

the HUMAN LIFE REVIEW



FALL 2002

Featured in this issue:

Hadley Arkes on The Unraveling of Rights

Kathryn Jean Lopez on The Right to Choose?

Wesley J. Smith on The Clone Hustlers

Revisiting Ireland's Pro-Life Civil War

Robin Haig • Richard Maggi • David Quinn

F. P. Tros on Onwards Libertarian Soldiers

Melinda Tankard Reist on Silencing Women

Ian Gentles on Women's Health after Abortion

Also in this issue:

George F. Will • Dinesh D'Souza • Noemie Emery • Nancy Valko
Adam G. Mersereau

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ABOUT THIS ISSUE . . .

. . . so here we are, approaching the thirtieth anniversary of *Roe v. Wade*, hearing more and more about how Harry Blackmun's raw judicial power-grab now represents "settled law." Attorney General John Ashcroft said as much during his Senate confirmation hearings. More recently, Michael McConnell, a Bush federal appeals court appointee, echoed the Ashcroft line. Thank Heaven for Hadley Arkes, the indefatigable scholar and activist whose new book, *Natural Rights and the Right to Choose*, should help shake off any conservative complacency which may have settled on *Roe*—one thing liberals are never complacent about is *Roe v. Wade*. We thank Cambridge University Press for permission to reprint Chapter 6, "Prudent Warnings and Imprudent Reactions" (page 7). If you want to read more—and we think you will—you can order the book directly from Cambridge by calling 212 924-3900, ext. 492; online: www.us.cambridge.org. Another book you may want to get hold of is *Women's Health after Abortion*, co-authored by *Review* contributor Ian Gentles whose article by the same name begins on page 87. For ordering information, contact the publisher, the deVeber Institute for Bioethics and Social Research, 3089 Bathurst St., Suite 316, Toronto, Ontario, Canada, M6A 2A4; online: www.deveber.org. Contributor Melinda Tankard Reist ("Silencing Women," page 80) informs us that her book, *Giving Sorrow Words*, is now in its second printing in Australia and will soon be published in France (Editions de l'Emmanuel) and the United States (Elliot Institute). The book presents 18 complete, first-person accounts of women who have undergone abortion, and draws on the experiences of nearly 300 others, documenting a legacy of pain and suffering the pro-"choice" establishment still refuses even to acknowledge. A final booknote—longtime contributor Wesley Smith dons a reviewer's cap for us in this issue (see "The Clone Hustlers," page 45), but his latest book, *Culture of Death: The Assault on Medical Ethics in America* is still available from Encounter Books.

As always, many thanks are in order for permission to reprint the work that makes up our Appendix section, beginning with the Washington Post Writers Group for George Will's "Life, and Death, in an Abortion Culture," and the *National Catholic Register* for Dinesh D'Souza's "Pro-Life Stasis? It's Time to Do What Lincoln Did." Noemie Emery's "Losers for the American Way" originally appeared in the *Weekly Standard* (www.weeklystandard.com); and *National Review Online* published Adam Mersereau's "Pro-Lifers Should Be Cautiously Optimistic" (www.nationalreview.com). Finally, the quarterly magazine *Voices*, published by Women for Faith and Family (www.wf-f.org), is where we found Nancy Valko's "Ethical Implications of Non-Heart Beating Organ Donation," an article which reminds us that the question about when life ends is just as *un-settled* these days as the one about when life begins.

ANNE CONLON
MANAGING EDITOR



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<i>Introduction</i>	2	
Maria McFadden		
<i>"Judicial Usurpation" and the Unraveling of Rights</i>	7	
Hadley Arkes		
<i>The Right to Choose? Really?</i>	39	
Kathryn Jean Lopez		
<i>The Clone Hustlers</i>	45	
Wesley J. Smith		
<i>Revisiting Ireland's Pro-Life Civil War</i>	55	
Robin Haig 56		
Richard Maggi 60		
David Quinn 68		
<i>Onwards Libertarian Soldiers</i>	73	
F. P. Tros		
<i>Silencing Women</i>	80	
Melinda Tankard Reist		
<i>Women's Health after Abortion: A Fresh Look at the Evidence</i>		87
Ian Gentles		
<i>Appendices</i>	97	

George F. Will
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Noemie Emery
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INTRODUCTION

AS YOUR SERVANT WRITES THIS, we are approaching the 30th anniversary of *Roe v. Wade*, a Supreme Court decision which even many pro-abortion legal scholars admit was poorly reasoned. Of course, that's the *least* one can say about it: *Roe* was an arrogant act of judicial usurpation, which wrested the abortion question away from the states, and attempted to "settle" it by baptizing killing in the name of the Constitution. Since then, an activist Court has continued to impose a new moral vision, one which rejects traditional American values—so argues Hadley Arkes, whose eloquent voice leads our issue.

Professor Arkes is well-known to readers of the *Review*; most recently (*Summer*, 2002) we heard from him as an architect of the Born-Alive Infants Protection Act, passed last summer, a bill which seeks to protect a baby who *survives* an abortion. In this issue we present a chapter from Arkes' new book, *Natural Rights and the Right to Choose*, in which he argues persuasively that the American political class has drifted away from the belief in natural rights and "into premises quite at odds with the premises of the American Founders." The "liberal project," which claims to be about expanding rights has, in the name of "privacy," "sexual freedom" and the "right to choose," taken *away* rights that ought to be constitutionally protected. In Chapter 6, "Prudent Warnings and Imprudent Reactions: 'Judicial Usurpation' and the Unraveling of Rights," Arkes writes about judicial activism in the context of a raging controversy sparked by the journal *First Things*.

You may remember the story. In 1996, Arkes participated (along with *First Things* editor-in-chief Father Richard John Neuhaus, Robert Bork, Robert George, Russell Hittinger, and Chuck Colson) in a symposium titled *The End of Democracy?* These contributors warned that the actions the courts had taken, especially since the *Griswold* and *Roe* decisions, had been decided on principles fundamentally at odds with the morality upon which our nation was founded. "Step by step, the federal courts had shown a willingness to challenge, at their root, the laws that restrained the taking of human life at the beginning (with abortion) and at the end (with euthanasia and assisted suicide). . . . What the judges were doing, virtually on their own, was remodeling the very matrix of laws on birth, death, sexuality and marriage." And all this had been done without "much awareness, among the judges or the political class," of the anti-Constitutional thresholds that had been crossed. So, the question posed was: *are* we a democracy, if we are ruled, in effect, by an elite class of judges, who were not elected by the populace, and whose decisions contradict the very principles of our democracy?

The authors were unprepared for the firestorm their words ignited. Furious

critics, including some (they had thought) “like-minded” colleagues, accused the symposiasts of flat-out treason. Arkes answers the charge: “For our own part, we never thought we were repudiating the American regime. Quite the reverse: We were seeking to vindicate the principles of the regime, to restore them in the face of a political class that was artfully replacing that regime with something else.”

Arkes also emphasizes the compelling parallels of our current situation with 19th century America, when our country was divided over slavery. Citing the speeches of Abraham Lincoln and the famous Lincoln-Douglas debates, he writes, “Some of us have argued for years that Lincoln’s arguments on slavery, and the crisis of the republic at the time, were the closest analogies to the questions we were facing with abortion and our recent crisis. But for some of us it has become ever clearer that Lincoln’s argument was not merely analogous: He was dealing with the same problem, or to put it another way, our problem today radiates from the same questions in principle, which is why that problem of abortion has held such a grip on us.”

In spite of *Roe*, the majority of Americans remain uncomfortable with abortion, and, as polls have consistently demonstrated, they support restrictions—from 24-hour waiting periods, and parental consent for minors, to a ban on partial-birth abortion, another bogus “right” recently protected by the Supreme Court. The abortion issue needs to be given back to the democratic process, Arkes says, “ending the monopoly of the courts and judges, and returning the question of abortion to the arena of legislatures and the arguments of citizens in the natural discourse about ‘rights’ and ‘wrongs.’”

This reasonable remedy is what the pro-abortion lobby *fears* the most—which is why they spend millions trying to convince Americans that every proposed limitation of the abortion license is a dangerous ploy by fanatics to take away a woman’s “right to control her reproduction.” The subject of our next article is a perfect example. *National Review*’s Kathryn Jean Lopez writes about the Abortion Non-Discrimination Act (ANDA), a sensible piece of legislation which would protect religious hospitals and healthcare workers who oppose abortion from having to provide or participate in the procedure. Yet the bill has been described by the National Organization for Women as “one of the most dangerous and burdensome of all the many anti-abortion and anti-contraception bills being promoted by extremist opponents of women’s reproductive health care.” As Lopez writes, though this bill is truly a matter of freedom of choice (and freedom from *coercion*) “it’s just short of a miracle that it successfully passed the House,” because of the “ridiculous rhetoric” released about it. It faces a battle in the Senate, but as you’ll read in Lopez’ informative analysis, it ought to have some support from unexpected voices—for example, here’s what (now Senator) Hillary Clinton said in the summer of 2000: “Even though I am pro-choice, I do not think it would be constitutional or appropriate for the government to be telling a Catholic hospital, ‘You have

INTRODUCTION

to do something which is totally contrary to your religious beliefs.” Er, . . . Amen, Hillary.

What follows is another eloquent, and urgent, plea for Americans to exercise their rights as participants in a democracy, and prevail upon Congress to stand firmly against the new encroaching evil: cloning. In this case, our esteemed colleague Wesley Smith cautions us about the true colors of those who advocate cloning, and warns that nothing less than a *total* ban on cloning will protect us from their Brave New World plans.

The cloning issue is being played along familiar lines. From the start, the American people have had a deep, instinctual aversion to the idea. “Poll after poll has shown that the vast majority of the American people wish to prevent the development of this technology. Unfortunately, the legislative attempt to outlaw cloning stalled when pro-cloners dangled the utilitarian hope that cloning for biomedical research . . . would lead to miraculous medical treatments.” Pro-cloning forces are appealing to the public’s self-interest and compassion for those afflicted by diseases by asking people to support “only” the so-called “therapeutic” cloning (remember “therapeutic abortions”?), which supposedly holds promise for wonderful cures. Of course, there is nothing “therapeutic” about the research for the *embryos*, which are created only to be destroyed—nor is there much real evidence that there are any cures around the corner. Furthermore, the appeal is dishonest: pro-cloning advocates know that a partial ban on cloning will *not* prevent reproductive cloning—allowing one would open the door to the other.

As Smith writes, the debate over research cloning is serving to obscure the most crucial information the public needs to know: the eugenic agenda of the cloning enthusiasts. Smith burns away the fog in his revealing essay: he goes straight to the words of the “mad scientists” themselves, as he reviews for us four major books on cloning, exposing the authors’ dreams of seizing control of human evolution and “improving” the human race.

You will no doubt be shocked by the scenarios envisioned in the books Smith reviews; you might be tempted to write the authors off as science-fiction nuts. But you can’t—all four are professors at major universities, with positions of power and prestige. Lee Silver is a prime example: a professor of biology at Princeton (now proud home of Peter Singer as well), and author of *Remaking Eden: Cloning and Beyond in a Brave New World*, Silver looks forward to a world where cloning has made genetic engineering a reality, and humans are “enhanced.” He predicts a time when humanity will be split in two: “the “Naturals,” doomed to go through life unenhanced, who will become the drone class, and the superior, demi-god-like enhanced humans, whom Silver names the “GenRich.” Silver gets all starry-eyed about the promise of such a society, proving, as Smith writes, that the “human advancement agenda is merely a new version of discredited eugenic master race thinking.”

Meanwhile, over in Ireland, the pro-life movement is struggling to recover

from its internecine warfare over last year's referendum. You can read about it in our special section, *Revisiting Ireland's Pro-Life Civil War*, which has its own introduction on p. 55.

In our Fall, 2001 issue, we welcomed a new European contributor, F. P. Tros, who wrote about the upcoming (April 2002) "official" legalization of euthanasia in the Netherlands (of course, it had been unofficially allowed there for years). We are pleased to have him back: this time, in "Onwards Libertarian Soldiers," he gives us a valuable—if tragic—look at voices in his country that cried out against the evil of euthanasia: the Roman Catholic Bishops. The occasion for his reflections was the release of *Euthanasia and Human Dignity*, a collection of the contributions of the Dutch Bishops' Conference to the legislative procedure, which marched relentlessly on into the brave new world they warned against. The Bishops' words on solidarity in suffering and death are a powerful testament, writes Tros, to "the continued and continual bearing witness to the moral values that forbid any willful putting to death."

Our final two articles explore a subject the "liberal project" would like to deny exists: the negative consequences of abortion for women. Australian journalist Melinda Tankard Reist is an expert on the sad subject of post-abortion grief. Her book, *Giving Sorrow Words*, is the result of her interviews with almost 300 women who had abortions (we reprinted an excerpt in our Winter, 2001 issue). The immediate catalyst to "Silencing Women" was an incredibly tasteless, ranting column written by a well-known journalist and feminist personality in Britain, Julie Burchill. You'll see why Reist couldn't let this one go by. Burchill herself exposes another hypocrisy of the "choice" movement: the unwillingness of abortion advocates to admit that women not only grieve abortion, but that their suffering is aggravated by the enormous pressure they are under to suppress their feelings. (This is probably the *only* area of human experience women are not encouraged to "share.")

As our next author, Professor Ian Gentles knows, there is also evidence of a trend (to put it kindly) to overlook or downplay studies which find connections between abortion and several physical and psychological disorders. Gentles, a professor of history and Research Director of the deVeber Institute for Bioethics, has recently co-authored (with Elizabeth Ring-Cassidy) *Women's Health After Abortion: The Medical and Psychological Evidence*, a review of over 500 books and studies on the medical and psychological effects of abortion. In this article, he gives an overview of the book, citing important studies whose results have been neglected by the media—for example, on the connections between abortion and breast cancer. Gentles says even the authors and sponsors of some of the studies have "shied away from the implications of their findings." Yet: If women have a right to choose, don't they also have a right to *know*? Moral matters aside, "informed consent must be an essential ingredient of good patient care. . . . I co-authored this study because of a conviction that the increased risks associated with induced abortion . . . are

INTRODUCTION

serious enough to merit dissemination beyond the pages of professional journals.” Those of you who want to read about these studies in more depth can order the book (see our “About this Issue” for details).

* * * * *

Our appendices section begins with further commentary on abortion and the courts. In *Appendix A*, George Will discusses an interesting legal case in Michigan which further illustrates how Roe’s “right of unlimited abortion on demand” comes into conflict with moral judgments expressed in state laws. *Appendix B*, by Dinesh D’Souza, echoes Hadley Arkes’ evocation of the Lincoln era as a parallel to our times. D’Souza says he has learned something new about the abortion question from studying the Lincoln-Douglas debates over slavery, and advises pro-lifers to learn from Lincoln’s incremental approach—we ought to try first to reduce the number of abortions. In *Appendix C*, Noemie Emery reports on the “widespread whipping” the pro-choice extremists took in the November elections—heartening news that the press just didn’t have the heart to report. The fact is, “pro-choice support crested around 1990, and since then has been declining”—all the more reason for action by pro-lifers to try and save lives through legislation which would restrict the number of abortions. Adam Mersereau, in *Appendix D*, looks at pro-lifers’ prospects in 2003, and advises “cautious optimism”; he too compares our government’s tolerance of abortion to its former tolerance of slavery, and sees hope that more Americans will realize that “a legitimate government has no right to declare certain human beings less than human. . . .” Yet he warns that “pro-choicers are preparing for war”—of course they are, they’re worried. (So worried that the National Abortion Rights Action League decided they needed a new, less in-your-face name: Naral Pro-Choice America.)

Our final appendix strikes out in a different direction, but one with an unquestionable place in our pages. Nurse Nancy Valko describes what *should* be a controversy in the medical community: a new method of organ procurement called non-heart-beating organ donation. Brain-death used to be the necessary condition for organ harvesting. NHBD may involve taking organs from patients who are *not* brain-dead, but who are deemed (by *whom* it is not clear) to have no “meaningful” quality of life; they are taken off life support, and if their heart stops, they are considered “good to go” for harvesting. As Valko explains, ventilators are often temporarily necessary in cases of brain injury, but the extent of a patient’s injury, and the chances of recovery, are very hard to predict.

As usual, to comfort the reader faced with our sobering material, we include excursions to the ridiculous, with cartoons from our friend, Nick Downes.

MARIA McFADDEN
EDITOR

Prudent Warnings and Imprudent Reactions:

“Judicial Usurpation”⁹⁹ and the Unraveling of Rights¹

Hadley Arkes

When we grasp the principles disclosed in the recent decisions of the courts on partial-birth abortion, we see at work furnishings of mind, among the judges, strikingly different from the furnishings of mind that were evident in the jurists of the Founding generation. As I have suggested, these changes have been long in the making, and yet, when they finally break in upon us in their import, they can be startling nevertheless. Someone might aptly ask, if all of this is so radical and even treasonous—rejecting of the very premises of the American regime—why has it not been especially noticeable? But in all of this, there is nothing novel: The point has been aptly made that the moral life often consists in discovering the further implications of our own principles. The changes in American law have been in the making since the end of the nineteenth century, and they have accelerated since our jurisprudence moved into a new liberal phase with *Griswold v. Connecticut* (on contraception) and *Roe v. Wade* (on abortion). But over the last twenty years, in a series of decisions, the courts have been compelled to make ever more explicit the new understandings on which their new jurisprudence must come to rest. As that remarkable man of all seasons, John Paul II, has put it, they are understandings that come to a focus on the nature of “the human person.” They are understandings about nature, and about life—its beginnings, and its ends.

The ancient question is whether human beings possess a distinct moral nature, which discloses in turn its telos, in distinctly moral ends, and a rather emphatic understanding about the terms of principle on which that human life must be led. To venture into those questions at all is to venture into the question about the terms on which new life is generated. It must make, after all, the most profound difference as to whether humans are spawned in random matings, or whether they are brought into the world within a framework of lawfulness and commitment, the framework we have come to know as “marriage.” The liberal project has made its claim to audacity in its claim to

Hadley Arkes, the Ann and Herbert Vaughan Fellow at the Madison Program, Princeton University, is one of the architects of the Born-Alive Infants Protection Act, signed into law by President George Bush last year. “Prudent Warnings and Imprudent Reactions” is Chapter Six in Prof. Arkes’ new book, *Natural Rights and the Right to Choose*, recently published by Cambridge. © Hadley Arkes, 2002. Reprinted with the permission of Cambridge University Press.

bring about something new, something strikingly at odds with “traditional morality,” and the conventions of law that sustained that morality.

But teachings so long planted, in the biblical tradition, and the tradition of classical philosophy, could not be inverted overnight without shocking the population at large. As Plato recognized, the multitude may not be capable of philosophy, but people at large are conservative in their reflexes, and if certain ways of life are grounded in the nature of human beings, the aversions, the public recoil, are likely to be felt right away. The warning bells are especially likely to be set off when people in authority decide to promulgate, on their own, useful innovations in morality for the improvement of the common folk. It is hardly astonishing that these changes could not be accomplished through the forms of republican government, in modes of decision that depended on “the consent of the governed.” With the exception of New York, California, and Hawaii, the people at large remained deeply resistant to changes in the laws, long in place, to protect even nascent life in the womb.² The strategy of moving finally to the courts, or taking the courts as the principal arenas of political change, reflected the sober awareness that the cause of abortion could not be achieved through referenda or the politics of a democracy. It could be achieved only by appealing to those men and women (largely men) of a certain class, who exercised authority as judges. In surveys of opinion, the support for abortion has always run stronger among men than women.³ As John Noonan has pointed out, the support for abortion has always found its strongest constituency among upper class white Protestant males, the people whose plans of life would always be more threatened by an inconvenient pregnancy with a woman from an inconvenient class.⁴ And as Bernard Nathanson has recorded, it was one of the strokes of political genius in our time, the achievement of those men who founded the National Abortion Rights Action League, that they could frame this issue, so critical to their own interests, as “a woman’s issue, a woman’s right, a woman’s choice.”⁵ Part of the political savvy, of course, was to read the political landscape, and that landscape was so patently discouraging that the scheme for advancing “abortion rights” would have to be pursued through the courts.

As a result of *Brown v. Board of Education*, in 1954, the federal courts gained a new legitimacy for an activist posture in striking down old laws, or overriding even older conventions that had the force of law. Without the experience of segregation, it is hard to imagine the course that the Supreme Court would begin to mark off as it moved to issues once thought to be too charged politically for the courts to enter. As judges ordered the reapportionment of legislatures, the redesign of school districts, the allocation of public housing, the move into questions like abortion seemed to fit into the larger

framework of judicial activism. But there is where the conservative imagination rather failed and gave a certain cover to this extension of judicial authority. The conservatives, mired in their own positivism, would not complain about the moral substance of these decisions, but mainly about the “activism” of the judges. The judges, it appeared, had strayed from the forms that confined them to a more limited and constrained exercise of power. That was no doubt the case—as indeed I have suggested here, in noting the drift of the judges from the conventions that traditionally disciplined and constrained their power with requirements of “standing” to sue. But the notion of “activism” discloses nothing of the ends to which that activism is directed. If judges of a later day honor the precedents set by activist judges, they simply confirm the victory of those who were incontinent in their use of power. The remedy for activism may have to be found in a willingness to overturn wrongful judgments, improvident precedents. But that course of remedies may readily strike observers as rather “activist.” Or it would strike an observer in that way if he abstracted from the moral substance of the decision and noted only the willingness of the judges to break from the past.

As the federal courts extended their reach, even in the days of Nixon and Warren Burger, the conservative critics obscured the problem as they complained merely about activism. In November 1996, that estimable journal, *First Things*, staged a Symposium on Judicial Usurpation and “The End of Democracy?” The writers assembled in that project offered a precise account of a trend of decisions that went beyond mere activism. Step by step, the federal courts had shown a willingness to challenge, at their root, the laws that restrained the taking of human life, at the beginning (with abortion) and at the end (with euthanasia and assisted suicide). With the same sweep, the judges were willing to think anew, and map anew, the begetting of human life, in mechanical fertilization or the storing of embryos. But then again, the courts became willing to pronounce anew on the meaning of sexuality itself as they took the first steps in altering the understanding of marriage. What the judges were doing, virtually on their own, was remodelling the very matrix of the laws on birth, death, sexuality, and marriage. As the participants in the Symposium sought to warn, this was not simply a record of activism. It was a record that reached into the deepest premises of our law and the meaning of “the human person.”

In that symposium in *First Things*, I offered one of the essays, along with my colleagues and friends, Robert George, Russell Hittinger, Robert Bork, Richard Neuhaus, and Chuck Colson. To our surprise, that symposium set off tremors in the land, as we began to raise doubts running to the very legitimacy of the regime; the regime that had now been altered, in its character

and principles, by the ascendance of the judges. But in all of this, there was no counsel to overthrow an elected government in the United States. We were rather taken aback that our critics, including several of our own friends, did not give us credit for understanding the canons of prudence. We did not think that we were calling for the overthrow of an elected government when we cast up warnings: We were trying to show that certain critical thresholds of principle had been crossed, without much awareness, among the judges or the political class, that there had taken place anything much worth noticing. As we dealt with the criticism, or the heated reactions, it became clearer to us that the critics did not take seriously the notion that a regime could be changed decisively in its essential character, while the forms of political life seemed to remain undisturbed. But that is to say, the critics did not take seriously that prospect put forth so compellingly by Lincoln in his “House Divided” speech in June 1858: that indeed the moral substance of a democracy may be removed, while the outward forms remained the same.⁶

In his magisterial book on the Lincoln-Douglas debates, *Crisis of the House Divided*, Harry Jaffa sought to condense Lincoln’s understanding here in this way: that “a free people cannot disagree on the relative merits of freedom and despotism without ceasing, to the extent of the difference, to be a free people.” In a related passage,⁷ Jaffa remarked, again construing Lincoln, that “if the majority favors despotism, it is no longer a free people, whether the form of the government has already changed or not.”⁸ I used to think that Jaffa, in these passages, was waxing metaphoric. But over the past few years, as this argument has deepened over judicial usurpation and the symposium in *First Things*, it has appeared to me that Jaffa and Lincoln should be taken here quite literally. Jaffa’s teacher (and mine), the late Leo Strauss, once remarked that he had “understood Spinoza too literally because I did not read him literally enough.”⁹ In a similar way, I might say now of Lincoln, and the most elegant expounder of his thought, that I did not understand quite how deeply their arguments ran, because I did not understand them literally enough.

A congressman, getting ensnarled in his own syntax, declared, “A friend of the farmer . . . one of whom I am which.” I would say: a participant in that symposium in *First Things*, one of whom I am which.¹⁰ But even I was startled by the resonance that the symposium managed to generate in the land—and I was even more astonished by the adverse reactions of some of our friends, from people, you might say, within our family.¹¹ The symposium was arranged for the purpose of sounding a warning, and we certainly produced our effect if some people were in turn alarmed by the alarm we had

sounded. Burke once remarked that the seasoned political man, “who could read the political sky will see a hurricane in a cloud no bigger than a hand at the very edge of the horizon, and will run into the first harbor.”¹² “Head for a harbor,” said one of our friends, “not start a revolution”—not urge people to the threshold of insurrection.

But we had sought, in several ways, to direct people away from a course of lawlessness, and of our own prudence I’ll have more to say in a moment. Yet, I was struck in contrast with the notable want of prudence shown by our erstwhile allies: Their reactions seemed to me out of scale, for they seemed to be taking far more offense at us than at the offenses that we had sought in detail to describe.¹³ They professed to share our judgments in the main about the wrongs produced by the judges, but they gave us ample reason to doubt that agreement. It might be said more accurately that they reached the same conclusion about the wrongness of certain decisions produced by the courts, but it became clearer now that they did not share the understandings that lay behind our judgments. At several levels, they did not understand the deep wrong of these cases as we understood them, and therefore they could not see, in the same way, that these cases were describing a genuine “crisis in the regime.”

For our own part, we never thought that we were repudiating the American regime. Quite the reverse: We were seeking to vindicate the principles of the regime, to restore them in the face of a political class that was artfully replacing that regime with something else. Our friends seemed to take as gravely serious the threat that we writers were posing, and yet they could not take with the same seriousness the warning set forth by Lincoln: namely, that a regime quite republican in its outward forms could be converted, in its substance, into something else, something radically different. Which is to say, our friends were curiously failing to take seriously the classic understanding that even decent regimes may fall into a certain corruption, even while they retain their outward forms. We were told that because certain “crazies” in the 1960’s railed against America and declared a crisis in the regime, that there could not be, in America, a crisis in the regime. Or that anyone who cast up a warning had to be touched with the same frenzy, bereft of judgment. In mapping out the problem, I would start with the simplest things, with a sense of our current situation, and I mean here a sober estimate, not a flexing of interpretive genius. My friend Mary Ann Glendon tells me that she steals from me, and I’m going to reciprocate by stealing from her—from a story she has used deftly, in recalling that scene from the film, *Young Dr. Frankenstein*, with Gene Wilder. Dr. Frankenstein was led into his Schloss, his castle, by Igor the hunchback, played by Marty Feldman. The

young doctor Frankenstein gently touches Igor's back, and says, "I may be able to help you with that hump." And Marty Feldman says, "What hump?" Mary Ann Glendon then observed, with Tocqueville, that

Tyranny need not announce itself with guns and trumpets. It may come softly—so softly that we will barely notice when we become one of those countries where there are no citizens but only subjects. So softly that if a well meaning foreigner should suggest, 'Perhaps you could do something about your oppression,' we might look up, puzzled, and ask, 'What oppression?'

Flashback, for a moment, to an evening, in Washington, D.C., in 1986, the day after the Supreme Court refused to strike down the laws on sodomy in the States.¹⁵ The Court left that judgment then in the hands of legislatures. At a party in town, an old friend, a seasoned lawyer in Washington, asked me, "Do you really want *politicians* making decisions on matters of this kind?" And I said, Consider what you are saying: that as people were drawn to office through the process of elections, they were rendered less fit to address questions of justice or matters of moral consequence. It was the most damning thing to be said about a democratic regime. It was also clear that my friend was part of a growing class of people who would readily prefer to be ruled, on the matters of the highest consequence, by people in judicial office—by a corps of people who do not have to suffer the rigors of running for election. Those judges would be drawn, of course, from the best law schools, rather like the school that my friend had attended. The judges were as likely to be people drawn from the same circles; in short, they would be people rather like my friend.

This is not a fiction, or a fable of the future; I take this to be a mark of our current situation, and the understanding of a good hunk of the people who form our political class. Indeed, without this understanding it would be hard to account for the intensity that was focused on defeating the nominations of Robert Bork and Clarence Thomas. Those nominations became freighted with a larger significance because either man was understood to be, potentially, the fifth vote in favor of overruling *Roe v. Wade*.¹⁶ But for both men, overruling *Roe v. Wade* meant returning the question of abortion to the political arena of legislatures in the States. Both Bork and Thomas have been far from the point of finding, in the Constitution, the ground for protecting unborn children against the decisions of legislators who would withdraw the protections of the law. But if there was really a constituency now behind the "right to abortion," if that right commanded the depth of support that Joseph Biden and Edward Kennedy claimed for it, then there should have been no threat presented by Bork and Thomas. The issue of abortion would merely have been taken out of the cloistered arena of the courts and returned to the

domain of a public politics. And there the public sentiment might have insisted on retaining the right to abortion—if that sentiment was as unequivocal, as unshaded with exceptions, as the law created by the Supreme Court.

But of course it was not, as Biden and Kennedy must have known. They had ample evidence to suspect that the public could not be depended on to install again a regimen of abortion in which abortions would be permitted for any and all reasons, throughout the entire length of the pregnancy. That kind of arrangement, produced by the courts, could be sustained only by the courts. What has to be understood about the Democratic party in recent years is that, in the aftermath of *Roe v. Wade*, the party had become, in effect, the party of the courts. The party would take it as one of its central missions to protect the authority and insulation of the courts—and the courts in turn could be counted on to enact certain parts of the agenda of the Democratic Left that the party could not declare in public or make the ground of a public campaign. Most of the Democrats would vote, in 1996, for the Defense of Marriage Act;¹⁷ and Mr. Clinton, in the dead of night, would quietly sign the bill. But Mr. Clinton would continue to appoint to the bench the kinds of judges who could be counted on, in the long run, to expand the reach of “gay rights,” or to find grounds for striking down laws that did not accord a legitimate standing to “same-sex” marriage.

