

# the HUMAN LIFE REVIEW



FALL 2005

*Featured in this issue:*

William Murchison on . . . . . *Roe Über Alles*  
Stephen Vincent on . . . . . A Protocol for Medical Murder  
David Oderberg on . . . What's Wrong with HESC Research?  
John Muggeridge on . . . . . Red in Tooth and Claw  
Mary Meehan on . . . . . Tiptoeing Around *Roe*  
Gregory J. Roden on . . . . . *Roe's* Abortion Mythology  
Patrick Kenny on . . . What's Ahead for Irish Pro-lifers?

*Also in this issue:*

Jo McGowan • Robert P. George • Ronald Bailey • Wesley J.  
Smith • Ramesh Ponnuru • Clarke D. Forsythe • Alicia Colon

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ABOUT THIS ISSUE . . .

. . . Fall 2005 completes the *Review's* 31st year of publication. For twelve of those years John Muggeridge was a contributor and for the last six a senior editor. But his death November 25 came as an especially hard blow because he was first and foremost a dear friend. John was in at least one significant way very much like our late founding editor, J.P. McFadden: They both had Cassandra-like radar for detecting far earlier than most other observers emerging threats to the sanctity-of-human-life ethic that has shaped the western world for the last 2,000 years. "Red in Tooth and Claw," a ten-year-old essay of John's we reprint here (page 34), early on identified the pernicious views of the Australian philosopher Peter Singer, who has since made the pilgrimage to Princeton, his deadly vision now being nourished in the bosom of one of America's most prominent universities. Unlike some in the pro-life movement, for whom the "business" of baby-saving can be a heavy and dispiriting load, John was a sunny (and funny) advocate for the unborn, a gentleman whose gentleness became even more pronounced as he endured the ravages of cancer. He was as far as a man could be from the arrogant-white-male stereotype that feminists (and "apologists" like Pat Robertson) have perpetrated on the public consciousness. In that, too, John was like my late boss J.P., who once told me of the many unsought "debates" he'd been dragged into about abortion, debates which often ended with a young woman sobbing out her sad story on his (always available) shoulder. Recently, a long-time subscriber told me the reason she liked the *Review* so much was its "charity," an approach, she thought, more likely to persuade minds and hearts than the hectoring some others seem to prefer. We like to think that charity pervades most if not all the articles we bring you, in this and every issue. One of the appendices we include here is by someone who emailed us that he "generally doesn't agree with your publication's positions" but generously gave us permission to reprint nonetheless. Thanks to him and to all the authors whose important work has graced our pages these thirty one years. And special thanks for the privilege of having known both J.P. McFadden and John Muggeridge. *RIP.*

ANNE CONLON  
MANAGING EDITOR



the  
HUMAN LIFE  
REVIEW

Fall 2005

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## INTRODUCTION

“TODAY WE WANT to know just one thing about a Supreme Court nominee: Where does he come down on *Roe v. Wade*? A Supreme Court nomination these days isn’t about things like brains and integrity. It’s about abortion.” So writes Senior Editor William Murchison in our lead article, naming the “elephant in the room” that may *not* be so acknowledged by the Senate Judiciary Committee come January 9th, the scheduled start of the Judge Samuel Alito hearings. Though we write before this date, readers of the *Review* will receive this issue after the hearings are over; whatever their result, Murchison’s “*Roe Über Alles*” is a marvelous essay on why it’s all about *Roe*, and what is at the root of the obsession with the “right” to abortion. As always, Mr. Murchison’s delightful style and sharp wit make his searing observations nonetheless a pleasure to read.

As the deadly *Roe* decision reaches the age of 33 this January 22nd, what some call its “progeny”—legal euthanasia and infanticide—are taking countless lives. Our next article is a *tour de force* by contributor Stephen Vincent, who takes as his starting point the “Groningen protocol” in Holland, which, translated, means euthanasia for babies. Vincent comments on a *New York Times Magazine* column about the protocol, which, in a manner consistent with many articles on similar issues in the *Times*, seems crafted to make the unthinkable—here, killing babies—not only acceptable, but an enlightened step toward progress. Vincent explains how the author attempts this, and then turns to the deeper subject for pro-lifers: what *is* the compassionate and moral response when faced with the hardest cases, like the infant girl described in the *Times* article, whose horrific suffering cannot be cured?

We turn next to the littlest victims of the post-*Roe* world: embryos who are destroyed in the name of Science. “Human Embryonic Stem Cell Research: What’s Wrong With It?” (p. 23) is an edited version of a talk given by Professor David Oderberg to the International Society for Stem Cell Research in San Francisco last June. Oderberg states up front that human embryonic stem cell research is “unqualifiedly and gravely immoral.” Interestingly enough, before discussing the research itself, Oderberg talks about the character of the scientists: “For when it comes to a momentous issue such as human embryonic stem cell research, perusal of the literature reveals that far too many scientists *and* bioethicists (who, as supposedly trained philosophers, ought especially to know better) think that all the stem-cell researcher should be doing is getting on with his research while leaving it to society somehow to solidify the ethical (and regulatory) quagmire the research leaves in its wake.” The news broke this November that *the* top Korean researcher, Hwang Woo-Suk, used unethical means to obtain eggs for his research; in December, it was further revealed that the ground-breaking results he announced to the world in the May edition of *Science* magazine, in which he claimed to have

created eleven stem-cell lines matched to different patients by cloning were fabricated. By the time you read this, his two other major breakthrough claims—that he was able to create the world’s first cloned embryo and the first cloned dog (Snuppy a fake?!)—may also have been discredited. Oderberg emailed us: “The South Korean team were treated like pop stars at the June mega-conference . . . their names were mentioned in hushed, awe-filled tones. Now is the perfect time for our side to go on the offensive.”

Obviously, the rosy promises held out to the public about this research have been grossly exaggerated. But even if they were not, the morality of such research on human embryos remains the crucial question. “Our side” has its arguments against such research thoroughly and articulately presented in Oderberg’s address. After stating his unequivocal position on the immorality of embryonic stem cell research, Oderberg goes through the arguments made in favor of such research, and refutes each one. What is tremendously valuable here is that Oderberg describes the science, using the technological language, in a manner accessible and educational to the lay reader. At the same time, because he is a philosopher, he articulates the full implications of the science—something, as he notes, many “bio-ethicists” have not done. Oderberg also discusses a new topic of debate among fellow travelers in the pro-life movement, and that is the concept of Altered Nuclear Transfer, a method for obtaining stem cells which does not create or destroy an embryo (also discussed in *Appendix B*). As you’ll read, he makes a case against it; we will no doubt have much more on this subject in future issues.

Our *Human Life Review* family suffered a great loss this fall. On November 25, our Senior Editor and much beloved friend John Muggeridge died. He had been struggling with cancer for some years, enduring painful treatments that did have some success, but he suffered a turn for the worse in late October. Longtime readers of the *Review* will remember that my late father, J. P. McFadden, and Malcolm Muggeridge, John’s father, became friends in the 70’s, after Malcolm agreed to write an article for us. (Malcolm was an editor of the *Review* from 1980 until his death in 1990.) A happy result of their friendship was that my parents got to know John and his wife Anne, who lived in Canada. Both were also writers, and they began to contribute to our publications. John joined the *Review*’s editorial staff in 1994 as Contributing Editor, and became Senior Editor in 1999; we have been blessed to have his eloquent and distinctive voice in our pages. In his honor, we are reprinting an article he wrote for our Winter, 1995 issue, about the animal rights movement, and the then-lesser-known Peter Singer. It’s an article even more relevant today, as the influence of the animal rights movement has grown, and Peter Singer is now a prominent academic at Princeton. Muggeridge writes in his conclusion about the movement against the Judeo-Christian teaching that God created man in His own image (thus we are not just another species), and the American Civil Liberties Union setting its sights against a school biology text which talks about “intelligent design” (another especially timely topic). He wrote: “Never have

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the first three chapters of Genesis come under such heavy bombardment. But that makes sense. They contain, as Pope John Paul II points out, all the information needed to understand the modern world. Accept them, and you see suffering not as a currency to be exchanged, at whatever the going rate, for bills of happiness, but as a mystery with implications that lead beyond this life.” This beautiful faith was much in evidence as John faced the mystery of his own harsh suffering; he was unfailingly valiant, uncomplaining and full of good will. He is and will always be greatly missed.

**W**e return now to the subject of our lead article—specifically, Supreme Court nominee hearings and *Roe v. Wade*. In “Tiptoeing around *Roe*,” Mary Meehan asks why there has to be such timidity about even discussing *Roe* on the part of the Republican senators and Supreme Court nominees. She asks us to imagine, for example, if a nominee, interrogated about *Roe*, talked about the fact that “there has been overwhelming criticism of *Roe* by legal scholars” as a poor ruling, by *both* sides of the abortion question. As Mary writes, “Such an answer would stun the Democratic side of the Senate Judiciary Committee. Massachusetts Senator Edward Kennedy’s formidable jaw would drop in amazement. . . . Senator Dianne Feinstein of California would be frozen in horror.” But would it backfire for our cause or, as Meehan argues, be an “extremely important chance to educate the public—and the media—about the constitutional wrongs of *Roe*”?

Forthrightness about *Roe* has not been the strategy employed by its foes during confirmation processes. Meehan traces this back to the infamous Robert Bork hearings which, she says, “overly traumatized” many Republicans and abortion foes, and led to the so-called “stealth strategy” in which nominees are chosen for their lack of paper trails. In an absorbing review of Supreme Court history, Meehan goes back further, to the post-*Roe* nominations of Justices John Paul Stevens, Sandra Day O’Connor and Antonin Scalia, and considers how *Roe* figured (or not) in their hearings. She comes back to the present by discussing the recent questioning of now-Justice John Roberts: “With his impressive constitutional knowledge and attractive personality, Judge Roberts charmed the Judiciary Committee and the public; but he still had to run the gauntlet on abortion.” (He had to face Senator Arlen Specter’s formidable legal concepts of “super,” even “super-duper” precedents!) Meehan concludes by observing that even if Alito is confirmed there may be a new vacancy in the near future: she offers her own questions for future nominees, questions which do *not* tiptoe around *Roe*.

As Meehan notes, the “common criticism” of *Roe* by legal scholars is that Justice Blackmun “failed to show a constitutional basis for *Roe*.” In our next article, “The Abortion Mythology of *Roe v. Wade*,” Gregory Roden focuses on the law-review article (with a whopping title; see Roden’s first paragraph, p. 68) that would become the “theoretical cornerstone of Harry Blackmun’s *Roe v. Wade* opinion”—and argues that it’s a “mythical” work. The article in question, written by Cyril Means, counselor for NARAL, claimed that abortion was not a common-law crime.

In a fascinating look at the primary sources, Roden cites the actual transcripts from the two eighteenth-century trials upon which Means based his claim, demonstrating that Means falsely represented legal precedent and manipulated the facts in his ideological zeal to pave the way for legalized abortion.

Our final article takes us overseas, to Ireland. Readers will remember the Irish brouhaha over the 2002 abortion referendum (see David Quinn's "Ireland's Pro-Life Civil War," Spring/Summer, 2002, and "Revisiting Ireland's Pro-Life Civil War," with Robin Haig, Richard Maggi and David Quinn, in Fall, 2002.) In "Irish Pro-Lifers: The Road Ahead," we welcome journalist Patrick Kenny, who writes for us about new challenges for pro-life forces in Ireland. The struggles in Ireland have involved much internecine warfare, and the current skirmishes are no exception. Forces supposedly on the pro-life side, including, sadly, the Catholic Church, have become unaccountably entangled with agencies seeking to provide access to abortion. Added to domestic difficulties is a serious threat looming from the international European Court of Human Rights. It all adds up, as Kenny writes, to a critical moment for Irish pro-lifers.

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We open our Appendices with "Another Modest Proposal," a column written for *Commonweal* by our friend Jo McGowan. It's a masterpiece. We reprint it here with the "letters to the editor" it inspired, because her response to the letters is also not to be missed. If only McGowan's satire was based on an imagined horror rather than a real one but, as the following appendices remind us, embryonic stem cell research is a terrible reality. In *Appendix B*, Professor Robert P. George cites new research which proves "that embryonic stem cells can be produced by a method that does not involve creating or destroying a living human embryo," a development that ought to excite advocates of embryonic stem cell research. But, he says, it doesn't—for some terribly ominous reasons. *Appendix C* is a column from the *Wall Street Journal* by Ronald Bailey, who reports that, the question of federal funding aside, stem cell research is being funded privately to the tune of *billions*.

