rehnquist, C. J., and Scalia, J., dissenting from denial of certiorari).

22. Use of the procedure may increase the risk of complications, including cervical incompetence, because it requires greater dilation of the cervix than other forms of abortion. See Epner, Jonas, & Seckinger, Late-term Abortion, 280 JAMA 724, 726 (Aug. 26, 1998). Physicians have also suggested that the procedure may pose a greater risk of infection. See *Planned Parenthood* of *Wis.* v. *Doyle*, 44 F. Supp. 2d 975, 979 (WD Wis. 1999). See also Sprang & Neerhof, Rationale for Banning Abortions Late in Pregnancy, 280 JAMA 744 (Aug. 26, 1998) ("Intact D&X poses serious medical risks to the mother").

23. Nebraska was entitled to rely on testimony and evidence presented to Congress and to other state legislatures. Cf. *Erie* v. *Pap's A. M.*, 529 U.S. ___, ___ (2000) (slip op., at 15—16); *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986). At numerous points during the legislative debates, various members of the Nebraska Legislature made clear that that body was aware of, and relying on, evidence before Congress and other legislative bodies. See App. in Nos. 98—3245, 98—3300 (CA8), pp. 846, 852—853, 878—879, 890—891, 912—913.

APPENDIX A

[*Chris Weinkopf is an editorial writer and columnist for the Los Angeles* Daily News. *He watched Tim Russert's* Meet the Press *interview with Al Gore on July 16, 2000 and sent us the following response.*]

A "Teachable Moment" Lost on Gore

Chris Weinkopf

Typically, when defenders of legal abortion are confronted with an argument that exposes the deficiencies of their position, they resort to one of two defenses: evasion or cant. It doesn't matter which. Their only objective is to change or obscure the subject, because truth has never been kind to their agenda.

When Al Gore went on *Meet the Press* in July, only to find himself ambushed on the abortion question by host Tim Russert, he relied heavily on both defenses. He began with evasion. When Russert asked him—three times—to pinpoint the stage in human development at which life begins, Gore tried to shift the discussion to the safer terrain of his voting record. When a persistent Russert refused to back down, Gore reverted to cant, invoking the indisputable gospel of the pro-choice faith. "The *Roe* v. *Wade* decision proposes an answer to that question," he replied solemnly. Next question?

The value of cant as an argument is that, in much of the mainstream media, the platitudes of the abortion-rights movement have come to be regarded as self-evident truth. When they are repeated, no one—not even Tim Russert—dares to question them. So a few moments later in the interview, when Gore implausibly contended that "a woman's right to choose" also guarantees the right of *girls* to obtain abortions without parental consent, no one objected.

Yet despite providing steady, effective doses of evasion and cant throughout the interview, Gore stumbled on one oddball question: "Right now," Russert began, "there's legislation which says that a woman on death row—if she's pregnant, she should not be executed. Do you support that?" Gore's immediate response was confusion. "I don't know what you're talking about," he replied, giving Russert an opportunity to recast the question, and Gore a chance to collect his thoughts.

The second time around, Gore reverted back to evasion. "Well, I don't know what the circumstances would be in that situation," he began. "I would—you know, it's an interesting fact situation. I'd want to think about it."

Washington Post columnist Mary McGrory described the Vice President's initial hesitation as "Gore's Pregnant Pause." She denounced Russert's question as absurdly hypothetical, noting that because the average capital-punishment appeals process lasts ten and a half years, any expecting woman entering death row would give birth long before making her way to the execution chamber. In the following day's *Post*, Marjorie Williams derisively compared the exchange to "a late-night bull session between a circle of college sophomores."

Hypothetical questions, however, are a legitimate means of testing the limits of an idea, and they have long been considered fair game in the abortion debate,

especially among the pro-choice crowd. During the presidential primaries, reporters dutifully asked all the Republican candidates how they would respond if their unmarried daughters became pregnant. Often, such questions take on an even more implausible nature—what if the pregnancy were the result of a rape, the baby were found to have an incurable, debilitating disease, and abortion alone could save the mother's life?