I take it, then, not as a speculation, or a bit of science fiction, that we have an important part of the political class that is quite willing to remove certain matters of moral consequence from the sphere of popular government, or common deliberation. And it is willing to do that, because it has powerful reason to expect that the country is willing to be ruled on these matters by a corps of lawyers, rather like themselves, who will reflect in their rulings the liberal ethic that now prevails in the law schools and the universities.

In my own contribution to the symposium¹⁸ I had written on the case of *Romer v. Evans*¹⁹ and gay rights, and the way in which the sentiments articulated by the Court were making their way from legal institutions into private settings. In a gesture of steely contempt, barely concealed, the Court declared that a tradition of Jewish and Christian teaching on sexuality and homosexuality could be dismissed, as Justice Kennedy said, as nothing more than an “animus.” It was an aversion that could claim for itself no reasoned grounds of support.²⁰ Once the Court has declared, from the highest levels, that moral reservations about homosexuality reduce to nothing more than a blind, unreasoned prejudice, it becomes all the easier for professional associations of all kinds—bar associations, associations of law schools, universities—to incorporate in their procedures an avowal that there should be no discrimination on the basis of “sexual orientation.”²¹ And so, in one major

law firm in New York, a senior partner, a serious Catholic, had opposed in public certain regulations on so-called “sexual orientation.” This senior lawyer was suddenly, discreetly, dropped from the recruitment committee of his firm. For his presence on a committee engaged in hiring would invite the charge that the process of hiring was biased at the outset by the presence of a man who bore what the Supreme Court itself has pronounced an “animus.” But that problem would be the same if this senior partner merely exercised his franchise as a partner to vote on the tenure, or retention, of young associates. That is to say, his very presence in the firm begins to constitute the immanent ground of a grievance, and of litigation. Law firms are nothing if not sensitive to incentives, and they will quickly come under an incentive to forestall the problem at the threshold through the simple expedient of not hiring people who are—shall we say?—“overly religious.” In this way, a new orthodoxy makes its way outward: it moves from public laws to rules governing private firms, corporations, universities, until it begins to affect the things that people will find it safe to say to another even in private settings. As the late Leo Strauss taught years ago, the notion of the “political regime” extends beyond the formal institutions of government to the ethic that pervades the way of life of a community.²² What we are seeing, in the movement on gay rights, is a movement that is promising to alter the political regime itself.

But that movement can be seen even more fully, even more deeply, on the issue that almost all of us, gathered in *First Things*, regarded as the central, or architectonic, question right now in our politics, the question of abortion. In my business, as we used to say, I see a lot of the public, and my travels bring me into touch with audiences that have not been uniformly sympathetic on the matter of abortion, to put it mildly. I have usually broached the problem to them by noting, right away, that in the absence of any extended argument, I would not expect them to share my position on abortion. But I ask them simply to flex their imaginations in this way for the sake of understanding their fellow citizens who cannot regard this issue as anything less than overriding: Imagine that some people look out on the scene, and they think that abortion involves the taking of human life. They also understand that they are not indulging fancies about leprechauns or centaurs; they know they can also summon a substantial body of evidence from embryology to confirm that this is not some odd, religious opinion on their part. These convictions are not at all then like emphatic views on the Hale-Bopp comet. In that event, if these people have reason to think that human lives are taken in these surgeries, they look out and see that 1.3 million lives are being taken

each year—as though the government had withdrawn the protections of law from a whole class of human beings in this country. What would we have thought, after all, if 1.3 million members of a minority could be lynched without restraint, and without the need even to render a justification? Again, I don't ask people to share this judgment, but to encompass merely this recognition: If other people did look out at the country and saw these things taking place, where would you expect them to rank this concern within the overall inventory of things political? Would it rank just below the concern for interest rates or unemployment? Once we understand what people see, how could we react with outrage or bafflement if we find that these people cannot see that issue as anything other than central—that they cannot see it merely as peripheral?

Some of our friends reproached us for making the issue of abortion a kind of litmus test of the regime. Their complaint then was that we were, on balance, making too much of abortion. But we had to wonder if they, on balance, were making too little of it, and whether the issue did not come down to this: that in their heart of hearts, some of our friends really were not possessed by a lively sense that there were real human beings getting killed in these surgeries. Yet, if it turned out that we were the ones who were seeing more accurately, that sense of things would have to add force to the claim that our law and politics had entered a new phase, marking nothing less than a crisis in the regime.

Our understanding of the crisis was arranged, one might say, in tiers, but what was curious is that our friends did not recognize, in the first instance, just where we were holding back and showing forbearance. In our indictments of the regime in its current state we hardly said anything more severe than could have been said of the regime in the middle of the 19th century, the republic that made its accommodation with slavery. The presence of slavery marked a corruption or a flaw running deep, to the very root of a polity founded on the principle that human beings deserved to be ruled only with their consent. And yet, as Lincoln understood, the opponents of slavery could not have been justified in taking up arms to overthrow an elected government that sustained slavery. They could not have done that without violating the very principle they were seeking to vindicate, for they would have put themselves in the position then of ruling people without their consent. But the same problem in principle would have to constrain us today. As long as elections are open, and we are free to persuade our fellow citizens, we could not be warranted in using force outside the law. Some of us have been careful also to be guided by the teaching in Plato's *Crito*, a work that offers some powerful instruction in prudence for holding back and respecting the law,

even when we are utterly persuaded that the cause of justice lies on our side.²³

But on their own part, our friends should have been alert to the fact that the same constraints would have come into play even if we had a democratic government that was presiding over an Auschwitz and shipping people to killing centers. And yet, what if someone asked us, under these conditions, “Would it be wrong to rescue the innocent victims, who are about to be killed unjustly?” Could we honestly tell them that it would be wrong, even when it means running counter to the law?

The same problem in principle must come into play, even in a muted form, with the matter of abortion. It bears recalling here that many of our friends among the critics would not really contest us on the question of abortion taking human lives. On that point, they would concede our premise. But in that event, what could they honestly say to the person who now asks, “Would it be wrong, or unjustified, to rescue the innocent human beings who are being killed in these surgeries?” Our friends do not seem to recognize, in Lincoln’s words, just how much we have had to bite our lips and “crucify [our] feelings”²⁴ for the sake of urging people to obey the law in these instances. When people ask us earnestly—as I have been asked, in interviews on radio—about the rescue of the innocent, we turn away from offering encouragement. Without surrendering the argument, we try, decorously, to change the subject, or we simply counsel them to obey the law. I fear, though, that for many of our friends Lincoln’s words could be adapted again: Nothing may satisfy them until we cease calling abortion wrong, and begin calling it right. Nothing else may ease their minds or quiet their angers.

Given what was at stake, it seemed to me that our severe critics among our friends were themselves showing the most pronounced want of prudence, for their reactions were out of scale, and they were lingering on the surface of things without tracing matters, in a serious way, to the core in principle. And by that I do not mean simply that they had not thought through the matter of abortion, but that they had not treated with a sufficient seriousness the notion of a genuine crisis in the regime. As I suggested earlier, they did not seem to take seriously the depth of the issue that Lincoln framed for us in the crisis of the “house divided.” The telling emblem of that crisis, the little example that told all, was the case Lincoln would cite of Senator Pettit of Indiana. Pettit had made quite a stylish point in insisting that the self-evident truth proclaimed in the Declaration of Independence—that “all men are created equal”—was nothing less than a “self-evident lie.”²⁶ As Lincoln understood, of course, the American republic did not begin with the Constitution, but with the Declaration, and that “proposition,” as he put it, on which the nation was founded and dedicated. But evidently, there were portions of the

American political class that were no longer committed to that proposition. They would vote to sustain a regimen of slavery, and they would acquiesce in every alteration of the laws, every abridgement of constitutional freedom, that was necessary to preserve those arrangements of slavery. In other words, men who filled the office of senator might nevertheless be *acting on premises that were incompatible, at the root, with the premises that underlay their offices*. For the office of senator held its meaning or coherence only as it was part of a republic, or a government based on the consent of the governed. But the moral commitment to a government by consent sprung from that moral axiom, that “all men are created equal,” that human beings did not deserve to be governed in the way that men governed horses and cows. The Senate found its place within a certain regime. Senator Pettit was an officer of high standing, he held an office within an institution defined by that regime. But he rejected the very premises that underlay the regime in which he held his office. He established in his own case a lesson that cannot be dismissed: that it was possible for people to hold high office within a political regime, and yet be entirely disloyal, in the sense of rejecting the deepest premises of that regime. And if that much could be said about senators, it could be said about judges, and any people who form the political class in our own day.

In classic terms, this was a case of the “corruption” of the political order, and as the ancients understood, this kind of corruption had to be an immanent possibility even in the best of regimes. Why should we suppose, then, that this country should be exempt from these dangers, inherent in political life? The American regime was, without question, a republic and a constitutional order. But within the framework of that regime, the need to keep reinforcing the system of slavery was imparting to the law an authoritarian character. Slave codes, sentinels, passports, curfews—the system of slavery was made all the more explicit as slavery moved from the plantation into the cities. Frederick Law Olmsted, visiting the South, remarked that he had seen “more direct expression of tyranny in a single day and night in Charleston, than in Naples in a week.”²⁷ And in this way, a government that remained outwardly a republic could be transmuted into something strikingly different in its substance.

Even now it is not appreciated as to just how penetrating was Lincoln’s argument here, or just how sobering was the lesson he was trying to convey. Some of us have argued for years that Lincoln’s arguments on slavery, and the crisis of the republic at the time, were the closest analogies to the questions we were facing with abortion and our recent crisis. But for some of us it has become ever clearer that Lincoln’s argument was not merely analogous:

He was dealing with the same problem, or to put it another way, our problem today radiates from the same questions in principle, which is why that problem of abortion has held such a grip on us.

In his debates with Stephen Douglas, Lincoln sought to warn off those Republicans and Free-Soilers who were drawn to Douglas and his scheme of “popular sovereignty” in the territories of the United States. That scheme was offered for its pragmatic appeal, as it promised to deliver some territories to the side of freedom, while it preserved the civic peace. Douglas’s plan would have preserved the peace by striking a posture of neutrality in regard to slavery. As Douglas said in that famous phrase, “I don’t care” whether slavery is voted up or down; that moral question would be left for the people of a territory, or a State, to decide for themselves. But as Lincoln would point out, there was nothing neutral in the “don’t care” policy. As Lincoln put it in the debate in Quincy, Illinois:

[W]hen Judge Douglas says he “don’t care whether slavery is voted up or down,” . . . he cannot thus argue logically if he sees anything wrong in it; . . . He cannot say that he would as soon see a wrong voted up as voted down. When Judge Douglas says that whoever, or whatever community, wants slaves, they have a right to have them, he is perfectly logical if there is nothing wrong in the institution; but if you admit that it is wrong, he cannot logically say that anybody has a right to do a wrong.²⁸

Aquinas and John Stuart Mill had reminded us that, when we say something is wrong—that it is wrong, say, for parents to torture their children—we mean that it is wrong for everyone, for anyone; that anyone may rightly be restrained from torturing infants, that anyone may rightly be punished for performing that act. If someone told us then that he would leave parents to their own judgment on these matters, that he “doesn’t care” whether they torture their children or not, he has not taken a position of neutrality. He has decided, in effect, that the torturing of infants stands in the class of those things “not wrong.”

Lincoln’s charge against Douglas was that the very object of his policy was to break down the sense, in a democratic people, that there was something “wrong” in slavery. His device was to treat the matter persistently, in Lincoln’s words, as a “morally indifferent thing.” And so Douglas would say that certain states, in their economy, feature oysters, certain of them feature cranberries, and others use slaves. As Lincoln pointed out, Douglas grouped slaves with cranberries and oysters, morally indifferent things. Or he encouraged us “to speak of negroes as we do of our horses and cattle.”²⁹ But if the American people backed themselves into that state of mind, their indifference to slavery in the territories would readily spill over into the states as well. If they came to think that the ownership of human beings was a legitimate

form of property, they would have to agree more readily that citizens of the United States should not be dispossessed of their ownership of this property in slaves when they entered a territory of the United States. But in that event, why should they be deprived of that legitimate property when they entered another state? The “privileges and immunities” of citizens of the United States describes a body of rights that may be portable for citizens as they travel from one state to another. Why will it not be discovered that this right to own slaves is part of that body of rights, carried from one place to another, and protected then in the states as well? And why should other citizens object to any of these claims? Why, indeed—if they have talked themselves into the notion that they may be quite indifferent on the question of whether one human being may rule another without his consent?

II would bring back, then, those two passages drawn from Harry Jaffa, trying to explain Lincoln, and I would make those passages the ground of further reflection, as one seeks in turn to expound them. It was Lincoln’s charge that Douglas was reshaping the climate of opinion and reshaping, at the same time, the American soul. Jaffa sought to condense Lincoln’s understanding here in this way: that “a free people cannot disagree on the relative merits of freedom and despotism without ceasing, to the extent of the difference, to be a free people.”³⁰ In a related passage, Jaffa remarked, again construing Lincoln, that “if the majority favors despotism, it is no longer a free people, whether the form of the government has already changed or not.”³¹ Jaffa might have been sweeping with a literary flair, but what was jarring for me recently was that I came to see that, on these points, he and Lincoln were being *quite literal*. And that is the thing that has to be explained.

The beginning of the explanation is to be found in that crisp summary Lincoln provided when he said that the “sacred right of self government” was so perverted in Douglas’s construction that it would amount to just this: “That if any *one* man, choose to enslave *another*, no *third* man shall be allowed to object.”³² Lincoln spoke of men, not black men. For his point was that the argument in principle for slavery could not, would not, be confined to blacks. On this matter, there is no statement more penetrating and decisive than that fragment Lincoln had written for himself, when he imagined himself engaged in a conversation with the owner of black slaves. He had put the question of how that white owner could justify this enslavement of the black man. (“It is color, then: the lighter having the right to enslave the darker? Take care. By this rule, you are to be slave to the first man you meet, with a fairer skin than your own.”)³³ In this fragment, Lincoln had also been reflecting the understanding of his political idol, Henry Clay. In one of the debates

with Douglas, Lincoln recalled that someone had pressed on Clay the argument that blacks were an inferior race, drawn from an uncivilized land. And Clay responded, in a remarkable passage that

Whether this argument is founded in fact or not, I will not now stop to inquire, but merely say that if it proves anything at all, it proves too much. It proves that among the white races of the world any one might properly be enslaved by any other which had made greater advances in civilization. And, if this rule applies to nations there is no reason why it should not apply to individuals; and it might easily be proved that the wisest man in the world could rightly reduce all other men and women to bondage.³⁴

With this ground, Jaffa was moved to suggest that the very willingness of certain Southerners to affirm the inferiority of black people, as the condition that justifies their enslavement, was sufficient to prove that these Southerners were themselves unfit for self-government. Or, it might establish that they were no longer a democratic people, even when they were voting and mimicking the acts that describe citizens in a republic. For in their willingness to justify the enslavement of black people, they were affably putting in place the premises that justified their own enslavement.³⁵

That may sound implausible and a bit far-fetched, but that is the point that gets us closer to what I am more and more disposed to treat as the literal truth of the matter. I would make my approach to it in this way: People may go into voting booths and cast votes, and for all we can see, they are acting in the familiar modes of citizens in a republic, engaged in the act of voting, or manifesting a government by consent. But we know of course that we cannot always give a moral account, or even an accurate descriptive account, of what people are doing when we merely describe their outward behavior. Smith goes to the garage of his next door neighbor and takes the hose on the wall. But from that outward act alone we cannot say that he is engaging in a theft. He might have had permission to use the hose, or he might not have had permission, but there is a fire in his house and he is seeking to borrow the hose for a moment for a justified end. Before we can give an account of the act, or its moral significance, we need to know something about the purposes animating the actor, or his own understanding of the principles that inform his action.

Now, with that perspective in place, we might imagine that we are viewing an election, in Germany, in 1932. There are some good Germans concerned about the Versailles Treaty and drawn to Hitler and his program for dealing with the Depression. They know that he has a severe, illiberal program, shall we say, in dealing with the Jews. They know, too, that there is a risk that Hitler and his Nazi party may remove this government by consent and replace it with a dictatorship of some kind. This German voter may doubt

that Hitler is fully serious in following through on his threats about the Jews, or that he would really act upon his expressions of contempt for the Weimar republic. But in his willingness to vote for Hitler, he marks his willingness *to take a chance on these things*. In that respect, he would separate himself from the people who think that the avoidance of genocide, and the preservation of constitutional government, are things so important that they cannot be placed in the basket of things “we are willing to take a chance upon.” On the other hand, this voter may indeed think that Hitler means it about the Jews, and the voter is quite willing, for his own part, to vote now to dispossess the Jews of their property and redistribute their businesses to deserving Aryans. The question then is: When this man casts a vote, is he affirming, with that vote, the principle of government by consent? Is he affirming, that is, the rightness in principle of a government that rules people only with their consent?

Apparently not, for he is not really concerned to preserve a regime of elections as an absolutely necessary condition of politics. Nor is he concerned to protect the right of his neighbors to enjoy an equal claim to that government by consent, a government that would protect their rights and their lives. The voter is acting to assert his interests, or his passions, quite apart from the form of the regime. If he is counting on a majority of Germans to vote with him in dispossessing the Jews, then he is merely affirming, through the ballot, the principle of the Rule of the Strong. If that is the case, the question then is: Does he have any ground of complaint when Hitler moves to suspend constitutional government after the Reichstag fire? For wouldn't Hitler merely be asserting now the same principle that the voter was acting upon in the voting booth? That voter would have no ground of complaint, for he was not in a position to offer a moral account, or a moral justification, for a “government by consent.”³⁶ He had overthrown, or discarded that principle already, in his understanding, even as he was casting his vote. We might say, then, that he had gone through all of the outward acts, quite familiar to citizens voting in a democracy; but in point of fact, in literal truth, he had not been acting, in the voting booth, as a citizen in a democracy. And if a majority of the electorate had acted in the same way, with the same understanding, it could indeed be said that the outward forms of a republic had been present, but that this group of voters had ceased being a democratic people. As Jaffa put it, “in choosing to enslave other men it is impossible not to concede the justice of one's own enslavement.” Or again: the voters no longer composed “a free people, whether the form of the government has already changed or not.”

I would bring the matter back then to our current situation, our present discontents. The doctrine of slavery, said Lincoln, meant that if one man

sought to enslave another, a third man may not object. And my friend, Russell Hittinger, summed up our own situation in this way a few years ago: We have now created a private right to use lethal force, a private right to kill, for wholly private reasons.³⁷ One person may now claim to kill a second person, a second being, for reasons that may not rise above convenience, and under those conditions a third person may not object. That third person, or the rest of the community, may not object, because this is now, as we are told, a matter of “privacy.” As Hittinger put it, imagine that a farmer in Vermont was told in the 1850’s that if he objected to the prospects of slaves around him, he should not buy one. But he is also informed at the same time that he may not join with his fellow citizens in Vermont in deliberating about the question of whether the political community, in its laws, will recognize or honor this form of property. That is a matter of privacy, he is told, and it forms no part of the legitimate business of the polity. And now, in our own day, he is told that if he objects to abortion, he should not choose one for the women in his life. Yet, the *choice* of abortion, he is told gravely, remains a private matter, outside the laws. That is to say, whether the laws on homicide will be extended or contracted, to protect children in the womb or leave them unprotected, is no longer part of the legitimate business of the polity. And it is no longer part of *his* legitimate business, then, as a citizen or a member of the political community. But if the laws on homicide, or the protection of life, are not part of the purpose of a polity, or central to its legitimate business, what purposes on earth could be more apt or central?

We can readily anticipate the argument that would be offered in protest or resistance: Surely, it might be said, the claim for abortion is not as broad as Hittinger and I have stated it. Surely it would not be a claim that a person has a franchise, or right, of homicide in regard to *any* other person, and that the rest of us have been rendered powerless to object. Lincoln had sought to show that the argument for slavery, when cast in a principled form, could not be cabined, or confined to black people. But as the argument might continue, this claim over abortion is more readily and evidently cabined. And yet, is it? In the first place, we should take note of the obvious point that not everyone could be enslaved. One person could choose to enslave another, but only from that class of beings who were marked off as *available*; a class of beings who would not be protected from enslavement. In our own case we begin with a class of beings who are not protected from private killing or this private homicide. And if that claim, that claim to engage in private killing, were so readily cabined, to what would be it be cabined? Would it be: the right of a woman to end the life of the offspring contained in her own womb? But then we quickly learned, in the Baby Doe cases in the early 80’s, that the

doctrine in *Roe v. Wade* would have to carry over to certain newborns.³⁸ The babies might come out with Down's syndrome or spina bifida, and we were told then, by jurists such as Thurgood Marshall, that the same rights of privacy contained in *Roe v. Wade* entailed now the exclusive, private right of the family to determine whether their newborn child had a life worth living, or a life worth preserving.³⁹ If the baby was slated for abortion, but in one of those rare cases, survived, then there were doctors and jurists ready to argue that the right to abortion entailed the right to an "effective abortion," or a dead child.⁴⁰ And very recently, of course, we have seen the case of the grisly partial birth abortion, with about 70 per cent of the child outside the birth canal. But once again we are told, quite explicitly, by the partisans of abortion that any yielding on this matter will *imperil the whole corpus of rights articulated in Roe v. Wade*. I do not then invent these connections in principle; the other side *insists* upon them. Ms. Kate Michelman insists, then, for the National Abortion and Reproductive Rights Action League, that the rights articulated in *Roe v. Wade* cannot be confined to the treatment of the child in the womb.⁴¹

But as I say, there had been no doubt, earlier, about a connection between *Roe v. Wade* and the right to dispose of infants born with serious handicaps or medical problems. There has been no attempt to conceal the reach of that doctrine in *Roe* by confining that doctrine to infants in the womb. We have been told, by many of the same people, arguing from the same book, that the right of privacy in *Roe* should entail the "right to die," or the right to assistance in dying for adults who lack the means, or the competence, to end their own lives.⁴² Who were the candidates for this right? First, it was people in a supposedly terminal state, but who were not dying at a decorous enough speed.⁴³ Then there were comatose patients, who were not exactly terminal, but living in a state, we were told, that could hardly be called "living."⁴⁴ In a flight of metaphor, their condition was often described as "vegetative," as though a person, in a diminished state, had suffered a shift in kingdoms, from animals to plants. As the argument advanced another step, it was applied to people who were not comatose, but conscious some of the time—and yet, not "what they used to be." They were people so impaired that their lives were wanting in fullness, or in the vigor that marked human flourishing. In the case of Dr. Jack Kevorkian, the candidates may now include people who are simply depressed and have no wish to live. And indeed, as Michael Uhlmann has pointed out, the decision of the Ninth Circuit, in *Compassion in Dying v. Washington*, in 1996, would have established a right to die, or assisted suicide, that covered the patient so depressed, or so weary of life, that he simply wished to be quit of it.⁴⁶

By the time we have moved along this route, the right to die entails the obligation of certain doctors to act as agents, or accomplices, in inflicting death. That is what a “right” to die means in its hard, operational side, or in its moral logic. If it is rightful for a patient to end his life, he should not be deprived of this good, or this “right,” merely because he is incapable of effecting his own death. If he has a right, another person with the competence and means may have the obligation to minister to him, to act as his agent. The patient may also be too comatose to announce his own intentions or execute a formal will. And yet, why should patients in those conditions suffer *discrimination*? Why should they be deprived of a “good” made available to others? Once we establish the class of people who should not be deprived of this right; once we establish that doctors, or administrators, in a hospital, have the responsibility to administer this right; why should it not be available to orphans or to people without families? Why should it not be granted to them through the helpful intervention of strangers who happen to be doctors and administrators?

Again, I offer no fictions, or speculations. I merely note the train of cases *we have already seen*. These arguments have been brought forth already to show how the doctrine of privacy in *Roe v. Wade* should be extended, in mercy and liberality, to cover these cases. We move then, from children in the womb to newborns out of the womb; and from there we move to aged, or even middle-aged, people, with conditions terminal, but then not so terminal, unconscious but then partially conscious, or conscious but depressed. And then finally we arrive at a new “right” in the law for strangers to administer death to adults, well outside the womb, who have neither ordered nor consented to their deaths. When we view the sweep of this movement, we must put again the question, How would this claim to kill, for private reasons, be cabined any more readily than that principle of enslaving other men, whose reach and dynamic Lincoln saw with an unsettling accuracy? And Lincoln saw the direction of that tendency precisely because he saw the principle that lay at the heart of the thing.

I return then to that final, sobering connection: that a people who have made themselves suggestible to these things have ceased to be a democratic people. In regard to slavery, I think that argument, offered by Lincoln, can be understood as literally true. And if that argument at the core is the same thing, could the same charge be levelled today? Can we take it, not as a sweeping metaphor, but as a literal truth: that we are in danger of ceasing to be a democratic people, and that a regime, outwardly a republic in its forms, has been converted, in our lifetimes, into something radically different? As the measure

of things, we would be obliged, earnestly, to consider, from what we have already seen and heard, whether the most educated people in this country have not in fact grasped hold of this right to abortion as though it were now the central right, the touchstone of our liberties, because it is the guarantor of sexual freedom. And sexual freedom seems to be taken now as the most fundamental freedom of all, perhaps because it is so evidently “personal.” But in taking hold of abortion as a fundamental right, a right now bound up with the regime, people seem to have backed themselves into the position of affirming one or both of the following propositions:

(1) “I have a ‘right,’ anchored in the Constitution, to kill another human being, a child in the womb, if the advent of that being would adversely affect my interests, disrupt my plans, cause me embarrassment.” That is, do we not find among some of our people an unashamed claim now of a right to kill for their own convenience? If so, that must be a novelty in our tradition, and could it be anything other than sobering or terrifying? Still, there is enough of a lingering moral reflex in our people that most of them, I think, would recoil from that kind of a claim. To their credit, they seek to avoid that way of framing the principle. But in trying to avoid it, they find themselves backing into a second proposition, even more portentous yet—namely:

(2) “The being I would kill is *not* a human being, and it is not yet a real person. But any evidence from embryology or genetics would be quite beside the point, for the decisive question is whether *I myself* regard the being as human. Or to put it another way, my right here is the right to decide just who is a human being, on the strength of my own beliefs, and as it suits my own interests.” That is, I may not have a right to kill any other human being as it suits my interests, but I have a right to decide just who is a human being when it comes to killing or disposing of that being, as *that* suits my interests. Either that claim reduces to the same thing, or it announces a principle, as I say, even more radical and unsettling yet.

I can report, from my own experience, that a surprising number of people, products of the best colleges and universities in the country, are indeed willing to affirm one or both of these propositions, as part of their defense of the right to abortion. And I would submit that a right to kill, cast in these terms, will not be cabined, any more than the claim to enslave could be cabined. But as we move through this series of discrete steps, absorbing the understandings that must come along with each step, there should no longer be anything unthinkable, or even startling, in that proposition I have put forth as the matter that had to be explained and justified: a people who have incorporated the understandings contained in these steps may no longer be a democratic people. To be sure, they are people quite used to the conventions of

democracy. They are quite familiar with candidates, and they may even have a certain appetite for campaigns, with their color and drama and flavor. They may feel themselves enmeshed in the life of a democracy as they feel themselves enmeshed with the life of baseball when they are at ball games and following, intensely, their favorite team. But in all strictness they cannot count themselves as part of an association devoted to the end of securing the constitutional rights of other members of the community, for they cannot give an account any longer of why other human beings have a claim to be the bearers of “rights” in any strict sense. They cannot vindicate then their own rights, and for that reason, they are not in a position any longer to vindicate the rights of others.

For in the course of defending this new “right” to abortion, they have talked themselves out of the notion of “natural rights” held by Lincoln and the American Founders. But that understanding was absolutely necessary to the Constitution in the sense that, without it, one could not give a coherent account of the Constitution or the “rights” it was meant to secure. The partisans of abortion have meant to establish an expansive notion of rights; but the requirements of their own argument have compelled them to evacuate from the logic of “rights” its deepest meaning. In order to defend that right to abortion, they were compelled to reject the deep logic of “natural rights,” for that logic would envelop even the child with rights as soon as the child begins to be. The partisans of abortion were driven then to put, in the place of natural rights, a rather diminished version of rights. But with that logic, or with that diminished notion of “rights,” the partisans of the “right to abortion” cannot protect any longer my life, my freedoms, my rights, against the most arbitrary takings and restrictions, for the defenders of abortion have *removed the moral ground for the definition and defense of any of those rights.*

That may be a jarring point, but it may be brought home more gently and compellingly by piecing together the lessons that may be drawn through a series of vignettes.

I was in a conversation with a former student of mine, who had indeed been one of the most gifted students in a course on the Constitution. But then the conversation suddenly took a turn that surprised me. My student leaned in, with a sheepish smile, and “confessed” that he had never really heard the fuller argument for “natural rights,” and he was inclined to be rather dubious about the notion. That did come as news to me, and I was curious: What were the grounds of his reservations, for how would he otherwise explain then the judgments he had reached and defended? If he had permitted himself no other grounds than legal “positivism” could supply—if he held that

all moral judgments were reducible to the opinions that were dominant in any place—his judgments on the leading cases would become inexplicable. At this moment, my student drew on his considerable acuties, along with certain arts of presentation that he had acquired at Amherst. As the conversation unfolded, I raised the example of a homeless man in the gutter: He might be quite diminished in his sensibilities, and he himself may bear a responsibility for certain injuries done to himself. Nevertheless we seem to look upon him as one who merits not only our sympathy but a certain respect. Even in his diminished state, we regard him as a bearer of rights, and therefore we think we have some obligation to minister to him. And why was that? My student, drawing on his arts, then did what might be called a postmodernist riff: The established vocabulary came rolling out, in sentences, intervals, even cadences that seemed quite familiar. He now found himself trying to explain that notions of rights are “socially constituted” in different places, and we treat the derelict as a bearer of rights because of the way in which we, as a society, have come to view him. It had something to do with the lens of culture through which we had come to perceive and “construct” him. At that moment, I broke in and pointed out that he had just shifted, decisively, the terms of the conversation: He was talking about *his perceptions or ours*, about the lens *we* bring to the problem. But he had ceased talking about *him*—that man in the gutter. The question put out of the picture was whether *he* had anything about him that merited our respect or commanded our reverence for *his* life? Was there anything *intrinsic* to him that could be a source of rights, anything about him that commanded our respect?