There is some good news. As Wesley Smith reports in "Umbilical Accord" (*Appendix D*), we do have an "utterly uncontroversial" source of promising cells: umbilical cord blood cells. These cells have enormous potential for good, and yet they have remained "woefully underutilized." Smith reports that a bill to change this, the Bone Marrow and Cord Blood Therapy and Research Act of 2005 is stalled in the Senate. However, since he wrote his December 12 column, the bill *has* been passed by both houses, and what is now called the Stem Cell Therapeutic and Research Act of 2005 was signed into law by President Bush on December 20th.

Ramesh Ponnuru's "Bad news for Pro-lifers" (*Appendix E*) reports on a troubling gain for the "pro-choice" side in recent polls which, he conjectures, may have to do with the retirement of Sandra Day O'Connor and the re-emphasis on the

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*Roe* decision. If he is correct, his might be an argument in support of Meehan's, that not *talking* about *Roe* hurts our side. In another related issue, Clarke D. Forsythe of Americans United for Life writes, in *Appendix F*, about an important case now before the Supreme Court. At issue in *Ayotte v. Planned Parenthood* is the validity of a New Hampshire law about parental notice for minors seeking abortions. This is a "Supreme opportunity," argues Forsythe, for the Court to not only affirm the New Hampshire law but to clean up the mess it has created "with its vague and contradictory decisions" about abortion restrictions since *Roe*.

We close this issue with a rousing column which pleases us: Alicia Colon of the New York *Sun* writing about our 2005 Great Defender of Life Dinner and our distinguished honoree, Nat Hentoff. We will have a full account of the evening in our next issue, complete with photos. In the meantime, you can get a taste of what it was like to be there from Ms. Colon, who had told us she wouldn't miss the evening for the world because Mr. Hentoff was one of her heroes (ours too!). As always, we adorn some of our pages with the splendid cartoons of our friend Nick Downes—who is also a great fan of Mr. Hentoff, and drew him his very own cartoon, also to be viewed in the next issue.

Such friends inspire us to continue fighting the good fight, which we will continue to do in the New Year. Until then—a peaceful and blessed 2006 to all our readers.

MARIA MCFADDEN  
EDITOR



## *Roe Über Alles*

*William Murchison*

**O**ur time, this moment we all inhabit with varying degrees of appreciation, is—I was on the verge of saying “about as nutty” a time as anyone can remember experiencing or reading about. For the sake of a vanishing cultural ideal, i.e., civility, suppose we change “nutty” to “morally ambiguous.” It likely comes to the same thing in the end.

I write a mere month or so after the controversial nomination of Judge Samuel Alito to the U. S. Supreme Court, which event followed the controversial and failed nomination of Harriet Miers to the U. S. Supreme Court, which event in turn succeeded the controversial if ultimately successful nomination of John Roberts to the chief justiceship of the United States. As I write, the Senate Judiciary Committee waits with fungo bats and brass knucks for Alito to enter its lair. I’ve no idea, nor has anyone else, how this business will conclude—with Alito’s Senate confirmation or his humiliation and eventual replacement by someone else. I’ve ample idea as to the tenor and tone of the examination process: loud, rude, rancorous, divisive, bitter, partisan, disfiguring, melodramatic, mendacious. Have I left out anything?

Any rearview mirror into which we look will show us the pure loopiness of the situation. When Potter Stewart was named to the High Court, in 1958, were Americans inspired to go at each other’s throats over the suitability of such a choice? No. What about, a decade later, the nomination of Lewis Powell? How many outside the Beltway gave the matter more than civic-minded attention? The moment of course was quite different from this present one. The nation’s highest court had not yet taken up, much less adjudicated, the claimed constitutional right to expel from the womb a commodity known by various contrasting names: “fetus,” “product of conception,” “unborn baby.”

Whereas the whole range of Stewarts and Powells passed muster on the basis of brains and political backing, today we want to know just one thing about a Supreme Court nominee: Where does he come down on *Roe v. Wade*? A Supreme Court nomination these days isn’t about things like brains and integrity. It’s about abortion. Which means, if you back away farther and gaze, it’s about us, and the culture in which we live. If you call it “culture.”

We get our national work done through unanimous acceptance of our written constitution. How we understand that document seems nowadays to

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depend on how we react to, or analyze, the handiwork of seven Supreme Court justices, every one of them dead now. Do we proclaim the handiwork of *Roe v. Wade*'s 7-2 majority to be the essence of American jurisprudence? Or do we castigate the decision and seek its reversal? Such are the questions with which we wrestle, and will continue to wrestle, whether or not Samuel Alito ever joins the court on which they formerly sat.

It's all about *Roe*. Up to a point at least.

A *Wall Street Journal* story Nov. 1, 2005, called abortion "the crucible of American judicial politics." Only a couple of days earlier, the chairman of the Senate Judiciary Committee, Pennsylvania's Arlen Specter, said of the Alito nomination, "The topic which dominates the discussion, as we all know, is a woman's right to choose." The liberal interest group, People for the American Way, was taking no chances on this one. So soon as the nomination came down, PAW's Ralph G. Neas made known that "Replacing a mainstream conservative like Justice [Sandra] O'Connor with a far-right activist like Samuel Alito would threaten Americans' rights and legal protections for decades." NARAL Pro-Choice America quickly handed down its own verdict: "Alito's confirmation could shift the Court in a direction that threatens to eviscerate the core protections for women's freedoms guaranteed by *Roe v. Wade*, or overturn the landmark decision altogether." Stop him! Stop him at once! The *New York Times* weighed in a couple of weeks later: "[T]here is reason to believe that Judge Alito could do significant damage to values Democrats have long stood for." Still later, the *Times* figured out that Alito is "an ideologue," navigating "far outside the legal mainstream." Sen. Ted Kennedy—remembered for prophesying the end of nearly everything should Robert Bork take a seat on the Court—characterized Alito's known views as "extremely troubling."

At least two women who serve in the Senate—California's Dianne Feinstein, a Democrat and Judiciary Committee member; and Maine's Susan Collins, a nominal Republican—served notice of their readiness to vote against Alito should they come to believe he truly questions *Roe*'s legitimacy.

Not all the gnashing of teeth proceeds from contemplation of *Roe*. Alito's critics—like the critics of Roberts and Meirs, who are in fact the same critics—raise related questions, such as where is the nominee on civil rights? What are his obligations, if any, to the "Christian right?" Would his religious faith ever blind him to secular needs and concerns? Yet, when the critics talk of these matters, it is more often than not in an everyday voice. When *Roe* comes up, that is when veins bulge and menace creeps into the intonation. We are made to know, hardly for the first time, that *Roe* is the big enchilada—the idea around which rotate all other ideas. In a perverse way it may be.

How we got to this point requires some figuring. That's what I want to do here—figure.

Let's start with a *Wall Street Journal* editorial which addressed the question last November. *Roe v. Wade*, said the *Journal*, "in one fell judicial swoop, took this deeply divisive social issue out of the hands of voters and their elected legislators. The year was 1973. The consequences have distorted American law and politics ever since." *Roe* "stopped democracy cold. Without *Roe*, we likely would have had a decade or so of political battles in 50 state legislatures. Our guess is that we would have ended up with a rough consensus close to where every poll shows the American public stands on abortion: Legal in the first trimester, with restrictions later in pregnancy and provisions for parental and spousal notification." The *Journal* quotes Watergate prosecutor Archibald Cox as likening the Court's behavior to that of "a body of Platonic Guardians, charged with bringing the Constitution up to date . . . without regard to the past or the long-run sentiment of the people."

So far, so good. I think the *Journal* is right factually—in spite of the wrench one feels upon acknowledging substantial public sentiment for any kind of abortion. Nor, I might add, is there anything unusual about defending spiritedly whatever legal or constitutional gain has come one's way. One might not enjoy imagining one's self a board member of NARAL, but if one happened to be such, and saw out of the corner of the eye an emerging threat to the maintenance of hard-won privilege—well, the sight might terrify. Certainly it would scandalize. One might have to take decisive action: as, come to think of it, various Southerners acted variously to thwart the advance of civil rights as promoted by the Supreme Court in the two decades following *Brown v. Board of Education*. I think we need to acknowledge, if not necessarily to appreciate, this cast of mind.

All this fails nonetheless to account fully for the outpourings of, I think, genuine horror at the notion that abortion policy might end up some day in the hands of state legislators. No choice as to abortion? Sen. Feinstein and the *New York Times* both suggest, without exactly saying so, that things don't get much worse than that. Never mind how smart and honest and capable Sam Alito might be, and never mind the growing incapacity of American politicians to be fair and civil. None of this seems to matter, as against the maintenance in constitutional law of *Roe v. Wade* and the right to abortion.

If you cared to throw some familiar language in the general direction of *Roe*'s defenders, you might venture that *Roe* has become for them 1) an "ideology," defended by "ideologues" and 2) "a litmus test" in political terms. That is because it has become both.

An ideology is a human construct—communism, fascism, Islamic

jihadism, etc.—around which the whole of life is organized. The Big Idea (Aryans trump Jews, Moslems trump Jews, vegetables trump meat, negotiations trump precision-guided missiles, etc., etc.) is kept on constant display for the edification of wan-faced worshippers. Only, don't think to argue with the worshippers. What would the point of that be? They're right, and you're wrong. No more needs saying. So shut up. That is how ideology triumphs and stays triumphant—through closing off variant viewpoints.

**M**odern liberals often refer to conservatism as ideology—a habit the late Russell Kirk strongly discouraged. Conservatism, Kirk liked to say, is the negation of ideology, valuing that which grows without benefit of blueprint; a living organism, like pre-Katrina New Orleans; illogical, untidy, with rough, splintery edges. All the more lovable for it, too. As firmly as pro-life people defend the value of unborn human life, they do so in deference either to divine mandate or to a human sensibility that no human has devised, rather just understood, without prompting. It is the sensibility—odd and grating as it may seem to the coldly rational—that Life is good. Good, even when damaged or soiled or stained.

The second term, “litmus test,” reeking of the science lab, hints likewise at a priority of values—with a bit more, but not too much, room for competing notions. The litmus paper, when dipped in solution, tells all: A thing is either acidic or it's basic. Once we know which, we know how to proceed.

So with a Supreme Court nominee facing confirmation in these times, when the ideology of *Roe v. Wade* is under sustained and serious assault at the judicial level. How does the nominee look when litmused? Will he uphold *Roe v. Wade*, or will he vote to reject it? Will he—getting right down to it—provide the vote that makes the difference, one way or the other, on a closely divided Court? That is what the *Roe* ideologues want to know. It is, from their perspective, what they *need* to know. You don't suppose, do you, they would go along with the seating of a justice likely to challenge the ideological order of things? When hell freezes over, they might.

Thus the proponents of *Roe* don't really care, deep down, where a nominee for Supreme Court went to law school or what grades he made there; whether he was law review or what judge he later clerked for; what posts afterwards came his way or what honors he won, what praises of his integrity and brains have resounded through courthouse corridors. All day long you could trumpet his character, intelligence, and prospects for citizenship in heaven. Still, what you want—what you *need*—to know is where the nominee stands on *Roe v. Wade*. Would he or wouldn't he try to destroy it?

That is partly because *Roe*, in addition to being a litmus test, is a code

phrase. The energy a judge sends off, when it comes to *Roe*, lights up other corners of his mind. A judge amenable to overturning *Roe* might oppose other projects of the blue-state elite—assisted suicide, ridding the public square of religious language and symbolism, etc. By the same token, those projects might escape the censure of someone inclined to let a pregnant woman act, shall we say, in her own interest.

Again, so far, so good in the quest to understand what goes on. No time to stop, though. How ever did a Supreme Court decision become ideology? We need to step back farther still—enlarge the viewing area.

Could it be that for 30 years we have underestimated the profound social changes that 20th-century feminism has wrought? That's my next question.

We thought of feminism, when it came along—or, rather, revived—in the 1970s as just one more expression of grassroots dismay over group repression. What we might call advanced feminism, as distinguished from the quest for greater workplace equality between men and women, closely followed, then overlapped, the national revolt against Jim Crow. It was easy to conflate the two movements, and to sympathize, shyly at least, with both. And so, beginning in the '70s, Americans of both sexes embraced with growing fervor or diffidence the “women's agenda”—the agenda that specific women designed—as if to embrace it were somehow to clamber aboard the freedom train before it left the station.