Russert's question obviously caught Gore, a champion of both capital punishment and legal abortion, off guard. His initial vacillation, one suspects, stemmed from the realization that he was trapped. Executing an unborn baby for the crimes of her condemned mother is, on its face, a grotesque proposition. Gore, naturally enough, recoiled from the thought, but quickly realized that to express his instinctive revulsion would be to cede too much ground to the other side. If it's wrong for the state to kill an unborn child, then why is it all right for a mother or an abortionist to do the same?

Gore's "pregnant pause" is what missionaries call a "teachable moment," an instance where grace softens the heart of an unbeliever, or at least opens his mind to the comprehension of a higher truth. It's during these moments that the chances of a conversion are the greatest, when an opponent, despite his bitter resistance, can become a convert.

Not all teachable moments bear fruit. After giving Russert's question some thought, Gore issued a bewildering clarification at a press conference the next day. His new position was that he supported letting the condemned pregnant woman choose between postponing her execution until after the baby's birth, or opting for a joint execution/abortion at an earlier date. Returning once again to the mind-numbing comfort of cant, Gore added that "the principle of a woman's right to choose governs in that case."

Gore delivered a policy formulation that was consistent with the old pro-choice slogans, but still at odds with itself. Granting a pregnant woman the option of a short-term stay of her execution makes sense only if we acknowledge that there truly is a second life at stake, whose protection merits a higher priority than the swift administration of justice. But if her fetus is, in fact, a human being, it defies reason to leave the baby's fate up to the whims of a convicted killer.

The notion that a condemned woman would have a choice at all is itself preposterous. Death-row inmates are generally not entrusted with *any* decisions. In many states they cannot vote, have visitors, or even interact with the rest of the prison population. They face execution precisely because the law considers their crimes so great as to forfeit *all* of their rights, including the right to life. But in Al Gore's vision, the right to abortion endures beyond all others. It extends all the way to the electric chair.

It is yet another example of the barbarism that abortion advocates accept rather than acknowledge the humanity of the unborn—and then watch their entire movement collapse under its own weight. That's why the abortion lobby is so adamant in its defense of partial-birth abortion. If the public were to start thinking about the

most extreme examples of abortion as horrific, the true horror of the more mundane variety would also become apparent.

In a remarkably candid piece in *Time Daily*, the online version of the weekly newsmagazine, Jessica Reaves admitted as much:

"If we suspend a pregnant woman's execution out of respect for the 'innocence' of the fetus, how can we justify any abortion? Because after all, one fetus is as 'innocent' as the next. . . . The image of a pregnant death row inmate choosing execution strikes many in both the pro-choice and pro-life movements as too barbaric to contemplate. . . . But what is the alternative to allowing that choice? The continued chipping away at *Roe* v. *Wade*."

Sometimes, it's easier—or more politically expedient—to flee from teachable moments than to learn from them. Instead of reconciling the conflict between his common sense and his policies, Gore chose simply to ignore it. He continued in the abortion-rights movement's long history of evading the truth, and embracing the cant.

"AT THIS RESTAURANT, A BLT IS BEANSPROUTS, LENTILS AND TOFU."

APPENDIX B

[George F. Will, a well-known author and television commentator, is a nationally-syndicated newspaper columnist. The following appeared in the Washington Post *on June 29, 2000 and is reprinted with permission (© 2000, The Washington Post Writers' Group.)]*

An Act of Judicial Infamy

George F. Will

It probably was inevitable that partial-birth abortion would become, as it did some while ago, a sacrament in the Church of "Choice." That sect's theology cannot risk conceding that what is killed in an abortion ever possesses more moral significance than a tumor. Hence it cannot concede that society's sensibilities should be lacerated by, or that its respect for life might be damaged by, any method of abortion.

But how did this surgical procedure become, as it did Wednesday, not just a constitutional right but a "fundamental" constitutional right—a right deemed integral to the enjoyment of liberty?

Nebraska's ban on partial-birth abortion, passed just one vote short of unanimity by the legislature, and akin to bans enacted by 29 other states, has not survived the Supreme Court's scrutiny. But scant scrutiny was required, given the logic the court locked itself into 27 years ago when, in Roe v. Wade, the court, with breathtaking disregard of elemental embryology, described a fetus as "potential life."