I had returned, not long before, from my visit to the Holocaust Museum, and that experience I recounted at the beginning of this book: I had suddenly come up against the vat filled with shoes, and that encounter had brought back those unforgettable lines from Justice McLean’s dissenting opinion in the Dred Scott case. Those lines, lingering with me, had led me to this question of how we had come to view that man in the gutter as a bearer of rights. McLean had said that the black man was a creature who bore “the impress of his Maker,” that he was “amenable to the laws of God and man,” and “destined to an endless existence.”⁴⁷ He might be uneducated, diminished in his slavery, and yet McLean thought he was the bearer of a certain dignity or sanctity because he was made in the image of something higher. And to call back some earlier words, without that sense of human beings made in the image of something higher, it may indeed be harder to explain why that fellow in the gutter should claim anything called “dignity,” or have even the slenderest claim to our respect.

As I had remarked earlier, in this vein, we find ourselves in a curious

situation in which so much of our language of politics and law is rooted in layers of moral understanding, and religious persuasion, which have fled from the recognitions of most of our people. Our words and terms often appear then as artifacts of a culture that has long departed. We casually speak of “rights,” and without quite knowing why, we fold in the assumption that the persons before us have the standing of rights-bearing beings. Without knowing very much about particular persons, we nevertheless attribute to them, as human beings, a certain dignity, or a certain claim to our respect. Even if we inadvertently jar another person, we quickly beg his pardon—as though even the slightest injury still counted, still merited our apology.

We know that it is possible to speak of right and wrong without making appeals to faith or to God—for that is the very promise of “natural law reasoning.” And yet, again, we may not realize just how much the notions of right and wrong are anchored in a sense of human beings as distinctly moral beings, with powers of reason that, in Aristotle’s estimate, touched the divine. The most wondrous things about us may no longer be noticed, and from the other side, we may not be quick to see that, that when we scale down our sense of the “moral,” or install a diminished sense of a “right,” we may be diminishing also our sense of the persons who bear those diminished claims. So, at least, was the charge that Harry Jaffa came to level at a man he otherwise esteemed as a decent man and a political friend. Chief Justice William Rehnquist had defined himself, over the years, in scholarly commentaries, as a jurist who showed his conservatism by preserving a fidelity to the positive law. That was a thoroughly defensible posture, but it generated certain points of worry even for his friends when he ventured into a philosophic stream that delivered him to a scheme of positivism in moral and legal judgments. In a notable speech, in the 1970’s, Rehnquist said that our moral views represent only our “value judgments” until they are enacted into law. “It is the fact of their enactment,” he said, “that gives them whatever moral claim they have upon us as a society.” He went on to say that, if a society

adopts a constitution and incorporates in that constitution safeguards for individual liberty, these safeguards do indeed take on a generalized moral rightness or goodness. They assume a general acceptance neither because of any *intrinsic worth* nor because of . . . someone’s idea of natural justice but instead simply because they have been incorporated in a constitution by a people.⁴⁸

That passage has drawn a sharp critique from Harry Jaffa, who unfolded its implications in this way:

. . . To say that safeguards for individual liberty do not have any intrinsic worth is to say that individual liberty does not have any intrinsic worth. To say that individual liberty does not have any intrinsic worth is to say that the individual human person

does not have any intrinsic worth. This is to deny that we are endowed with rights by our Creator. To deny that is in effect to deny that there is a Creator. This is atheism and nihilism no less than moral relativism.⁴⁹

But this is simply to say that conservatives, as well as liberals, can fall into the premises of legal positivism, and even with the best of intentions, they may not gauge the depth of the premises they are accepting. What Jaffa finds, contained by implication in the writing of conservative jurists, can be found routinely on the other side of the political divide, with the premises of moral relativism made quite explicit. An interesting example may be found, most recently, in Professor Mark Tushnet's *Taking the Constitution Away from the Courts*.⁵⁰ Tushnet evidently became seized with the conviction that the Constitution must be taken from the courts when he sensed, on the part of the Supreme Court, an alarming drift to the political right (a drift discernible, it must be said, only to people of the most refined perceptions). And so, in a remarkable turnabout, Tushnet seeks to recover, for the Left in politics, Lincoln's argument on the limits to the reach of the courts. In the hands of Tushnet, that move has the purpose of permitting local governments and private corporations to persist with policies of racial preferences and affirmative action, even as the federal courts are more and more likely to regard those policies as unconstitutional. In a faint echo of Lincoln, Tushnet would deny the monopoly of the judges in interpreting the Constitution, and he would look beyond the Constitution for the standards of judgment used by politicians and ordinary citizens. He would appeal, as Lincoln appealed, to the Declaration of Independence, and to the "first principles" that marked the character of the American republic. Except for one notable thing: It is not the Declaration as Lincoln and the Founders understood it. In Tushnet's rendering, the Declaration is purged of its moral substance. For one thing—and quite a notable thing—Tushnet's Declaration of Independence omits that tricky reference to the "Creator" who endowed us, in the first place, with unalienable rights. In a stroke, Tushnet removes what the Founders understood as the source of those rights—and the Author of a Law outside ourselves, which even a majority is obliged to respect.

But that omission becomes the key to other omissions with an evident moral significance: In good postmodernist form Tushnet announces that "the Declaration's principles, the values that constitute the American people are always subject to change as the people change." But then how are they "principles"? They do not articulate truths, much less those truths, as Lincoln said, that were "applicable to all men and all times." If the principles of the Declaration are not really principles, based upon truths, then on what ground can we even claim their *goodness*? Why should we think that the political

life based on those principles is better, or more just, than a politics based on premises wholly at odds with the principles of the Declaration? Tushnet, the child finally of postmodernism, delivers his valedictory:

We are who we are because we are committed to the project of realizing the Declaration's principles. But we can start telling a different story about ourselves precisely because we constitute *ourselves*. [Italics in original.] We can, in short, change who we are . . .

In taking that step . . . we would have to rethink how we understand the original Constitution, the post-Civil War amendments, and the New Deal and the Great Society programs. [But] the Declaration's principles provide a story line that is much closer at hand.⁵¹

A "story line"? In Tushnet's new method of constitutional interpretation, the text of the Constitution is displaced, first, in favor of the "principles" of the Declaration. Yet, those principles are detached from a Creator of nature and a moral law, so that they are not in fact, any longer, principles, but propositions of a contingent character, always subject to change. They "declare," then, in this version of the Declaration, no moral truths. They disclose no source of their rightness, and in the end we find that they provide only a "story line," a line we are free to change. What is left, after all of this, is not Lincoln or the Founders, but Nietzsche. We are left simply as agents with a will, asserting our freedom to remake our own stories, or our own sense of the moral universe.⁵²

Left or right, liberal or conservative, may come back then to the same ground. The conservatives may begin with a moral modesty, a reluctance to pronounce moral judgments, but that position turns, without much strain, into a posture of moral skepticism. The conservatives back then into a "soft relativism." But either way, the two sides may converge on the same point, and in either case, they end up undermining the moral logic that attaches to "rights." What Jaffa managed to capture here, or bring to a new level of awareness, was this implication: that the move to relativism finds both conservatives and liberals denying that any of us bears an intrinsic dignity, which can become the source in turn of rights with an intrinsic dignity. Yet, without that sense of things, we cannot give a coherent account of rights, and we have no "rights" in the strict sense: we have, that is, no claims of liberty or safety that others must be obliged to respect, even when those claims run counter to their own interests. For if we accord rights to people only because we think it would be useful to us in the long run—that we would all benefit, by and large, by a regime of rights—why should we continue to respect those kinds of rights when they no longer seem useful to us?

That understanding may be conveyed finally, in the last vignette I would

recall, and the last fragment I would put in place here. The scene is Brookline, Massachusetts, just a few years ago. It is just after the shooting that took place at an abortion clinic there, a shooting that took the lives of two women on the staff. The gunman, a young man crazed, eventually took his own life while in jail. A couple of nights after the shooting, there was a candlelight vigil. One young woman was there holding her daughter, born only about two weeks earlier. She explained to the interviewer that she was there for the sake of preserving, for her daughter, the same “reproductive rights” that she had enjoyed—meaning, of course, the right to have destroyed that child right up through the time of birth.

But if her daughter had possessed those reproductive rights as rights that were part of “women’s rights,” it becomes apt to ask: what was the source of those rights, and when did she acquire them? Were they a species of “natural rights”? If so, they flowed to her as a human being, or as a woman, and those rights would have come into existence as soon as she herself began to be, or began her existence as a female. But in that event, she would have been the bearer of those rights when she was in her mother’s womb, and her mother could not have held a franchise then to sweep away all of her rights through the simple device of removing, in a stroke, the bearer of those rights. In short, if that child truly possessed “rights,” her mother could not have possessed an unrestricted right to abortion.

But obviously, that could not have been the understanding of the mother, for her own “reproductive rights” evidently enjoyed a certain trumping power. They clearly overrode any rights possessed by the child. Plainly, the child had a claim to exist, as the bearer of rights, only when the mother decided to confer upon her the privilege of living. In other words, the child became a rights-bearing person only when the mother, in a grand Nietzschean gesture, said in effect, “I permit you to live. I confer upon you, now, dignity and standing.” But if the child gains her rights in that way, *they could hardly be natural rights, and indeed they may hardly be rights at all*. For they do not begin—they cannot begin—with the sense that there is anything *intrinsic in the child* that we are obliged to respect, or any objective truths that we are obliged to respect as truths, *when they do not accord with our own interests*.

To the extent that we buy on to a “right to abortion,” it must follow, inescapably, that we must buy on to this “story,” or this construction of how we acquire our rights. No logic of natural rights can be squared with that right to abortion. But in that event, this most awkward tangle of construction produces that bizarre kind of “right” I mentioned earlier: a right that virtually extinguishes itself. Let us suppose then, for the sake of argument, what I would otherwise contest at every point: that there is such a thing as a “right

to abortion.” But the logic that must attend that right cannot draw on the logic of natural rights, or the sense that there is, in any of us, from the very beginning, an intrinsic dignity, the source in turn of rights with an intrinsic dignity. All rights then must be conferred by people in a position to confer them, and it must be clear that the only ground of their rightness lies in the act of their conferring. If those rights, or franchises, are conferred by the ruling majority in any place, it simply means, again, that those rights are thought to be consistent with the interests of the majority. When we come through this chain of steps, each clear in its import, what would that “right to abortion” now mean? It would be a right conferred only because it is thought to be consistent with the interests of those people who are affected most directly—or consistent with the interests of those who rule. The so-called right to abortion would be, then, a right that could readily be qualified, restricted, even canceled outright, if it were no longer thought to be consistent with the convenience or interests of others. Under those conditions, I would submit, we may still talk about a “right to abortion,” but with no more significance than attaches to a “right to use the squash courts” at the club. It is a right that will always be contingent, always dependent on its acceptance by local opinion, always open to repeal at any point. It would bear no resemblance to what the partisans of abortion refer to these days as “abortion rights.” For it would not in fact have the substance of a right in the deepest sense, the sense that attaches to natural rights.

If there is a dimension even further to this train of implications, it would begin with the recognition that the “story” that comes along with the right to abortion is a story that is not confined to abortion: it must determine, across the board, the entire spectrum of our claims to “rights.” After all, the “story” that comes along with abortion is a story of how each one of us acquires our rights at our very beginnings as “rights-bearing beings.” It is a story of the radical absence of rights, our nakedness of rights, until those rights are conferred by the powerful. It implies also the most emphatic judgment on the question of whether those rights have cognitive significance, objective standing as truths, or whether they depend at every moment on perception or the “social construction” of reality. And of course this account of rights implies something about us, in the same way, as the vessels of those rights. If there is no objective truth attaching to “nature,” or human nature, if the very meaning of a human being is, as some radical feminists say, always contingent, always open to “contestation,”⁵³ then how could any of us be the bearers of *rights* that have objective standing? *Could our rights, after all, have an objective standing, while we ourselves do not?* The postmodernists, flexing their “literary theory,” may be in a state of terminal cleverness, as they suggest

the ingenious ways in which our natures may be reinvented, or reconceived, or effaced altogether. They say, with brashness, what they can hardly mean, and they write with a serene want of the awareness of the rights they are imperiling.

In short, the people who sign on to the “right to abortion” in the radical style of our current laws—a right to destroy a dependent human life at any time, for any reason—those people set in place the logic that deprives them of *all* of their rights. But not only “them”: To the extent that this story line becomes necessary to the understanding of rights, it affects all of us with its radically diminished state. Hence, the conclusion that I set myself earlier the task of explaining: The people who talk themselves into this diminished logic of rights cannot vindicate that right to abortion, because they are not in a position to vindicate *any* set of rights, for themselves or others. They have made of themselves the most infirm allies, as fellow citizens, for they cannot be depended on any longer to come to our side in defending any of the rest of us, in the defense of our rights. For they can no longer offer a moral defense of those rights. And for the same reason, they cannot offer any longer a coherent defense of the regime that began with the understanding of a Creator endowing us all, from our own beginning, with unalienable rights.

In one of his lasting phrases, George Orwell had taken note of a theory of intricate contrivance, and remarked that it had to be the work of intellectuals, for no ordinary man could have been that stupid. It may be breathtaking to contemplate the fuller implications that we have had to absorb in our law and our lives when we absorbed the novelty of a “constitutional right to abortion.” But matters may be restored to the ground of sobriety when we recognize that the “right to abortion,” and all of the theories of “autonomy” it has licensed, did not emanate from the conversation of ordinary citizens, or even from the arguments of politicians in the public arena. These doctrines have been promulgated by courts, and the supporting doctrines, growing more and more audacious, have been cultivated by the intellectuals resident in schools of law. When the matter of abortion is presented to the public, in surveys, ordinary people show that they have the wit to deliberate about the conditions under which abortions may be justified or unjustified. The conclusions produced by the public may not always display models of coherence, but they have been far more reasonable than the doctrines produced by the courts, as the judges have produced rationalizations ever more inventive in order to “explain” why even the most modest restrictions on abortion are not in the least tenable. The arguments that took place among ordinary citizens and their representatives were arguments anchored in a more

natural language, not the jargon of the law schools, for they sprung from conversations, grounded in common sense, about the abortions that were justified or unjustified.

I would suggest then that the remedies can be found in measures that are quite modest, and grounded in arguments accessible to ordinary folk. The main remedy is to be found by ending the monopoly of the courts and judges, and returning the question of abortion to the arena of legislatures and the arguments of citizens in the natural discourse about “rights” and “wrongs.” If legislatures are forbidden to legislate on the matter of abortion, then there will be no arguments in public. But if legislators are compelled to take positions again on this issue, then the conversation radiates outward: If something is at stake in the legislative arena, citizens will have some reason to be discussing the matter again in public meetings and private arguments. As Marx used to say, “the struggle of the orators on the platform evokes the struggle of the scribblers of the press; the debating club in Parliament is necessarily supplemented by debating clubs in the salons and pothouses. . . . When you play the fiddle at the top of the state, what else is to be expected than that those down below dance?”⁵⁴ In the politics of a republic, the conversations, and the arguments at the center of power radiate outward. But there is no need for that conversation if legislatures have nothing to legislate, and they have nothing to legislate if the matter of abortion is removed from the political arena and reserved entirely to the governance of the judges.

It requires, however, no unsettling of the Constitution, no alteration in the American regime, in order to dislodge the courts from their monopoly of control on abortion and other matters. The remedy here lies in a simple restoration, and it needs no special contrivances, no new schemes of voting or constitutional amendments: It requires only recalling, for a new generation, Lincoln’s understanding of the limits that must be part of the logic and character of the federal courts. That understanding reminds us, also, of the responsibility that must lie with the political officers of the government, as well as with the judges, to measure their practical judgments against the principles of the Constitution. Without wrenching the constitutional order, the issue of abortion, along with other matters of moral consequence, can be returned to the hands of executives, congressmen, and senators. It can be returned, that is, to the hands of officials who bear a more direct responsibility to the public, and who work under the discipline of giving an account of themselves to the voters who elected them. Yet, once that step is taken, and the issue of abortion is returned to the political arena, legislators as well as professors will be confronted with the next phase of the problem: What would

THE HUMAN LIFE REVIEW

be the constitutional ground on which the national government would legislate on a matter like abortion? It is precisely because the matter had been confined almost exclusively to the jurisdiction of the states that it becomes difficult to explain the ground of any federal jurisdiction over a matter seen as so vividly “personal.” But here we may find ourselves dazzled to the point of distraction by the argument over constitutional formulas. Many things may fall into place when we ask the elementary question, What is the ground in the Constitution on which the Supreme Court had discovered, in 1973, a lurking right to abortion? If we can answer that elementary question, we have the main guidance we would need for a Congress interested in legislating on the same subject. At that point, we would find again that the solution would not lie in formulas overly intricate and contrived. The solution, or the remedy, would be rather modest, and it would find its ground in the axioms of the Constitution: not in theories, problematic and clever, but in the propositions that must be in place, because they are part of the very logic of the Constitution. And for that reason, as we used to say, they cannot be otherwise.

NOTES

1. It would not detract, I think, from this chapter, but perhaps underline its seriousness in another way, to note that this chapter had its origins in remarks I was invited to offer, along with my friends in the symposium of First Things, at the School of Law at Loyola University in New Orleans in October 1997. We were invited there by the dean of the law school, John Makdisi, who offered us the chance to engage with certain critics of our position, and in turn to restate, and sharpen, our arguments. An earlier version of this chapter was published in *The End of Democracy? II: A Crisis of Legitimacy*, Mitchell S. Muncy, ed. (Dallas, Spence Publishing Co. 1999), pp. 44-85. I would like to thank my friends at Spence Publishing, as well as Cambridge University Press, for allowing us to publish this piece again in another format.
2. Russell Hittinger, “Abortion Before Roe,” *First Things* (October 1994), pp. 14-16.
3. This point was confirmed rather clearly in one of the classic studies of public opinion on this subject, designed and reported by a scholar who, herself, happened to be “pro-choice.” See Judith Blake, “The Supreme Court’s Abortion Decisions and Public Opinion,” *Population and Development Review*, vol. 3, nos. 1-2 (March and June 1977), pp. 45-62; reprinted in *Human Life Review* (Winter 1978), pp. 64-81. See also James Davison Hunter, *Before the Shooting Begins* (New York: The Free Press, 1994), pp. 90-91.
4. See John Noonan, *A Private Choice* (New York: The Free Press, 1979), pp. 49-51.
5. Bernard Nathanson, *Aborting America* (New York: Doubleday, 1979), pp. 47-66, especially 52-53.
6. See the Speech at Springfield, Illinois (June 16, 1858), in *The Collected Works of Abraham Lincoln*, Roy P. Basler, ed. (New Brunswick, N.J.: Rutgers University Press, 1953), V. II, pp. 461-9.
7. Harry V. Jaffa, *Crisis of the House Divided* (New York: Doubleday, 1959), p. 336; republished by the University of Chicago Press, 1973.
8. *Ibid.*, p. 334.
9. Strauss, *Spinoza’s Critique of Religion* (New York: Schocken Books, 1965; originally published in 1930), p. 31.

HADLEY ARKES

10. Again, see "The End of Democracy?," *First Things* (November 1996), pp. 18-42.
11. See, most notably, the symposium in *Commentary*; the letters, the exchanges, and resignations, published in *First Things* (January 1997), especially pp. 2-3 (Gertrude Himmelfarb and Walter Berns). Some of these pieces were assembled, in a representative collection, by Thomas Spence—see Mitchell Muncy (ed.), *The End of Democracy?* (Dallas: Spence Publishing Co., 1997). The editors arranged a sequel in which some of the original participants, joined by other supporters, restated and sharpened their arguments. See *The End of Democracy? II: A Crisis of Legitimacy*, ed. M. Muncy (Spence, 1999).
12. Edmund Burke, "Thoughts on the Cause of the Present Discontents [1770] in Burke, *Selected Writings and Speeches*, Peter J. Stanlis, ed. (Anchor Books, 1963), at 123.
13. See the Symposium, "On the Future of Conservatism," *Commentary* (February 1997), pp. 14-43.
14. Mary Ann Glendon, Comment in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), pp. 95-114, at pp. 113-114.
15. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).
16. 410 U.S. 113 (1973).
17. See 28 U.S.C. Sec. 1738 (c) (West Supp. 1997).
18. "A Culture Corrupted," *First Things* (November 1996), pp. 33 ff.
19. 517 U.S. 620 (1996).
20. Of Amendment II, in Colorado, Justice Kennedy could proclaim, without a trace of hesitation, that "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." (*Ibid.*, at 632.)
21. Justice Scalia, who seems to be tuned in quite precisely and realistically to the ways of the world, anticipated these moves already in his dissenting opinion in *Romer*:

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals. (Bylaws of the Association of American Law Schools, Inc. § 6-4(b); Executive Committee Regulations of the Association of American Law Schools § 6.19, in 1995 Handbook, Association of American Law Schools. *Ibid.*, at 652-53.)

22. See Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), pp. 135-36, and *passim*.
23. For my own treatment of this problem, see my book, *First Things* (Princeton: Princeton University Press, 1986), pp. 224-27.
24. Letter to Joshua Speed (August 24, 1855), in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler (New Brunswick, N.J.: Rutgers University Press, 1953), Vol. II, pp. 320-23, at 320. "It is hardly fair for you to assume, that I have no interest in a thing which has, and continually exercises, the power of making me miserable. You ought rather to appreciate how much the great body of the Northern people do crucify their feelings, in order to maintain their loyalty to the constitution and the Union."
25. See Lincoln, Speech at Cooper Union (February 27, 1860), in *Ibid.*, v. III, pp. 522-50, at 547-48.
26. See *ibid.* (Debate with Stephen Douglas at Alton, Illinois, October 15, 1858), at 301-302.
27. Quoted in Richard Wade, *Slavery in the Cities* (New York: Oxford University Press, 1964), p. 98.

THE HUMAN LIFE REVIEW

28. *The Collected Works of Abraham Lincoln*, *supra*, n. 224, v. III pp. 256-7.
29. Debate at Charleston (September 18, 1858), in *ibid.*, p. 181.
30. Jaffa, *supra*, n. 7, p. 336.
31. *Ibid.*, p. 334.
32. Lincoln, Speech on the House Divided, Springfield, Illinois, June 16, 1858, in *supra*, n. 24, v. II, p. 462.
33. *Ibid.*, v. II, pp. 222-23.
34. Clay, cited in Jaffa, *supra*, n. 7, p. 337.
35. Hence, that stirring line, offered by Lincoln, which quickly spread through the ranks of men in the Union Army: "In giving freedom to the slave, we assure freedom to the free—honorable alike in what we give, and what we preserve." Message to Congress (December 1, 1862), in *The Collected Works of Abraham Lincoln*, *supra*, n. 24, v. V, p. 537.
36. For an interesting argument converging with this one, see Richard Neuhaus, "Can Atheists Be Good Citizens?," *First Things* (August/September 1991), pp. 17-21.
37. See Russell Hittinger, "When the Court Should Not Be Obeyed," *First Things* (October 1993), pp. 12-18, especially p. 16.
38. See *Bowen v. American Hospital Association* 476 U.S. 610 (1986).
39. See, for example, Marshall's comments during the oral argument in the Bowen case, U.S. Supreme Court, Oral Arguments, Vol 8, Cases Nos. 84-1573-84-1560; October Term 1985, pp. 16, 23.
40. Without pronouncing a judgment on the matter, the Supreme Court took note of these kinds of arguments in *Planned Parenthood v. Aschcroft* (1983). Justice Powell noted the testimony of a Dr. Robert Christ, "that 'the abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus.'" Justice Powell pronounced this argument to be "remarkable in its candor." But, as noted earlier, to describe the argument as "remarkable" is not exactly to pronounce it "wrong," and still less is it to supply the reasons that make it a wrongful construction of the doctrines put forth by the Court. See 76 L Ed 2d 733, at 740, n. 7. We may remind ourselves that, without exactly saying so, Judge Haynesworth had been willing to install, in effect, the same understanding—of a right to an effective abortion—in his opinion in *Floyd v. Anders*, 440 F. Supp. 535 (1977).
41. See her testimony in opposition to the bill on partial-birth abortions in "Partial-Birth Abortion: The Truth," Joint Hearing before the Senate Committee on the Judiciary and the Subcommittee on the Constitution of the House Committee on the Judiciary; 105th Cong., 1st Sess, March 11, 1997, pp. 19-21. And see also the testimony from the representatives from other groups that have been engaged in the defense and promotion of abortion: the Planned Parenthood Federation, and the National Abortion Federation, pp. 23-26, 31-35.
42. See, as a notable case in point, the opinion by Judge Stephen Reinhardt, in *Compassion in Dying v. Washington* 49 F. 3d 790 (1996), the opinion that was overruled by the Supreme Court in *Washington v. Glucksberg*, 138 L Ed 2d 772 (1997).
43. See *In re [Nancy] Jobes* 529 A. 2d 434 (1987).
44. See, for example, *In re Guardianship of [Barbara] Grant*, 747 P. 2d 445, 452 (Wash. 1987) (en banc), modified, 757 P.2d 534 (Wash. 1988), and *Bouvia v. Superior Court ex rel. Glenchur*, 225 Cal. Rptr. 297, 304 (Ct. App. 1986).
45. See *In re Jobes*, *supra*, n. 44, and *Bouvia v. Superior Court ex rel. Glenchur*, n. 45.
46. See, again, 49 F.3d 790, and Michael Uhlmann, *Last Rights* (Eerdmans, 1998), pp. 1-44.
47. *Scott v. Sandford*, 60 U.S. 393, at 550 (1857). The fuller sweep of his remarks read in this way: "A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."
48. William H. Rehnquist, "The Notion of a Living Constitution," 54 *Texas Law Review* 693, at 705 (1976).
49. These remarks, by Professor Jaffa, were contained in an address, "The False Prophets of American Conservatism," delivered on Lincoln's birthday in February 1998. The passage is contained on p. 12 of that typescript. Jaffa has elaborated on the argument in print, though not exactly in the version found in the address of 1998. See, for example, Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (Lanham: Rowman & Littlefield, 2000), pp. 87-88.
50. Princeton: Princeton University Press, 1999.
51. *Ibid.*, p. 191.

HADLEY ARKES

52. See, in this vein, my own review of Tushnet, "Lincoln, Nietzsche, and the Constitution," *First Things* (April 2000), pp. 16-20.
53. See Judith Butler, "Contingent Foundations: Feminism and the Question of Postmodernism," in Butler and Scott (eds.), *Feminists Theorize the Political*, pp. 3-21.
54. Marx, "The Eighteenth Brumaire of Louis Napoleon" [1869], reprinted in Lewis S. Feuer (ed.), *Karl Marx and Friedrich Engels, Basic Writings on Politics and Philosophy* (New York: Anchor Books, 1959), p. 333.



"Now wait a minute—are you calling
killing a man for snoring, murder?"

The Right to Choose? Really?

Kathryn Jean Lopez

“This legislation is one of the most dangerous and burdensome of all of the many anti-abortion and anti-contraception bills being promoted by extremist opponents of women’s reproductive health care,” said the National Organization of Women.

Sounds pretty bad, doesn’t it? What NOW was referring to is the Abortion Non-Discrimination Act (ANDA). The goal: To protect Americans’ right to not have to pay for or otherwise participate in abortions. Specifically, ANDA seeks to protect religious hospitals and other healthcare providers (clinics, insurers, nurses, doctors) who are opposed, in conscience, to abortion, from having to have anything to do with them.

“The so-called Abortion Non-Discrimination Act . . . is really an abortion refusal law, which attacks women’s fundamental civil and human rights,” said Planned Parenthood Federation of America President Gloria Feldt.

Feldt, in a press release titled “The Abortion Non-Discrimination Act Is A Farce,” continued: “In fact, the bill discriminates against women who seek abortions and hogsies health care providers who want to give their patients full reproductive health care.

“If members of Congress are really concerned about discrimination, they should immediately remove all refusal clauses so women can have full access to their reproductive rights,” Feldt said.

And yet, it passed the House of Representatives in September, in a vote of 229-189. Despite the spin—which was laid on heavy from the pro-abortion folks—it managed to pass because it was only a matter of fairness.

Still, it’s just short of a miracle that it successfully passed the House. The press-release rhetoric was even more ridiculous on the House floor. Take Rep. Jim McDermott of Washington State for instance:

For us to be moving back in this direction, overriding *Roe v. Wade*, and the Hyde amendment, is simply a step back into the dark ages and it is absolutely wrong. This is not a women’s issue; this is a human issue. Those 14 children in Buffalo who grew up without their mothers because their mothers could not have full reproductive services in a decent hospital in a major city in the United States are what Members are saying is all right for all of the children of this country.

At the same time that was going on in Buffalo at the place I now live, Seattle, women could go down to a travel agency, buy a ticket to Japan, have a day’s shopping and an abortion, and come home. Now, that is the circumstance in 1961, 1962, 1963 in this country.

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KATHRYN JEAN LOPEZ

Leave no children behind, my President has said. Well, this is guaranteed to leave children behind if we step back this far into the past. I urge Members to vote against this.

And here's Rep. Lynn Woolsey (D., Calif.) from the House floor, too:

Mr. Speaker, I rise today in strong opposition to H.R. 4691. It is a misguided measure that has dangerous implications for women's reproductive health and for our health care system as a whole.

Of course, elections are near, so this debate might be advanced because of a right wing, anti-choice agenda. We have heard and it has been made quite clear that their political schemes are worth sacrificing the health of American women. This bill robs women of their right to get comprehensive information about their medical and legal options, and this bill will leave health care providers at the whim of the anti-choice movement.

The current state of our health system is obviously weakening day by day. Our constituents are experiencing increased premiums or they are being dropped by their plans altogether, and now the right wing of this Congress is prepared to tell our constituents that their right to make an informed decision is being taken away.

Mr. Speaker, rather than putting patient access to care in future jeopardy, why are we not working to improve access to quality care? This bill also is a slap in the face to state and local governments that have implemented policies that put a woman's health ahead of bad politics.

We cannot fall for the outrageous antics of the anti-choice community. We cannot let them twist another health care issue into a political issue. That is why I implore my colleagues, my colleagues on both sides of the aisle, vote against this extremely harmful measure and vote against this rule.

Or—just one more (though there are myriad examples)—Pete Stark (D., Calif.):

I rise today in opposition to the misnamed Abortion Non-Discrimination Act. It should really be entitled the First Step Toward Outlawing Abortion Act. At a time when my own state of California is leading the nation in enacting the most progressive laws protecting a woman's right to choose, Republicans in Congress continue to lead their ill-conceived, extremist crusade to stamp out this fundamental freedom.