Feminism's identification with the cause of abortion is like popcorn's identification with salt. “Reproductive freedom” is the ideal—the freedom to “control” the body. As Elizabeth Fox-Genovese noted, a decade ago, “More than any other single issue, support for a woman's right to choose to have an abortion has become the litmus test [that phrase again!] of feminism.”

If, in other words, you oppose abortion, you oppose feminism; if you oppose feminism, you oppose women; if you oppose women, you likely call your wife “babe,” badmouth her cooking, ridicule her makeup, and force her to subsist on an allowance. You're a male chauvinist, in other words; and what Modern Man wants to be that? As Fox-Genovese explains, “[F]or those who defend the woman's right to choose, denial of abortion kills women—either physically through back-alley abortions or spiritually through the curtailment of their autonomy. The struggle thus reduces to a decision in favor of the unborn child or the life of the pregnant woman. Which side are you on?”

A powerful question, yes. Yet the indicated answer—“I'm on the woman's side”—falls short of explaining the passion and venom that a post-*Roe* Supreme Court nomination reliably generates, with all eyes on the outcome. We need to back up farther for the big picture.

So—why the new hands-off-my-bod ideology in the first place? Is it because this whole thing is less about abortion than about sexual freedom? Plain old down-to-earth sex—is that the key (assuming anything about sex is “plain” or “old”)? Sex without consequences. Sex on demand. Sex for a purpose or none at all. Sex on the merest of whims. As one feminist, Joan Williams, puts it: “Like most women of my class, I view an active sexual life as an entitlement.”

There you are—it’s *ours*, and no Supreme Court justice is going to wrest it away in the name of constitutional principle or whatever. Feminism—an intermittent passion whose origins go back at least to the early 19th century—made its late 20th century comeback amid the moral chaos of the ’70s, when younger Americans were asserting the right to pretty much anything: especially to sexual freedom. Anti-war movement, “counterculture,” and “women’s lib” merged neatly as to motive and intended targets for destruction, meaning authority figures of all sorts and descriptions. Whoever trafficked more often in “shoulds” and “oughts” than in “you bets” and “go right aheads” was the kind of person, whether standing at a pulpit or a lectern, or sitting at the family breakfast table, who plainly warranted no serious attention. Hadn’t “authoritarians” of this sort been making life miserable and unequal for centuries? Enough already.

Scarcely had the dew settled on the mid-’60s before this novel (in context) outlook hardened into orthodoxy. Theoretically wise authority figures were spotted wagging their heads acquiescently—either because they agreed with the new orthodoxy or because they understood and feared it too little not to agree. Autonomy became the rage: not just a pose of the alienated (hippies) or those dedicated to the destruction of cultural fences and guard rails (Timothy Leary, Tom Hayden, Herbert Marcuse, etc.).

Now this thing comes together. *Roe v. Wade*, at root level, isn’t about abortion. Or even about sex. It’s about autonomy.

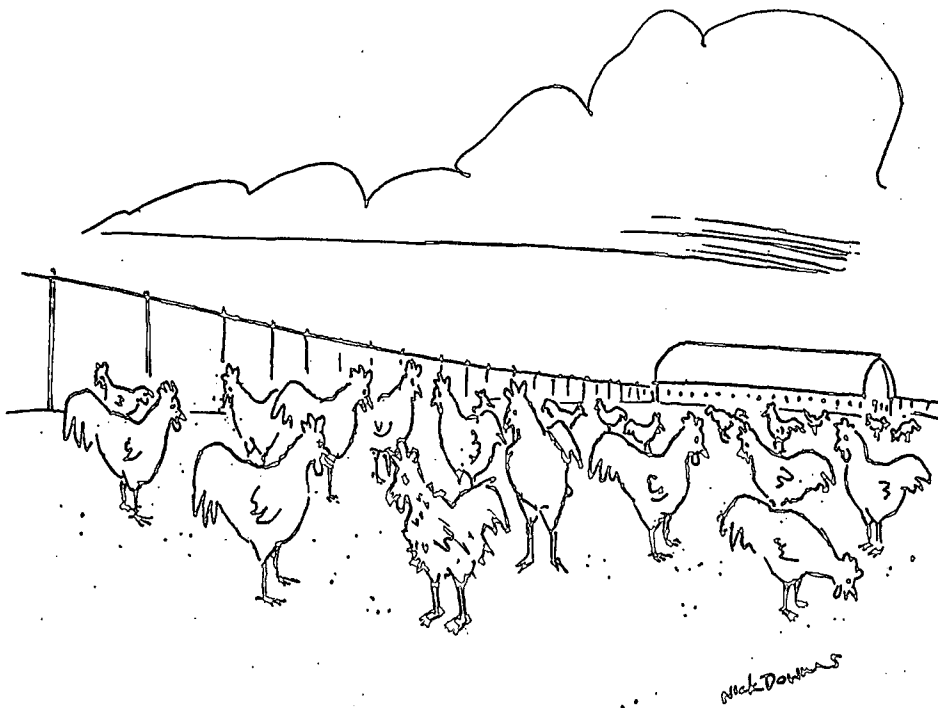
There’s your real ideology. To the familiar ideological watchwords of our times—“*Deutschland über alles*,” “All power to the soviets,” “Make love, not war”—add this one: “It’s all about me.” Yes, little me, the center of the universe. As God withdraws, seemingly, to the periphery of human affairs, unable to compete with current attractions, a good portion of his human handiwork steps forward: asserting, demanding, claiming. “All about me” means a multitude of things: not least, nobody—*nobody*—for any reason whatever, has the right to compromise my physical autonomy, my control of my personal space. Which is *mine*, got that?

Got it. At least the part of it leading to the conclusion that rules are off

and appetite dominates; that to want is to get, or anyway to expect as constitutional entitlement. The elected politician scanning the electorate's wish list quickly sees how much safer and just downright pleasant it is to grant rather than to resist insistent demands. That's especially the case when those demands, rolled up together like a scroll, constitute theology—the Law and the Prophets for 21st century denizens.

You can see maybe—just a bit?—why the political and journalistic glares thrown Sam Alito's way are so strong, so searing; the determination to block his confirmation so powerful (and possibly fruitful by the time this article sees print, though many of us fervently hope otherwise).

*Roe über alles*—*Roe* first, last, and always—*Roe* as the test of purity and probity—*Roe* as everything there is in life: so wacky this test; so morally off-center. And so modern. So tragically Today.



"*Nót the funky chicken?*"

## A Protocol for Medical Murder

Stephen Vincent

It might have been called “A Modest Proposal,” recalling as it did Swift’s satire proposing the eating of infants to solve the hunger problem. Yet this recent article was no satire. Tucked unassumingly into the slick pages of a New York *Times Magazine* opinion column, amid the usual array of soft porn fashion ads, it was a trial balloon floated over the culture on a sleepy summer Sunday. Let’s talk about—mind you, just talk about, dear reasonable reader—ethanizing infants, suggested *Times* writer Jim Holt on July 10.

He is frank, honest, engaging, and lets us know right from the start that this is a *serious* discussion. After all, the article is titled “Euthanasia for Babies?” which does sort of cause the morning coffee to jump in the stomach. The author lays out the shocking proposal and even argues against it himself, asking how a culture based on rights and freedom and compassion for the helpless could even contemplate killing its innocent infants. How would such an idea fly, Holt asks his refined readers, at that ultimate venue of civilized debate—the dinner party? He does not hasten to the answer, letting the reader form an instinctive repulsion to the idea, then softly draws out his trump card designed to make us feel a bit foolish for going with our gut reaction. After all, Holt explains, we are talking about killing newborns for *their own good*, to put them out of excruciating pain, under controlled clinical conditions. We all have aversion to this horrible-sounding task, he humbly admits, but we must suck in the gut, take another sip of coffee, get the sleepy sentiments out of our heads and be brave for the sake of the children who must be killed. They need us to do what they cannot do for themselves, and what responsible adult would refuse?

In this way, the author introduces the topsy-turvy world of the Groningen protocol. Killing is called euthanasia (“good death”). Pain and suffering are the ultimate enemies to be fought at all costs to the foundations of our culture and our conscience. Evil is dressed in the raiment of good. In the time it takes Holt to dismiss “a dubious distinction between ‘killing’ and ‘letting nature take its course,’” he has taken readers through the thickets of Christian culture, scaled a mountain of legal impediments, leaped a chasm of biblical commandments and forded a river called Styx to arrive at the ancient pagan culture of Rome, where “reason” prevails over “sentiment” and the “unflinching honesty” of the paterfamilias prevails over the “moral

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Stephen Vincent writes from Wallingford, Conn.



sentiments” of anyone objecting to the wails of the abandoned baby in the woods. Though you don’t know it, dear reader, you are the barbarian at the gate of this classic culture, banging away with your millennia of Western Christian culture that would seek to keep alive this infant who would suffer a short life of howling pain to satisfy your soft conscience.

The author is quite clear that the biblical religions must go, or at least acquiesce, if “progress” is to be made, if we are to answer yes to the question he would raise at a dinner party: “Are we humans getting more decent over time?” Holt writes that infanticide has been common throughout most of human history. In some societies, like the Eskimos, the Kung in Africa and 18th-century Japan, it served as a form of birth control when food supplies were limited. In others, like the Greek city-states and ancient Rome, it was a way of getting rid of deformed babies. (Plato was an ardent advocate of infanticide for eugenic purposes.) *But the three great monotheistic religions, Judaism, Christianity and Islam, all condemned infanticide as murder, holding that only God has the right to take innocent human life.* Consequently, the practice has long been outlawed in every Western nation.

Everything was fine, evidently, in Alaska and Africa and even in the Greco-Roman seedbed of the West until the children of Abraham came along with their unbending belief in one God and His authority over all created things. Notice also that Holt slips a radical redefinition into his breezy historical survey. Killing a child already born is not what most people mean by the term *birth control*, which is usually reserved for various forms of contraceptives or abortion before the child is out of the womb. What Holt refers to is more accurately called *population control*, but he purposely avoids that term for the more accepted birth control, which is practiced by the large majority of Americans on a daily basis. Here we have an instance of what the late Cardinal John O’Connor often warned about: a change in morals is always preceded by a change in language. Perhaps fellow *Times* magazine columnist William Safire will write an “On Language” article on the first use of *birth control* to mean *infanticide*.

Holt’s version of *birth control* may pop up in a Planned Parenthood press release touting the clinically caring way to liberate women and fight poverty by euthanizing newborns. Then may come the term *post-natal fetus*. The word *baby*, with its cuddly connotations, will be kept from public view. Holt also provides the legal industry with a handy term when he asserts that “to keep alive an infant whose short life expectancy will be dominated by pain—pain that it can neither bear nor comprehend—is, it might be argued, to do that infant a *continuous injury*.” Look for that term, which I have italicized, in future legal proceedings *in re Groningen protocol*.

Holt additionally assures us that in our advanced, technological culture, infanticide is not as bad as it sounds, and would surely not involve infants flailing in the fire or wailing in the woods. The little ones would be sent off to infinite sleep by an overdose of morphine and midazolam introduced to their I.V. bottles. A few seconds, and their bony, bird-cage chests would rise no more. Though it may not *seem* so at first, this act is actually an advance in the moral structure of our culture. It is scientific, and done only under the most stringent of conditions to guarantee that this act of killing babies, which sounds so horrible, will be performed only in the worst cases and with full consent of doctors and parents. There will be no slippery slope, Holt insists. Only babies with intractable, incurable pain who everyone involved really wants dead will be killed.

#### **Nazi Undertones**

Any “protocol” with a German-sounding name that proposes for any purpose the killing of innocents should raise a big red flag in our post-Nazi era. Yet how can our post-*Roe* regime resist? After swallowing the camel of killing healthy babies on the verge of being born, are we to strain out the gnat by rejecting the idea of killing grossly deformed *born* babies for their own good?

As Holt helpfully points out, the protocol is named after the city where it was developed in the Netherlands, “the very heart of civilized Europe,” and news of it was published last March in the prestigious *New England Journal of Medicine*. He doesn’t note, though, that the Netherlands already is well along the slippery slope he assures us does not lay ahead, having years ago legalized physician-assisted suicide for the old and incurable, under so-called stringent conditions. Dutch authorities have admitted, though, that countless numbers of patients (Hitler’s “worthless eaters”) have been “ethanized” without their consent, and none of the death doctors has been prosecuted for murder.