Nowadays pro-abortion forces, speaking with the mincing language of people who lack the courage of their squeamishness, speak of abortion producing "fetal demise." Remarkable that—the demise of something only potentially alive. But not long ago pro-abortion forces denied that what they call "fetal material," and Nebraska calls "a living unborn child," can feel pain. In fact, partial-birth abortion, which is generally used in the third trimester of gestation, is inflicted on beings that have reflexes and brain activity and other attributes of newborn infants.

Not long ago pro-abortion forces argued that abortion involves no cruelty or gruesomeness from which society should flinch. Now they defend partial-birth abortion in order to defend all late-term abortions, all of which involve the violent dismemberment of "fetal material" that looks exactly like a baby.

Nebraska defined the prohibited practice as "delivering into the vagina a living unborn child" for the purpose of killing it. In this procedure (which the court majority, in its delicacy, flinches from fully describing) the baby is turned, pulled by its kicking legs almost entirely from the mother. Then, with only the top of the skull in the birth canal, the skull is punctured and its contents sucked out.

Divided 5 to 4, the court held that Nebraska's law, as phrased, might criminalize another, more common procedure used primarily in second-trimester abortions. But Nebraska's attorney general has expressly vowed not to apply the law to this more common procedure.

The court also faulted Nebraska's law for lacking an "exception for the preservation of the . . . health of the mother." But the American College of Obstetricians

and Gynecologists, which opposes restrictions on abortion, says it can identify "no circumstances under which" partial-birth abortion "would be the only option to save the life or preserve the health of the woman." And the American Medical Association says "there does not appear to be any identified situation in which" partial-birth abortion "is the only appropriate procedure to induce abortion."

The primary reason the court ruled against Nebraska is that it cannot find traction on the slippery slope onto which it so improvidently stepped 27 years ago. America's subsequent slide into the culture of death was manifest Sept. 26, 1996, during a Senate debate on partial-birth abortion.

Pennsylvania Republican Rick Santorum asked Democrats Russ Feingold of Wisconsin and Frank Lautenberg of New Jersey this: Suppose during an attempted partial-birth abortion the infant, instead of being just almost delivered, with only a few inches of skull remaining in the birth canal, slips entirely out of the canal. Is killing the born baby still a "choice"? Feingold and Lautenberg said it was still a matter between a mother and her abortionist. (C-SPAN captured this exchange. The Congressional Record was subsequently falsified.)

Feingold and Lautenberg anticipated the court. In Roe v. Wade, which arose in Texas, the court left standing a Texas law prohibiting "the killing of unborn children during parturition," meaning the killing of an infant "in the state of being born and before actual birth." On Wednesday, such killing—what Justice Scalia, dissenting, accurately calls "live-birth abortion"—became a fundamental constitutional right.

Wednesday's decision will, as Justice Scalia said in dissent, rank with the cases of Dred Scott (1857, saying blacks could not be citizens and so could not seek judicial protection of their rights) and Korematsu (1944, upholding the internment of American citizens of Japanese ancestry) as acts of judicial infamy.

Al Gore approving Wednesday's decision, and George Bush deploring it, affirm strikingly different understandings of constitutional reasoning and elemental morality. With the court and the culture in the balance, let no one say this is an unimportant election.

APPENDIX C

Here Come the Judges: The courts in the balance

Robert H. Bork

Both George Bush and Al Gore are attempting to make the selection of judges an issue in the upcoming election. If they succeed, it will be one of the few times—perhaps the only time—the electorate has been moved by that issue. Gore has put the matter precisely: "In this election, the Supreme Court is at stake, [and] many of our personal liberties are at stake."

The question of judges is indeed a monumental one. It does not bear on national security, as missile defense and the readiness of the military do. Nor does it go to the vibrancy of the economy, as taxes and tax cuts do. Judicial selection merely goes to the heart of democratic government: the ability of Americans to govern themselves.

It is time, and past time, to be blunt about the rule of judges. Many of them bear less resemblance to judges than they do to commissars. How else would you characterize men and women who have assumed the power to decide the most serious cultural and social issues facing America, who will be in place long after the president who named them leaves office, and who are accountable to no one, particularly not to voters or elected representatives? The only accountability these "robed masters" should have is to the meaning of the Constitution, a meaning discerned by study of its text, structure, and history. If justices ignore those constraints, as many of them do, they govern according to their own tastes, and we have no way of resisting or altering the ukases they hand down. Whatever else may be said of it, the rule of judges without any plausible reference to the Constitution can hardly be called legitimate in a nation that was designed to be basically democratic.