In truth, if ANDA were all about abortion, its language and reach would be a lot more dramatic than it is. Instead, the opposition's rhetoric has the monopoly on drama.

The Abortion Non-Discrimination Act stems from one of the hottest "reproductive rights" issues of the last few years. Very few statehouses haven't seen coercive bills seeking to force religious—often Catholic—hospitals to provide the whole gamut of so-called "reproductive health" services, including abortion, all in the name of "access." Currently 49 states (the exception is Vermont) have some kind of conscience protection for healthcare providers, though none of them are as comprehensive as the proposed ANDA bill—which covers all healthcare "entities."

In this regard, one of the favorite topics recently among abortion advocates has been hospital mergers. In an action alert sent out to supporters

around the time ANDA was up for consideration in the U.S. House of Representatives, Planned Parenthood argues that health-care institutions, whatever their affiliation, “operate in a secular sphere, and employ and serve people of diverse backgrounds and faiths. Thus, their claimed right to refuse to provide these services imposes serious burdens on people who do not share their religious views.”

The ANDA bill, says Planned Parenthood, “would allow the ‘conscience’ of the entity to trump the ‘conscience’ and needs of the women they serve. . . . This is wrong.”

What is not wrong, however, in Planned Parenthood’s estimation, is for “the entity”—i.e., actual private organizations and Americans—to be forced by law to provide services that the people who make up the organizations believe to be morally prohibited. In fact, these hospitals often believe the very essence of their work is founded on an opposition to the taking of a human life. It’s a principle that all of medicine—whether the practitioners were religious, agnostic, or atheist—once considered to be at its very core.

The issue is a toxic one when it comes to hospital mergers. In New Jersey, Rancocas Hospital in Willingboro was purchased by Our Lady of Lourdes Healthcare Services (Our Lady has never been an abortion fan). The new administration prohibited abortions. The New Jersey American Civil Liberties Union sued, arguing that Our Lady of Lourdes should mark a separate building from the main one on the hospital grounds where abortions could take place. The Catholic hospital, of course, was not going for that. (And, once again, the ACLU proves that “civil liberties” are not foremost on their agenda.)

The healthcare profession may have lost track of its “do no harm” rule, but Catholic healthcare networks are less pliable on issues of life and death.

Even a nonsectarian hospital can get in legal trouble under the current regime. In Alaska, Valley Hospital’s (elected) board decided that it did not want to continue letting a community OB/GYN use hospital facilities to perform abortions. The board’s decision meant that abortion was no longer available at the hospital except in cases of “rape, incest, and danger to the life of the mother—exactly the same policy the federal government has had in Medicaid and its other health programs for many years,” as board member Karen Vosburgh reminded the House Energy and Commerce Committee last summer. An Alaska court’s subsequent decision (upheld by the state supreme court) to prohibit Valley Hospital from making such a decision, Vosburgh told the committee, “potentially places all hospitals in our state in a ‘Catch-22’ situation. If you are a non-religious hospital you have no First Amendment claim of religious freedom, so you must provide abortions. If you are a religious hospital with a ‘free exercise’ claim, respect for your right of conscience

may be seen as showing favoritism to religion, so you may still have to provide abortions.”

It’s not just Planned Parenthood and the overt abortion-advocacy groups that are actively opposing ANDA. The American Civil Liberties Union’s Reproductive Freedom Project sent a representative to the Hill earlier last summer to argue that the bill would unfairly restrict women from abortion, contraception, and even simple counseling.

The groups lobbying against ANDA have grabbed the talking points from their anti-abortion folder without focusing on the actual legislation they are so enthusiastically opposing. In fact, if this were not the narrow clarification that ANDA is, pro-lifers would likely be debating among themselves, some saying that the bill does not go far enough into specifics, into the realm of abortifacient so-called contraception, for instance. But these are battles for another day—they have nothing to do with this piece of legislation.

Simply put, the Abortion Non-Discrimination Act has never been a bill about abortion politics. It’s a bill about freedom. What abortion advocates have been arguing when it comes to “access” is that they would rather see a hospital merger not go through—and a hospital potentially shut down—than allow a hospital to choose not to participate in what its employees and founders believe to be murder. For abortion activists, this is not about freedom. Their opposition to ANDA is a backdoor way to oppose any restrictions on women getting abortions whenever, wherever. As Brigham Young University Law School professor Lynn Wardle has put it, “zealous abortion activists continue to try to use the powers of government to compel participation in and payment for and coverage of abortion. Specifically, they try to compel hospitals, clinics, provider groups, and health-care insurers to provide facilities for, personnel for, and funding for abortion.”

In fact, despite the scare stories from those opposed to the bill, federally funded abortions would still be possible under ANDA. Nor is this a bill that seeks to reverse *Roe v. Wade*. As a fact sheet put out by the Catholic Bishops’ pro-life department notes, “States can ensure access to any abortions they fund without forcing *specific* providers against their will to provide these particular abortions. A requirement that a state will contract only with a provider that offers absolutely *every* reimbursable service would be an enormous *barrier* to patients’ access to care, as few providers in any state could meet such a test.”

The case for the Abortion Non-Discrimination Act is a simple one, despite the overheated rhetoric. As Pennsylvania congressman Joe Pitts put it at a hearing in July, “Abortion is an elective surgery. It is not prenatal care. It is not basic health care, as some of our friends would like us to believe. Private hospitals should be able to decide what types of elective surgery they

wish to offer. If they don't want to provide abortions, they shouldn't have to."

That simplicity might give the bill a decent shot at penetrating even Senate stubbornness. On the House side, otherwise tough sells on pro-life issues, like Republicans Tom Davis and Fred Upton, actually co-sponsored ANDA. Even President Clinton signed a less-comprehensive conscience-clause bill in 1996. Cases like the Alaska one, however, make the need for ANDA clear.

In fact, for some members, ANDA is not at all different from what they voted for in 1996. Senator Olympia Snowe said on the Senate floor in 1996: "[The amendment] does protect those institutions and those individuals who do not want to get involved in the performance or training of abortion when it is contrary to their beliefs . . . I do not think anyone would disagree with the fact—and I am pro-choice on this matter, but I do not think anybody would disagree with the fact that an institution or an individual who does not want to perform an abortion should do so contrary to their beliefs." She didn't foresee how courts would interpret the law as not including hospitals, because they are "quasi-public" entities.

Of course, prospects in the Senate—as is so often the case—are murkier than in the House. However, now that the Senate has slipped into the hands of a Republican majority—however slim—the Abortion Non-Discrimination Act, at least, has a shot at being considered—and even passed (although with high-voltage life-and-death issues like partial-birth abortion and cloning on the table too, it's likely to be low on the priority list). Previously, however, it wasn't even a pipe dream.

And, if the Senate does wind up debating ANDA, it may make for the strangest of bedfellows. Common sense and fairness, evidently, do not always elude the junior senator from New York. None other than former First Lady Hillary Clinton, when asked about abortion and contraception mandates on Catholic hospitals, told the *New York Observer* in the summer of 2000: "Even though I am pro-choice, I do not think it would be constitutional or appropriate for the government to be telling a Catholic hospital, 'You have to do something which is totally contrary to your religious beliefs.' . . . Once the government crosses into that area of appropriate religious authority, I think we're on a slippery slope."

The support of a few more Hillary Clintons would be welcome. As Lynn Wardle noted in his testimony this summer, ANDA "is a very small, but very important, step in the right direction." Wardle tells me, "The basic issue in the Abortion Non-Discrimination Act is forced abortion. A forced abortion occurs not only when a woman is forced to have an abortion she does not want, but also when a health-care provider is forced to provide or participate

in an abortion against her will. Even the Supreme Court abortion cases are based on protecting voluntary choice. The right of individuals and organizations of individuals to choose in accord with their conscience to not have and to not participate in abortion must be protected against extremists who are trying to coerce others to provide abortion services that extremists want but which others find morally repugnant. That is what ANDA is about. It protects freedom of choice, the freedom not to be forced to perform or support abortion against one's moral beliefs."

But then, for some, there are issues much more important than choice and non-discrimination: like making sure abortion is anything but rare. That's why the National Organization for Women calls ANDA "one of the most harmful bills yet proposed."

It is the spirit of a new experiment in New York City, where its mayor, Michael Bloomberg, recently made abortion training mandatory as part of OB-GYN residencies in the city's public hospitals, that abortion advocates get so worked up over conscience clauses. The reality is, fewer doctors and hospitals across the country want to offer abortions. The more we know about fetal life, the less anyone wants to be a part of destroying it—abortion's a political hot button, and yes, it's even antithetical to the whole medical profession.

In a 1998 piece in the *New York Times Magazine* ruing the decline in doctors below the age of retirement who are willing to perform abortions, the reporter noted with dismay the attitude of OB-GYN residents who, though perfectly free to do them, still don't want to touch abortion. "Some of them," Jack Hitt wrote, "have the kind of revulsion you expect to find among abortion protesters."

"If you do 12 in a row, it can make you feel bad," the chief resident said. "No matter how pro-choice you are, it makes you feel low." Another resident said, "I guess I never realized I would find it as unpleasant as I do. I really don't enjoy it [at] all. It's not a rewarding thing to do."

Quotes like that scare pro-abortion advocates. It is desperation—being on the losing end of the debate, watching the emanations and penumbras of a culture of life have more and more influence—that makes them advocate less freedom for their opponents.

In the United States today upwards of 80 percent of hospitals do not perform abortions on site. They have the right to choose not to. Abortion remains legal in the United States and Planned Parenthood, NOW, and the rest of the abortion industry keeps it common. If abortion advocates are ever to be taken at their word, they must concede that freedom to choose extends to abortion opponents as well.

The Clone Hustlers

Wesley J. Smith

Human cloning: it's the public policy issue with the greatest potential to define the morality of future generations. The science may be complicated, the very premise appear a futuristic fantasy, but the moral questions we now face with the emergence of this new technology are clear: Does human life have ultimate value precisely because it is human? Will society be able to thwart a Brave New World?

If the answer to these essential questions is yes, we will (to quote Leon Kass), reject the "the soft dehumanization" threatened by biotechnology as we embrace the "genuine contributions" that await us through a greater understanding of the workings of the human body at the molecular level. This high-wire balancing act would encourage adult-stem-cell research—already demonstrating exciting potential to treat maladies such as Parkinson's disease and multiple sclerosis—while rejecting *all* human cloning, whether for biomedical research or to produce children.

On the other hand, if we decide that human life does not, in and of itself, have ultimate value; if we are unable to resist being seduced into exploring the dark side of biotechnology; then the human cloning enterprise will, *Titanic*-like, steam full-speed-ahead toward an inevitable rendezvous with the deadly iceberg called eugenics. The resulting collision would sink Jefferson's ideal of our society based on the self-evident truth that all men and women are created equal, and replace it with a eugenics-oriented, class-based society in which the "genetically inferior" would be "selected out" before they were born, and where life's success or failure would largely depend on the perceived quality of one's genetic enhancements.

These are the alternative futures we confront in the human cloning debate. The outcome will not appear today, certainly. Nor tomorrow. Not even next week or next year. But there can be no question that the decisions we make about biotechnology from here on will determine whether our future in the decades to come will be an ever greater realization of Jefferson's humanitarian dream, or the dehumanized horror of Huxley's prophetic nightmare.

A total ban on human cloning is necessary if we are to prevent the evolution of Brave New World. This shouldn't be a difficult task. Poll after poll

Wesley J. Smith, a senior fellow at the Discovery Institute, is the author of *Culture of Death: The Assault on Medical Ethics in America* (Encounter). His next book will be *A Consumer's Guide to Brave New World*, which will explore the morality and business aspects of human cloning.

has shown that the vast majority of the American people wish to prevent the development of this technology. Unfortunately, the legislative attempt to outlaw cloning stalled when pro-cloners dangled the utilitarian hope that cloning for biomedical research, known as “therapeutic cloning,” would lead to miraculous medical treatments. The idea is to clone embryos of human patients, develop them for five to seven days, harvest the embryonic stem cells, and then use these tissues to manufacture new organs or injectable tissues that would not be rejected by the patients’ auto-immune systems, because the patient’s and clone’s DNA would be virtually identical.

Therapeutic cloning would treat nascent human life like a mere natural resource, akin to a corn crop ripe for the harvesting. Space does not permit a full moral critique here, but morality aside, it is becoming increasingly clear that therapeutic cloning is more a pipe dream than a potential reality. Even if human embryos could be successfully created from ill patients’ DNA, even if embryonic stem-cell lines could be derived from these embryos, and even if this would lead to potential treatments, the practicalities are so daunting that therapeutic cloning would probably only be available to the very few, meaning the very rich. Indeed, even articles published in pro-cloning scientific journals are beginning to acknowledge that therapeutic cloning is unlikely to ever enter medicine’s armamentarium.

The eugenic goal of many human cloning enthusiasts has been obscured by the last two years’ raging debate over therapeutic cloning. Yet the scenario these futurists dream of is mind-boggling in its hubris and scope. Quite literally, they plan to “seize control of human evolution” by using human cloning research and technology to “improve” the human race through germ-line genetic engineering. Should they succeed, some of us would actually be recreated into man’s desired image.

Unfortunately, this alarming agenda receives little attention in the ever-shallow media’s obsession with depicting the human cloning debate as either a new front in the culture war over abortion, or as a repeat of the Enlightenment struggle pitting reason and science versus “backward” religion and superstition. But the *books* written about human cloning and its ultimate purposes; ah, they reveal a far different story. For it is in these books—which only a few thousand people may ever actually *read*—that the eugenic uses to which human cloning would be put are most candidly and vividly described.

Like an advanced combat patrol that presages a pending invasion, these books represent the first incursions of Brave New World from the realm of science fantasy into future possibility. If we are to comprehend the ultimate importance of the great cloning debate and the reasons many opponents of

human cloning—whether they are pro-life or pro-choice, religious or secular, liberal or conservative—fervently believe the human cloning issue to be the most crucial our society faces, then we must understand the kind of future that the high priests of the new eugenics envision.

The purpose of this essay is to shed much-needed light upon this advocacy. I will do so by summarizing the contents of four of the most notable books published in recent years which promote human cloning or the right of prospective parents to eugenically engineer their progeny. My hope is that by doing so I will motivate my readers to participate vigorously in democratic processes to enact a nation-wide, legal ban on *all* human cloning. We have everything to gain: succeeding in this endeavor would make the future for which these authors yearn impossible to implement.

*Children of Choice:
Freedom and the New Reproductive Technologies*
by John A. Robertson
(1994, Princeton University Press, Princeton, NJ)

Bioethicist John A. Robertson, a law professor at the University of Texas, Austin, reflects the nearly “anything goes” attitudes that are rife throughout the bioethics establishment. In *Children of Choice*, Robertson asserts that women not only have an absolute right to terminate their pregnancies, but ironically, just as absolute a right to access whatever “non coital technology” they require to bear children. Indeed, this right is so fundamental, Robertson believes, that it also includes the license to genetically engineer progeny—a process he crassly calls “quality control of offspring.”

Wouldn't this dehumanize children and transform our perceptions of children from flesh-of-our-flesh and blood-of-our-blood into mere products chosen like goods “in a shop window?” Yes, that could happen, Robertson admits. But so what? His language reveals a distinctly eugenics mindset: “Although [embryo] selection techniques will permit some defective ‘products’ to be repaired before birth, most affected fetuses will be discarded based on judgments of fitness, worth, or parental convenience.”

Robertson views the decision to become a parent through a cool, utilitarian prism, reducing this most profound decision from one based in self-giving and generosity into a solipsism akin to achieving a rewarding career or pursuing an interesting avocation. Hence, he supports a right of prospective parents to genetically alter progeny to suit their desires (so long as it is a positive improvement), which in telling language he labels “the *fabricator's* procreative liberty.” (My emphasis.) This license, he writes, implies the right of prospective parents “to take actions to assure that their offspring have

characteristics that make procreation desirable or meaningful for that individual. On this theory, both negative and positive means of selection would . . . be protected.” In other words, parents can remake their children into a desirable product, and abort should the unborn child not possess desired traits or acceptable expected levels of health or ability. (He is silent about whether this license to kill would extend to active infanticide.)

Robertson’s sterile vision of procreation and parenthood is not on the fringe but within mainstream thought in bioethics. When his book came out in 1994, he stopped short of endorsing human reproductive cloning, claiming that such technology goes “far beyond what is essential to assure a normal, healthy birth.” However, this caveat seems out of place in the light of his absolutism on “choice”—indeed, and not surprisingly, I learned upon further investigation that Robertson now supports human cloning as a right, should it become safe, at least for couples who want biologically-related children in circumstances in which the male is sterile.

*Remaking Eden:
Cloning and Beyond in a Brave New World*
by Lee M. Silver
(1997, Avon Books, New York, NY)

Lee M. Silver, a professor of biology at Princeton University, is one of the nation’s most enthusiastic proponents of human reproductive cloning. In *Remaking Eden*, Silver not only supports cloning and genetic engineering, but makes it clear that learning how to make human clones is *the* key that opens the door to altering and transforming the human genome. As Silver writes, “Without cloning, genetic engineering is simply science fiction. But with cloning, genetic engineering moves into the realm of reality.”

Why does Silver believe this to be true? Genetic engineering—already being accomplished in animals—is very “inefficient,” Silver writes, with a success rate of 50 percent at best, plus the additional risk of causing a genetic disease when modifying the animal. “This is not a problem for animal geneticists,” he asserts, since animal genetic modifiers can pick out healthy animals and destroy the unhealthy or defective ones. Of course, this cannot be done with human life (to which I hasten to add the word “yet”).

Here, according to Silver, is where cloning enters the picture. Once scientists learn how to modify human genes so as to create a “new human being with a special genetic gift,” cloning will assure that the child is born with the desired genetic alterations. This is how it would be done: cells would be extracted from a donor and the DNA in the nucleus genetically engineered to taste. Then, the nucleus would be extracted from the altered cell and inserted

into a woman's egg that had previously had its own nucleus removed. The modified egg would then be stimulated with an electric current to begin embryonic division. (This form of cloning is called somatic nuclear cell transfer.) Once the embryo reached the blastocyst stage—five to seven days of development—it would be implanted into a willing woman's womb and gestated to birth.

When born, the child's genes would be virtually identical to the genetic makeup of the altered cell from which he or she received almost all their DNA. (About 3 percent of the DNA would still come from the egg.) In theory, this would result in the child exhibiting the "enhancements" engineered into its makeup.

Silver predicts that, once the technology becomes widely accessible, "the global marketplace will reign supreme," resulting in a genetic arms race of sorts in which the "well-off" would compete with each other to enhance their children with increasingly sophisticated genetic modifications. These could include increasing intelligence, health, strength, etc. Silver sees animal genes being introduced into human embryos to increase the child's sense of smell, or even—I kid you not—to create "light emitting organs" by using firefly genes. (Such modifications are already being done with animals. For example, a "transgenic" herd of goats modified with spider DNA has been engineered in which the females of the herd manufacture spider webs in their milk.)

Silver believes that, over time, this competition would lead to genetic modifications so radical that the human species would divide into two divergent categories; the "Naturals," doomed to go through life unenhanced, and the superior, enhanced beings, whom Silver names the "GenRich." Proving that the human enhancement agenda is merely a new version of discredited eugenic master race thinking, Silver predicts a future in which the *ubermenschen* GenRich will utterly dominate the *untermenschen* Naturals.

All aspects of the economy, media, the entertainment industry, and the knowledge industry are controlled by members of the GenRich class. GenRich parents can afford to send their children to private schools rich in resources required for them to take advantage of their enhanced genetic potential. In contrast, Naturals work as low-paid service providers or as laborers, and their children go to public schools. . . . Now, Natural children are only taught the basic skills they need to perform the kinds of tasks they'll encounter in the jobs available to members of their class.

In the far distant future, Silver hopes, the GenRich and the Naturals will become two entirely separate species. "In this era," Silver sighs ecstatically, "there exists a special group of mental beings" who "can trace their ancestry

back directly to homo sapiens,” but who are as “different from humans as humans are from the primitive worms with tiny brains that first crawled along the earth’s surface.”

These “mental beings” will be gods.

“Intelligence” does not do justice to their cognitive abilities. “Knowledge” does not explain the depth of their understanding of both the universe and consciousness. “Power” is not strong enough to describe the control they have over technologies that can be used to shape the universe in which they live.

This vision of a utopian post-human future is catching fire among radical humanists in the academy. Indeed, a nascent social movement, known as “transhumanism,” has formed to promote it. Transhumanism’s stated goal is to seize control of human evolution and steer it toward post-humanity. It even hopes that cloning and other biotechnologies would lead to an era of human immortality.

Who’s Afraid of Human Cloning?

by Gregory E. Pence

(1998, Rowman & Littlefield Publishers, Inc., Lanham, MD)

Gregory E. Pence, philosophy professor in the Schools of Medicine and Arts/Humanities at the University of Alabama, Birmingham, is a wild advocate of cloning-to-produce-children. But he knows that the American people disagree in overwhelming numbers. What to do? Simple: change the lexicon. Pence declares early in his book that he refuses to call human cloning undertaken to produce a child . . . cloning. Why? Pretending to don the mantle of nobility, he claims that the term “cloning” when joined with the word “human” is the moral equivalent of racial and ethnic pejoratives. That’s nonsense, of course. The real reason for this lexicon switch is pragmatically political. Following the old debating maxim that he or she who controls the definitions wins the debate, Pence hopes that by changing the currently accepted terms, he can alter people’s beliefs.

(This same tactic was recently used by pro-cloners, such as Senator Arlen Specter [R-PA], in the great cloning debate of 2002. When polls showed that the American people overwhelmingly opposed legalizing “therapeutic cloning” as well as “reproductive cloning,” they simply changed their terminology. Abetted by a compliant media, the use of the term therapeutic cloning—cloning-for-biomedical research—was suddenly dropped and replaced with SCNT (somatic cell nuclear transfer).

Linguistic manipulation is the least of the problems in *Who’s Afraid of Human Cloning?* Pence comes across as a moral anarchist. Explicitly adopting

Peter Singer's view that we should liberate ourselves from existing moral presumptions which are "likely to derive from discarded religious systems, from warped views of sex and bodily functions," Pence rejects outright the sanctity of human life. What matters is not humanity but consciousness, which the author proclaims "the foundation of all value."

Pence writes that humans who are without consciousness are not "persons." Since nascent human life is not conscious, Pence asserts, we should be able to treat human embryos as a mere natural resource to be used and exploited for the benefit of persons. For those who might be seduced into accepting this approach to unborn life, it could apply equally to born humans such as people in comas or suffering from Alzheimer's, since many bioethicists claim that these humans too are non-persons. Indeed, Pence goes so far as to claim that famous coma patients such as Nancy Cruzan and Karen Quinlan, about whom internationally famous legal battles were fought over continuing their medical treatment, were actually dead rather than cognitively disabled since "persistent vegetative state is the real death of the person."

All of this leads Pence to his desired conclusion. Adopting the mindset of John Robertson, Pence sees reproduction as an almost unlimited "right," which includes the use of any and all technology required for a person—it need not be a couple—to accomplish that end. But Pence goes beyond Robertson when he claims that human cloning ("asexual reproduction") without limit is included in the right to reproduce.

Why cloning? The "strongest arguments" for permitting cloning to produce children is "that his parents might give him or her a wonderful genetic legacy." This would be a tricky business, Pence acknowledges. Sure there would be mistakes, but what of it? "There are mistakes in choosing schools," Pence sniffs, "in trying to plan conception of children, in estimating one's capacity to be a good parent, and such mistakes don't justify a policy that bans children."

One hardly knows where to begin to answer such crassness. A mistaken choice of school does not alter a child's genetic makeup. Overestimating one's parenting abilities does not forever change a child's *biological nature* and that of his or her progeny and progeny's progeny down through the balance of time. Forcing a child to take piano lessons does not mean the child must play piano for the rest of his or her life. More crucially, mistakes in such matters do not lead to illness or disability or require extermination to rectify.

Pence next brings on the hard eugenics—the end goal of most advocates who support cloning-to-produce-children. Not only should parents have the right to genetically "enhance" their offspring, Pence asserts, "they are *obligated*

to do so.” Why? “It is wrong to choose lives for future people that make them much worse off than they otherwise could have been.”

What hubris. Who is to say which human is inherently “better” and which is inherently “worse?” Take people with developmental disabilities, as just one example. Are they really worse humans than their brothers and sisters with more intelligence? I submit that the answer is an emphatic no. People I have known with Down’s syndrome, for example, have been the most kind, loving, sweet, cooperative people in the world, earnest contributors to humanity who made us better for their presence—not only for what they gave to us but because of what they induced us to give to them. Would society really be better off if they were wiped off the face of the earth?

Eugenics isn’t ultimately about making life better for our children, but making *our* lives more meaningful or happy. In a telling section near the end of the book, Pence writes:

When it comes to non-human animals we think nothing of trying to match the breed to the needs of the owner. . . . [M]any people love their retrievers and their sunny dispositions around children and adults. Could people be chosen the same way? Would it be so terrible to allow parents to at least aim for a certain type, in the same way that great breeders . . . try to match a breed of dog to the needs of a family?

Yes, it would. Such thinking implies an end to the unconditional love and acceptance of our children. It perceives the young, not as eventual autonomous beings possessing incalculable ultimate moral worth, but as mere chattel—property—designed and fabricated to fulfill *our* needs, *our* expectations, *our* desires.

Pence—like many bioethicists—also attacks the uniqueness and sanctity of human life by blurring the crucial moral distinctions between humans and animals, claiming that people “are both nothing more than, and as wonderful as, compassionate monkeys.” Here Pence finds common ground with the animal rights/liberation movement, which argues that humans and animals are morally equal.

There is method behind this madness. Where animal liberationists claim a moral equality between people and animals, their *goal* is to force people to treat animals like people. Pence, along with many of his ilk in bioethics, seeks license to treat some people in the same way we now treat animals. Thus, in *Who’s Afraid of Human Cloning?* Pence is explicit in this regard when he discusses genetic engineering, urging that by “weakening the ethical boundary between non-human and human animals” we could allow “doing to humans some of the things we think quite sane to do to animals.” Since farmers are allowed to genetically alter cows to produce better milk,

thinking of human life as nothing special would “allow parents to give their babies at birth the best genetic heritage possible.”

Moo.

*Redesigning Humans:
Our Inevitable Genetic Future*
by Gregory Stock
(2002, Houghton Mifflin Company, Boston, MA)

These eugenic, post-human attitudes find their most robust and enthusiastic expression in the new book *Redesigning Humans* by California bioethicist Gregory Stock, the director of the Program on Medicine, Technology, and Society at the School of Medicine of the University of California, Los Angeles (UCLA). Stock is an explicit transhumanist, believing that all individuals should be free to alter themselves and their progeny genetically. This could include inserting animal DNA into human embryos, inserting or removing chromosomes, inserting artificial chromosomes into a genetically engineered embryo, or perhaps, altering human capacities through nanotechnology.

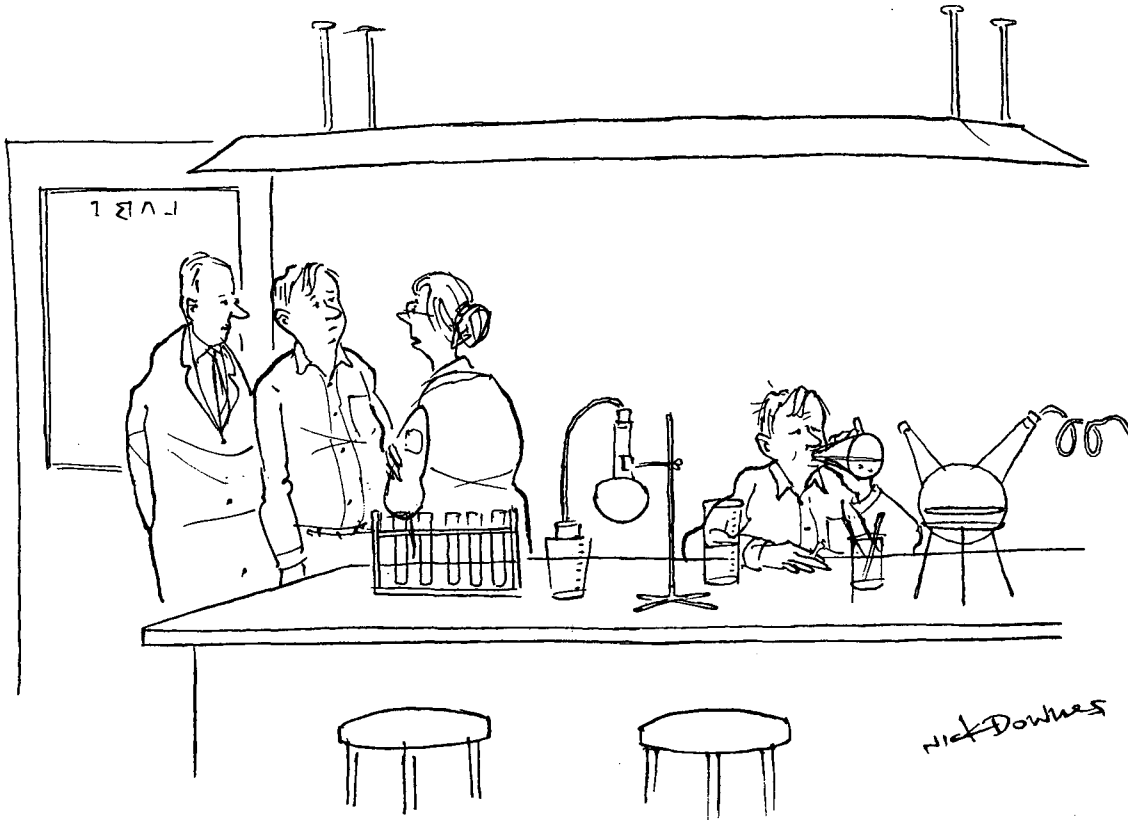
Stock sees humans taking such absolute control of human evolution that he envisions a time when we will have altered ourselves to the point that we are no longer a single species. In this post-human future, we may become so genetically diverse that we may no longer be able to procreate outside of the laboratory since the “union of egg and sperm from two [transhumanist] individuals with different numbers of chromosomes or different sequences of genes on their extra chromosomes would be too unpredictable with intercourse.” If that sounds as if having children will become onerous, worry not, Stock soothes. Our attitudes toward children as commodities will have become so pronounced that “laboratory conception” will not “seem a burden because . . . parents will probably want the most up-do-date chromosome enhancements anyway.”