The doctors of the Groningen protocol also have not been prosecuted, he points out, though the practice of overdosing newborns is technically illegal in the Netherlands. One of the authors of the medical journal article, Dr. Eduard Verhagen, admits to “presiding over the killing of four babies in the last three years.” When you’re well down a slippery slope, evidently it’s difficult to tell which way is up.

For Holt to tell us about the obscure practices of the Eskimos and the Kung, and not alert us to the forced euthanasia going on today in the country he’s studying reveals his agenda. He’s stumping for a cause, not presenting the facts.

Soon after the *Times* article appeared, the Dutch government released a

study on the deaths of 64 children which found that doctors had hastened the death of 42 of them. Old people already think twice before entering a hospital or nursing home in the Netherlands for fear of being killed without consent. Will parents now fear to take a severely sick child to a doctor?

Reason v. Sentiment

Holt attempts to frame the debate in terms of the excessive sentiments and religious sensibilities of the “right-to-life” absolutists versus the clinical reason and technical expertise of the Groningen protocol. Yet the sides are not so easily separated. Right-to-life advocates also have claim to reason by the application of the natural law, which defines some acts as evil in themselves regardless of circumstances, and the solid science of genetics that shows each human to be unique and unrepeatably. The Groningen advocates, on the other hand, may be overly swayed by an emotional response to the clinical experience of seeing newborns suffer.

Holt cites the case of a Dutch baby girl named Sanne, who was born with a severe form of the rare skin disease, Hallopeau-Siemens syndrome. Sanne’s skin “would literally come off if anyone touched her, leaving painful scar tissue in its place.” Her parents asked doctors to “put an end to her ordeal.” The doctors refused, fearing criminal charges, but the child died a few months later of pneumonia.

The question is compelling. How do we deal with the cries of a baby who cannot be touched and will never interact throughout her abbreviated life? The tables, in a sense, are turned on pro-lifers because hers are not the cries of a child exposed in the wilderness. They are the cries of a child kept alive by adherence to the sanctity of life and the agency of modern medicine. The Groningen protocol is a response to this emotionally wrenching situation. In the case of baby Sanne, reasoned appeals to the right to life, a slippery slope and the good of society may come off as heartless as the above question lingers. It is a question akin to the one pro-lifers often pose at the doors of abortion clinics: Don’t talk about world poverty or population, what about *this* baby who is suffering now?

City of God

We need to formulate an answer based not on what is expedient or emotionally satisfying, but on what is good and what is evil. We must reclaim the moral tenets of the Christian West.

As Holt advocates the ancient practice of infanticide, he also revives some of the old Roman critiques of Christianity, which was accused of causing the empire’s decline by preaching love of enemy and forgiveness to an im-

practical degree. Christianity, some Romans railed, had given voice to weak feminine sentiment, forbidding the exposure of infants, thus filling the empire with cripples and imbeciles. St. Augustine wrote his massive *The City of God*, in part, to refute the claim that Christianity had brought the fall of the classical culture as the fifth-century empire lay in ruins around him. Pagan culture, by its worship of false gods and moral decadence (the circus in those days was filled with bloody displays not painted clowns), sowed the seeds of its own destruction, Augustine insisted. Christianity, on the other hand, opened the way to a true and lasting civilization worthy of the more noble Roman ideals. In reality, the saint said, there is not Greek, Roman or barbarian, but the City of God and the city of the evil one, and each person, made in the image of God and regardless of earthly citizenship, belongs to one city or the other based on whether he or she chooses good or evil. In a world locked in an ideology of determinism and weary of capricious gods and debauched emperors of imputed divine descent, Augustine claimed that human free will was the engine of history. Each individual, from peasant to patrician, could determine his own fate and eternal abode by choosing good and rejecting evil.

As he wrote, Augustine could not see hordes of barbarian races Christianized and civilized, cathedral spires rising from the rubble of the Dark Ages or monastic chants and scriptoria preserving not only the sacred texts but the best thinking of Greece and Rome.

Yet today, in civilized areas such as the Netherlands, pagan practices are regaining ground under the guise of medical necessity. Christian culture seems exhausted, in need of an infusion of good news. What we need is another Augustine to tease out the threads of Christian truth and beauty in a European culture that refuses even to acknowledge its Christian roots. Or, as Pope Benedict XVI has written, we need another St. Benedict, innovator of the monastic movement that built the West, to re-evangelize Europe according to the modern forms of association, technology and communication. Augustine's tale of two cities holds true. The seeds of civilization lie in the heart of each one of us, and we determine our citizenship as we choose good or evil.

#### *Malum in Se*

The slippery slope has always seemed to me to be the weakest of all moral arguments. If our only objection is that the Groningen protocol would set us on a slope to moral decay, what would we say if we could absolutely guarantee that it would never be pushed beyond its limits? Could we argue that it is *malum in se*, evil in itself? Tough cases may make for bad law, but they

also make us think deeply about the facts of the tough cases. Does our rejection of killing innocents really wear away at the edges of difficult medical realities, as Holt claims? Are the sanctity of life and the slippery slope only invoked to protect the broad middle of Americans from lethal medical expedience, while we turn our thoughts from the tough decisions doctors make each day about the quality of life and the killing of incurable patients? Is Holt really the honest one by equating what he calls “passive euthanasia” (the denial of life-sustaining treatment for incurable patients) and real euthanasia, which involves an act and intention to cause a patient’s death? Do we really prefer putting babies like Sanne to sleep permanently, as her parents did, rather than letting them live in horrible pain? Is such a practice, in fact, more humane? Are we getting more decent over time?

Holt has identified a fine line, but it is no less bright for being thin. Christian ethics has contended with such issues and come to some conclusions that we push aside at our peril. You must never act to directly cause the death of a human person, nor may you intend directly his or her death. *First, do no harm* is a medical dictate that Christians preserved from the ancient culture Holt extols. The underlying assumption, difficult for some “realists” to accept, is that life is a good in itself, and pain and suffering are not the ultimate evils, to be avoided at all costs. The good news is that pain may be treated with strong medicines such as morphine, even up to the point of hastening a patient’s death, as long as the intention is to treat the pain, not to kill the patient to end the pain. Here we enter the sometimes gray area of intention, but we must not do away with the *Do no harm* rule because it is sometimes difficult to discern or apply. That would be, to use an especially appropriate saying, throwing out the baby with the bath water.

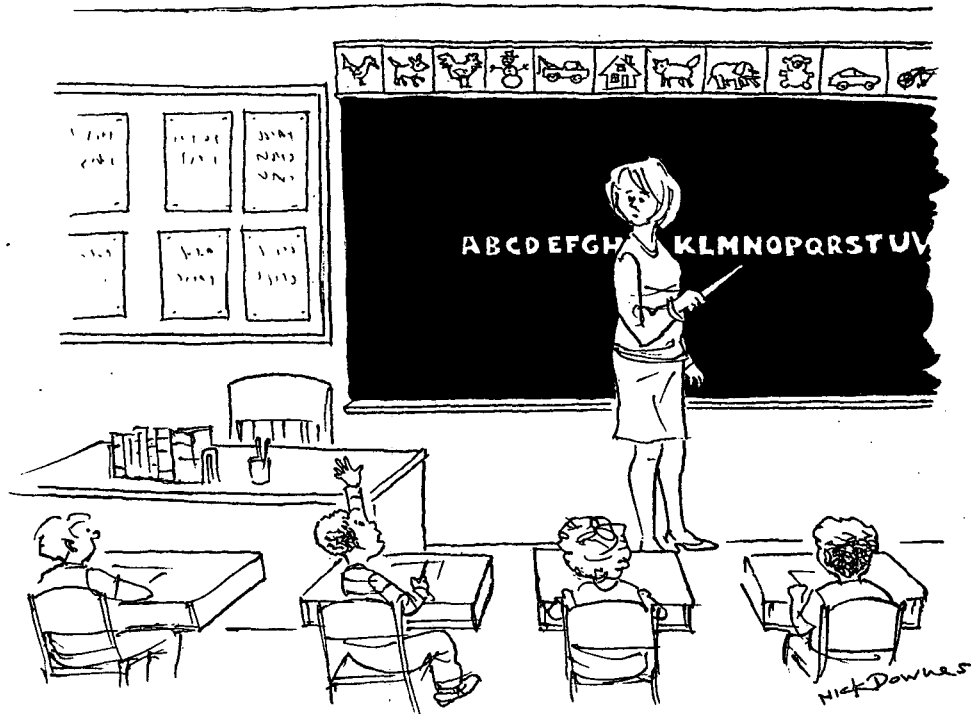
It is possible to see the bright line without religious faith, though faith certainly highlights it. Christian tradition insists that pain and suffering are what happen to people as a result of the human condition, including original sin, and they can always be directed toward a good purpose or intention. In the case of a baby Sanne, who cannot make sense of the pain, doctors can treat the pain aggressively, and possibly hasten death as an unintended second effect. And parents can see through their grief to view the good of their child’s life in itself. Would life be better if we had never seen Sanne or heard her cry of life in this fallen world? Do we do her and ourselves well to effect her death with a lethal act?

Good and evil, as Augustine stated at the beginning of the Christian era, are choices that people make, and they determine the direction of our lives and the thrust of history.

The point is portrayed dramatically in the movie “Judgment At

STEPHEN VINCENT

Nuremberg,” when the judge played by Spencer Tracy confronts his Nazi colleague pleading pathetically that he did not realize how far his unjust decisions would go. Tracy replies with simple eloquence that the Nazi judge had gone too far the first time he condemned a man he knew was innocent. The same can be said for the killing of innocent children in the Groningen protocol. We don’t need to argue the slippery slope. This is evil in itself, and must be stopped in its tracks.



*“Why are ‘N’ and ‘O’ always together?”*

## Human Embryonic Stem Cell Research:

### What's Wrong with It?

David S. Oderberg

Science does not take place in a vacuum. By this truism I do not mean what many would understand by it. I am not referring to the obvious fact that science takes place in society, and that many societies—indeed all “liberal” societies—are awash with competing views about what scientists should or should not be doing. We all know that scientists, especially those working in areas touching matters of fundamental concern to society, are surrounded by a swirl of diverse and inconsistent ideas coming from politicians and policy-makers, lobbyists, academics, interest groups, industry, finance, and “plain ordinary folk.”

When I speak of science as not being done in a vacuum, however, I am referring not to society but to the scientist's own character. For when it comes to a momentous issue such as human embryonic stem cell research, perusal of the literature reveals that far too many scientists *and* bioethicists (who, as supposedly trained philosophers, ought especially to know better) think that all the stem cell researcher should be doing is getting on with his research while leaving it to society somehow to solidify the ethical (and regulatory) quagmire the research leaves in its wake. For some researchers—the Severino Antinoris of this world—the view seems to be that their duty is to try—in the name of scientific freedom—to get away with as much as they can unless and until society, or the law, puts a stop to their endeavours. Most, however, take a more cautious and prudent position, namely that they should keep their heads down and get on with the job of pushing forward the frontiers of discovery in a way that does not cause any fright. For them, the task is not to get too far out of step with what society can tolerate, but to inch forward with their research in the hope that others will do the necessary work of negotiating the conflicting views surrounding that research and nudging the community toward a moral consensus that will gain for the scientist as much freedom as possible.

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Such an attitude is radically misguided. For there is no such thing as a “division of ethical labour” paralleling the division of labour in economics, or finance, or science itself. The scientist is always a human being first, a scientist second. It is not for him, any more than for the rest of us, to leave the hard moral decisions to others. Even when we implicitly trust the moral judgment of another, it is in the end up to us as rational agents to reflect on the opinions passed on to us, in short to *consult our conscience* as to whether, given the arguments, what we do is right or wrong. There is nothing special about human embryonic stem cell (HESC) research in this regard. It is like research on, say, nuclear weapons, or genetically modified crops, or animal experimentation, or any research that has an ethical dimension. The HESC researcher is in no way allowed to go on a “moral holiday” simply because he is not a trained philosopher or does not believe himself competent to assess the moral arguments. Rather, he must listen to those arguments, from whatever quarter they may originate, assess their cogency, and ask himself: “Is what *I* am doing ethically acceptable?”