The Supreme Court and the courts of appeals are at tipping points. The Supreme Court is more often liberal, undisciplined, and imperialistic than it is restrained; but it is capable of being moved in either direction by the next president's choice of justices. The courts of appeals, which are final for all but a tiny percentage of litigants, are similarly situated.

What would be the consequences of a Gore judiciary? He has made that clear, and his message does not augur well for republican, let alone conservative, values. For one thing, the abortion right cobbled up by the Court in *Roe* v. *Wade* would be entrenched for years, probably decades, to come, and would be broadened. Partial-birth abortion would be a firm constitutional right, without even the pretense that a ban including a mother's-health exception might make a difference. Other restrictions, such as parental notification where a minor is involved, would fall by the wayside. So fierce is Gore on this topic that he has said that a pregnant woman under sentence of death must have the choice whether to have her unborn baby

killed with her. On abortion issues, Kate Michelman would in effect be the Supreme Court.

Homosexuality would be normalized. Questioned about the Court's recent 5-to-4 decision that the Boy Scouts may refuse to have homosexual scoutmasters, Gore replied that the issue should depend on whether the Scouts are a "public organization or sufficiently intertwined with public activities." There, presumably, goes any limitation on open homosexuals in the military. He went on: "I disagree with discrimination against gays and lesbians. I just think the time has come to end that discrimination." Moral disapproval of homosexual conduct would be outlawed in any public and many private contexts. Open-housing laws, for example, would forbid a landlady to turn away homosexual couples, and the Court would uphold that as constitutional. The Court is within one vote of producing these results now.

We may expect racial and sexual quotas to flourish in government and private employment and in the faculty and student composition of universities. As Thomas Sowell has shown in a study of other nations, once preferences are put into place, even though touted as transitional, they become permanent, expand to cover new "victim" groups, and produce great bitterness and even violence. Legislative districting by race and ethnic group will go forward unimpeded. There is no better prescription for the continued Balkanization of America.

Criminal-law enforcement will become weaker and less effective. Miranda warnings have now become constitutional requirements, but far more awaits an activist liberal Court. Justices presently on the Court favor an expansion of the exclusionary rule by which reliable evidence of guilt may not be used at trial if the police have acquired that evidence in a manner that is displeasing to squeamish justices. They are not comparably squeamish about turning loose criminals who will rob and kill again.

Similarly, the death penalty would likely be abolished by Court diktat. Liberals have frequently viewed death as "cruel and unusual punishment" forbidden by the Eighth Amendment, despite the fact that capital punishment is explicitly shown to be available several times in the Constitution.

The question of the constitutionality of school vouchers will shortly be before the Court. The crucial issue will be the provision of vouchers to children whose parents want them to attend schools with religious affiliations and training. No doubt the ACLU will sue, claiming that this is government support of religion that violates the Establishment Clause of the First Amendment. Though the Court has just permitted government donation of equipment to religious schools, the switch of one vote would almost surely outlaw voucher programs that a majority of Americans support and that are of particular importance to minority students trapped in the travesties called inner-city public schools. Al Gore and the Democrats are in thrall to the National Education Association, a teachers' union fiercely devoted to preserving its monopoly in the public schools. A Gore presidency thus surely means the destruction of voucher programs and with it the destruction of the hopes of many minority students.

Norman Podhoretz has explained America's immunity from the horrors that visited Europe in the 20th century by saying, "[T]he institutional structure of American democracy . . . provided a barrier against the terrible evils that could issue from even the most apparently benevolent utopian intentions. This institutional structure therefore must be defended . . ." The liberal bloc of justices now on the Supreme Court are utopians in the sense that they would remake the nation in keeping with universalistic principles of justice and equality, as they, rather than we, define those terms. The attempt to rein in a runaway liberal Court is a necessary defense of the institutional structure of American democracy.