The eugenic and dehumanizing values rife throughout these books are too often eclipsed by the ongoing arguments over whether cloning technology should be allowed in pursuit of new medical cures. That’s too bad because the American people deserve to know the future toward which human cloning would lead. And while there are plenty of important and substantial reasons for banning human cloning outside the context of *Brave New World*, the key point of this brief review is this: If we want to thwart the creation of a posthuman future, if we want to prevent a new eugenics from destroying society’s belief in the sanctity-of-human-life ethic and our commitment to

WESLEY J. SMITH

universal human equality, *we must outlaw all human cloning. And we must do it now.*

Succeed in that endeavor and biotechnology will be our friend, and we can move vigorously toward a human future that will remain truly human. Fail in that simple task, and the eugenic, posthuman future for which these authors yearn will be well on its way toward reality. As with everything else involving human society, the choice is ours. So will be the consequences.



"I'm afraid we'll need your liver to keep your clone alive."

Revisiting Ireland's Pro-Life Civil War

In a recent issue, *Review* contributor David Quinn, editor of *The Irish Catholic*, wrote about *Ireland's Pro-Life Civil War* (Winter/Spring 2002). It was the story of the March 2002 abortion referendum, in which the issue was a proposed Protection of Human Life in Pregnancy Bill. The hope was that the new referendum could reverse the "suicide exception" which had resulted from the 1992 "X-case" (in which a 14-year old girl was allowed an abortion on the grounds that if she did not have one she might commit suicide). However, the major pro-life groups in Ireland were at odds over the wording of the proposed bill, and a "pro-life civil war" ensued. The Bill was defeated. Mr. Quinn, who was in favor of the Bill's passage, wrote:

The bid to reverse the X-case was undone in large part by an inability on the part of some pro-lifers to tell the difference between a political compromise and a moral compromise. ... On March 7, the day of the count, the enemies of the culture of life cheered their victory as the final result came in. They knew that the defeat of the government proposal had brought much closer the day when abortions would take place in Ireland. What a pity those pro-lifers who opposed the amendment couldn't see that also. Instead they played right into the hands of their enemies. A disaster.

Interest in the Irish referendum was not at all limited to the Irish, and several international pro-life organizations were involved in lobbying for or against the Bill. Soon after the *Review* was published, we received several letters of protest, from abroad (England, Ireland and Italy) and here in the States, from members of some of the organizations which had mobilized "No" votes. They took exception to Mr. Quinn's portrayal of their objections, insisting that the wording of the Bill would have actually allowed for more exceptions, and *less* protection for human life.

We decided the *Review* ought to revisit the issue. Although we greatly appreciate hearing from our readers, space considerations prevent us from printing all the letters we received (nor does the *Review* have a regular "Letters to the Editor" section). In the pages which follow, we have selected one letter, from lawyer Robin Haig of London, as well as a more lengthy response, also from a lawyer (hailing from New Jersey) Richard Maggi. Finally, David Quinn himself has kindly written for us a response to his critics.

—MARIA MCFADDEN

“An unacceptable definition of abortion”

Robin Haig

Dear Editor,

I write regarding David Quinn’s article concerning the abortion referendum in Ireland (HLR Winter/Summer 2002). As Chairman of [the Association of Lawyers for the Defence of the Unborn], which comprises over 3,000 members, including many in Ireland, I was first contacted about the proposed referendum by an English ALDU member, who has connections in Ireland. In October 2001, a matter of only a few days after the draft law had been published, he wrote to me pointing out that the main objection to the proposed new law was “an unacceptable definition of ‘abortion.’” He added, “*It is unfortunate that some of the leaders of the Pro-life campaign in Ireland have supported the Government’s proposals. Few seem to see the dangers involved in the new definition of abortion.*”

Mr. Justice Rory O’Hanlon, a former Irish High Court judge and a very well known and experienced pro-lifer in Ireland, did see the dangers and described the proposed law as “*the most serious attack yet witnessed on the integrity of our Constitution.*”

So, pro-life opposition to the Irish referendum proposals was not something extraordinary. In reality, what was extraordinary was that any pro-lifer could contemplate voting for those referendum proposals.

The referendum proposed the introduction into the Irish law of the Protection of Human Life in Pregnancy Bill 2002 (the Bill). What this Bill proposed went much further than just political compromise. Moral compromises were undoubtedly required if the Bill was to be accepted and become law. For example:

- The Bill would have introduced into Irish law a definition of abortion as applying to the intentional killing of unborn human life “after implantation.”¹ As a purely factual definition, this is untrue; it is not a legal fiction or some such legal device, it is a lie. No one should be asked to vote for a lie. In a private letter, written weeks before the referendum had taken place, Mr. Justice O’Hanlon referred to this particular provision with the warning, “*This seems to me to leave the way open for many undesirable practices.*”

- The clause in the Bill containing this false definition began with the words, “*In this Act*” and it was claimed, therefore, that this definition was

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limited to be used in the context of this new law alone. In practice, however, what this law would have done, had it been approved in the referendum, would have been to enshrine this false definition of abortion in Irish law. This was undoubtedly introduced to smooth the path for the introduction of the abortifacient “morning-after” pill. It is no coincidence that in September and October 2001 the Irish Medicines Board was considering an application to licence the morning-after pill in Ireland. Approval to the m.a.p. was duly given on the mendacious ground that the m.a.p. is a contraceptive, not an abortifacient, and in regard to the licence application the Medical Director of the Irish Medicines Board on 23rd October 2001, advised the Board that “The proposed referendum on abortion helps to clarify the issue in that it proposes to define an abortion as occurring after implantation of a fertilised egg.”²

There is no acknowledgement here that this definition was intended only to be applied in the narrow confines of that specific law. And yet this statement was made only 3 weeks after the Bill was published, 6 months before the referendum was due to take place and long before the law might have come into force, a law which will not now ever come into force.

In his article, Mr. Quinn states that the proposed new law “*could not have withdrawn protection from unborn life pre-implantation even if it had wanted to*” but, as the above example shows, it has already been used to do exactly that. This false definition of abortion was never going to be limited to the circumstances “In this Act,” but had been introduced to be used, as here, to legitimise the killing of and experimentation upon human embryos.

◦ The new law would have repealed³ the Offences against the Person Act 1861, which is the underlying law (subject to the Irish Constitution) which prohibits abortion in Ireland. Much was said to down-play the significance of this change—the 1861 Act was said to be an anachronism and it was said that the Constitution contains other protective measures. The same 1861 Act still applies also in the United Kingdom and especially in Northern Ireland where the Abortion Act 1967 does not apply at all. The Abortion Act has largely undermined the 1861 Act in the remainder of the U.K. but not in Northern Ireland and pro-lifers in Northern Ireland were rightly concerned at proposals to repeal the Act in the Irish Republic. The repeal of the Act would have had symbolic connotations in the whole of the U.K and indeed in many parts of the former British Empire where laws based upon the 1861 Act still apply.

◦ The law would have allowed abortion to be carried out by doctors where “*in the reasonable opinion of the practitioner [it is] necessary to prevent a real and substantial risk of loss of the woman’s life other than by self*

destruction.”⁴ It was established in English law as long ago as 1939⁵ that saving a woman’s life was (in the context of abortion) interpreted by the Courts to mean preventing her from becoming “a physical or mental wreck,” in other words a much wider interpretation than simply preventing her death. There is every reason to suspect that a similar interpretation would be given in Ireland.

- What is more, the new law would have required the medical practitioner to form his opinion acting “in good faith.”⁶ That phrase, which occurs in the U.K. Abortion Act, is the reason, above almost all other reasons, why we have abortion on demand in the U.K. However stupid, foolish, even negligent the doctor may be shown to have been in reaching his opinion, it is almost impossible to challenge the doctor’s assertion that it was given in good faith. This provision in the proposed new law would have given Irish doctors wide powers of interpretation to decide whether or not, in their opinion, an abortion was justified. Abortionists would have leapt through this open door with glee.

- The Bill would have enshrined in Irish statute law the right for Irish women to travel abroad to have abortions.⁷ Whether or not this provision would have made any practical difference to what is actually happening (Irish women are already travelling abroad for abortions), there seems to be no good reason why this provision should have been included in the Bill nor why any pro-lifer should be expected to vote for it.

What was being demanded was not compromise but concessions. No one who supported the referendum has ever explained why these concessions had to be made at all. Why not simply change the law to close the loophole which had apparently been opened by the X case and which appeared to allow abortions in Ireland if the pregnant woman claimed that she would commit suicide? Pro-life opponents of the referendum did not insist upon “*perfection*” in the legislation, as has been claimed, but they were not willing to accept concessions, such as those I have mentioned above.

Paragraph 73 of *Evangelium Vitae* would not, as it is claimed, have justified a “Yes” vote in the referendum. In that paragraph, the Pope writes that “*an elected official, whose personal opposition to procured abortion was well known, could licitly support proposals aimed at limiting the harm done by [a pro-abortion law].*” (Emphasis in the original.)⁸ But this is not the situation which pertained in Ireland. First, it was every eligible member of the Irish population who was being asked to vote, not just an elected official. Secondly, the Bill was not merely limiting the harm done by a pro-abortion law (i.e., the X-case judgement), it was introducing a whole raft of new provisions as I have mentioned above, provisions which would certainly have

THE HUMAN LIFE REVIEW

increased the harm of abortion.

In truth, therefore, the rejection of the referendum, far from being a disaster, was a resounding success. The Irish people have not yet escaped the depredation of the culture of death but they have rejected its lies. All people of goodwill, whether they voted Yes or No, must seize the opportunity to build on this success and work together to further the culture of life.

Yours sincerely,
Robin Haig, Chairman

NOTES

1. Clause 1 (1) of the Bill.
2. Note to the Irish Medicines Board from the Medical Director prior to Board meeting of 31 October 2001.
3. Clause 6 of the Bill.
4. Clause 1 (2) of the Bill.
5. R.V. Bourne [1939] 1K.B. 687.
6. Clause 1 (3) of the Bill.
7. Clause 4 of the Bill.
8. *Evangelium Vitae* 73.

A Dangerous Bill

Richard Maggi

David Quinn, in his article on the Irish referendum (“Ireland’s Pro-Life Civil War,” *HLR* Winter/Spring 2002), says that pro-lifers should support any improvement in abortion law, even if it falls far short of perfection. He then asserts that pro-lifers who did not support the proposed amendment to the Irish constitution did the cause a serious disservice. I respectfully submit that he is mistaken in considering that amendment to be, on balance, an improvement.

Before we examine the proposed amendment, we need to review the development of Irish law on abortion.

In 1861, the Offences Against the Person Act was adopted. Paragraph 58 provides:

Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, *whether she be or be not with child*, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . [emphasis added].

(Omitted words *were* repealed by the Statute Law Revision Act 1892 and the Statute Law Revision (No. 2) Act 1893. Paragraph 59 of the 1861 Act also imposed a criminal penalty for those who procured an instrument or substance intended to be used to effectuate an abortion.)

Essentially, this Act outlawed abortion in Ireland. Its provisions remain in effect to this day, except as subject to Article 40, section 3.3, of the Constitution.

The original version of this subsection of Article 40 was added to the 1937 Constitution in 1983 by the Eighth Amendment, which provided that

The State acknowledges the right to life of the unborn and, with due regard to the equal right of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

This was the text of this constitutional provision when *The Attorney General v. X* [1992] 1 *IR* 1 (generally known as the *X* case) was decided in 1992.

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In this case, the Attorney General had been apprised that a young woman, a minor, intended to go to England to obtain an abortion. The Attorney General sought a court order forbidding her to obtain an abortion, whether in or outside Ireland. The defense argued that the woman, allegedly a victim of rape, was so distressed that she was likely to take her own life. The court, holding that the threat of the mother's self-destruction "is much less and of a different order of magnitude than the certainty that the life of the unborn will be terminated," granted the injunction sought by the Attorney General.

When this ruling was appealed, the Supreme Court of Ireland agreed that the State had an obligation to protect the life of the unborn child. However, the majority of the court concluded, in the words of Chief Judge Finlay, that the "test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having due regard to the true interpretation of Article 40, s.3, sub-s.3 of the Constitution." The Supreme Court accordingly voted to lift the injunction against travel imposed by the lower court.

Shortly after this decision, a referendum was submitted to the Irish citizenry which, in December 1992, resulted in the following provisions being added to Article 40, section 3, subsection 3:

This subsection shall not limit freedom to travel between the State and another state.

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.

For nearly nine years following the X decision, the pro-life camp had been calling for its reversal. That could easily have been accomplished through a constitutional amendment that simply eliminated threatened self-destruction as a justification for abortion, without any further legislative embellishments. Had such an amendment been offered, there would have been unanimous support from the entire pro-life community.

Instead, the government insisted that it wanted to put forth a proposal that would finally settle abortion issues and would gather the support of a majority of the electorate. However, not until the language was a *fait accompli* were some of the leading pro-life groups and persons, whose support would have been crucial to the success of the referendum, approached by the amendment's supporters.

The amendment as it was offered to the Irish people would have added to Article 40 a fourth section stating: "In particular, the life of the unborn in the

womb shall be protected in accordance with the provisions of the Protection of Human Life in Pregnancy Act, 2002.” The 2002 Act, whose terms were set forth within the amendment, would have had to be introduced and passed by the Oireachtas (the Irish parliament) after the amendment was adopted. At that point, the act itself would have been equivalent, in force and effect, to a constitutional provision. Thus, whatever was deemed good and whatever was deemed bad in the Protection of Human Life in Pregnancy Act could not have been changed by an ordinary act of the legislature. It could only have been changed by the constitutional referendum process.

The Protection of Human Life in Pregnancy Act would, among other things, have accomplished the following:

1. eliminated the mother’s threatened self-destruction as a basis for justifying an abortion;
2. defined “abortion” as “the intentional destruction by any means of unborn human life *after implantation* in the womb of the woman” (emphasis added);
3. excluded from the category of “abortion” “a medical procedure by a medical practitioner at an approved place in the course of which or as a result of which unborn human life is ended where that procedure is, in the reasonable opinion of the practitioner, necessary to prevent a real and substantial risk of loss of the woman’s life other than by self-destruction”;
4. defined “reasonable opinion” as “a reasonable opinion formed in good faith which has regard to the need to preserve unborn human life where practicable and of which a written record has been made and signed by the practitioner”;
5. provided for imprisonment of not more than 12 years, or a fine, or both, for the performance or facilitation of abortion as defined under this statute;
6. protected a conscientious objector by directing that the Act shall not “be construed as obliging any person to carry out . . . any medical procedure referred to” in the Act;
7. protected the “freedom to obtain or make available in the State [of Ireland] . . . information relating to services lawfully available in another state”;
8. declined to “restrict any person from travelling to another state on the ground that his or her intended conduct there would, if it occurred in the State, constitute an offence under section 2 of this Act”; and
9. repealed sections 58 and 59 of the Offences against the Person Act, 1861.

An analysis of these provisions will demonstrate whether they would have been improvements over the existing law.

The provision removing “threatened self-destruction” as a justification for abortion is an unqualified good, as is the provision on conscientious objection. The provisions concerning information about the availability of abortion and travel to another state are no worse than the existing provisions in Article 40, 3.3, but no better. The term “reasonable opinion” might have provided some objective measure if it was intended to refer to accepted standards of practice; however, (a) the standards of practice can change, and (b) the statute required that the “reasonable opinion” be formed in “good faith,” a subjective standard. The lowering of the prison term from life to 12 years might send the wrong signal, but this is not at the heart of the issue.

The crucial points are that by repealing sections 58 and 59 of the 1861 Act, and by making explicit that abortion refers only to the destruction of human life “after implantation,” the amendment would have made it impossible (except through a new constitutional referendum) to protect all human life inside the mother’s body between conception and implantation. John Rogers, a former Irish Attorney General, warned in the Irish *Times*:

It cannot be stated with any confidence that the Constitution, as amended by the addition of Article 40.3.4, will protect “the life of the unborn in the womb” before implantation, which is what Cardinal Connell contends to be the case. Although an argument can be made that there is residual protection in Article 40.3.3 for unborn life prior to implantation in the womb, I have come to the conclusion that that is not an argument which could prevail in light of the clear meaning that must be given to Article 40.3.3 and the proposed Article 40.3.4

Accordingly I feel I must say that the Cardinal’s assurance to those opposed to abortion on this issue is unconvincing and one on which it would be unwise for them to rely.

In addition, by not mentioning life artificially created outside the mother’s body—*i.e.*, through *in vitro* fertilization—it implied that such matters as human cloning, experimentation on human embryos, and the production and harvesting of embryos were of little concern.

Since the present constitutional provisions could still have been rightly interpreted as protecting *all* unborn human life, the 25th Amendment represented not an improvement but a retreat from the present law.

David Quinn argues: “How could abortion have been defined as the intentional destruction of unborn life pre-implantation for the purposes of criminal law, when no one can prove that the woman is pregnant until *after* implantation?” That is the beauty of the 1861 Act. Pregnancy does not have to

be proven, but only the intent to cause miscarriage. Once intent exists, the crime has been committed “whether she be or be not with child.” Mr. Quinn’s argument is without legal merit.

Thus, the people of Ireland were confronted with a bill that was, at best, a tradeoff between benefits and detriments. While it was good that threatened suicide would have been eliminated as a legal justification for abortion, the critical question was whether the number of lives saved by that provision would have exceeded the number of pre-implanted embryos that might have been killed absent any statutory or residual constitutional protection.

The Irish Medicines Board had recently denominated the morning-after pill a contraceptive rather than what it truly is—an abortifacient. Once regularly available, that pill is likely to cause more abortions than the suicide exception created by the Supreme Court. If this conclusion is correct, the bill should have been rejected on this basis alone.

An extremely disturbing feature was succinctly described by Charles Rice, Emeritus Professor of the University of Notre Dame. The direct killing of an unborn *post*-implanted human would now be permitted by a “standard . . . so malleable that it is inconceivable that it would operate as a basis for successful prosecution of any abortionist who asserted his ‘good faith’ and his ‘regard to the need to preserve unborn human life where practicable.’” This analysis was echoed by former Irish High Court Judge Rory O’Hanlon:

Aside from the fact that this particular legislative drafting convention or writing technique (the contrived re-defining of a commonly understood word [abortion] so closely associated with the protection of a basic human right) is repugnant to all persons of basic ethical sensibility, the legal standard, “necessary to prevent a real and substantial risk of loss of the woman’s life other than by self-destruction” is fraught with ambiguity and imprecision inviting further liberalization beyond that currently allowed by the “X-Case.” Its application is nearly impossible to control or sanction, especially because of the breadth and range of allowable medical practitioner opinions which it apparently embraces . . .

Perhaps the most dangerous aspect of this bill was the sense of indifference to pre-implanted and extra-maternal unborn life it communicated to the country and particularly to the courts. One legitimate concern that the proponents of this bill had is that an increasingly liberal Supreme Court would erode the protection to the unborn originally intended by Article 40.3.3. This fear was well-founded. However, it cannot be forgotten that it would have been the same increasingly liberal Supreme Court that would have been construing Article 40.3.3 as amended. By refusing to statutorily protect *all* unborn life before implantation and outside the mother’s body, the government would have been either conveying that it did not believe Article 40.3.3 confers on it

the power to protect such human life, or declaring that it was simply unwilling to do so.

Judge O'Hanlon summed up the bill's deficiencies: "This proposal of the Irish Taoiseach [Prime Minister] constitutes the most serious attack yet witnessed on the integrity of our Constitution, and it would definitely liberalize Irish abortion law greatly so as to increase the number of legalized abortions in Ireland."

The practical ramifications of this bill were manifested in pronouncements coming from various quarters in the last few days before the vote. The Minister for Health stated, in the media, that a doctor's notes regarding a woman's reason for termination would be totally confidential and would not be made available to any government minister or any court of law, thus making the doctor's decision nearly immune from scrutiny. Also prior to the vote, thirty Irish hospitals were designated for terminations, and the list was printed in the national newspapers. The leading maternity hospital, the Rotunda, announced that, if the referendum were approved, it would begin destroying its frozen embryos within months. Lastly, while calling for a yes vote, the Masters of the three main maternity hospitals voiced their opinion that the termination of unviable human embryos should be permitted under this proposal.

Since the defeat of the referendum, events in the European Community have confirmed the necessity of leaving intact the existing constitutional language and the Offences Against the Person Act. A few weeks after the referendum, a report was authorized in the European Parliament which called for legalization of abortion in every member state and candidate country. It also urged easy access to the morning-after pill. This report was approved in July 2002.

Additionally, the European Commission has exerted pressure to permit embryo research. In December 2001, the Irish government failed to support three member states in a joint declaration banning funding for such research. In September 2002, the Irish government appeared poised to permit the application of Irish taxpayers' funds to stem cell research, and without the strict rules and deadlines in force in the United States. These decisions of the Irish government are consistent with its failure to include in the proposed amendment the banning of experimentation on, and destruction of, embryos. It further demonstrates the government's disdain for early human life.

By defeating the proposed amendment and maintaining the constitutional and statutory status quo, the Irish people left the door open for EU representatives and a future government to return to the deep-seated right-to-life tenets of the Irish constitution.

As the above analysis demonstrates, reasonable persons preparing to vote on this amendment could have legitimately reasoned that the proposed language represented an unacceptable compromise in which the negatives outweighed the positives, and which, once adopted, would be irreversible except through the constitutional amendment process. Those who publicly opposed the amendment did not need to be, as suggested by Mr. Quinn, persons who could not distinguish between moral and political compromises.

It is time for the recriminations—no matter from what quarter they come—to stop. It would be disastrous, whether the amendment was flawed or not, to convey to the pro-abortion forces the notion that the failure to pass it spells certain doom for the Irish pro-life movement. Liberal abortion does not have to be the future of Ireland. However, if those who supported the amendment continue to think and act as they have been doing, their prediction will become a self-fulfilling prophecy.

Valuable time and energy are being wasted. There is immediate work to be done, as can be seen from the recent actions taken by the European Parliament and from the Irish government's failure to uphold the clear intent of the Irish Constitution.

Now is the opportune moment for all members of the pro-life community, together, to fashion a strategy to assure the protection of all human life equally from conception to natural death. I respectfully suggest that consideration be given to including an approach, especially aimed at the female electorate, which explains how abortion causes long-term harm to the deepest being of the aborting mother.

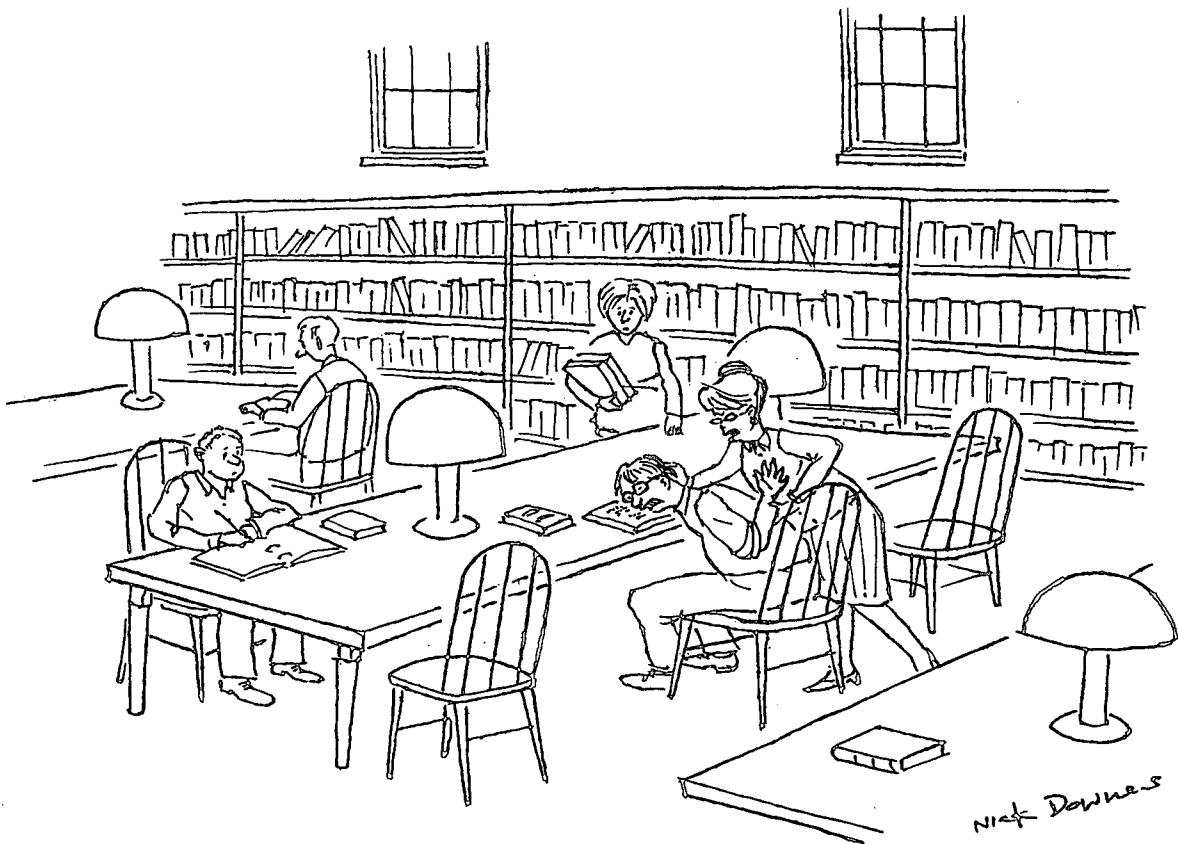
The fortunes of the pro-life movement cannot be tied to those of any political party. And all elements of the pro-life community should be invited to have input in any future bills that they are going to be asked to support.

Simultaneously with this educational and political effort, the Church must persist in educating the laity in the moral principles that undergird the culture of life and instructing the lay faithful that they are charged with allowing that culture of life to inform every aspect of their lives. From them must continue to emerge businesspersons, lawyers, doctors, and statesmen who have the spiritual and moral wherewithal to guide the great nation of Ireland and the European Community.

The United States has had the good fortune to experience the fortitude and courage of the Irish who have graced our shores as firefighters, police officers, bishops, priests, nuns, nurses, and soldiers. The European Community, the United States, and all of the West needs Ireland to exhibit these same virtues in defending life. Ireland has the spiritual and moral capital to take its

THE HUMAN LIFE REVIEW

place as a moral leader of Europe. It cannot let its legitimate political and economic interests be held hostage to the cultural elites bent on imposing a culture of death on Western civilization. I pray that the pro-life forces in Ireland will reunite to make this vision a reality.



"You have overdue books, Mr. Donahue."

David Quinn Responds

A few preliminary words are in order before responding to the points raised by Richard Maggi and Robin Haig.

During our most recent abortion referendum, the number of overseas pro-life activists taking an interest in it was striking. They hailed from Italy, the United States, Britain and from as far afield as Australia. This was understandable and was testimony to the enormous symbolic importance of Ireland in the international struggle over abortion.

Without wishing to be melodramatic, in terms of the “culture wars,” Ireland enjoys (if that is the word) a position somewhat analogous to that of West Berlin during the Cold War. What I mean by this is that Ireland is one of the last outposts in the world holding out against legalised abortion, and if it falls it will have a galvanising effect on pro-abortion forces worldwide, and a demoralising effect on pro-life forces. This will be particularly so given that Ireland still remains one of the most Catholic countries in the world with one of the highest rates of Mass attendance despite the recent troubles of the Church and the general trend towards secularisation. So as I say, it is understandable that so many people from overseas took such an interest in our referendum of last March. The pity is that they misread the Protection of Human Life in Pregnancy Bill so badly and therefore threw their weight behind those opposing the Bill and helped to defeat it.

This argument about the real meaning of the above Bill hinges on a number of factors. First of all, would it have had the effect of rescinding the X-case decision of 1992 which allowed a pregnant woman, judged by a psychologist to be suicidal, to have an abortion?

Secondly, would the Bill have withdrawn protection from human life pre-implantation in the womb? Third, and following on from this, would it have paved the way for legalisation of the morning-after pill (m.a.p.), and fourth, would it have allowed doctors to carry out abortions under the pretence that they were doing so in order to save the mother’s life? The first point is easiest to deal with, because everyone appears to be agreed that the Bill would have rescinded the X-case decision and therefore, and to this extent, was a step in the right direction.

However, there is strong disagreement about the other three points mentioned above. Basically, and as evidenced by the replies of Messrs. Maggi and Haig,

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the belief of some pro-life activists and lawyers is that the Bill would have withdrawn protection from the unborn child pre-implantation, it would have led to the legalisation of the m.a.p. (and possibly of embryo experimentation also), and it would have led to doctors carrying out abortions pretending they were doing so to save the lives of the mothers.

Because of this, the judgement of these activists was that overall, and despite the fact that the Bill would have rescinded the X-case, it was a step in the wrong direction. This, in turn, is why the Bill is not covered, in their view, by *Evangelium Vitae* paragraph 73. To repeat, this allows Catholics to vote for a Bill aimed at protecting human life even if it does not offer total protection, so long as it is an improvement over the current law.

On this point, I would have to concede to the arguments of Mr. Haig and Mr. Maggi if I accepted their arguments with regard to factors two, three and four above, but I do not, and for the following reasons.

Point two above is that the Bill, in defining abortion as the destruction of human life following implantation in the womb, was thereby withdrawing protection from human life pre-implantation. But this is simply not true. Vitaly, this interpretation overlooks the fact that the overall protection given to unborn life by the Constitution would remain in place. The proposed Bill was giving protection “in particular” to human life in the womb. But by giving protection “in particular” to life in the womb it was not thereby withdrawing protection from life between conception and implantation. In fact, in theory there was absolutely nothing to stop pro-life groups from following up this Bill with another one that would have given protection “in particular” to human life pre-implantation.

Would it have paved the way to legalisation of the m.a.p.? Robin Haig believes so. He says: “This [i.e. its definition of abortion] was undoubtedly introduced to smooth the path for the introduction of the abortifacient ‘morning after’ pill.” He correctly goes on to say that in September and October 2001 the Irish Medicines Board gave its approval to the m.a.p. on the grounds that it was a form of contraception rather than an abortifacient. Mr. Haig also correctly says that that the Board was advised that the Bill, if passed, would confirm that this decision was within the law because of its definition of abortion.