The position I will defend in this presentation is that HESC research is unqualifiedly and gravely immoral. Note that by saying “immoral” I am *not* referring to the character or motives of any HESC researchers. I have no doubt that many are motivated by a genuine desire to cure disease and benefit mankind. I also do not doubt that many sincerely believe that what they are doing is anything but wrong. But it is, and neither a motive however innocent, nor a conscience however pure, can make an intrinsically bad act into a good one.

I do not have the space to canvass all of the arguments proposed in the literature in favour of HESC research. Some arguments seek positively to defend it, others to refute the objections to it and so leave open the strong possibility that it is permissible. In my view not a single one of these arguments is sound. I will now go through a selection of them, explaining briefly what is wrong with each one.

**F**irst, however, let me start with the straightforward argument against HESC research. I begin with the principle that every innocent human being has an inviolable right to life. In fact every human being has a right to life which is inviolable, but it can be forfeited in certain cases (war, capital punishment, self-defence). So when people speak of the “sanctity of life,” they (should) mean the lives of innocent human beings. The sanctity of life is a principle of equality—equal, unconditional respect for innocent human beings. It is the bedrock of any nation or society that would call itself civilized. No ethical system that lacks the sanctity of life as one of its foundational principles



can avoid implications that are ethically repugnant. A corollary of the sanctity of life is what some have called the principle of solidarity, namely that there is no true sanctity of life without special protection for “the last and the least,” i.e. the most vulnerable and defenceless human beings—the young, the old, the sick, the disabled.<sup>1</sup> A further corollary of the sanctity of life is that no human being should be treated as anything less than an individual with unconditional intrinsic worth and inherent dignity. And this is incompatible with treating human beings as commodities, chattels, pure objects of use, sacrificial victims, or experimental subjects (in the last case without consent).

Now I recognize that there is much room for debate about what these principles mean exactly and how they are to be applied in practice, but even a simple statement of them is sufficient to show their incompatibility with HESC research, at least in any form in which it is currently practised. For such research involves one or more of the manufacture, experimentation upon, and destruction of innocent human beings. These practices are jointly and severally inconsistent with the sanctity of life and the inherent dignity of the human being. As such, HESC research is seriously wrong.

So much for a brief statement of the positive argument against. I will now survey some of the principal objections to the position I have outlined. The first is the obvious one that the embryo is not a human being in the first place. If true, the position I am defending falls at the first hurdle. But is it true? Mere assertion does not make it so. One common defence of the objection is the famous (or rather infamous) argument from twinning, which formed the basis of the UK government’s decision to allow embryo experimentation, and now cloning for research (aka “therapeutic” cloning) up to the formation of the primitive streak.<sup>2</sup> The idea is that where twinning is possible, there is no individual human being. I will not spend much time on this specious argument, since Dr. Louis M. Guenin has done his best to broadcast its speciousness to all who will listen.<sup>3</sup> For cells divide, but that does not show they are not individuals. Lower orders of animal such as worms can be divided, but that does not show they lack individuality. Plants can be split and replanted, but they are still individuals. So why shouldn’t the same be true of human or other embryos?

It might be rejoindered that there is a false analogy: embryos are not mere cells and are not like plants or worms. In one sense this is true, but not in a way that will give succour to the defender of HESC research. I am quite happy to concede that no embryo, least of all a human one, is a mere cell (or lump of cells). More important for present purposes, though, is that the analogy is a perfectly good one when all we are considering are basic properties

common to all organic entities, namely properties of organic growth, development, and perpetuation, what philosophers have traditionally called “vegetative properties.” The mere fact that some organic entity can divide of its own accord, or be divided by an external influence, into conspecific descendants, even if the original ceases to exist in the process, simply does not entail that the original entity is not an individual. Hence the argument from twinning is a failure.

The related “argument from totipotency” fails for a similar reason. Here there is a certain terminological confusion in the literature which can obscure the issue. Embryologists usually reserve the term “totipotent” for the potential of a stem cell, if there be such potential, to develop into a human being in its own right, once removed from the embryo containing it. By contrast, its potential, if there be any, to develop into any differentiated somatic cell is called “pluripotency,” as is its potential to develop into many kinds, though not all, of such cells. In the philosophical literature, however, “totipotency” is often used to cover potential development into any somatic cell and/or a human being.<sup>4</sup> Scientists and philosophers would do well (a) to refine their terminology here and (b) to use it consistently.

Nevertheless, what HESC defenders mean when using totipotency against individuality is the alleged potential of an embryonic stem cell to develop into a human being in its own right. Yet this argument fares no better than the twinning argument. For one thing, we should note that the claim itself is empirically false.<sup>5</sup> Embryonic stem cells, once extracted, lack a trophoblast, which is essential for embryogenesis. To develop into a human being they would need supplementation to enable the formation of a trophoblast and other supporting structures. Metaphysically speaking, this means radically changing the nature of the stem cells, in other words turning them into parts of a new, augmented entity that, if itself intrinsically capable of normal embryonic development, would be an embryo.

But suppose this were wrong, and that someone found a way of inducing normal embryonic development in an extracted stem cell without doing anything that radically altered its nature. Suppose, for instance, that someone found the right nutritive environment in which development could take place without further ado. This would still not militate against the individuality of the parent embryo from which the stem cell was extracted. Once again, plants are capable of having many parts removed and regrown into separate and distinct plants, but that does not contradict the original’s individuality. The same is probably true for some lower orders of animal. Even if not, on the hypothesis that it were we would not thereby be entitled to infer that the parent organism was not an individual, absent behavioural indicators to the

contrary. I conclude that the argument from totipotency fails to undermine the individuality of the human embryo.

A different argument is based on the claim that until about four days after fertilization or its equivalent, the blastomeres are not differentiated into embryoblast and trophoblast. But since the trophoblast gives rise to extra-embryonic structures, it is impossible to speak, before such differentiation, of *the* embryo.<sup>6</sup> Though an interesting argument, it does not work. Note again that there is an empirical question over the implied assumption that embryoblast and trophoblast (or supporting cells in general) are sharply distinguished, the former giving rise to the so-called “embryo proper” and the latter to the placenta and other extra-embryonic structures. But this may not be the case. It seems that the hypoblast<sup>7</sup> is displaced to extra-embryonic regions, and though it gives rise to extra-embryonic structures such as the yolk sac and allantois, there also appears to be intermingling between the hypoblast and the epiblast: part of the yolk sac is incorporated into the primordial gut of the embryo, and the allantois is incorporated into the embryo as the median umbilical ligament.<sup>8</sup> Why, then, should we exclude the likelihood of intermingling between embryoblast and trophoblast—or at least between embryoblast and other supporting structures, even though the trophectoderm, which forms directly from the trophoblast, is as far as we know fixed? Whatever the details, the point is that one cannot simply assert that before differentiation into embryoblast and trophoblast there is no human individual if, as a matter of fact, *after* differentiation the embryo is still directing or controlling which cells become structures of its body proper and which do not.

Even if there *were* no such intermingling between layers, however, the argument would not go through. For “extra-embryonic” and “embryo proper” are ambiguous terms. What they apply to in fact is the distinction between, on the one hand, structures that belong to the body of the embryo as defined by the boundaries of its head, tail, front and back—that which is the early stage of the mature body—and, on the other, the extra-corporal structures discarded at birth. But supporters of the argument in question conflate this proper usage with the idea that structures that are “extra-embryonic” or do not belong to the “embryo proper” do not, ipso facto, belong to the embryo *at all*. Yet this is false. The placenta, yolk sac, and other supporting structures clearly belong to the embryo, *not* to the mother. Hence the mere fact that in early development they cannot be distinguished from those parts of the embryo that are *not* discarded at birth does nothing to undermine the individuality of the embryo at this early stage. All it shows is that in the first few days of development one cannot distinguish between internal

and external parts of the embryo, i.e. between the embryo's body as defined above and the structures discarded at birth.

The position I defend, then—and I have looked here only at the main arguments against it—is that the embryo is a human being even at the stage that stem cells can be extracted from it. It is a self-contained, self-organizing entity with a full genetic programme giving it the complete intrinsic potential, given only a hospitable environment, to develop into a mature member of its kind.

Nevertheless, when it comes to the moral status of the embryo, by far the dominant view among supporters of HESC research is that the considerations just advanced, even if correct, are irrelevant. Even if the embryo is a human being, it does not possess an unconditional right to life since it is not a “person” in the philosophical sense made notorious by Peter Singer and other bioethicists. The issues can be subtle and complicated here, and I have addressed them at length elsewhere.<sup>9</sup> So I will try only to summarise my view of the situation. A good place to start is Dr. Guenin's article,<sup>10</sup> in which, after correctly dismissing a number of *bad* arguments in favour of embryo experimentation, he unveils what appears to be a novel argument called the “argument from nonenablement.” There are a number of strands to this argument, which I will try to unpick.

The basic thought is that where a couple “donates to medicine” an IVF embryo or one produced from their donated cells, this embryo acquires a new moral status: it becomes what he calls an “epidosembryo,” one whose sole existence is now for the sake of the welfare of others. Such an embryo, Dr. Guenin concludes, may be used for research. But why? Here is where the various sub-arguments come into play. One thing Dr. Guenin says is that the embryo is not sentient, lacks a cortex and so cannot form preferences, nor can it adopt ends. Therefore, nothing anyone does to it can discomfort or frustrate it. (Let us leave aside the evident fact that killing it frustrates its life.) Moreover, since there is no “morally significant chance” that it will develop into an infant, there can be no “possible person” that corresponds to an epidosembryo.

Now by referring to “possible persons,” Dr. Guenin seems to be bringing in a kind of argument from potential, not from mere possibility. As far as possibility goes, of course the “epidosembryo” is still a possible person—assuming for the sake of argument that it would be a possible person were it not donated for research—because one can easily conceive of a world where it was *not* donated for research and developed into a person! So he must be saying something stronger, namely that in the actual world there is no realistic possibility of the “epidosembryo's” becoming a person—it is not a

potential person. But then it would be a potential person were it not donated. Yet basing a duty to protect an embryo's life on the ground of its being a potential person in the sort of sense Dr. Guenin has in mind is tenuous, for as liberal bioethicists are fond of repeating, a potential X does not necessarily have the rights of an X: a vegetarian who said that because an egg is a potential chicken she may not make an omelette would be philosophically confused. So if Dr. Guenin is serious about protecting at least some classes of embryo, he ought not to take comfort in arguments from potential. Or if he isn't serious, he should take a conceptual shortcut, forget about donation, and argue along with other liberal bioethicists that no embryo is more than a potential person, and thus does not—absent an argument to the contrary—have the rights of a person.

More importantly, though, suppose we assume that potential in the sense understood by Dr. Guenin and other supporters *were* morally significant. Then his argument would have the absurd consequence that a sufficiently malicious and devious scientist could so arrange things as to be allowed to experiment on just about anyone! Following an edifying lecture on “epidosis” (i.e., donation) by our scientist, parents of children who are too young to have “adopted ends” or to “form preferences” (of any meaningful sort stipulated by “personist” bioethicists) could legitimately “donate” them for research. So could the guardians of senile and mentally handicapped humans who have no “morally significant chance” of attaining or recovering “personhood.” As for the rest of us, to ensure there is no morally significant chance of our being “caused discomfort” or “frustrated,” all our devious scientist with one eye on “epidosis” needs to do is either get us sufficiently inebriated, or wait until we are asleep, and whisk us off to a holding centre from which there is no chance of escape. He could then give us—before sobriety or wakefulness returned—a long-acting general anaesthetic and then experiment on us to his heart's content. I cannot believe Dr. Guenin would welcome this implication of his position, so if he cannot distinguish these cases from that of the “epidosembryo,” he had better rethink his argument.

Perhaps he might reply that the cases are different because the kinds of people I have just mentioned—namely, all of us—have *already* adopted ends and formed preferences of a meaningful sort (let us leave aside for the moment the mentally disabled who have never done so), so we have a “stake” in our continued existence that the embryo does not. One occasionally sees this thought in the bioethical literature, but I have always failed to see its force. Why the ethical bias towards the past? One might as well say that a *million dollars won in Las Vegas and later spent* makes me presently wealthier than if I merely had an excellent chance of winning a million dollars tomorrow.

If anything, the bias should be towards the future: I'd rather have the excellent winning chance though I had no cash right now than be the one whose money is all spent and who has no winning prospect. Unless, of course, I had spent my winnings on useful assets. But then the only worthwhile feature of such assets is that I would be able to sell or use them *in the future*. Yet in the cases I described, there *is* no chance of doing anything in the future with our prior investment in life. We will have become pure "epidospeople."