Al Gore is the perfect modern liberal, with all that implies about rigid political correctness and willingness to use coercion to achieve liberalism's ends. The ideal instrument for carrying out that agenda is, of course, the Supreme Court. To the modern liberal, democracy is not a process but a long list of substantive results. If the electorate will not produce those results, a way must be found to force them on the electorate, willy-nilly. This is all too close to Bertolt Brecht's quip that the government has lost confidence in the people and a new people must be formed. The Supreme Court has been working assiduously at that, with more success than not. Gore wants to step up the pace.

The deepest corruption of the Clinton-Gore administration has been its unremitting assault on the rule of law. Every major executive-branch agency involved with law or its enforcement—the Immigration and Naturalization Service, the Internal Revenue Service, the Federal Bureau of Investigation, the Department of Justice—has been touched, and some of them imbued, with political corruption. Gore explicitly promises to accelerate the attack on the judiciary, particularly the Supreme Court. Without breaking stride, he simultaneously disapproves of litmus tests for judges and promises that his appointees will continue the charade of pretending that abortion is a right to be found in the Constitution. Abortion is a proxy for all the other attitudes that a Gore Supreme Court would enact as if they were fundamental law.

Al Gore is right about one central issue in this fall's election: The Supreme Court and our personal liberties are at stake. The fundamental liberty enshrined in the Constitution is the liberty to govern ourselves. Should Gore become president, greater and greater portions of that liberty will be lost. The liberal bloc of the Court is sublimely indifferent to the opinions of most Americans, to the Constitution, and to the laws that elected representatives enact. The pity of it is that the American electorate is supinely indifferent to these depredations.

APPENDIX D

[*The following syndicated columns appeared on September 15 and October 2, 2000, respectively and are reprinted with permission of the author. Mr. Leo is a contributing editor of* U.S. News & World Report.]

Time to Draw the Line on Abortion and Infanticide

John Leo

Defenders of abortion rights think the Born-Alive Infants Protection Act is just another tactical ploy in the abortion wars. In part it is. Opponents of abortion want to see if the abortion lobby is really going to come out against a proposed law that simply says babies born alive are persons.

Sure enough it did, thus fulfilling the safe prediction that the abortion lobby will always adopt the most extreme position available. The National Abortion and Reproductive Rights Action League (NARAL) put out a hot statement announcing that "this bill attempts to inject Congress into what should be personal and private decisions about medical treatment." Translation: Killing babies born accidentally as a result of botched abortions has to be legal because we want it to be.

Anti-abortion people simply said: We told you so. We predicted that court approval of those grisly partial-birth abortions would lead to demands that infanticide should be legal, too.

The "Born-Alive" bill (coming soon to your local newspaper as "the so-called Born-Alive Act, know medically as, etc., etc.) was introduced by Rep. Charles Canady, R-Fla., and approved 22-1 by the House Judiciary Committee. It defines born alive as meaning "complete expulsion or extraction from its mother" of "a member of the species homo sapiens . . . who after such expulsion or extraction, breathes or has a beating heart, pulsation of the umbilical cord or definite movement of voluntary muscles . . ."

Jerrold Nadler, D-N.Y., an abortion-rights supporter, voted in favor but seemed mystified by the bill. Though he thinks it is part of an effort to undermine Roe vs. Wade, "As far as I can tell, this bill does nothing except restate current law."

Canady says the bill recapitulates existing law in 40 states and will bring their standard to the federal level. In effect, the bill says that babies born during abortions must be put on the same plane and extended the same care and constitutional protections as other babies. Once born, they cannot be discriminated against, killed, or allowed to die simply because they are unwanted.

Nurses testified before the Judiciary Committee about how medical personnel deal with the results of "induced labor abortion" at Christ Hospital in Oak Lawn, Ill. Under this technique, a drug forces the woman's cervix open and the woman expels a premature baby who dies during the process or soon afterward. Most are disabled and too small to survive.

Jill Stanek, one of the Christ Hospital nurses, said she retrieved a 10-inch, 21-week-old Down's syndrome baby from a soiled utility room and cradled and rocked

him for the 45 minutes that he lived. One nurse, Stanek said, told her of an aborted baby who was supposed to have spina bifida but was delivered with an intact spine. Another 23-week-old baby, she said, "who showed signs of thriving, was merely wrapped in a blanket and kept in the labor and delivery department until she died 2 1/2 hours later."