However, what Mr. Haig overlooks, and I already pointed it out in my article printed in the HLR of Winter/Spring 2002, is that the m.a.p. is already available in Ireland and has been for years. It is routinely handed out to women seeking it and in ever growing numbers. So with or without this Bill, the m.a.p. is already in Ireland. What the Irish Medicines Board approved was not the m.a.p. per se, but a particular form of it, namely Levonelle II.

Also, the Board had approved Levonelle II without the supposed cover of the Protection of Human Life in Pregnancy Bill. In other words, it didn't need the Bill to approve it and had the Bill been passed, it would not in fact have further solidified the position of the m.a.p. in Irish life because, and despite advice given to the Board, the Bill would not have withdrawn protection from human life pre-implantation.

Both Mr. Haig and Mr. Maggi attach significance to Section 58 (and to a lesser extent 59) of the Offences Against the Person Act of 1861. They appear to believe that the effect of this section is to make both the m.a.p. and abortion illegal. The proposed Bill would have rescinded Sections 58 and 59, it is true, but the fact is that this section offered little or no protection to unborn human life. As I say, in spite of Section 58 still being in force in Irish law, the m.a.p. is already available, so a way around it had already been found. Neither Mr. Maggi nor Mr. Haig need to be told that pro-abortionists are adept at finding loopholes in any law intended to thwart them, especially if they have on their side compliant judges, as in Britain, America etc., and I fear increasingly in Ireland also. This is why it is so difficult to frame a comprehensive pro-life law that will actually do what it is intended to do, namely keep abortion out. Irish pro-lifers thought they had done that with the pro-life constitutional amendment of 1983 and then we got the X-case. The proposed Bill might have reinforced the protection of the Constitution, but who really knows how it might have been interpreted in the end by mischievous courts?

The Offences Against the Person Act has offered little or no protection to unborn life in Britain. Despite the fact that it is still in force in that country, the m.a.p. is available without restriction. Also, even before the Abortion Act 1967, thousands of abortions were being performed in Britain each year. Mr. Haig points out that the 1967 Act does not apply in Northern Ireland, meaning the 1861 Act is still fully in force there. He thinks this is responsible for the fact that very few abortions are performed in that part of Ireland. But the m.a.p., Levonelle II and all, is freely available in Northern Ireland, and the real reason more abortions are not carried out there is because of strong social and political resistance.

Hopefully I have by now made it reasonably clear that had this Bill passed, it would not have withdrawn protection from unborn life pre-implantation, and that it would not have paved the way for the m.a.p. seeing as it is already available.

What about the fear that the Bill was so worded that it would have allowed doctors to perform abortions under the pretence that they would be doing so

in order to save the life of the mother? This, I believe, was a more realistic fear. The Bill did allow for a subjective judgement on the part of doctors. You could have had a situation whereby one doctor might sincerely (or not) believe that it was necessary to perform a life-saving operation on the mother which would result in the death of the baby, while another would strongly believe that no such procedure was necessary.

But in a way this is already the situation in Ireland. Doctors are already allowed to perform medical procedures on pregnant women under Irish law the indirect effect of which could be to kill the child in the womb. More than that, some doctors claim that direct abortions are already taking place in order to save the lives of mothers. This is vehemently denied by the Pro-Life Campaign which says that all the procedures named by such doctors involve the indirect as opposed to the direct death of the child, but you can see how subjective judgements are already in play.

What is really preventing “life-saving” direct abortions from taking place in Ireland is probably not so much the Constitution, as the stance of the Irish Medical Council which says that any doctor who performs a direct abortion will be struck off the medical register.

There is now a real fear that the IMC is being slowly taken over by pro-choice doctors who will remove this injunction from the Council’s ethical guidelines. Should this happen then “life-saving” direct abortions might begin to take place and there is every chance that a judge would uphold these abortions under our already existing law. But the point is that this danger exists now, and would exist whether or not this Bill had been passed. However, the Bill would have put the onus upon doctors to show that they had done everything possible to save the life of both mother and child. Doctors do not now operate under this explicit requirement, so the Bill would have tightened things up in this area. So to sum up, the Bill would have rescinded the judgement in the X-case. It did not withdraw protection from unborn life pre-implantation. The Offences Against the Person Act is already, for most practical purposes, null and void in Irish law. The morning after pill is, regrettably, already widely used in Ireland, and doctors are already exercising their judgement about when it is necessary to medically intervene to save the life of a pregnant woman. What is in dispute is whether the death of the child in such cases is a result of direct or indirect abortion. (Indirect abortion in this case means the unavoidable, and unintended—although foreseen—consequence of the medical intervention.)

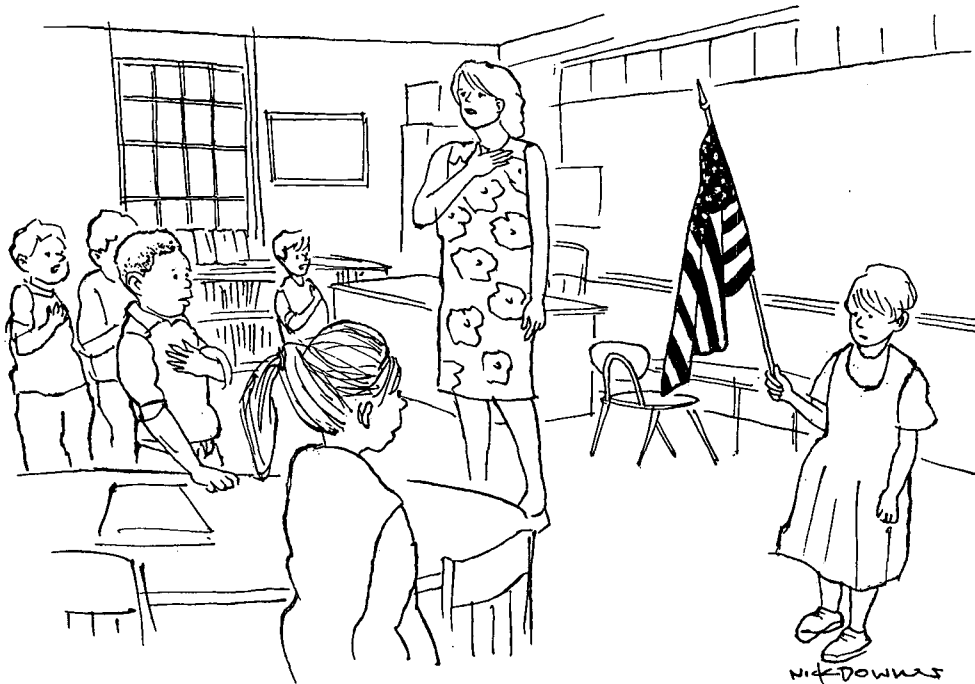
It needs to be repeated that all of the bishops of Ireland supported this Bill. In 1992, at the time of the previous abortion referendum, there was a split in the hierarchy. There was no split this time. In addition, Cardinal

DAVID QUINN

Joseph Ratzinger, the Prefect of the Congregation for the Doctrine of the Faith, sent a letter to the bishops, via Dublin's Cardinal Desmond Connell, saying that Catholics could support the Bill. It is hard to believe that all of these men would have been so easily fooled by a Bill that is, according to its critics, so legally and morally defective.

Also, if the Bill was a large step towards an abortion culture, then why did no pro-choice group support it? Was it because it didn't go far enough for them? Unlikely, because that is not normally how pro-choice groups work. They are usually happy with small, incremental victories, and if the analysis of Messrs. Haig and Maggi is correct, this was more than a small step for them. Strange that they did not read it that way.

On one point at least Mr. Maggi is certainly correct, however. We should not become too pessimistic about the future. I believe the defeat of this Bill was a big set-back for the pro-life cause in Ireland, one it will take a long time to recover from. But it is important that defeatism does not give victory by default to pro-abortion forces in Ireland. The essential task now is to plan a new strategy, to re-unite, and to focus on the future.



“ . . . one nation, under a godless consumer culture . . . ”

Onwards Libertarian Soldiers

F.P. Tros

A woman of good Catholic stock. And “good Catholic stock” stands for generations of loyalty to the faith in this, our predominantly Dutch Reformed province of Friesland, where popery was for centuries barely tolerated, if not actually persecuted. She triumphantly tells us, this good woman, of her eldest daughter’s good deed. A younger colleague had got pregnant, against her wish and almost without believing it could happen to her. Our latter-day saintly girl succeeded in obtaining the support of their employer in having the inexperienced girl’s pregnancy terminated without fuss. My wife attempted to explain to the proud mother that the issue was not that a young woman’s career had been saved, but that a human being had been cheated of life. The mother’s angry reply: “What nonsense! Everybody knows how to deal with this sort of thing these days.” What nonsense . . . everybody knows . . . this sort of thing . . . these days. One is left in bafflement. *How fell they, warriors such as these?*

This sorry anecdote provides a perfect illustration of C. S. Lewis’s characterization of modern hollow man in “Screwtape’s Toast”:

“In each individual choice . . . such creatures are at first hardly, if at all, in a state of spiritual responsibility. They do not understand either the source or the real character of the prohibitions they are breaking. Their consciousness hardly exists apart from the social atmosphere that surrounds them. And of course . . . their very language [is] all smudge and blur . . .”

It is against this backdrop of moral and intellectual mizzle and drizzle that we must consider the reception of the contributions by the Dutch Catholic Bishops’ Conference to the legislative procedure leading up to the present Dutch law on euthanasia.¹

Modern Western societies are bedeviled by the widespread belief that democracy is no more than a technique for ironing out differences and reaching generally accepted practical decisions. Almost no one thinks of it any longer as a platform for the implementation of a communal metaphysically grounded ethics and morality, the foundation and *raison d’être* of society. Morality has been silently extruded from the equation, and the very word *ethical* has been reduced to meaning something like “in accordance with present-day thinking.” *Feeling*, rather. Modern public opinion does not reflect what lies inarticulate in the minds and hearts of the people. The

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“responsible” secularized media—not to mention the prostituted yellow press and commercial television—do not attempt to give tongue to what moves people in their heart of hearts. Instead, public opinion is now the preserve of the fun retailers and the pontificating semi-intellectual social elite. In this fool’s nirvana my country finds it easy to turn two deaf ears to any argument against the recent legal innovations of abortion on demand, same-sex marriage, euthanasia, and assisted suicide. Although the last two items are the occasion of this article, a few words on the first two—for the flavor.

The Dutch abortion law and the way it works in practice generally meet with approbation, even pride. The admittedly low number of abortions (compared, for instance, to the United States) fosters the impression that opposition is no longer approved of in polite society. Onwards Libertarian Soldiers. Onwards, nay, upwards to the highlands of free sexual expression. “The Netherlands is the the first country in the world to allow same-sex couples to marry,” proudly proclaims the Facts Sheet of the Dutch Justice Department. At 00: 01 on the 1st of April (the date’s connotation happily ignored) in the Year of the Lord 2001, the Burgomaster of Amsterdam united a number of man-man and woman-woman couples in matrimony in a televised registry-office ceremony, cakes and ale courtesy of the municipality of the Nation’s Capital. The legislation permitting this presumes to take the institution under which a *man* and a *woman* become legally united on a permanent basis and “opens it up” to same-sex partners. One can only imagine the crisis that would ensue if a member of the Royal House should claim the right to pair off with a person of the same sex. Would Parliament bow to the pressure of political correctness, or would it insist on kingly custom of begetting children in good old (variegated) wedlock? The Constitution itself says: “The King shall be deemed to have abdicated if he contracts a marriage without having obtained approval by Act of Parliament.”

In this ambience, it could not have come as a surprise to anybody that the release last April of the collection of documents from the Catholic bishops met with no spectacular welcome. Here indeed was the voice of one crying in the wilderness—an apt parallel with regard to both the messengers and the listeners. A valuable collection all the same. It can be viewed under two aspects: (1) the continued and continual bearing witness to the moral values that forbid any willful putting to death; and (2) the ongoing struggle of the Bishops to convince cabinet and parliament that the practice of euthanasia was illegal.

(1) In their Pastoral Letter of March 1985 the Bishops deal exhaustively with the value of human life in the light of death, and with the medical

problems attending a patient's nearing end. Although they

address this pastoral letter to the Catholics of our country . . . we hope that also those who do not profess to belong to the Roman Catholic community may see it as an assistance . . .

. . . In this letter we write about the care for the mortally sick and about problems that may occur around the dying, such as intervention in the dying process and euthanasia. We also reflect on the underlying questions: does man have the right to dispose of his own life, and how do we live with the reality of suffering? Finally we also draw attention to the meaning which prayer and the sacraments can have for the sick and those around them.

Of course no one would expect us to approach this problem from a medical, nursing or juridical standpoint, but from our understanding of God's word as it is proclaimed by the Church. Moreover we will consider questions about individual conscience. This letter is meant as a Pastoral. In preparing it we have had the help of priests as well as others engaged in pastoral care in institutions of health care, of doctors, nurses and many others with a heart for the sick . . .

After dealing with "assistance in dying and fighting pain," and the need of "inner resignation" when death is near, the Bishops go on to speak of "the meaning of our existence," which seems to fall away in the face of the borderline experiences of life, and how the pain and "ready-made answer—also the religious one—is often felt as extraneous to life." The next of kin or other helper is urged to "engage in a personal meeting with the dying person," and "to help him by working out his questions and trying to open to him the prospect of home-coming with God."

A fundamental passage is the one in which the Bishops bear witness to their belief that it is not the physical "indignities" of dying that are unworthy of a human being, but being looked upon as a burden, and even more so being "left alone and lonesome, waiting for death . . . nobody caring for him any more." The Bishops point out that the present-day scheme of values—in which youthful strength and the enjoyment of life are exalted above all else, and sickness and death are regarded as matters that shouldn't intrude on someone else's fun—add a new burden of isolation to the dying. But for those who accept sickness and death, their "decrease of strength does not spoil their dignity. The real values they have aimed at in life prevail."

The latter part of the pastoral letter reflects upon euthanasia ethically and theologically. The letter categorically rejects "putting an end to the life of a dying person" even "at his own request," although the Bishops naturally recognize the patient's right to refuse treatment which "would constitute too great a burden for him." The bishops then issue a heartfelt injunction to help the Christian patient ground his acceptance of suffering in the imitation of Christ. The letter emphasizes the importance of a sacramental life that can

recognize the signs of God's presence and it urges the necessity of human fellowship:

Visiting the sick has been called of old a work of mercy. In such a visit the spiritual conversation has always been an important element: someone who, because of sickness or pain could not find God any more, often found the way back to God in conversation with a fellow believer. Human togetherness with the sick as an opening to prayer is literally a work of mercy, also today.

(2) From 1983 onwards the Bishops addressed themselves to the Prime Minister and to the various institutions and committees engaged upon deliberations with regard to the growing demand, indeed clamor, for euthanasia. Hearings of Royal Commissions, the formation of new cabinets and Parliamentary Justice Commissions, sessions of the Second Chamber, courts' rulings on cases of euthanasia—all these and more were occasions for the Bishops to attempt to make themselves heard.

The final stage may be reckoned to have begun on April 11, 2001, when the First Chamber passed a euthanasia bill which eventually came into force on April 1, 2002. From then onwards the Bishops must needs accept the fact of their countrymen's decision; they could do no more than express through an official statement for the press their

... great fear that, as a consequence of the legislation, euthanasia would increasingly come to be considered "normal." In a recent petition to the Upper House, organized by many churches and other organisations, they pointed out that the legislative proposal corrodes the foundation of society. The Dutch Bishops are not surprised about the strong reactions the legislation has evoked in other countries. Now that the political decision has been made in favor of this legislation, the Bishops ask that meticulous attention be given to the responsibility of all those involved that they may be extremely careful in the ethical considerations in actual cases.

But the Bishops had had much to say in the years between 1983 and 2001.

As long as euthanasia was a felony punishable by law the Bishops drew their strength from the prevailing law itself, and put much of their energy into pointing out that certain court rulings on acts of mercy-killing flouted that law. On June 16, 1983, following court rulings in cases of euthanasia and of assisted suicide, they wrote to the Prime Minister concerning articles 293 and 294 of the Dutch Penal Code:

The history of the law shows that according to the legislature, neither the right to self-determination in an absolute sense nor the nature of the suffering in itself can excuse from punishment an act that fits the description in articles 293 and 294 of the Dutch Penal Code.

1. Article 293 speaks explicitly of terminating someone's life "at his express and serious desire." In the Explanatory Memorandum the legislature says that the consent cannot excuse from punishment. It does give the fact a totally different

THE HUMAN LIFE REVIEW

character—it gives it the character of what is called a privileged offense—but “the violation of the respect for human life in general must still be paid for, regardless of the perpetrator’s motive.” Article 294 is also, according to the words of the legislature, based on “the respect for human life,” even toward him who would shortchange himself in this.

2. The history of the law shows that when the law was made, severe suffering was not considered a justification for the active, direct termination of a life. The fact that the legislature took this factor into account is not surprising in a time when the notion of euthanasia was by no means unfamiliar and was even expressly discussed internationally. The legislature speaks, therefore, of liability to punishment “regardless of the perpetrator’s motive.” This is clear when it involves actions that as such are not intended to relieve suffering but are consciously, actively and directly aimed at the termination of life.

From this it follows that . . . suffering undergone by the person cannot in itself lead to exemption from punishment. When in a court’s consideration one or both factors are called determinative as grounds for a possible exemption from punishment, on the condition that a number of other requirements are satisfied, then this cannot be deemed a credible interpretation of the present legislations; it contains a new substance that is contrary to existing law. We are of the opinion that the judge is not at liberty to maintain such a consideration, either as a basis for a conviction or as a justification for a discharge from prosecution.

A remarkable similarity to the history of the legalization of abortion in America can be noted here, namely the unwarranted interpretation of fundamental legal texts. In the American case, the courts “created” a new legality in contempt of the legislature; in the Dutch case, they changed positive law beyond recognition in a process of wishful interpretation. Running ahead of laws and lawgiving, the desire itself became the critical factor. The Bishops’ letter of June 16, 1983, shows up this fraud irrefutably:

According to the press, the Court passes the judgment that assisting the voluntary termination of life need not always be materially unlawful, if and insofar as that act cannot rightly be branded undesired, even though there is a formal question of a crime according to article 293 or 294 of the Dutch Penal Code. The Court bases itself here on the consideration “*that self-determination in matters of the termination of one’s own life is accepted in a growing circle.*” [My emphasis.] . . .

We believe that for articles of the law that are as clear as the present ones—in wording, in intention and in the remaining case law—no such distinction between formal unlawfulness and material unlawfulness can be made without the judge entering the area reserved to the legislator.

. . . The Court here refers to the acceptance of self-determination “in a growing circle.” Factually existing views in society, which are far from being uncontested, are thus qualified as legal ground. . . .

. . . This concept (“in a growing circle”) is not the least of those that are deservedly the object of protest:

1. The Court provides neither qualitative nor quantitative criteria for this concept “in a growing circle.”
2. The Court provides no verification criteria for the method it has used to establish this observation.
3. The Court indicates in no way—and cannot indicate in any way—whether and how far a right to self-determination understood in this sense can be reconciled with the factual substance of the prevailing law, and thus vitiates the essence of the law’s validity.
4. The Court ignores in this way the views of all citizens outside the indicated “growing circle,” who continue to accept the substance of the aforementioned articles as well as the preceding articles in Title XIX of the Penal Code, and considers them to be legally irrelevant.
5. When this argumentation is considered acceptable, the law in our country as a law of substance would change, as soon as any new ideas were spread with conviction. We do not acknowledge that the essence of an existing law can in this way be made inoperable. . . .

Even more remarkable than the introduction of fraudulent reasoning by the presiding judges is the fact that there was no appeal to a higher court. We cannot know what was said in the bosom of the cabinet, but a fact is that the then Prime Minister, a Roman Catholic who headed a Christian Democrat Socialist cabinet, did not succeed in convincing the Minister of Justice (or perhaps did not try) that the Public Prosecutor should be directed to file an appeal. It may be assumed perhaps that the pressure of the social elite, the rumblings of the gathering libertarian storm, and various political considerations caused him to be weak-kneed and let events take their course.

Which they did.

Let us follow the rush down the hemlock path of dalliance with death. In the Fall 2001 issue we wrote that “It all began some two decades ago when the judiciary decided to take a lenient view of what were indeed from the sentimental point of view mere mercy killings; and the thin end of the wedge was deftly inserted. The jurisprudence further greased the slippery slope, and presently it appeared necessary to regularize the blindness to what was in contravention to the penal code. The fruit of this unofficial regularization—a decision by the Ministry of Justice not to prosecute euthanasia if committed under certain conditions—is now about to become the law of the land. If ever hard cases have proved to make bad law it is here.”

In his address on the occasion of the hearings of the Lower House on May 7, 1997, Monsignor Bomers, the Bishop of Haarlem, speaking on behalf of the Dutch Bishops’ Conference, made it clear that he was well aware of the road chosen by the cabinet: “The fact that 60 per cent of all cases of euthanasia

THE HUMAN LIFE REVIEW

do not comply with the legal notification requirements is a serious violation of the rule of law.”

But, of course, once it had been decided *not* to prosecute cases of euthanasia (at that time still a grave felony) if certain criteria of due care in its execution were met, it was certain that there would be no bar against the subjective interpretation of the law. The prosecutor’s authority to dismiss a case for reasons of motivation had now evolved into a matter of general quasi-legalization. In December 1996 the Bishops wrote:

The reporting procedure is embedded in a criminal context. . . . an act that terminates a life cannot be severed from the rule of law. The involvement of the Public Prosecutions Department as decisive assessment authority is not to be relinquished.

But it was. Of course it was. And of course it is now no longer necessary.

The introduction of euthanasia in the Netherlands as a lawful deed is an illustration of how a trite and easily spoken adage can take on a macabre meaning. Where there’s a will, there’s a way. However fatal the will. And crooked the way.

NOTE

1. *Euthanasia and Human Dignity*, a Collection of Contributions by the Dutch Bishops’ Conference to the Legislative Procedure 1983-2001. Order from: Secretariat of the Roman Catholic Church in the Netherlands, P.O. Box 13049, 5307 LA, Utrecht, The Netherlands or online at media@rkk.nl.

Silencing Women

Melinda Tankard Reist

Julie Burchill had fallen hopelessly in love.

Her heart, without warning, unprepared, had been captured by the lovely Louie.

Irresistible, beguiling—so great is his effect on the woman described as “Britain’s most famous journalist,” that she collapses to the floor, a lovesick fool.

• “The minute I saw the baby, I fell, in every way possible; fell down on the floor and babbled at him for an hour and a half, finally to be rewarded by that singular finger-gripped-by-tiny-fist routine and that priceless gummy smile,” she writes breathlessly.

But her passionate encounter with her friend’s infant son was to sour shortly thereafter. Back home with her boyfriend, she turns on the television. There, on the screen before her, is a scene so despicable it sends her from babbling to a baby to frothing at the mouth in a Fleet Street broadsheet.

What could cause her to become so upset? Was there a London sniper imitating the Washington one and randomly shooting Brits? Had terrorists bombed the Groucho Club, the famous Soho hangout of trendy media types like herself?

No. The object of Burchill’s wrath is a woman grieving after abortion, as depicted on the long-running popular British TV soap “EastEnders.”

Now, let’s make it clear upfront that Ms. Burchill isn’t known as the doyenne of niceness. She has been described variously as “the vitriolic Empress of Grub Street”; “a normal human being with blood in her veins, two arms, two legs, a brain and 16 pints of bile”; “only truly happy when she is destroying something . . . her motto was ‘If it ain’t broke, break it’”; “possibly the only existent tubby lipstick’d feminist communist” and a “British media institution” churning out 1000 words a week “in what amounts to ‘Everything and everyone sucks except Julie Burchill.’”

But the woman whose autobiography was titled *I Knew I Was Right* has excelled herself in her let’s-beat-up-on-all-those-pathetic-grieving-post-aborted-women column, in the well-read British *Guardian* earlier this year. (“Abortion: still a dirty word,” May 2002 <http://www.guardian.co.uk/Archive/Article/0,4273,4419718,00.html>).

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Women emotionally distraught after abortion are, writes Burchill, “lumbering” and “self-obsessed.” They choose not to get over their abortions because they are “weak and vain,” and anyway it’s not really pain they are experiencing, just “too much time on [their] hands” because their lives are “lacking in incident and interest.”

Perhaps Burchill was disappointed she didn’t get a mention in Phyllis Chesler’s book, *Woman’s Inhumanity to Women*, and thought she’d do all she could to make it into the second edition? As mentioned, it was “EastEnders,” a show depicting the lives and loves of working-class Londoners, which got her going. One of the show’s characters, Dot, has had an abortion and is suffering because of it. Burchill is outraged: she says this sends a message that “having an abortion renders a woman ‘cold and empty’ for ever more.” Why, *she’s* had a raft of them and life has gone on swimmingly.

“Exposure to Dot[’s] . . . breast-beating, should by rights have launched me into a right royal depression, or at least a bit of ‘bittersweet’ brooding over my barren terrain,” she writes. “But—and I examined my psyche closely for signs of self-delusion here—all I felt was happy to be home, alone, with my boyfriend.” She continues:

“But I didn’t want to seem like a smug cow, so I said tentatively, ‘Isn’t Louie gorgeous?’”

“Bloody lovely—and he certainly liked you.”

“‘I love babies,’ I said, surprised at the simplicity of my statement. And then immediately, perfectly naturally, ‘I’m so glad I had all those abortions.’”

So great is Burchill’s love for babies, she’s expressed it in the only way she knows how—by handing them over to the local abortuary. (“Show them you care: say it with abortion.”) From bloody lovely Louie to lovely bloody babies, with no regrets.

And because her abortions haven’t caused even a blip on her emotional radar, every other woman who has undergone a termination should be as footloose and fancy-free as she is. A “self-obsessed poltroon” who can’t “get over an abortion” also “wouldn’t get over stubbing [their] toe without professional help,” she seethes. “Myself, I’d as soon weep over my taken tonsils or my absent appendix as snivel over those abortions. I had a choice, and I chose life—mine.” (Oddly, she fails to mention the two sons who survived this fate, now being raised by their fathers—two of her three former husbands.)

Burchill has confirmed one of the premises of my book, *Giving Sorrow Words: Women’s Stories of Grief After Abortion* (Duffy and Snellgrove 2000; extracted in *HLR* Winter 2001): Women whose lives are shattered after an

abortion are condemned if they dare mention it.

The woman who describes her hobbies as shopping and . . . well let's just say "sex," may have been able to jump off the abortionist's table (five times, no less) and get on with a life of abusing women less superior than herself. But many other women find their enthusiasm for life has left them.

The almost 300 women who shared their experiences in *Giving Sorrow Words*, and those who have contacted me since its publication, felt cheated that abortion was promoted as quick and easy: not as bad as losing a tonsil or appendix, to use Burchill's examples, or equivalent to having a tooth pulled.

As one woman, Susan, relates: "After the abortion I went downhill. I had a broken heart but couldn't see it. Everyone seemed to regard abortion in the same light as tooth extraction. I thought something was wrong with me because I couldn't get over it. It didn't even occur to me to seek counselling or medical help as I felt I was a freak and wouldn't be taken seriously. My self-esteem plummeted, I no longer cared about work, I abandoned my studies, I drank like a fish. One night I found myself sitting in the gutter, drunk and crying, wondering what the hell was happening to me. It was like something in me died the same time my baby died."

Burchill makes abortion sound easier and more sensible than a pair of slippers, and denies any potentially heart-breaking consequences: grief and trauma, haunting nightmares and day terrors.

Some of the women in my book attempted suicide, abused drugs, developed eating disorders, suffered anxiety attacks and depression. Some still cry uncontrollably, dream about babies and have grief reactions on the date the baby would have been born.

Take Jane from Western Australia, who wrote: "I just have no words to describe what I went through. I did not feel I deserved to live. I still feel enormous guilt and shame and God, I miss my baby—the pain is indescribable . . . The abortion has blown my life apart, blown my entire self/psyche/soul/belief in myself apart. It has devastated me and I don't know how long this goes on for."

And Ginny, from Melbourne: "I would hear a baby crying in my sleep or I would get up thinking I had to breastfeed or just getting up to check on the baby . . . No-one prepared me for the years of nightmares, the guilt and the pain."

Or Elizabeth, who had an abortion in 1973: "The aftermath was a numbness I hadn't anticipated. I was numb, hollow, dead, and so very heavy with sorrow. The feelings didn't 'go with time' as my delighted mother assured me they would. I grew morose, bitter, very sad, so heavy with sadness, I

can't describe it. I became very different—cheap—I'd sleep with almost anyone. I drank heavily. I didn't care what happened to me and I tried several times to commit suicide. For 10 years this went on. I cried every day, I stayed as drunk as I could for as long as I could, and I hated myself and everyone else. I used to dream about the child I'd lost . . . I wanted my child. I loved it, cherished it, yearned for its birth, missed it when it was taken from me, and to this day, 26 years later, feel the tragic heaviness of loss. My only consolation is that one day when I die our souls may re-unite."

Then there's Julie, from New South Wales: "I experienced the trauma in 1993. I became pregnant (after being told I was infertile) by an impotent man, who I later found out, was two timing me . . . the decision I had to make still haunts me to this day. When I awoke in recovery it was the worst experience of my life. I immediately felt like a murderer. I felt hollow and empty . . . cried uncontrollably. I hated myself . . . I've lost self-esteem, inner peace, find it very difficult to find joy anywhere in life, am always depressed (I'm taking Luvox) and use alcohol (occasionally) and marijuana to cope with the pain of living. I always feel sad and ashamed. It doesn't matter how 'justified' I may have been at the time, I still feel guilty."

And D from New South Wales, who, in a recent letter, described herself and women like her as "duped, lied to, ignored, discriminated against, unloved, unsupported, violated and left for dead. I wanted to drive to my ex-GP and yell 'you horrible bastard' and ask him why didn't he tell me, prepare me, warn me," D wrote. "I did not give an informed consent, the GP violated my body and my mind—it was like a mechanical rape. And, after all this happened, three days later I collapsed at home, in my backyard in front of my children, crying and wailing a primordial wail, I had no idea why this was happening and was led to believe that I was going insane . . . The two things I want back are my pregnancy and my life."

"We live with that regret till the day we die and for some we were wishing we too were dead," wrote a woman who signed her name "*Tortured*."