The objection I am levelling is an application of a general objection I and others have raised elsewhere against "personism": there is no sound conceptual method for regarding embryos as "non-persons" while continuing to regard as "persons"—and hence as worthy of serious moral respect—the drunk, the drugged, the sleeping, the comatose, the senile, the very young, and the severely disabled.<sup>11</sup> Some bioethicists, such as Peter Singer, are not too bothered that *some* of the above end up as "non-persons" on this theory, but they have still failed to account for the ones they want to *retain* within the magic circle of "personhood."

Dr. Guenin and other "personists" might want to reply that, unlike embryos, the sleeping and the drugged *do* have preferences; surely it is true to say that even while asleep Dr. Guenin (let's call him "sleeping Lou") still believes the Earth is round. I agree, but the reason why sleeping Lou still has beliefs, desires, and preferences is precisely because he is still in a dispositional state—all you need to do is wake him up and ask him whether, say, he wants to go on living. In other words, his sleeping preferences are grounded in a future-oriented disposition. So why is the embryo any different? Just give it an hospitable environment, wait long enough, and hey presto!—it too will tell you whether it wants to go on living. But, comes the rejoinder, Dr. Guenin has preferences *qua adult*, even while asleep, whereas the embryo has no preferences *qua embryo*. This will not do, since sleeping Dr. Guenin has no preferences *qua sleeping Lou*; rather, he has preferences *qua human being* capable of being roused from slumber into consciousness. So too the embryo has preferences, not *qua embryo*, but *qua human being* capable of developing, given the right conditions, into a *conscious* human being. Human beings are the sort of animal that has preferences. The embryo is a human being. Therefore, the embryo is the sort of animal that has preferences. The same goes even for a severely disabled person who will *never* attain the state of holding conscious preferences. Why? As Jenny Teichman once put it—all cows are mammals, even the bulls.

Here are some more problems with Dr. Guenin's argument from non-enablement that serve to highlight the position defended by opponents of

HESC research. He claims: “There is no moral view of which I know that asserts a duty [on a woman’s part, and presumably also on that of the male cell or gamete donor] of intrauterine embryo transfer.”<sup>12</sup> From which he concludes that we should respect the woman’s “autonomy” to donate her embryo for research. But this, as it stands, is a non sequitur. How does it follow that she is permitted to make such a donation? Does her “autonomy” also allow her to do other things with her embryo, such as donate it for manufacture as Soylent Green to save the world from starvation? Or maybe just to flush it down the sink? What has “epidosis” to do with it, unless one is a utilitarian who believes the ends justify the means?<sup>13</sup> in which case I am more than happy to argue against *that* (as would Dr. Guenin, who stoutly rejects utilitarianism in his paper).

More generally, Dr. Guenin seems to want to argue that from the absence of a duty of intrauterine embryo transfer it follows that there is no duty to save the embryo’s life. Again, this is a non sequitur. And even if it does follow that there is no duty to save its life, it does not follow that the woman, man, or anyone else is allowed to procure the embryo’s death, whether by donation or any other action.

Not only are there a number of non sequiturs in Dr. Guenin’s argument, but it is also filled with ambiguity and loaded terminology. For instance, he proposes for consideration a “final decision” by a woman and her partner to donate an embryo for research; from which he concludes that the embryo has “left parental control.” But “parental control” is ambiguous: does he mean physical or moral control? I would argue that such a decision no more entails a loss of *moral* control and responsibility than the abandonment of a newborn baby (absent the baby’s danger of death if retained by the mother, which does not apply to Dr. Guenin’s case).

An example of tendentious terminology is given when Dr. Guenin speaks of a “*gift* to medicine of a *life form* that, were they to *decide* otherwise, *could* become their child.”<sup>14</sup> As if the embryo were no more than a chattel, or perhaps an organ like a kidney, that lay within the couple’s “gift”—this term handily doing the extra job of playing on our emotional response to the idea of helping to save life by advancing medicine. As if the embryo were no more than a “life form,” which helps to distance us from its ontological reality. As if the couple merely had to *decide* its fate, like the emperor and crowds at a gladiatorial combat. As if the embryo *could* become their child but was not their child already.

Again, when Dr. Guenin speaks of the “duty of mutual aid asserted within each of the leading moral views of our time,”<sup>15</sup> he omits to show exactly why that duty does not apply to each and every human being, embryos included.

When he speaks of “the autonomous decision of couples,”<sup>16</sup> he presses the “autonomy button” without explaining whether he really thinks that human liberty and autonomy are not subject to the laws of morality, not least the law of justice that says that the rights of every human being must be respected and never violated—which if it does not apply to the right to life does not apply to anything. Finally—though there are more examples like the above that I could extract from Dr. Guenin’s discussion—he asserts that “we cannot promote any advantage of epidosembryos.”<sup>17</sup> Well, we could save their lives, and that sounds to me like an advantage. But, comes the reply, they are already marked out as *epidosembryos*—as though giving them an exotic name changes their moral status. Here it *looks* as though Dr. Guenin is backtracking on an argument he explicitly—and correctly—rejects earlier,<sup>18</sup> namely that imminent death licenses killing. Of course it doesn’t: if I find my enemy Fred tied to a railway line and a train is approaching, I am not entitled to celebrate my good fortune at his misfortune by untying him, pulling him from the track, and shooting him dead myself! According to Dr. Guenin, who is keen to distinguish, as far as the argument from non-enablement goes, “it is not that death is imminent, but that development is bounded.”<sup>19</sup> A strange distinction, as I implied earlier, for it seems to mean that if death *happens* to be imminent I may not kill, but if I engineer things *myself* so that death is imminent—for that is what “bounded development” euphemistically amounts to—then I am magically free to carry out my designs.

Maybe I am being too harsh here, since it might be claimed that “bounded development” is broader than “imminent death” in the following sense: why couldn’t the couple donate for research, whether destructive or non-destructive, either an embryo, or cells that will be used to produce an embryo, that has intrinsically, or will be induced to have, a limitation on its potential to undergo normal embryonic and foetal development? How could such an entity even be called a human being if it intrinsically lacks the potential for normal human development?

Such is the sort of idea being promoted by William Hurlbut, with his concept of Altered Nuclear Transfer. I think it is too early to say at present what the empirical facts are or will be, but the ethical guidelines should be clear, given what I have argued.<sup>20</sup> It would be seriously wrong to take an existing human embryo and deform it, say by interfering with its genome, into what is essentially a handicapped human that will never realize the potential it previously had. Just as it is wrong to do this to an existing human, so it is wrong deliberately to *produce* a human in that condition, say by altering the somatic cell before nuclear transfer. Nor does any person have the right to *hand over* a human embryo for such a purpose, nor to hand over



the precursor cells to such an embryo, which would constitute complicity in the immoral enterprise.

What, though, if the entity created could not even properly be called an embryo at all, not even a deformed one? Here we are at the limits of current knowledge. Perhaps—and it is a huge perhaps—there will be a possibility of harvesting genuinely beneficial and usable stem cells using only somatic cell nuclear transfer and animal eggs or maybe even synthesized trophectoderms (though not human eggs). Here is an activity with which I cannot see any obvious ethical problems, on the large assumption that the created entity was known not to be a human embryo. Should there be any doubt whatsoever, the practice could not be allowed since we should use a principle of prudence in ethics according to which, if we have reasonable doubt whether what we are doing is seriously wrong, we should refrain as a matter of conscience. In particular, if I am about to destroy something and have a realistic suspicion that it might be a human being, I should give the object of my designs the benefit of the doubt. Hence all proposals for Altered Nuclear Transfer or something similar must be treated with extreme caution, and scientists have a responsibility to avoid making or heeding “messianic” proclamations that run the real risk of creating false hopes in the face of substantial ignorance as to what such proposals really entail, both empirically and ethically.

I would like to end with some brief theoretical remarks and then some practical observations. On the theoretical level, I want to emphasize that the principle of equal respect for all persons, in whatever condition and whatever stage of development, is the only foundation on which a civilized morality can be based. No other theory, be it utilitarianism, consequentialism in one of its many guises, contractualism, or even so-called virtue ethics, avoids conclusions that are morally repugnant and an offence to humane values. In particular, once we start trying to isolate certain categories of human being as “non-persons,” as somehow outside the scope of our ultimate ethical concern, we set ourselves on a path that is fundamentally anti-human and inhumane. This is especially the case if we ignore the equal claims of the “last and least,” the most vulnerable among us who are least able to speak for themselves.

When it comes to the human embryo, by seeing it as the person it really is, we do not appeal to its potential to become a mature member of its kind as the *reason* for giving it respect now. The respect is in no wise *prospective*. Rather, its developmental potential merely reflects what the embryo actually is *now*, namely one of us, just as we all were like it at an earlier

stage of our development. The embryo is not a potential person but an *actual* person whose capacities have not yet reached full flowering in actual behaviour. If “personism” is to be used as an ethical term at all, it can only legitimately be used in a way that applies to such an individual as much as to the adult members of its kind, since only such a usage reflects metaphysical and biological reality.

On a practical level, I observe what many have seen already: that biotechnology possesses, even more than nuclear technology, the practical possibility of taking humanity into an abyss from which it will assuredly never escape. Like all human inventions, however, it can also make a real contribution to the common good—in this case health benefits of a kind that were only figments of the imagination barely half a century ago. No biotechnologist can shirk the personal responsibility of deciding for himself what path he wants to go down. He cannot simply ask a philosopher or look in an ethics textbook, because contemporary ethics is far too fragmented even to pretend to be speaking with a unified voice. Nor should he treat morality much as the Greeks and Romans treated their gods, namely as some kind of supermarket from which to select the “value system” that best suits his personal prejudices, prior convictions, or the expediency of the times.

On the contrary, in the face of the many material inducements on offer, each biotechnologist *must* listen to all the arguments on all sides, without fear or favour, and make a personal, rational decision as to just what kind of research he wishes to engage in. Fortunately, with developments in adult stem cell research offering real promise, the biotechnologist need not treat stem cells as a no-go area. Nature positively holds out for inspection and admiration the possibility of forms of research that are consistent with fundamental human values. Only the individual scientist can, listening carefully to the still, small voice of conscience, decide whether to take up the offer.

#### NOTES

1. See Colin Harte, *Changing Unjust Laws Justly: Pro-Life Solidarity with ‘The Last and Least’* (Washington, D.C.: Catholic University of America Press, 2005).
2. Prominent adherents of the twinning argument include John Harris, *The Value of Life* (London: Routledge, 1985): 11, and Peter Singer, *Practical Ethics* (Cambridge: CUP, 1993): 156-7, both of whom repeat the argument in many places throughout their writings. The argument formed the conceptual basis of the Warnock Committee’s 14-day limit on embryo experimentation: *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd. 9314, Department of Health and Social Security (UK), 1984). I refuted the argument at length in my “Modal Properties, Moral Status and Identity”, *Philosophy and Public Affairs* 26 (1997): 259-98. I have since been informed by several embryologists that they considered the Warnock Committee’s reliance on the twinning argument as only ever a political expedient to enable the research to go ahead, rather than as involving an argument with either philosophical or biological