Last year, Albert Report magazine said that Foothills Hospital in Calgary, Alberta, was conducting two or three induction abortions a week, many of which result in live births. Afraid of losing their jobs but repelled by hospital policy, four nurses spoke out anonymously. All protested the killing of the unborn because they may be defective. One said that doctors are frequently wrong about diagnosing a serious mental or physical defect, but even when a baby is born apparently healthy, the doctors often choose to hide their mistakes and let the baby die.

Here's why the bill is more than a gambit in the abortion wars. We live at a time when the intellectual groundwork for the promotion of infanticide is already in place and spreading. Peter Singer at Princeton and other influential scholars around the country argue that birth is an arbitrary point for society to bestow personhood (and therefore constitutional protections). They want it later, so parents would have some time to decide whether to dispatch the baby or keep it. Jeffrey Reiman, philosophy professor at American University, thinks that infants do not "possess in their own right a property that makes it wrong to kill them."

In this growing climate, a slide toward casual euthanasia is possible, and viable babies born as the accidental result of abortions are more vulnerable than ever. Some abortionists routinely let these babies die on the ground that they were marked for extinction anyway. Some act on the belief that the mother's intent must govern. Others are simply unwilling to admit incompetence by telling a woman who came in for an abortion that she is now a mother.

The intent of the mother is something of a frontier for abortion supporters. It shifts attention away from the reality of the baby, already born with rights, and back toward the purpose of the operation—to abort. Pro-choice literature is filled with suggestions that the developing life within a mother is an unborn baby if she wants it, simply discardable tissue if she doesn't.

The Supreme Court's decision striking down Nebraska's partial-birth abortion law has some hints that the intent governs. The 3rd Circuit's July 26 decision striking down New Jersey's partial-birth ban has stronger indications that what the mother means to do is more important than the position of the baby during the procedure (partly out, completely out).

All the more reason to draw the brightest line possible between abortion and homicide. The bill doesn't undermine Roe. Its point is just that you can't kill babies. Can't both sides of the abortion dispute agree on that?

Appendix D continued

The Sleeper Effect

John Leo

A startling thought is occurring to the folks who study the impact of divorce on children: A good divorce may be much worse than a bad marriage. The conventional wisdom that followed the rapid spread of divorce in the 1970s and 1980s—that children are resilient and usually overcome the shock of divorce—has been mugged by a brutal gang of facts. Some children cope well and thrive. But taken as a group, the children of divorce are at serious risk.

For a decade now, the evidence has piled up. Children of divorce are more depressed and aggressive toward parents and teachers than are youngsters from intact families. They are much more likely to develop mental and emotional disorders later in life. They start sexual activity earlier, have more children out of wedlock, are less likely to marry, and if they do marry, are more likely to divorce. They are likelier to abuse drugs, turn to crime, and commit suicide. One study shows that the children of divorce, when they grow up, are significantly less likely than adults from intact families to think they ought to help support their parents in old age. This is an indication that resentments do not fade and that the divorce boom could create disruption between generations. A report in June from the Heritage Foundation began: "American society may have erased the stigma that once accompanied divorce, but it can no longer ignore its massive effects."

Now this discussion among researchers and policy experts is becoming part of the national conversation thanks to Judith Wallerstein and her important new book, *The Unexpected Legacy of Divorce*. The "unexpected" part is that divorce produces "sleeper effects," deep and long-term emotional problems that arise only when the children enter early adulthood and begin to confront issues of romance and marriage. The "powerful ghosts" of their parents' experience rise only in later life, Wallerstein told a seminar in New York City last week.

Sense of dread. Wallerstein is a psychologist who has been studying 131 children of divorce since 1971, interviewing them intensively at different stages of life. Now these children are ages 28 through 43, and the news about them is not good. Their parents' divorce hangs like a cloud over their lives. Compared with similar grown children from intact families in the same neighborhood, the children of divorce were more erratic and self-defeating. Some sought out unreliable partners or dull ones who at least would never leave. Others ran from conflict or avoided relationships entirely. Expecting disaster, they often worked to create it. Some grew up to achieve success in work and romance, Wallerstein says, but even they are filled with a sense of dread and foreboding that it could all collapse at any moment, like the intact home they once had.