Then there's the woman who rang me one night and howled inconsolably over and over again: "I just want to hold my baby, I just want to hold my baby."

But the grief of women like this remains unrelieved—thanks to the disdainful and belittling attitudes of those such as Burchill. She has made a significant contribution to the culture of silence surrounding women who suffer lasting emotional shock after abortion. Women like the teenager Jane from Melbourne who wrote to me recently:

"I would love somewhere to go and sit with my child, pay tribute on his/her birthday and anniversary, but unfortunately I can't. The third anniversary

of my abortion came on 23 December 1999. I don't think I have felt so alone in my life. My baby had died three years ago and no one cared. Not many know but my close friends and family—not even one called to see if I was all right. All I wanted to do was sit somewhere and cry and talk to my baby and most of all apologise and ask for some kind of forgiveness. Unfortunately, [we] can't openly grieve or tell people how we're feeling at times like anniversaries, birthdays, and especially Christmas.”

Of course, Burchill is not the only one to trivialise abortion-related anguish or dismiss it altogether. When *Giving Sorrow Words* (which was reprinted this year) was first published in 2000, the abortion-grief-denial brigade rushed into print to attack the book and paint its contributors as the freakish few.

The Children by Choice Association claimed “the vast majority of women, around 98 percent . . . have not had adverse psychological reactions” to abortion. And the Fertility Control Clinic stated: “by far the majority of women (about 90 percent) experience relief and improved functioning following an abortion . . . the abortion provides a woman with the opportunity to regain control of her life . . .”

A number made the point that *only 250* women responded to my appeal for women to come forward (as though every women who ever had an abortion saw one of a handful of small advertisements and that those who didn't respond must have been free, therefore, of any emotional ramifications).

Prominent and controversial leftie author and journalist Bob Ellis responded to this oppression by numbers: “[the book] has attracted . . . obtuse mathematical criticism. Only 2 percent of women [some claim] . . . suffer grief . . . their numbers are so few, so unimportant that they are not entitled to their grief. They should be grateful for their ‘empowerment’, this lucky, whingeing 2 per cent.”

Another writer stated: “In Melinda Tankard-[sic]Reist's world, women are coerced into having sex and abortions they don't want . . .”

In my world? Hello? What world does she live in?

This writer also claimed “. . . what women find so painful are problematic pregnancies, not problematic abortions.”

I put this to “Asphyxia,” one of the book's main contributors. “What did you find painful? What are you grieving?” I asked her. She rocked an imaginary baby in her arms as tears fell down her cheeks.

The *Green Left Weekly* described the book as “Anti-choice brigade's emotional blackmail . . . the latest ideological onslaught against women's right to choose abortion” and its conclusions as “reactionary.” It seems women who claim to listen to women's voices and credit women's experiences did not

hear a word the book's contributors had to say. This was not a book about ideology; but about agony. Only those blinded by ideology could fail to see that.

But the grieving-post-aborted desperately need their grief acknowledged. Anne, a contributor to *Giving Sorrow Words*, described the relief she felt from having aired her pain, in a letter she wrote me after the book was published: "You don't know how much you have helped me . . . I can't begin to describe the release I feel. The whole issue was like having a corpse in the cupboard. It was grim, ugly and always there. [Telling my story] has finally laid the spectre and corpse to rest. I don't feel like my walk through life is constantly dogged by the abortion experience. The 'haunting' is over. The wounds haven't completely healed, but the torment in my mind has gone."

And Susan, quoted earlier: "I have never read anything like it and for the first time in 15 years I don't feel like a freak. *Giving Sorrow Words* has been a revelation to me as I now know that my reaction to the abortion was not unusual . . ."

And Natalie, in an e-mail after reading the book: "What I feel strongly about now is the lack of recognition in society of the emotional trauma, pain and grieving that women go through after an abortion. I feel that society plays along with the abortion myth and there is almost no discussion and thus validation of the pain that comes with that 'decision' for some women . . . This attitude negates the actual and very real pain felt."

Still, Burchill wants women like Anne, Susan and Natalie to shut up. In fact anyone who doesn't experience abortion as one long party can just go to hell. Burchill is a master of disappearance—*disappearing* those women who don't fit her view of the way women should behave.

In her world, having an abortion sorts out the real feminists—herself, who has well and truly earned her membership in the club—from feminist wannabes such as Cherie Blair, the wife of the British Prime Minister, who committed the vile sin of bearing a fourth child in her mid-40s. Blair, Burchill writes, "can call herself a feminist all she likes, but any feminist worth her salt would have made a point of having a termination . . . when she got knocked up the last time."

Cherie Blair, along with psychiatry and the natural birth movement, are all to blame for what she describes as the "recent creeping foetus fetishism." Burchill even has a go at pro-choicers who have, she says, taken to saying: "No woman takes abortion lightly," not realising that they are adding to the illusion that abortion is a serious, murderous, life-changing act. It isn't—unless your life is so sadly lacking in incident and interest that you make it

so.” Burchill wants to do away with this so-called foetus fetishism but fails to recognise her own *abortion* fetishism. She says abortion is the last taboo. But she’s wrong. The last taboo is grieving an aborted child.

Enduring grief for one’s terminated children should not be mocked. It is a normal response to a diabolical loss. As Melissa wrote: “My abortion experiences have crippled me. All of my children are dead and I am responsible. How can you feel good about yourself after doing something like that?”

Nor is it a post-modern, self-obsessed phenomenon recently discovered in a psychiatrist’s rooms.

The poet Gwendolyn Brooks wrote a moving, lyrical eulogy to her dead children almost 60 years ago (reprinted in *HLR* in 1980). In “The Mother,” she wrote:

*Abortions will not let you forget.
You remember the children you got
that you did not get, . . .*

*I have heard the voices of the wind
the voices of my dim killed children.*

She was not a captive of modern psychoanalysis. She knew that she had stolen her babies’ “births and your names.”

Gwendolyn Brooks couldn’t forget. The women in *Giving Sorrow Words* can’t forget. What they would give to have their missing baby grip their finger with a tiny fist and greet them with a gummy smile.

Burchill mocks their weeping, sarcastically calling it a “life sentence of sorrow.” But in this she has chosen the perfect words. For that’s just what it is. A life sentence of sorrow.

Women's Health after Abortion:
A Fresh Look at the Evidence

Ian Gentles

Earlier this year a great deal of anxiety was provoked in the media by the publication of a medical report on the long-term consequences of hormone replacement therapy for women. Among the several negative effects of HRT, the one that caused the greatest distress was the increased risk—about 25 per cent—of breast cancer. The incidence of breast cancer among women has certainly risen alarmingly in the past three decades. Many explanations for this rise have been suggested: a more polluted environment, changes in diet, smoking, the postponement of childbearing, the contraceptive pill, and other drug therapies.

But the media have paid almost no attention to the many studies that have documented a significantly higher incidence of breast cancer among women who have abortions, in particular those who abort their first pregnancy before the age of 20. At least 27 studies in ten countries have discovered an increased risk of 30 per cent—significantly higher than the increased risk of 25 per cent reported in the single study of the effects of HRT.

Strange to say, the authors and sponsors of several of these studies have shied away from the implications of their findings. The National Cancer Institute in the U.S., for example, sponsored a major study which showed a 36 per cent increased risk (rising to a disturbing 50 per cent among women under 20 who abort their first pregnancy) of breast cancer among women who undergo abortions. In fact, given that young women who carry their first pregnancy to term *reduce* their chances of breast cancer by 30 per cent, the consequences are even more dramatic. The lifetime chances of a woman in North America being diagnosed with breast cancer are currently about ten per cent. A woman who has a child before age 20 has a seven per cent chance. On the other hand, if she aborts that first early pregnancy, she more than doubles her lifetime chances to fifteen per cent. Yet the National Cancer Institute, and other establishment voices such as the prestigious *New England Journal of Medicine* stoutly continue to deny that there is any link between abortion and breast cancer.

Curiously, the establishment on the other side of the ocean is much less reluctant to recognize the link. In April 2000, Britain's Royal College of

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Obstetricians and Gynecologists acknowledged that studies demonstrating the abortion-breast cancer link “could not be disregarded.”¹ Writing in the *London Times* a year later, Dr. Thomas Stuttaford declared that “an unusually high proportion” of the women diagnosed with breast cancer in the U.K. each year “had an abortion before eventually starting a family. Such women are up to four times more likely to develop breast cancer.”²

There are solid physiological reasons for the association between induced abortion and the later development of breast cancer which have to do with the hormonal effects of pregnancy on a woman’s breast tissue. A surge of the hormone oestradiol at conception reaches twentyfold in the first trimester, triggering an explosive growth of breast tissue—a period when breast cells are most likely to be affected by carcinogens. When a woman completes her first full pregnancy, further hormonal changes propel these newly produced breast cells through a state of differentiation, a natural maturing process that greatly reduces the risk of future breast cancer.³ An early, abrupt termination of pregnancy by abortion arrests this process before the cancer-reducing evolution of hormone release can occur, leaving a large population of dangerously-stimulated breast tissue cells in place, enormously raising future cancer risk. On the other hand, “. . . an early first, full-term pregnancy would provide the greatest protection against breast cancer by drastically reducing, early on, the presence of undifferentiated and hence vulnerable breast cells, thereby decreasing the risk of subsequent transformation.”⁴ A fascinating animal study supports this line of reasoning. Two groups of rats were exposed to a chemical carcinogen before mating. The group that carried a first pregnancy to term developed mammary tumours at a rate of six per cent. The group whose pregnancies were aborted, however, developed mammary tumours at an astounding rate of 78 per cent.⁵

These are among several dramatic findings dredged up from the obscurity of scientific journals and presented in *Women’s Health After Abortion: The Medical and Scientific Evidence*, a new book I co-authored with Elizabeth Ring-Cassidy.⁶ In it, we review and summarize over 500 studies which have appeared in medical and professional journals, most of them over the past twenty years. What follows here is a brief overview of our work.

Cancers of the cervix, ovaries and rectum

Research in this area is in its early stages, but a few studies from the past decade point to a link between abortion and subsequent cancers of the reproductive system, as well as colorectal cancer. Cervical cancer in particular seems to be directly associated with induced abortion. Studies of cancer of the ovary have presented conflicting evidence. A strong association has been

discovered between abortion and cancer of the rectum. What is remarkable is that with the increase in cancers of the breast and reproductive system in women over the past thirty years, there has as yet been so little interest in investigating the link with induced abortion. Despite the overwhelming weight of the studies pointing to such a link, their conclusions have been generally ignored by the research establishments in North America. The rationale for this may be that for some it is more important for abortion to remain accessible than for women to be informed about a clear threat to their health. Thus, the politicized and controversial nature of the subject, and the desire of some powerful groups to keep abortion "safe, simple, and easily available," have militated against the objective consideration of data pointing strongly to a link between abortion and various cancers.

Maternal mortality

In both Canada and the U.S. there is a general and systematic underreporting of maternal deaths, whether from abortion, pregnancy, or during delivery. Not least among the reasons for this is the fact that more and more abortions are now performed in free-standing clinics. A woman whose post-abortion condition is life threatening generally goes to a hospital, not back to the clinic. The attending emergency room doctor may not record a subsequent death as resulting from an abortion. The practice of coding the immediate rather than the underlying cause of death also causes underreporting: an induced abortion may result in bleeding, embolism, cardiac arrest or infection, or it may lead to a subsequent ectopic pregnancy. But the death certificate of a woman who dies from these conditions may make no reference to abortion.

A recent, large-scale Scandinavian study found that within one year of the end of a pregnancy, women who had induced abortions suffered a mortality rate that was almost four times greater than that for women who delivered their babies. And their rate of suicide was six times greater.⁷ A recent study in Wales found that women who had induced abortions were 2.25 times more likely to commit suicide than women admitted for normal delivery.⁸ A large-scale California study just recently published reported similar findings. These studies, using record linkage and involving many hundreds of thousands of cases, authoritatively refute the oft-repeated fiction that induced abortion is safer for women than giving birth.

Ectopic pregnancy

While overall health has generally improved in the past century, there has been a disturbing rise in ectopic pregnancies. Between 1970 and 1990 they

doubled, trebled or quadrupled in frequency, depending on the country, so that they now account for two per cent of all pregnancies in the areas studied. The rise of ectopic pregnancy coincides almost exactly with the steep rise in the frequency of induced abortion during the same period. Studies from Italy, Japan, Yugoslavia and the U.S. have documented a much higher risk of ectopic pregnancy among women who have had one or more abortions. Yet the authors of an American study that uncovered a 160 per cent increased risk arrived at the strange conclusion that abortion “does not carry a large excess risk” of ectopic pregnancy.⁹ This is one of many examples in the literature of abortion researchers making statements in the abstracts or conclusions of their articles that flatly contradict their findings.

Uterine perforations, pelvic inflammatory disease, and infertility

Among the other risks involved in surgical abortion are uterine perforation, uterine adhesions, retained fetal fragments and infections that lead to pelvic inflammatory disease (PID). PID is now epidemic in Canada and much of the rest of the world. Nearly 100,000 women contract it each year in Canada alone. The disease is difficult and expensive to treat, and causes infertility in women. The link between PID and abortion is well established in the sense that women who undergo surgical abortions suffer a much higher incidence of PID afterwards. The link is even stronger among women who have had two or more abortions.¹⁰

Pain and abortion

Some abortion clinics attempt to reassure their patients that the pain they are about to suffer will resemble nothing greater than heavy menstrual cramps. A large study conducted in Montreal paints a different picture. Pain is the most subjective of experiences, yet when the pain scores of these abortion patients were checked against other acute and chronic pain syndromes, “they were found to be higher than fractures, sprains, neuralgia or arthritis, and equal to those of amputees experiencing phantom limb pain and patients with cancer.” When it comes to mental pain, abortion is often touted as bringing relief from the depression caused by pregnancy. Not necessarily so. The Montreal study found that 50 per cent of the women who had high depression scores “remained clinically depressed and anxious two weeks after the procedure.”¹¹

Chemical abortions

Chemical or drug-induced abortions have been hailed in some quarters as a less traumatic solution to an unwanted pregnancy than surgical abortion.

Yet these are not without their own difficulties. A variety of studies have found failure rates ranging from 6 to 45 per cent, necessitating a second, surgical abortion. There are unpleasant side effects, including prolonged bleeding, diarrhea, fevers and nausea, as well as the inconvenience of several visits to the doctor and the lack of immediate confirmation of the success of the procedure. Typically, the abortion is not triggered until twenty-four days after the drug has been administered. Furthermore, the pain is reported to be even greater than surgical abortion.¹²

Risks to future children

The most recent studies point to an approximately 85 per cent increase in premature (or “very preterm,” meaning less than 33 weeks’ gestation) births to women who have had a previous induced abortion. This risk increases sharply with every additional abortion that a woman undergoes.¹³ Premature infants suffer a very high incidence of disability. Their rate of cerebral palsy for example, is thirty-eight times greater than that of the general population. Induced abortion, therefore, has appalling implications for women who subsequently wish to bear a child. It is the direct cause of many thousands more cases of cerebral palsy in North America than otherwise would have occurred.

Depression, guilt and low self-esteem

Abortion is frequently touted as the obvious answer to a woman’s emotional distress at the discovery that she is pregnant. Research suggests that this is a glib answer. Far from being a “quick fix,” abortion exacerbates problems such as depression, grief or low self-esteem. In general, women who are suffering from psychological or psychiatric disorders before they undergo an abortion will continue to experience these difficulties afterwards, sometimes in greater measure.¹⁴ A very large-scale study in California, using record linkage, found that over a four-year period women who aborted had a 72 per cent higher rate of psychiatric admission to hospital than women who delivered their babies.¹⁵

Repeat abortions are a growing phenomenon in both Canada and the U.S., where they constitute forty and fifty per cent respectively of all abortions. Women who undergo the experience of two or more abortions also experience lowered self-esteem coupled with a lack of self-respect. In the words of one researcher, “rather than being a relief, an abortion may be additional proof of their worthlessness.”¹⁶

Many women have mixed feelings about their decision to abort. It has been shown that ambivalence about having an abortion entails a greater like-

likelihood of suffering negative emotional consequences such as depression and guilt. Ambivalent women more often state that it was their partner who decided on the abortion. Only a minority initially wanted it. The discovery that many women are pressured into abortion by men is not surprising if we bear in mind that opinion surveys have consistently found more women opposing abortion than men. This is because abortion often suits men's convenience much better than it does women's.

Adolescents

Teenagers who abort are at greater risk than older women for later psychological and physical problems. They suffer lower self-esteem, absence of affect and greater symptoms of depression than those who are either not pregnant or carry their pregnancies to term. The most striking evidence of this is a major American study which found a six to tenfold increase in suicide attempts among adolescent girls who had had an abortion at any time in their lives.¹⁷

The higher suicide rate also applies, though less dramatically, to older women. The high rate of post-abortion suicide has never been taken into account by those who claim that abortion is a safer procedure than childbirth.

Religion and healing

Women who are religious are very likely to experience regret or guilt after abortion. The simplistic solution sometimes offered is that women should abandon their religion or switch to one that doesn't induce guilt. Either that, or the major religions that frown on abortion—Judaism, Islam, Christianity—should change their positions. In contrast to this advice, it has been found that some of the most interesting efforts to promote women's emotional healing after abortion involve the harnessing of their religious spirituality. Initiatives such as Project Rachel put forgiveness at the heart of their therapy: forgiveness of everyone involved in the woman's abortion, forgiveness of herself, and finally, discernment of how to move on and make a positive impact on her world.¹⁸

Grief therapy and abortion for genetic reasons

An increasing number of pregnancies are aborted because prenatal tests have shown the fetus to be defective in some way. Interestingly, there is no attempt to deny or minimize the distress and grief that often accompany these types of abortion. The loss of a defective fetus is recognized as being equivalent to the loss of a child. This legitimizes the use of humanizing terms.

It is permissible to grieve. Researchers drop the word “fetus” and write instead about “the baby’s abnormality,” the “death of the baby,” “guilt over having killed the baby,” “saw the child,” “lost baby,” and so on. Why this starkly different approach? Apparently it is because a pregnancy aborted for genetic reasons is assumed to be, in the beginning at least, a wanted pregnancy. Yet it is known that depressive symptoms following pregnancy loss are unrelated to the woman’s attitude towards the pregnancy. In other words, the woman who rejects her pregnancy is just as likely to grieve her loss as the woman who wanted to be pregnant.¹⁹

The effect on siblings

Almost never considered in the abortion decision is its impact on other children in a family. Children do not understand the socially-constructed distinction between fetus and baby. If they find out about their parents’ decision to abort a pregnancy, they undergo marked and disturbing reactions. “Abortion can produce a deep, subtle (and often permanent) fracture of the trusting relationship that once existed between a child and parent.”²⁰ Furthermore, the knowledge that a potential sibling has been aborted can lead to behavioral disturbances, emotional insecurity, fears of abandonment, and delayed grief that surfaces years later.

The effect on men

Men are generally more favorable to abortion than women. Yet the stark fact is that men have *no* rights whatever when it comes to abortion. Their only options are to support the woman emotionally if she aborts, or support her financially if she chooses to bear the child. Thus for men abortion can be “a private exercise in powerlessness.” Many experience grief at the loss of the child they have fathered, and may have a psychological need for recognition of their mourning. This could also be a reason why so many men abandon the relationship after an abortion.

Interpersonal relationships

There is no doubt that abortion results in worsening relationships between women and those who are close to them. The rate of marital breakup and relationship dissolution is anywhere from 40 to 75 per cent after abortion. Couples commonly experience reduced libido. A previous abortion leads to more post-partum depression following a subsequent delivery. There is less bonding, less touching and less breast-feeding of the new baby. More than one study has found that women who abort are also likelier to abuse their other children. Conversely, people who have been abused are more likely to

have an abortion. Far from ending the problem of child abuse, abortion appears to have made it worse.²²

* * * * *

Much post-abortion research is conducted by those committed to preserving unrestricted access to induced abortion. Their tendency is to cite only the work of those who share their political outlook on the question. Most post-abortion research is short-term, with the result that long-term consequences tend to be ignored. Many women, especially those who abort late in pregnancy, are unwilling to participate in follow-up studies. Finally, in North America, unlike in European and other countries, there is a pronounced bias against reporting bad news about induced abortion.

In a surprising number of North American studies data on abortion are downplayed or omitted from the discussion or conclusion sections of the paper. Here are a few examples from the highly contentious field of breast cancer and abortion. In 1995 Lipworth and colleagues found that there was a 100 per cent increased risk of breast cancer for women whose first pregnancy ended in abortion. In the discussion section the author downplayed this increase as “at most statistically marginal.”²³ In another study Ewertz and Duffy found that induced abortions were associated with an almost four-fold increased risk of breast cancer. In the discussion section this finding was not commented upon, the authors confining themselves to the observation that “pregnancies must go to term to exert a protective effect against breast cancer.”²⁴ A study by Daling and colleagues found a 2.5 risk—in other words a 150 per cent increase in the risk of breast cancer for women whose first pregnancy was aborted before age eighteen—but in their Discussion Section said that their findings “give only slight support to the hypothesis that there is an increase in breast cancer incidence among women of reproductive age.”²⁵

The investigation of abortion’s after-effects is also bedeviled by coding and diagnostic problems. International Disease Classification codes prevent cross-referencing between ectopic pregnancy and induced abortion, even though a clear link has been demonstrated. Pelvic inflammatory disease or Asherman’s Syndrome (intra-uterine adhesions, a complication of surgical curettage) may arise from an abortion but not be identified in that way either.

All the adverse effects of abortion put together affect perhaps twenty per cent of the women who undergo the procedure. Though a minority, they are a substantial one. The question that *Women’s Health After Abortion* raises is: Are women entitled to know about the risks? Or are those who draw atten-

THE HUMAN LIFE REVIEW

tion to them merely sowing unnecessary despondency and alarm, as some would claim? Fortunately the courts have already established that informed consent must be an essential ingredient of good patient care. Elective procedures—and induced abortion is an elective procedure—require from the physician a greater degree of disclosure than emergency procedures. Common but minor risks must be disclosed. Extremely rare risks must also be disclosed if they have serious or fatal consequences.

I co-authored this study because of a conviction that the increased risks associated with induced abortion—breast cancer, death, sterility, ectopic pregnancy, pelvic inflammatory disease, emotional distress, harm to subsequent children, the impact on partners and other children—are serious enough to merit dissemination beyond the pages of professional journals. If women have the right to choose, surely they also have the right to make their choice an informed one.

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IAN GENTLES

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"God, I hate it when people tell me their dreams."

APPENDIX A

[George F. Will is an author, television commentator, and nationally syndicated columnist.
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Life, and Death, in an Abortion Culture

George F. Will

Antonio Peña and Jaclyn Kurr of Michigan were a turbulent pair. She had sought hospital treatment for injuries he inflicted and spent time in a domestic violence shelter. Then came their argument about his cocaine use, during which he twice punched her in the stomach.

Kurr did not fear for her life but warned Peña that she was carrying his babies. She was 16 or 17 weeks pregnant with quadruplets. When Peña seemed about to punch her again, she stabbed him in the chest, fatally. Thus began another awkward episode of living with an abortion culture.

Convicted of voluntary manslaughter, Kurr was sentenced as a habitual offender to five to 20 years' imprisonment. The trial judge denied her request that the jury be instructed that she had a right to use deadly force in "defense of others"—namely, her babies.

The judge ruled that a fetus under 22 weeks old is not "viable," meaning not capable of surviving outside the mother's womb. (The noun "mother," which seems to postulate the existence of an "other" of the sort properly denoted by the noun "baby," is routinely used in court rulings about abortion.) Therefore, said the judge, there were no "others" to make the "defense of others" rule applicable. He said: "That's my theory."

His "theory" is that an unborn baby—which has its own unique DNA complex, and which will, absent natural misfortune or deliberate attack (by abortion or someone like Peña), become a born human being—is not an "other." But a Michigan court of appeals disagrees.

It has ordered a new trial, ruling that under Michigan law Kurr had a right to invoke the defense of "others." The appeals court noted that in 1998, Michigan's Legislature adopted a fetal defense act, which does not distinguish between viable and nonviable fetuses and says it is a crime to cause a miscarriage or stillbirth while acting "in wanton or willful disregard of the likelihood that the natural tendency of" such conduct is to cause a miscarriage or stillbirth.

The appeals court said the Legislature plainly believes "that fetuses are worthy of protection as living entities." About half the states have such laws. But given the U.S. Supreme Court's 1973 ruling in *Roe v. Wade*, states can treat fetuses as worthy of protection from people like Peña but not from their mothers. The "defense of others" doctrine allows an individual to protect an unborn baby only from *unlawful* violence, which does not include abortion.

There have been many cases illustrating the impossibility of reconciling an abortion culture—the right of unlimited abortion on demand—and moral judgments of the sort expressed in Michigan law. In Texas a drunk driver who struck a pregnant

APPENDIX A

woman's car was convicted of killing the woman's baby, which did not survive after being born a month and a half prematurely. A Baltimore court in effect took custody of a fetus by placing a pregnant drug abuser under court jurisdiction to prevent her from jeopardizing the health of her fetus—unless she exercised her right to kill it by abortion.

Abortion kills *something*. What is it?

A television commercial for General Electric's new ultrasound system shows a pregnant woman and her husband marveling at an amazingly clear picture of their unborn baby's features. The commercial features Roberta Flack's song "The First Time Ever I Saw Your Face." The announcer says: "When you see your baby for the first time on the new GE 4D ultrasound system, it really is a miracle."

By the time babies are as old as Kurr's quadruplets were, ultrasound can show their fingers and beating hearts. The Supreme Court in *Roe* called such babies "potential life," a weird opinion that could be forgiven if this were the 11th century, knowing nothing of embryology or microbiology—if the beginning of life were a matter of uninformed conjecture.

Today doctors perform wonders of prenatal diagnostic and therapeutic medicine, administering drugs and blood transfusions and performing surgery in utero—treating as patients fetuses that mothers have a right to kill. Many expectant couples have, in the nurseries they have prepared for their "potential" babies, framed ultrasound photographs of the "potential" babies. Many couples have fetal heart-beat stethoscopes for listening to—what? "potential" heartbeats?

A few weeks after being punched by Peña, Kurr miscarried. Whether the punches caused the miscarriage is unclear. She had a constitutional right—her privacy right of "choice"—to kill the unborn babies. And in Michigan and many other states she could kill someone who endangered them. That's the law.



"7-11, er, 10-4!"

APPENDIX B

[Dinesh D'Souza's new book is Letters to a Young Conservative (Basic Books). He is the Rishwain Research Scholar at the Hoover Institution. The following originally appeared in the Nov. 3-7 issue of the National Catholic Register and is reprinted with permission.]

Pro-Life Stasis? It's Time to Do What Lincoln Did

Dinesh D'Souza

No doubt it continues to cause controversy. The Democrat-controlled Senate won't confirm President Bush's judicial appointees if they are suspected of harboring pro-life sympathies. Democratic lawmakers and activists are furious about the Bush administration's decision to let states classify fetuses as "unborn children" eligible for government-funded health programs.

But is there anything new to say about it all? I believe so, and strangely what I have learned about it comes from studying the Lincoln-Douglas debates. These debates occurred in the 19th century and were about slavery. But look at how closely the arguments parallel the abortion debate.

Stephen Douglas, the Democrat, took the pro-choice position. He said that each state should decide for itself whether or not it wanted slavery. Douglas denied that he was pro-slavery. In fact, at one time he professed to be "personally opposed" to it. At the same time, Douglas was reluctant to impose his moral views on the new territories. Douglas affirmed the right of each state to choose. He invoked the great principle of freedom of choice.

Abraham Lincoln, the Republican, disagreed. Lincoln argued that choice cannot be exercised without reference to the content of the choice. How can it make sense to permit a person to choose to enslave another human being? How can self-determination be invoked to deny others self-determination? How can choice be used to negate choice? At its deepest level, Lincoln is saying that the legitimacy of freedom as a political principle is itself dependent on a doctrine of natural rights that arises out of a specific understanding of human nature and human dignity.

If Negroes are like hogs, Lincoln said, then the pro-choice position is right, and there is no problem with choosing to own them. Of course they may be governed without their consent. But if Negroes are human beings, then it is grotesquely evil to treat them like hogs, to buy and sell them as objects of merchandise.

The argument between Douglas and Lincoln is very similar in content, and very nearly in form, to the argument between the pro-choice and the pro-life movements. Pro-choice advocates don't like to be considered pro-abortion. Many of them say they are "personally opposed." One question to put to them is, "Why are you personally opposed?" The only reason for one to be personally opposed to abortion is that one is deeply convinced that the fetus is more than a mere collection of cells, that it is a developing human being.

Even though the weight of the argument is strongly on the pro-life side, the pro-choice side seems to be winning politically. This is because liberals understand that abortion-on-demand is the debris of the sexual revolution. If you are going to

APPENDIX B

have sexual promiscuity, then there are going to be mistakes, and many women are going to get pregnant without wanting to do so. For them, the fetus becomes what one feminist writer termed “an uninvited guest.” As long as the fetus occupies the woman’s womb, liberals view it as an enemy of female autonomy. Thus liberalism is willing to grant to the woman full control over the life of the fetus, even to the point of allowing her to kill it. No other liberal principle—not equality, not compassion—is permitted to get in the way of the principle of autonomy.

The abortion issue reveals the bloody essence of modern liberalism. In fact, it is the one issue on which liberals rarely compromise. Being pro-choice is a litmus test for nomination to high office in the Democratic Party. Liberals as a group oppose *any* restriction of abortion. They don’t want laws that regulate late-term abortion. Many liberals object to parental notification laws that would notify the parents if a minor seeks to have an abortion. Some liberals would even allow partial-birth abortion, a gruesome procedure in which the abortionist dismembers a child that could survive outside the womb. One may say that in the church of modern liberalism, abortion has become a sacrament.

What, then, is the challenge facing the pro-life movement? It is the same challenge that Lincoln faced: to build popular consent for the restriction and ultimately the ending of abortions. Right now the pro-life movement does not enjoy the support of the American people to do this. Neither, by the way, did Lincoln have a national mandate to end slavery. It is highly significant that Lincoln was not an abolitionist. He was resolutely anti-slavery in principle, but his political campaign focused on the issue of curtailing the spread of slavery to the territories.