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- merit. As long as a cut-off point could be sold to the public, most of the desired research could continue undisturbed.
3. See, e.g., L. Guenin, "The Morality of Unenabled Embryo Use—Arguments that Work and Arguments that Don't," *Mayo Clin. Proc.* 79 (2004): 801-8.
  4. See, e.g., J. Harris, "The Ethical Use of Human Embryonic Stem Cells in Research and Therapy," in J. Burley and J. Harris (eds), *A Companion to Genetics* (Oxford: Blackwell, 2002): 158-74 at 163.
  5. See D.M. Gilbert, "The Future of Human Embryonic Stem Cell Research: Addressing Ethical Conflict with Responsible Scientific Research," *Medical Science Monitor* 10 (2004): RA99-103, at [www.upstate.edu/biochem/faculty/gilbert/publications/gilbert\\_humanES.pdf](http://www.upstate.edu/biochem/faculty/gilbert/publications/gilbert_humanES.pdf) (accessed 7 Nov. 05).
  6. J. Harris, *The Value of Life*: 11, and *Clones, Genes, and Immortality* (Oxford: OUP, 1998): 47.
  7. The layer of cells adjacent to the epiblast (from which the embryo's body develops) on the side facing the blastocyst cavity.
  8. See further Keith Moore, *The Developing Human* (Philadelphia: W.B. Saunders, 1982; 3rd ed.): ch.7; the observation is repeated in the 5th edition (1993) by Keith Moore and T.V.N. Persaud. I have not checked the 6th edition (1998). The references to Moore and Persaud come from C. Ward Kischer and Dianne N. Irving, *The Human Development Hoax* (2nd ed., 1997; no named publisher): 41-3. Kischer is Associate Professor Emeritus, Cell Biology and Anatomy, University of Arizona College of Medicine. See also Irving, "'New Age' Embryology Text Books: Implications for Fetal Research," *Linacre Quarterly* 61 (1994): 42-62. I am grateful to Dr. Ann A. Kiessling of the Beth Israel Deaconess Medical Center for discussion and clarification of the embryological facts related to this issue.
  9. See D.S. Oderberg, *Moral Theory* (Oxford: Blackwell, 2000): 174-184.
  10. "The Morality of Unenabled Embryo Use": 804ff.
  11. See note 9 and also J.A. Laing, "Innocence and Consequentialism: Inconsistency, Equivocation and Contradiction in the Philosophy of Peter Singer," in D.S. Oderberg and J.A. Laing (eds), *Human Lives: Critical Essays on Consequentialist Bioethics* (London/New York: Macmillan/St Martin's Press, 1997): 196-224.
  12. Guenin, "Morality": 804.
  13. Moreover, as one embryologist explained to me, since all morality was relative it was simply a question of finding a way that allowed scientists to carry on their research in the light of their own personal value systems.
  14. Guenin, "Morality": 804.
  15. *Ibid.*: 804-5.
  16. *Ibid.*: 805.
  17. *Ibid.*: 805.
  18. *Ibid.*: 801.
  19. *Ibid.*: 805.
  20. At the time of writing, the journal *Nature* has just published two articles detailing methods of obtaining stem cells while potentially avoiding ethical difficulties associated with the current techniques destructive of the embryo (*Nature* 437, 20 Oct. 2005). One technique involves using a single-cell biopsy procedure to obtain stem cells without destroying the embryo or affecting its subsequent development. The other involves altering the nucleus before it is transferred to the egg, so that the resultant embryo lacks the ability to implant. Hurlbut claims that this latter kind of embryo, lacking from its very beginning the developmental potential of a normal embryo, would not have the same moral status. Leaving aside the great factual uncertainty in such cases—e.g. whether in the first case the embryo might not suffer long-term harm (the *Nature* articles concern mouse embryos, it should be added)—it is still the case that the first technique involves experimenting on human beings, and using them for spare parts, without their being able to give consent (let alone the ethical problems with IVF, this being the source for the donor embryos), and the second is wrong for the reasons given above.

## Red in Tooth and Claw

John Muggeridge

In 1973, the High Court of the U.S. handed down *Roe v. Wade*; just two years later, Peter Singer, the high priest of “Animal Liberation,” handed down a book of the same name.<sup>1</sup> The first marked a defeat for the belief that all human life is sacred and, despite a strong anti-abortion backlash by a dedicated “pro-life” movement, *Roe* has not been reversed. Meanwhile, the second inspired a dozen or so university professors to launch a campaign to sacralize “animal rights” which, in the opinion of one well-known observer of social-protest movements, has now “come close to the mainstream of Western consciousness.”<sup>2</sup>

What’s happening here? How can two movements that preach so passionately against cruelty have met with such disparate success? One understands why Professor Singer’s cause has prospered. Any non-psychopath with Jewish or Christian roots must feel tender towards wounded animals. Once, when Winston Churchill’s chauffeur ran over a badger, Britain’s wartime prime minister was reduced to tears. And it was watching a cab driver beat his horse that finally drove Friedrich Nietzsche, the inventor of the Superman, into a mental asylum. No wonder the horror pictures used as propaganda by animal-liberationists work so well. In 1984, they managed to steal videotapes of baboons writhing in agony as their brains are being operated on in a University of Pennsylvania laboratory; the film persuaded the U.S. Department of Health and Human Services to withdraw funding from the National Institutes of Health for that particular research project.

It was also photography that enabled Brian Davies’ animal rights group, the International Fund for Animal Welfare, to score an even bigger victory, this time against Canada’s annual seal-pup hunt. From about 1970 on Davies included in his propaganda the carefully-posed picture of a young seal hunter brandishing a blood-stained baseball bat above a whitecoat pup. That did it. Who could fail to be moved by such a wee, sleekit, cow’rin, tim’rous beastie? In 1982 alone, material sent out by Davies prompted three-and-a-half *million* animal lovers to send postcards to the European Economic Community’s headquarters in Brussels, demanding a ban on all seal imports—one year later the ban duly went into effect, followed by an international embargo on Canadian fish products more rigorously observed than the arms embargo

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**John Muggeridge**, who died on November 25, 2005, was a longtime Senior Editor of the *Human Life Review*. This article originally appeared in our Winter, 1995 issue.

against Bosnia. Thus perished east-coast sealing, an enterprise which for 300 years had been providing fishermen with winter employment.<sup>3</sup>

Why, then, don't anti-abortion pictures get comparable results? Their quality is every bit as good as that of Davies' stuff, and their credibility far better. And it isn't as if their message hasn't got out. Twenty years of running off newsletters, handing out flyers, and flicking through slide presentations have certainly borne some fruit. The famous movie *The Silent Scream* (an ultrasound view of an actual abortion) was shown to President Ronald Reagan in the White House, and was even featured in the "Doonesbury" comic strip. But a still-clearer sign of how far understanding of the case against abortion has penetrated is the fact that David Frum's much-praised history of contemporary U.S. conservatism, *Dead Right*, which treats with total seriousness the concerns of anti-abortion Republicans, was published by the left-leaning *The New Republic*.<sup>4</sup>

But it's no good. Most Americans have by now encountered the truth about abortion, yet those who belong to the "thoughtful part of the nation"<sup>5</sup> continue to combine concern for the sufferings of animals with *unconcern* for those of unborn children. This isn't callousness. No one but a monster could go on advocating abortion in the knowledge that fetal pain was a reality. That is why "pro-choicers" only discuss this nasty issue metaphysically. Religious people may hold that prenatals can suffer, but certainly not rational moderns: "Is a 12-week fetus a child?" wonders a feminist writer in the Toronto *Globe and Mail*, adding "Theologically, for some people the answer is yes, and they're entitled to their belief. On all other measures of personhood the answer is no."

Yet the nation's "thoughtful people" have no such metaphysical doubts about the reality of pain inflicted on animals. Consider what happened at Toronto's Exhibition Stadium on August 5, 1983. It was the middle of the sixth inning in a game between the Toronto Blue Jays and the New York Yankees. Toronto being up to bat, the Yankee fielders were warming up. A seagull alighted in midfield. Dave Winfield, then playing for New York, threw an eighty-foot hopper which struck the bird on the neck and killed it. After the game an off-duty policeman, who happened to have watched the incident from the stands, arrested Winfield and had him taken to a nearby police station, to be charged with "causing unnecessary suffering to an animal." The penalty for that crime under Canadian law is a five hundred dollar fine or six months in jail. Pat Gillick, the General Manager of the Blue Jays, made bail for Winfield, and an hour and a half later he was allowed to rejoin his team.

The next day the charge was dropped. However, the policeman who had

made the arrest received no public reprimand. Moreover, Toronto opinion was decidedly on the side of the seagull. One newspaper reader accused Winfield of having deliberately hit the bird, since no batboy had positioned himself to take the throw; a second expressed agreement “with the police and the other horrified witnesses,” and a third approved of what had happened because “the message that will go out is that Toronto is a place where people care about animals . . .” But not, however, a place where people care about unborn babies: on the same day Winfield was charged, doctors committed some two dozen abortions in the city’s hospitals and clinics.

**I**t is when our good-thinkers are discussing the use of violence to promote justice that they demonstrate most clearly their preference for liberators of animals over rescuers of babies. Last November in Vancouver, a sniper shot an abortionist in the leg (two bullets from an assault rifle came through the window as he was having breakfast). The Toronto *Globe and Mail* responded by devoting four six-inch columns (on the page it reserves for national news) to an interview with Doctor Dallas Blanchard, professor of sociology and author of *Religious Violence and Abortion* and *The Anti-Abortion Movement and Lies of the Religious Right*. “Sniping,” Blanchard told the *Globe*, “reflects a new stage in the cycle of abortion-related violence in North America.” On the incident in Vancouver, his comment was: “I’m kind of amazed it has not happened before.” Yet no evidence has come to light linking the still-unidentified sniper with any anti-abortion group in Canada. Nor did the *Globe* bother mentioning that before this indefensible but isolated attack, the *only* abortion-related violence reported to have taken place on Canada’s west coast was carried out by pro-abortionists.<sup>6</sup> Meanwhile, there came news of yet another holocaust being prepared against a segment of Canadian society. The same edition of the *Globe* which carried Blanchard’s remarks about the rise of anti-abortion urban terrorism across North America featured a diatribe by Canada’s most famous animalist, Farley Mowat, warning his readers to beware of “a new pogrom against the seals.” According to Mowat, the International Fund for Animal Welfare hasn’t stepped in yet because it hopes Canada will do the right thing without coercion. “But if we have to,” an IAWF spokesman told Mowat, “we’ll set the world on fire over this one.” And Mowat doubts that this threat is an idle one.

Perhaps global firebombing won’t be necessary after all. In “Out of the Cage: the Movement in Transition,” animal journalist Merritt Clifton claims that the shooting war is over. It’s time to get into advertising and school-textbook publishing. Above all, it’s election time. The movement’s leadership, according to one authority quoted by Clifton, needs feminizing: “Nurturing

democratic leaders” must gently persuade the old autocratic ones “that the purr can now be more effective than hissing with a rake of the claws.” And I must say it really does look as if this strategy has been put into effect. You are more likely to find animal activists sitting in board rooms than on sidewalks. In fact “Animal Lib” has become big business. The Toronto Humane Society, which was taken over in the early eighties by radicals, last year ran a budget of 7.4 million dollars, over five million of which it received in the form of donations and bequests. Its only public funding was a few hundred thousand dollars for the city’s pound contract. Nodding over the final frames of Robert Redford’s interminable fly-fishing idyll, *A River Runs Through It*, I woke up with a start to read the following disclaimer:

No fish were killed or injured in the making of *A River Runs Through It*. The producer would like to point out that, though the McLeans kept their fish, as was common earlier in the century, enlightened fishermen today endorse a “catch and release” policy to ensure that this priceless resource swims free to fight another day. Good fishing.

Yes, the era of animal-lib *chic* has arrived. But why?

In the first place, animalism takes the heat off pro-abortionists. Having to see abortion in the same context as AIDS, apartheid, arms control, capital punishment, child abuse, pollution, poverty, racism, sexism, white slavery and world hunger certainly helped to diffuse the efforts of anti-abortionists in the seventies and eighties. But the seamless tarpaulin Peter Singer has woven covers not just humanity but the whole of the animal kingdom. An appendix to the latest edition of *Animal Liberation* lists forty-five animal advocacy groups across the world including Chicken’s Lib, Farm Animal Reform Movement, and Compassion in World Farming. In this ever-widening circle of concern the very phrase “sanctity of human life” sounds sectarian. A spokesman for People for the Ethical Treatment of Animals claims that “a human being has no special rights. A rat is a dog is a boy. They’re all mammals.” With millions of animals killed in U.S. laboratories each year, why get so hot under the collar about a mere million-and-a-half preborn humans? “More animals,” points out the animalist political scientist, Robert Garner, “suffer and die at the hands of humans than do human foetuses (assuming they *can* suffer) and it is, at the very least, open to debate that a healthy adult animal is a more worthy candidate for moral concern.”

The two key phrases here are “assuming they *can* suffer” and “a more worthy candidate for moral concern.” Peter Singer is a utilitarian. He believes that the goodness or badness of an act depends exclusively on how much pleasure or pain it imparts. Which means that a being incapable of feeling pain is also incapable of having good or bad done to it. “Sentience,”

says Singer, “is the only defensible boundary of concern for others.” And he takes this business of not inflicting pain on sentient beings with the utmost seriousness: “With creatures like oysters, doubts about a capacity for pain are considerable,” he writes in the 1990 edition of *Animal Liberation*, “and in the first edition of this book I suggested that somewhere between a shrimp and an oyster seems as good a place as any to draw the line.” So occasionally he would allow himself a meal of oysters, scallops and mussels. But then, doubts began to arise in his mind. What if he turned out to have been wrong, and such crustaceans really could suffer? In that case, depending on one’s appetite, “a meal of oysters or mussels would inflict considerable pain on a considerable number of creatures.” And so, just to be on the safe side, at some point between 1975 and 1990 Singer gave up all shellfish.