Wallerstein's work undercuts the notion that divorce saves children by eliminat-

ing the open conflict of parents. She finds that kids generally tune out their parents' bitter quarrels and aren't much bothered by them. They don't much care whether their parents like each other or sleep in different beds. A cordial divorce doesn't help. The children just need parents to stay together. Wallerstein says that the loss of the powerful mental image of the intact family inflicts the crucial harm. The damage is compounded by the loss of attention from frazzled parents trying to rebuild their lives.

She has her critics. Her sample is small and not necessarily representative, drawn entirely from an upscale neighborhood in Marin County, Calif. But she has reached deeper into the psyche of children of divorce over a longer period of time than any other psychologist, and her fellow researchers seem to be leaning her way. Her most strident critic, sociologist Andrew Cherlin of Johns Hopkins University, now acknowledges that divorce has significant long-term negative effects on children. David Blankenhorn, head of the Institute for American Values, calls this a sign of "the shift"—a major turnaround in thinking about divorce.

Part of the shift is the growing realization that divorce is more widespread than it needs to be. In their book, *A Generation at Risk*, researchers Paul Amato and Alan Booth report that 70 percent of American divorces are occurring in "low-conflict" marriages. In the study of some 2,000 married people, just 30 percent of divorcing spouses reported more than two serious quarrels in a month, and only 25 percent said they disagreed "often" or "very often." So three quarters of divorcing couples don't say they quarrel often or even disagree much.

Even bad marriages are likely to improve, according to sociologist Linda Waite of the University of Chicago. Analyzing data from the National Survey of Families and Households, Waite found that 86 percent of people who said they were in bad marriages, but who decided to stick it out, said five years later that their marriages had turned around and were now happier. Sixty percent said their marriages were "very happy." "Bad marriage is nowhere near as permanent a condition as we sometimes assume," Waite says in her new book, *The Case for Marriage*. Considering what we now know about the impact of divorce on children, that should give many divorce-minded couples some second thoughts.

"DOES THIS HURT?"

APPENDIX E

[*Midge Decter is a writer and social critic living in New York. The following commentary first appeared on October 2, 2000 on* National Review Online *(www.nationalreview.com) and is reprinted with permission.*]

A Revealing Pill

Midge Decter

It seems that the use of the medication mifepristone (popularly known as RU-486) combined with the prostaglandin misoprostal is the preferred form of abortion in something like 14 countries, including most of Europe, the United Kingdom, and Israel. And now at long last and after much pressure from the abortion-rights movement, the FDA has approved its importation to the United States.

According to the National Abortion Federation approximately 95 percent of women using mifepristone/misoprostal will have a complete abortion up to 49 days after the start of the last menstrual period. The other 5 percent will need a suction abortion because of excessive bleeding, or an incomplete abortion, or an ongoing pregnancy, in which even after the m/m cocktail the embryo remains viable (this last occurring in fewer than 1 percent of the cases). The way it works is, a doctor gives a woman the mifepristone pill, and if no abortion has taken place after two days, she is then given a couple of misoprostal tablets either to swallow or to insert into the vagina. Finally, somewhere between eleven and seventeen days later, a clinician determines whether she has in fact had a complete abortion. If she has not, a suction abortion will be performed. On average, she will be bleeding from nine to sixteen days, and she may be passing blood clots of varying sizes.

Setting aside the whole issue of whether abortion is murder, the interesting question is why the procedure just described is considered by so many to be an improvement on the by now old-fashioned, ordinary dilation and curettage. Surely something requiring three visits to the doctor over a possible period of two weeks cannot be considered more convenient, or, for that matter, less painful. (The passing of blood clots, for instance, is normally far from an easy or casual experience.) Why, then, do so many women seem to prefer this possibly protracted process of getting rid of an unwanted pregnancy to a quick and dirty procedure?