In my view, the pro-life movement at this point should focus on seeking to reduce the number of abortions. At times this will require political and legal fights, at times it will require education and the establishment of alternatives to abortion, such as adoption centers. Unfortunately such measures are sometimes opposed by so-called hard-liners in the pro-life movement. These hardliners are misguided. They want to outlaw *all* abortions, and so they refuse to settle for stopping *some* abortions, with the consequence that they end up preventing *no* abortions. These folks should learn some lessons from Abraham Lincoln.

APPENDIX C

[*Noemie Emery is a contributing editor to The Weekly Standard, which first published this article (Nov. 11). © Copyright 2002, News Corporation, Weekly Standard, All Rights Reserved.*]

Losers for the American Way:

The electorate turns its back on pro-choice extremists

Noemie Emery

A big thing happened in the elections that you won't read about much in the papers, and the fact that you won't be reading about it is one of the reasons it did. The big story is that the pro-choice extremists took a widespread whipping, which is the one thing the press doesn't want to acknowledge, much less trumpet abroad to the troops. Nevertheless, the big-picture facts are astounding. NARAL, the nation's premier abortion-rights lobby, won 2 of its 11 targeted runs in the Senate, and went 6 for 26 in the House. As the third-worst performing political action committee in the country, NARAL took a backseat to the absolute loser, EMILY's List, the much-lauded PAC that promotes pro-choice women Democrats, which won 1 of 10 key runs in the Congress. By contrast, the National Right to Life Committee won 8 of 10 races. In three Senate states in which abortion emerged as a visible difference—New Hampshire, Colorado, and Missouri—pro-choice candidates lost to pro-lifers.

In state after state after state, in venues as liberal as Massachusetts and Maryland, women candidates who had walked hand in hand with NARAL's Kate Michelman lost races to pro-lifers or moderates. Shannon O'Brien lost to Mitt Romney, Jeanne Shaheen lost to John Sununu, Jean Carnahan lost to Jim Talent, and Kathleen Kennedy Townsend lost to Bob Ehrlich in a state Democrats rule two to one. It is not possible to say just how the issue played out in all of these races, but it is safe to say nobody lost in the big ticket races for liking abortion too little. On the weekend before the election, Eleanor Clift told a national audience that Jeanne Shaheen would win her state for the Democrats, as "New Hampshire is a pro-choice state." John Sununu won by three points.

Pro-choice extremists then lost on another dimension, in a different nationwide sweep. The Democratic-controlled Senate Judiciary Committee made itself the transmission belt for People for the American Way and other liberal lobbies, and waged bloody war on all judicial nominees who did not follow their line on "choice." Among the judges bagged and shot down by the committee were Charles Pickering of Mississippi and Priscilla Owen of Texas, the latter for supporting parental notification on abortions for minors—a stance that most of the country supports.

Bush lost no time making judges an issue. The Washington Post reported on April 15, "Two days in a row last month, Bush broached Pickering's defeat at political events he attended in Texas and Georgia. 'We're going to have more fights when it comes to the judiciary,' he said at a fund-raiser for Rep. C. Saxby Chambliss. Bush said the Senate needs more Republicans such as Chambliss who, he said, would have 'stood up and defended the honor' of Pickering. GOP strategists

APPENDIX C

contend that the future of the judiciary—while not a top rung issue—may nevertheless prove potent in the midterm elections, among voters the White House is seeking to reach.”

And did it ever. Chambliss will now be a senator, after a startling upset. John Cornyn from Texas will now be a senator, after his opponent Ron Kirk followed People for the American Way’s lead on Owen. The issue of judgeships, a stand-in for abortion, did its part in swinging key states to Republicans. “Last week’s election returns did not produce anything like a right-wing mandate,” the New York Times is now wailing in retrospect. “Nothing in the election returns suggests that Americans want the courts packed with such judges.”

Actually, nothing in the election returns suggests that Americans want judgeships to stand empty to save the great cause of late-term abortion. Having helped the Democrats lose some elections in key seats in the Senate, the Times now wants those still left to increase their efforts, filibustering against judges who don’t toe NARAL’s line. Ralph Neas of People for the American Way thinks this idea is terrific, as does Ted Kennedy, who told reporters that if the White House wants to “send right-wing ideologues [to the courts], that will cause a battle to the Senate floor.” The White House might now want to pay them to do so. Next time they might win still more seats.

Clearly, NARAL and the Times have a reality deficit crisis, vis-à-vis their own position in the world. While it is true enough that most Americans do not want to see a ban on all abortions, they are perfectly willing to see the practice discouraged, restricted, and even fenced in by new laws. As polls consistently show, most Americans would like to see abortion outlawed after the third month of gestation, support parental and even spousal notification, and especially oppose the grisly procedure called partial-birth abortion, in which a near full-term fetus, while still in the birth canal, has its brains extracted and then its skull crushed so that it can be born safely dead. Pro-choice support crested around 1990, and since then has been declining, losing ground in every demographic imaginable, among all women, young women, the young in general. American opinion will never swing wholly over to a totally pro-life view, but it is moving now in a pro-life direction. “Jane Roe” herself has even recanted. In real life, the trend lines are down.

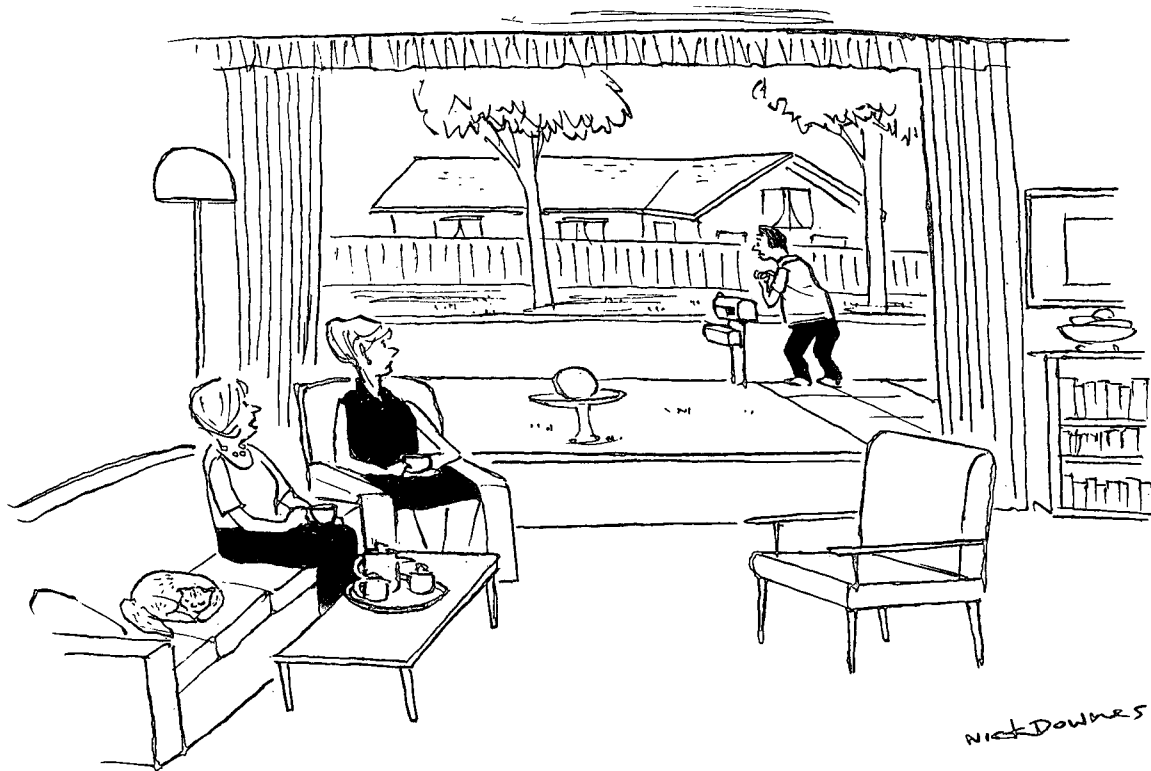
One reason the lobbies don’t see this too clearly is that they have too many good friends in the press. On no other issue are liberal blinders more evident: More than four in five journalists support a position that most voters reject as immoderate. The result is that in nearly all of their coverage, pro-choice extremists are described as being mainstream and moderate, while center-right moderates are presented as extremists. Typical was a report by Dana Milbank in the Washington Post on November 12, headlined “Lott’s Promise to Bring Up Abortion Worries Bush Aides.”

The gist of this tale was that “religious conservatives” are threatening to damage the president’s interests by pressing an unpopular, fringe agenda. Among other things, they want a partial-birth abortion ban, an act making it a crime to take a

THE HUMAN LIFE REVIEW

minor out of state for an abortion without telling her parents, and an act forbidding local governments from punishing doctors and hospitals that refuse to perform abortions for reasons of conscience. Bush might want to delay these for tactical reasons. But these ideas remain popular. Stories like this make conservatives seethe, but they are really a much larger problem for Democrats. Prodded on by the Clifts and the Milbanks, they launch ferocious assaults on moderate proposals and candidates. And then they run into a wall.

This does not mean that pro-life absolutism is popular either; it isn't. But the pro-lifers know this, and have adjusted their tactics, while pro-choice extremists have not. NARAL and the Times may think abortion law is fine as it is (if not too restrictive) and that Bush's judges and allies will pull it too far to the right. Actually, current abortion law is well to the left of the country, and Bush's judges will push it back closer to the center, which is something that voters appreciate. NARAL and PAW will think this is extremist, and not know what hit them. They can blame their good friends in the press.



"He's waiting for this month's 'Journal of Obsessive-Compulsive Disorders.'"

APPENDIX D

[The following appeared on National Review Online (nationalreview.com) on Nov. 18 and is reprinted with permission. Adam G. Mersereau is an attorney in Atlanta, Georgia.]

Pro-Lifers Should Be Cautiously Optimistic

Adam G. Mersereau

When the Republicans assume control of the Senate in 2003, they will start combing through the stacks of bills that have been piling up on Senator Daschle's calendar since the 2000 elections. One of those bills is the ban on partial-birth abortions that was passed by the House in July, but which has lain almost dormant on the Senate's calendar ever since. Republican Senator Trent Lott, the new Senate majority leader, reportedly spoke of the stalled bill recently, saying, "I will call it up, we will pass it, and the president will sign it. I'm making that commitment to you—you can write it down."

Needless to say, pro-choicers are preparing for war. That same day, NOW president Kim Gandy wrote, "With Trent Lott running the Senate and George W. Bush in charge of the White House and Supreme Court, the health and welfare of America's and the world's women and families have never been in greater jeopardy . . . We must mobilize and organize as if our lives and the futures of our children and families depended on it. They do."

How ironic. Even while claiming that her life and the lives of her children are in jeopardy, Gandy remains blind to the fates of the unborn children whose lives actually hang in the balance.

Gandy is right, of course, to be concerned. Even before the Republicans' big wins on Election Day, pro-life advocates were making some headway. On August 5, President Bush signed the Born-Alive Infants Protection Act, a law Gandy has called "stealth legislation" and a "thinly veiled effort to deprive many more women of their reproductive freedom." President Bush was apparently never informed that the law was meant to be kept a secret. He signed the bill at a ceremony attended by people such as Jill Stanek, a nurse who has given Congress eyewitness accounts of babies who survived abortions only to be put in a dirty linen closet until they died. Bush explained: "This important legislation ensures that every infant born alive—including an infant who survives an abortion procedure—is considered a person under federal law." Drawing upon recent genetic research and from his faith, he stated that unborn children are "members of the human family . . . [that] reflect our image, and they are created in God's image."

While a Christian president and a Republican Congress could feasibly team up to pass all kinds of pro-life legislation, lasting change in the abortion wars will require strong public support. Unfortunately, Republicans cannot assume that their sweeping victories on Tuesday are attributable to the abortion issue, and so they would be wise to bring a strong pro-life case to the American people before enacting pro-life legislation. Unfortunately, even conservative Republicans have always struggled to make that case, and most shy away from making it at all.

One reason is that conservative Republicans, the pro-life standard bearers, are largely seen as hypocrites on the issue of abortion—and they know it. Most people believe it is hypocritical to advocate less intrusive government while also promoting a legal ban on abortions. A legal ban is thought to require more powerful, more intrusive government. This charge of hypocrisy is often the rhetorical coup de grace in the debate over abortion. It has all but stymied pro-lifers. Al Gore used it in his first presidential debate against then-candidate George W. Bush, and Bush quickly (and conspicuously) changed the focus of the discussion. If conservatives are looking to change the abortion laws by first changing the hearts and minds of pro-choice Americans, then they must learn to face the hypocrisy charge head-on, and overcome it.

Can it be done? Is it reasonable to suggest that a government that outlaws abortion can be less powerful and less intrusive than one that permits them? Absolutely.

Our government's failure or refusal to act is not always a sign of a less-powerful government. Government that has become too bloated and powerful might also fail or refuse to intervene on behalf of particular citizens, just as a decadent, self-indulgent monarch might yawn and roll his eyes in response to a peasant's plea for justice. One of our federal government's most fundamental roles is to protect the lives and liberties of its people. It does not possess the constitutional power to decide which groups of people it will and will not protect. It follows that when our government begins picking and choosing which people deserve protection, it is engaging in an arrogant power grab.

Our federal government appears to have taken a passive posture on abortion that favors the freedom of women to exercise "choice" in their private lives. On the surface, such a government may seem deferential and non-intrusive—the kind of government conservatives prefer. But the government only looks passive because it is delegating its authority. In reality, by permitting abortions, the government delegates to expectant mothers the power to strip an unborn human being of any and all rights, so that it can be put to death with no legal ramifications. In other words, the government delegates to women the right to treat their unborn children as "unpersons" before the law. Of course, before it can delegate a power, the government must first claim that power for itself. By claiming the power to declare certain persons to be "unpersons," and then delegating that power, our government is choosing to reject its constitutional obligation to protect the lives and liberties of a particular class of people. This is hardly smaller government; it's a case of government power spinning out of control.

Our government's tolerance of abortion is reminiscent of our government's former tolerance of slavery. By failing to ban slavery prior to the Civil War, the government essentially delegated to white people the power to treat African Americans as "unpersons" by enslaving them. Today, Americans agree that a government possessing the power to declare African Americans "unpersons" before the law is one whose power has reached dangerous proportions. It follows that a

APPENDIX D

government that permits abortion—like a government that permits slavery—is far too powerful and intrusive. To pass a law that requires the government to protect the unborn, then, is to limit the government by restoring a sense of proportion to government power. Such a law would stand as a reminder that a legitimate government has no right to declare certain human beings less than human, or to refuse to guarantee their full human rights.

Of course, many pro-choice advocates would claim precisely that an unborn child is something less than a human being—and indeed, if a fetus is not truly a human being, then there is nothing wrong with declaring it an “unperson.” Hence the strange marriage between the pro-choice movement and the scientific theory that “ontogeny recapitulates phylogeny.” Also known simply as “recapitulation,” this is the theory that a fetus passes through various stages (from protozoan to fish to frog to bird to primate and finally to human) while in the womb. This theory has been a great help to the pro-choice movement, because it makes an early-stage abortion akin to killing germs on a kitchen counter, or flushing a goldfish down a toilet. Clearly, if a fetus is nothing more than a germ or a goldfish, then it should not enjoy government protection at the expense of the mother’s freedom. Such protection would constitute blatant discrimination against women.

Unfortunately for the pro-choice movement, the German scientist who originated the theory of recapitulation, Ernst Haeckel, fabricated his famous drawings of the fetus going through the various stages. Still, the theory is so valuable to proponents of macro-evolution—many of whom are, naturally, pro-choice—that it is still taught in many school textbooks as a scientific fact. Most readers of this article who attended public grade school were taught the theory without qualification, despite the fact that Dr. Haeckel’s fabrications were exposed as far back as 1911! Dr. Hymie Gordon, a physician and professor of medical genetics at the Mayo Clinic, points out that science has now progressed to the point that:

“We can now say that the question of the beginning of life—when life begins—is no longer a question for theological or philosophical dispute. It is an established scientific fact. Theologians and philosophers may go on to debate the meaning of life or purpose of life, but it is an established fact that all life, including human life, begins at the moment of conception.”

Ironically, pro-choice Democrats ought to find themselves in a much more awkward position than pro-life Republicans. After all, the Democratic party is the self-proclaimed defender of the dignity and the rights of all “unpersons” in our society: the elderly, the homeless, minorities, the needy, and the otherwise disenfranchised. And yet the Democratic party is also the undisputed home of the pro-choice movement, which summarily dismisses the rights of the unborn. One cannot help but conclude that the Democrats have turned a blind eye toward the disenfranchisement of millions of unborn children merely to secure the feminist vote. Talk about hypocrisy.

APPENDIX E

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Ethical Implications of Non-Heart-Beating Organ Donation

Nancy Valko, RN

Whether we are renewing our driver's licenses, watching the TV news or just picking up a newspaper, it's impossible to miss the campaign to persuade us to sign an organ donation card. We see story after story about how grieving relatives have been comforted by donating a loved one's organs after a tragic death, and how grateful the people are whose lives have been changed by the "gift of life."

But in the understandable zeal to save or extend as many lives as possible through organ transplantation, are some ethical boundaries being crossed? A case in point is the newer issue of non-heart-beating organ donation (NHBD), which comprises about 2% of all organ donations now¹ but is expected to increase with more widespread use.

While most public information about organ donation emphasizes that organs can be taken only after "all efforts to save your life have been exhausted" and brain death has been determined, in the past decade a little-known innovation has been changing these rules. Now, organ donation can occur in a person who is not brain dead but whose relatives have agreed to withdraw a ventilator (a machine that supports or maintains breathing) and have the person's kidneys, liver or pancreas removed when the heartbeat stops.

A Brief History of Non-Heart-Beating Organ Donation

When organ transplantation was first attempted, organs were taken from people who had recently died. These organs usually failed, however, because they had deteriorated too much during the dying process.

In 1968, an ad hoc committee at Harvard recommended a new way of determining death—the loss of function of the entire brain. This is commonly known now as brain death. Before this, only the irreversible loss of heart and breathing function (cardiac death) had been generally used to determine the point of death.

Brain death has been promoted as a method to determine death when a person is on a ventilator but still has a pulse, blood pressure and other signs of life. Brain death holds that the lack of functioning of the entire brain is the truest sign of death and that the rest of the body soon stops functioning even if the ventilator is continued. The immediate clinical benefit of adopting this new method of determining death into law was that vital organs like the heart, liver and kidneys could be removed ("harvested," in transplant terminology) while still functioning, and would therefore be more likely to be transplanted successfully. In brain death organ donation, the ventilator is continued until the organs are removed. In all states now, death can be legally determined either by the traditional irreversible cardiac death or by brain death.

APPENDIX E

While questions about brain death are still being debated in ethical circles, it is now apparent that the number of organs from people declared brain dead will never be enough to treat all patients who need new organs. Thus, in the past decade, doctors and ethicists have turned to a new source of organs—patients who are not brain dead but who are on ventilators and considered “hopeless.” In these patients, the ventilator is withdrawn and organs are quickly taken when cardiac death rather than brain death is pronounced. This is known as non-heart-beating organ donation. At the present time, about half of all organ procurement organizations have been involved in at least one NHBD procedure, even though most people are unaware of this new method of obtaining organs.

One of the first and few public discussions of NHBD in the media occurred in April 1997 when the CBS television program *60 Minutes* aired a segment on NHBD, which began with the case of a young woman who was shot in the head and, although not brain dead, was judged to be fatally injured and a perfect candidate for NHBD. However, the medical examiner that conducted a later autopsy said that he believed the gunshot wound was survivable. This led narrator Mike Wallace to question the little-known NHBD policies at some hospitals that would allow taking organs for transplants from persons who could be, in Wallace’s words, “not quite dead.”

The *60 Minutes* segment went on to examine the proposed NHBD policy at a Cleveland hospital that included potentially dangerous drugs such as Heparin (a blood thinner) and Regitine (a drug that dilates blood vessels) to help preserve the donor patient’s organs before death. This prompted a local prosecutor to raise the specter of such policies “seeking to hasten the deaths of terminally ill patients to obtain their organs for transplant.”² At the program’s end, Wallace predicted that as a result of the broadcast NHBD was unlikely to continue.

But he was wrong.

Transplant organizations immediately condemned the *60 Minutes* segment as inaccurate and unfair and defended NHBD as an ethical way to obtain organs after death. By December, the Institute of Medicine (IOM), the research arm of the National Academy of Sciences, delivered a report on NHBD. While the report admitted that some hospitals were using questionable methods to get organs for transplants, it called NHBD “ethically acceptable” and called for more research and the setting of national standards for NHBD. This 1997 IOM report³ did not address all issues, such as standards for withdrawal of treatment decisions, but instead made recommendations such as having transplant surgeons wait five minutes after the heart stops before harvesting organs. After this report, the brief flurry of media interest in the topic dissipated.

However, in 2000, the IOM issued a follow-up report⁴ that found that almost none of the recommendations made about NHBD were now being followed universally. Even more shocking, the 2000 report revealed that the participants in the report could not reach a consensus on even such basic issues as whether conscious people on ventilators should be allowed to donate organs using NHBD. Despite this, the report still encouraged all organ procurement organizations to use NHBD.

NHBD Procedures and the Ethical Implications

Although, as the IOM report showed, there are great variations in NHBD procedures among various hospitals, NHBD is generally divided into “controlled” and “uncontrolled” categories. Controlled NHBD refers to situations where a decision is made to withdraw a ventilator, wait for the heart to stop (cardiac death) and then rapidly remove the person’s organs before he or she deteriorates. Uncontrolled NHBD refers to situations where a person suddenly dies and cannot be resuscitated. In uncontrolled NHBD, tubes are then inserted into the donor and cold preservation fluid is instilled to preserve the organs until transplantation. Since such cases occur in an emergency situation, this method of preserving organs also gives time to notify family members and obtain consent for the donation. While legal in a few states, the uncontrolled NHBD procedure is not often done due to cost, technical difficulties and public resistance to starting preservation of organs before family consent is obtained. We will therefore only examine the more common controlled NHBD procedure.

Although controlled NHBD policies vary widely, once the decision to withdraw treatment is reached, medications such as blood thinners and blood vessel dilators are often started to preserve the potential transplant organs. NHBD supporters deny that such medications harm a potential donor, but even an accidental administration of such medications to an average patient would be considered a serious, reportable mistake.

When the ventilator is removed, doctors wait for the patient’s heart and breathing to stop, declare cardiac death either immediately or after a waiting period of two to five minutes and then begin to take the organs in an operating room. The legal standard of irreversible cardiac death is considered met because the decision has already been made not to restart the heart by cardiopulmonary resuscitation (CPR) and the heart is not expected to resume beating on its own. Even though brain death is not a requirement in NHBD, some NHBD supporters maintain that the brain death soon follows when the heart and breathing stop, despite animal studies and CPR experience itself, which show that even complete recovery of consciousness is possible after several minutes if resuscitative efforts are successful.

If, as sometimes happens, the potential NHBD patient does not stop breathing as expected and continues to have a heartbeat, doctors usually wait an hour before canceling the transplant. Since the decision to withdraw treatment has already been made, the patient is then returned to the hospital room to eventually die without treatment being resumed.

Reports and articles supporting NHBD dismiss the withdrawal of the ventilator as an ethical problem because the withdrawal decision is supposed to be made before and independently of the NHBD decision. This crucial first step in NHBD may deserve the most scrutiny, however. As the 2000 Institute of Medicine report states, “controlled non-heart-beating organ donation cannot take place unless life-sustaining treatment is stopped.”⁵ Thus, innovations such as the “living will” and

APPENDIX E

other advance directives, as well as “right to die” court cases allowing the withdrawal of even basic treatment from non-dying people, were crucial to the development of NHBD.

The 1997 IOM report describes the potential non-heart-beating donor as follows: “These patients are either competent with intolerable quality of life or incompetent, but not brain dead because of severe, generally neurological, illness or injury with an extremely poor prognosis as to survival or any meaningful functional status.” Note that this description includes not only patients on a ventilator who are judged to have little potential for a “meaningful” life but also fully conscious people who find their lives “intolerable.” Indeed, one of the first patients considered for NHBD was a conscious, 48-year-old woman with multiple sclerosis who asked to have her ventilator stopped and her organs donated.⁶ This particular patient unexpectedly continued to breathe after the ventilator was removed and by the time she actually died, her organs were felt to have deteriorated too much for transplantation. Still, the 2000 IOM report acknowledged that such requests still occur and found no agreement among their ethicists and doctors as to whether such conscious terminally ill or disabled people should be granted such requests.

This intersection of the “right to die” and organ donation is condemned by many people, including disability advocate Diane Coleman, who has predicted that

there is going to be growing pressure on disabled people who are dependent on life support to “pull the plug.” Allowing them to believe that they are being altruistic by doing so through organ donation will only increase the pressure on disabled people to choose to die in the belief that by giving their organs up, their lives can have some meaning. The danger is especially acute for people who are newly disabled, many of whom believe, falsely, that their lives can never be worth living.⁷

In the case of the incompetent (unconscious or otherwise unable to make medical decisions) patient, there are other serious ethical concerns about NHBD, including what and who determines a “meaningful functional status” for such a vulnerable patient. Although supporters of NHBD insist that withdrawal of ventilators is legally and ethically allowable because such patients are “hopeless,” these decisions are routinely being made because of potential quality of life concerns rather than ability to survive. NHBD policies also avoid the question of how quickly the determination of such hopelessness is being made. This can have dire consequences for the NHBD patient.

For example, in a January 2000 Nursing Library journal article⁸, nurse Myra Popernack describes the case of a 16-year-old car accident victim who, two days after his accident, was evaluated as a potential organ donor. The doctor told the family that their son was not brain dead but would remain in a “vegetative” state and “probably could not survive without continued life support,” even though the so-called permanent “vegetative” state is supposed to be determined only after at least three months. The family agreed to withdraw the ventilator and have a non-heart-beating organ donation.

In this case, the young man unexpectedly continued breathing after the ventila-

tor was withdrawn and the transplantation procedure was canceled. He was returned to his room where no treatment was resumed except for pain medication and, of course, he eventually died. Ironically, the family was so upset by all this that they refused to even donate tissues like corneas and bones after their son died. Despite this outcome, the nurse-author was still enthusiastic about NHBD.

This case is not unusual and it should raise concerns about denying such patients even a chance for recovery. For instance, I have been involved in a similar case where a chaplain in a Catholic hospital asked the mother of a teenage accident victim about organ donation shortly after her daughter was injured. The mother was horrified and refused. Her daughter was able to get off the ventilator and breathe on her own a few days later. Although this young girl is still disabled, she has defied the doctor's early prognosis that she would be a "vegetable."

Contrary to many people's perceptions, a ventilator is most often a short-term therapy used to support a patient's breathing during a crisis until he or she can resume breathing without assistance. In the past, traditional ethics have allowed for the withdrawal or withholding of any treatment if that treatment was futile in terms of survival or excessively burdensome to the patient. However, that principle has become so corrupted that even such basic care or treatment such as food, water and crucial medications like insulin or heart medicine are now being withdrawn to make sure a person dies sooner rather than later or does not continue to live with a diminished quality of life.

In cases of severe head injuries, strokes or other critical conditions that can qualify a patient for NHBD, it is virtually impossible at the beginning to accurately predict whether the patient will die or what level of recovery he or she may eventually attain. As a nurse for 34 years, I have personally seen many such patients, who initially needed a ventilator and who were even expected to die, go on to completely recover.

Conclusion

Organ donation can truly be "the gift of life," and innovations such as adult stem cells and the donation of a kidney or part of a liver by a living person generally pose no ethical problems and hold much promise to increasingly meet the needs of people with failing organs. In 2001, the *Lancet*, a British medical journal, reported on a case in Sweden where doctors were able to successfully transplant lungs one hour after a woman died after a failed resuscitation.⁹ Unfortunately, the recipient later died from causes unrelated to the transplant, but such a case may mean that, in the future, organs may be retrieved without depending on a withdrawal-of-treatment decision coupled with a rapid declaration of death and organ removal. And, of course, tissues such as corneas, skin and bone can be donated up to several hours after a natural death.

But the laudable goal of saving more lives through transplantation cannot sacrifice ethical principles or occur without vigorous public scrutiny. The quiet implementation of an innovation like NHBD is disturbing, especially when people are

APPENDIX E

urged to sign an organ donor card with little or no awareness of what that action can mean. While most people who sign such cards believe that only a careful determination of brain death will allow their organs to be removed, such cards do not say how death will be actually determined. In one study, organ donation was canceled in about one-third of cases because the criteria for brain death could not be met.¹⁰ Thus, NHBD is also seen as a “fall back” position to get those organs anyway, as well as from cases involving withdrawal of treatment decisions.

There is also the danger of NHBD allowing society to slide even further down the slippery slope of the “right to die.” The issue of choice already often overrides traditional ethics when life or death issues are involved. Right now, some prominent ethicists are also proposing that the definition of brain death be expanded to include patients with lesser brain damage, so that even more organs can be obtained for transplantation. Doctor Michael DeVita, a doctor supporting NHBD, has even predicted that, “if assisted suicide becomes acceptable, then a discussion about organ donation is probably reasonable.”¹¹

Organ donation has become a kind of sacred cow—in our society today no one is supposed to criticize any aspect of it lest lives be lost. But as in any other issue involving ethical principles, we must be sure that a desired good end does not justify any and every means of accomplishing that end. The practice of NHBD needs public scrutiny and reevaluation.

NOTES

1. ASTS Second Annual Winter Symposium 2002: Bench to Bedside, Ischemia and Reperfusion Injury in Clinical Transplantation. Miami Beach, Florida; January 25-27, 2002.
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3. Non-Heart-Beating Organ Transplantation: Medical and Ethical Issues in Procurement (1997), Institute of Medicine. National Academy Press. Available online at <http://books.nap.edu/books/0309064244/html/index.html>.
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6. Michael A. DeVita and James V. Snyder, “Development of the University of Pittsburgh Medical Center Policy for the Care of Terminally Ill Patients Who May Become Organ Donors after Death Following the Removal of Life Support” in *Procuring Organs for Transplant*, ed. Robert M. Arnold, et al. (Baltimore: Johns Hopkins University Press, 1995), p. 58.
7. Wesley Smith, *Culture of Death—The Assault on Medical Ethics in America* (Encounter Books, 2000), p. 167.
8. Myra L. Popernack, “Are We Overlooking a Hidden Source of Organs?,” *Nursing Library*, January, 2000. Available online at http://www.findarticles.com/cf_dls/m3231/1_30/58916375/p1/article.jhtml.
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