Perhaps the answer is that most of the satisfied consumers of mifepristone/misoprostal had for some reason found the prospect of a trip to the abortion clinic or the abortionist's office a particularly unpleasant one—still redolent of the old back-alley shame and scandal of bygone days. Or perhaps they simply preferred the greater privacy of aborting their pregnancies by themselves in their own homes. Whatever the reason, one thing above all distinguishes a pill from a curette: It is infinitely more abstract and immaterial. One can swallow a pill or two and no matter how much discomfort and bleeding ensues, the experience is far more that of having an unpleasant medical condition than of being witness to the unmistakable ripping out of living human tissue destined to become a baby. In other words,

it can feel like something that is happening to one rather than something one is doing.

For years now, the pro-abortion party has sought to play down the eventfulness of a woman's ending her pregnancy by speaking in dulcet tones of the experience and raising high the banner of so unexceptionable a principle as "choice." But rare is the woman undergoing an abortion who will not now and then, at least for a moment and sometimes for many moments, be haunted by the thought of the baby who never was and her part in making that so. How could anyone have imagined that she would not be? All the "emanations and penumbras" in the world cannot insure here the "right" to go through this experience without some deep consequence.

And that is where RU-486 comes in. The party of abortion, who have fought for so long to bring it to the United States; and who are celebrating today—have advertised its use as a simpler and safer way to terminate a pregnancy. But in the event, it might not turn out to be either simpler or safer, as those who have studied or experienced its use must surely know. Why, then, all the urgent pressure for its adoption, and the present great sigh of happiness in the abortion community? Well, for one thing, because it will be so much easier to slip a girl or a woman a pill than to get her feet into stirrups. Because it will be so much more difficult for anti-abortion demonstrators to find the proper place in which to congregate. Because it will be so much more possible to get around the problem of parental consent. But most of all, where the pregnant girls or women themselves are concerned, it will be much more appealing to be able to set the deed in motion without having to be nearly so mindful of what one is actually doing.

The question is, if abortion is not murder and no more than a function of a woman's freedom of choice, why has there been so much pressure to perfect the means for getting through it with blinders on?

"SORRY, THE DOCTOR NO LONGER SEES PEOPLE. HE E-MAILS THEM."

SUBSCRIPTIONS AND BOUND VOLUMES

Subscriptions: the *Human Life Review* accepts regular subscriptions at the rate of $20 for a full year (four issues). Canadian and all other foreign subscriptions please add $5 (total: $25 U.S. currency). Please address all subscription orders to the address below and enclose payment with order. You may enter gift subscriptions for friends, libraries, or schools at the same rates.

Additional Copies: this issue—No. 4, Volume XXVI—is available while the supply lasts at $5 per copy; 10 copies or more $3 each. A limited number of back issues from 1996 to this year are also available at the same prices. We will pay all postage and handling.

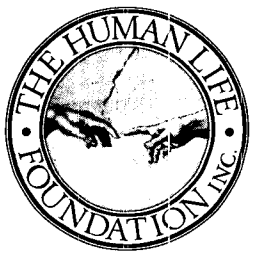
Bound Volumes: we still have available bound volumes of the years 1990 through 1998 at $50 each. The volumes are indexed, and bound in permanent library-style hardcovers, complete with gold lettering, etc. (they will make handsome additions to your personal library). Please send payment with order to the address below. We will pay all postage and handling.

Earlier Volumes: while several volumes are now in very short supply, we can still offer most of the volumes for the first 16 years (1975-1989) of this review at $50 each.

Selected articles from the current issue of the *Review* are available on our website, ***www.humanlifereview.com***. Articles from recent issues can also be accessed, in whole or in part, from the CD-ROM database of **Information Access Company** (362 Lakeside Drive, Foster City, California 94404).

Address all orders to:

The Human Life Foundation, Inc.
215 Lexington Avenue, 4th Floor
New York, New York 10016


THE HUMAN LIFE
FOUNDATION INC.

Index

the HUMAN LIFE REVIEW

Volume XXVI
2000

The Human Life Foundation • 215 Lexington Avenue, New York, NY 10016 •
www.humanlifereview.com • (212) 685-5210

Index: The Human Life Review, Volume XXVI, 2000

The code for all references is:
W (Winter), SP (Spring), SU (Summer), F (Fall) issues
followed by the page number for that issue.
Titles in **bold face** indicate articles which appeared in this *Review*.

C

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

V

W

Y

Z