What if a utilitarian has to decide which of two sentient creatures to inflict pain upon? That is where worthiness for moral concern comes in. The fact that pain is evil, according to Singer, is not affected by “the other characteristics of the being who feels pain,” but the value of that being’s life *is*. For example, says Singer, when you kill a being “who has been hoping, planning, and working for some future goal,” you deprive it “of the fulfillment of all those efforts”; if on the other hand, your victim has a mental capacity below the level needed to appreciate that he has a future and can make plans for it, then the *only* thing that being killed deprives him of is painlessness.

In most cases this means that if Singer has to choose between killing a human and an animal, the human is safe. But, warns Singer, “when we consider members of our own species who lack the characteristics of normal humans we can no longer say that their lives are always to be preferred to those of other animals.” He discusses, for example, the case of a newborn baby, reduced by massive and irreparable brain damage to the status of what he calls a “human vegetable” [at least he has the grace to use quotation marks]. Under a legal system which embodies the principle that all human life is sacred, the parents of such a child (or so claims Singer) are prohibited from having it painlessly put to death, even though “adult chimpanzees, dogs, pigs, and members of many other species far surpass the brain-damaged infant in their ability to relate to others, act independently, be self-aware, and any other capacity that could reasonably be said to give value to life.” And he clinches his “unanswerable” case by saying: “With the most intensive care possible, some severely retarded infants can never achieve the intelligence level of a dog.” One thing about pain, of course, is that it can be prevented by anaesthesia. Thus, in a society governed by animalist principles, however brain-damaged a child might be, his life would be secure as long as



it could not be taken without hurting him. Once desensitize him, however, and he has to compete for the privilege of staying alive with every adult primate in the neighborhood. Don't forget, Singer *ate* the mussels when he thought it wouldn't hurt them. Here, surely, is animalism's biggest drawing card for pro-abortionists.

Having once accepted Singer's teaching on pain, if one could anaesthetize the unborn child, there would no longer be an argument about when sentience begins. Thanks to novocaine, there *is* no sentience. With nothing but an unfeeling being in her womb, the pregnant woman's control over her body does indeed become incontestable. Moreover, since the bigger her baby grows, the easier a target it will be for an anaesthetist, we may live to see *Roe v. Wade* turned on its head and the last trimester of a pregnancy made the *least* subject to state regulation.

Except that, as Singer would have it, the first half of the first trimester doesn't count. He claims that a preborn baby needs six weeks to develop a brain and nervous system. Before that, in his eyes, it is "simply a thing," to be cloned, sex-selected, genetically manipulated or experimented on at will. This is where Singer's brand of trans-species utilitarianism comes to the aid not only of abortionists but also of the new fertility engineers. Last Fall, Georgetown University's Patricia King, who belongs to the Women's Legal Defense Fund and supports Planned Parenthood, announced on behalf of the National Institutes of Health that, since human embryos—i.e. unborn children less than six weeks old—"do not have the same moral status as infants and children" they are fit subjects for publicly funded research.

This is the same NIH, remember, which in 1982, after a sit-in outside its Washington offices by People for the Ethical Treatment of Animals, *withdrew* public funding from the experiment on baboons at the University of Pennsylvania. These two NIH policy decisions may seem contradictory, but for followers of Singer they are perfectly consistent. Baboons hurt; newly-conceived humans don't.

Utilitarianism is the philosophy of revolution. It puts the principle of utility above custom, tradition, legal precedent and religion. Jeremy Bentham, the father of modern utilitarianism, who lived around the turn of the nineteenth century, saw no logical reason for punishing sex offenders.

You imprison thieves, he argued, to cut down on stealing; you hang murderers to discourage homicide, but what pain-inflicting activity are you helping to prevent when you stigmatize adulterers? (Bentham would surely have favoured no-fault divorce and gay liberation?) In fact, we have a Benthamite *in our Canadian Parliament* who wants to lower the age of consent for same-sex to fourteen. But Bentham does more than prefigure the sexual revolution; he

envisages the liberation of animals. Singer quotes a passage in which his eighteenth-century mentor looks forward to a time when “the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny.” In the same paragraph Bentham goes on to argue that “a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day or week or even a month old,” and concludes by asserting that “The question is not, Can they *reason?* nor Can they *talk?* but, Can they *suffer?*”

That is why today’s respectable libertines are likely to sympathize with animal liberation. It makes a virtue of rejecting the claims of Judaism and Christianity. Nowadays, claims Singer, only a religious fanatic would maintain “that man is the special darling of the universe or that other animals were created to provide us with food, or that we have divine authority over them, and divine permission to kill them.” But according to *Genesis* 1:26-30, this is precisely the status God did assign to man. In other words, we must either dismiss the biblical account of man’s relationship to the rest of creation, or stand condemned by Singer as outdated extremists. It’s not that the Bible is wrong, so much as that it needs updating.

One has to remember that, unlike Singer, its Author did not have access to Bentham’s *Introduction to the Principles of Morals and Legislation*. Small wonder, then, that *Genesis* blames the fall of man on a woman and an animal, thus compounding the sin of speciesism with that of sexism, or that the same book says of God Himself that He “smelled a sweet savour” when Noah sacrificed animals to Him. Even so, admits the fair-minded Singer, “scattered passages in the Old Testament encourage some degree of kindness towards animals, so that it is possible to argue that . . . ‘dominion’ really is more like ‘stewardship.’” Possible to argue, yes, but alas, not possible to prove. Regretfully, Singer has to admit to finding in Scripture “no serious challenge to the overall view . . . that the human species is the pinnacle of creation and has God’s permission to kill and eat other animals.”

Nor did things get any better with the rise of Christianity. Such early animal-welfarists as St. Anselm, who once rescued a hare from huntsmen, and the Hermit of Eskdale, who was killed by huntsmen while protecting a wild boar, “failed,” in Singer’s words, “to divert mainstream Christian thinking from its exclusively speciesist preoccupation.” Even St. Francis could make no dent in the prevailing anthropomorphism: Singer complains that for all the Saint’s love of birds and oxen, he went on eating them.

And let us not forget St. Thomas Aquinas. St. Thomas is the animalists’ *homme noir*. What they particularly dislike is his view that the *only* justification for kindness to animals is that it prompts men to be kind to each other. This

sort of speciesism with a human face is as repugnant to animalists as chivalry is to feminists. And, according to Singer, its influence has lasted. He claims, for example, that it was Aquinas who inspired Pope Pius IX to ban a society for the prevention of cruelty to animals in Rome for fear it would imply that men have duties towards animals. In fact, for Singer the only light at the end of the burrow is a statement made by the present Pontiff in 1988 which declares that “The dominion granted to man by the creator is not an absolute power.”<sup>8</sup>

But the fact that animalists disparage Christianity and Judaism by no means implies that they are anti-religious. For them, putting aside speciesism is indeed a form of spiritual awakening. Their theology teaches that sin came into the world when man enslaved his fellow animals and used religion to justify the unequal relationships thus established between them—end this bondage, and both parties to it will experience liberation. As will our whole planet. Once freed from what animal theologians call “the moral orthodoxy” (i.e., the Ten Commandments), man will be able to rise above all selfish notions about saving his soul, and concentrate instead on saving the environment.

**H**ere Greens and animal liberationists find themselves kneeling to the same gods. Both believe that in making the world safe for biodiversity, they are helping good to triumph over evil. Man having finally learnt that he is part of nature, not the lord of it, will, as the animalist charismatic, Michael Fox (the British author of *Returning to Eden: Animal Rights and Human Responsibility*) promises, have purchased his return ticket to Eden.

In the meantime, though, having disposed of the moral orthodoxy, we’ll need a new code of ethics. What could be more natural in a hedonistic society, asks the animalist historian, Richard D. Ryer (in his *Animal Revolution: Changing Attitudes Towards Speciesism*), than to fill the moral vacuum created by retreating Christianity with “an explicit morality that all can understand and accept: that to cause pain is wrong, and to give pleasure is right . . .”? And what could be more *unnatural* in such a society than to insist on reinstating the Christian precept that, because all human life is sacred, abortion and euthanasia should be illegal?

In Canada, easy access to state-funded abortion having been secured, the push is on for euthanasia.<sup>9</sup> Robert Latimer, a farmer from Saskatchewan, has been found guilty of second-degree murder in the death of his twelve-year-old daughter Tracy, who had cerebral palsy. The judge sentenced him to ten years in prison, and suddenly *another* Peter Singer—by sheer chance, a namesake, who is the associate director of the Centre for Bioethics at the University of Toronto—is also spouting Benthamism in the *Toronto Star* to

the effect that “Canada’s criminal law hasn’t taken into account the complexities of mercy killing,” and that Latimer “should receive mercy and have his sentence thrown out by the federal justice minister.” “Mercy” is hardly the *mot juste* here: what Singer means is that, since Tracy was unable to hope, plan, or work for the future, her father did no wrong in killing her to secure his own happiness. And to resist that sort of thinking is to fight a revolution which has already taken place.

**W**hat, then, lies ahead? More and more doubts cast on the Jewish and Christian teaching that God created man in His own image. Animal liberationists insist, with Michael Fox, that “there are no clear distinctions between us and animals.” Most school textbooks and newspaper science columns make the same point. A recent newspaper report, for example, unhesitatingly defines Bonobo chimpanzees as “hominoids,” or members of the “human and ape’ family,” as if that zoological order were as clearly established as *lepidoptera*. The very idea that “the human soul is different because we are immortal,” in Fox’s words, “becomes completely absurd.”

Teaching creationist anthropology in public schools was long ago ruled unconstitutional, but now the American Civil Liberties Union has set its sights against a school biology text which talks about “intelligent design.” Never have the first three chapters of *Genesis* come under such heavy bombardment.

But that makes sense. They contain, as Pope John Paul II points out, all the information needed to understand the modern world. Accept them, and you see suffering not as a currency to be exchanged, at whatever the going rate, for bills of happiness, but as a mystery with implications that lead beyond this life. Reject the *Genesis* account of creation, and all you have to look forward to is a world in which vegetarianism will become compulsory, and Doctor Kevorkian’s “mercitron” will get as thorough a work-out as guillotines in the French Revolution.

#### NOTES

1. Peter Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* (New York: Random House, by arrangement with the New York Review of Books, 1975).
2. Social Movement Empowerment Project analyst Bill Moyers, quoted in Jeanne Williams, *Animal Rights and Welfare* (New York: the H. W. Wilson Company, 1991), p. 148. Moyers bases this judgment on “nearly 30 years’ observation of the civil rights, antinuclear, and antiwar movements.”
3. Ten years later they have lost their summer livelihood as well. Cod stocks have sunk so low that the inshore fishery has had to close. Ironically, seals may have helped cause this tragedy. Unculled; they are increasing in numbers by 500,000 a year, and their favourite form of nourishment is—cod.
4. Frum writes: “To pro-life conservatives, the ghastliest proof of the unabated decay of American

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- morality in the Reagan 1980s was the administration's diffidence in the face of what seemed to pro-lifers a crime so horrible that they had to wonder when and how divine retribution would crash down upon the land: the killing by abortion of nearly 2 million children a year."
5. Robert A. Destro quotes this phrase from David Garrow's *Liberty and Sexuality: The Rights of Privacy and the Making of Roe v. Wade* (see the *Human Life Review*, Summer 1994). It is the thoughtful part of the nation which views the recent vote in Oregon in favour of euthanasia as a victory for the people, and the one in California rejecting single-payer health insurance as a victory for big business.
  6. Paul Nielsen, a columnist from British Columbia for the *Interim* (a pro-life monthly), had his house smoke-bombed.
  7. That is, morally-correct fishing.
  8. The truth is, of course, that no Catholic theologian ever said that it was. See *Catechism of the Catholic Church*, 2416-2418.
  9. Sabina McLuhan of Campaign Life Coalition estimates that since 1988, at approximately \$300.00 per abortion, the government has spent \$132 million of taxpayers' money to kill off its own people. See the *Interim* (October, 1994).



## Tiptoeing Around *Roe*

Mary Meehan

Asked about *Roe v. Wade* during her 1981 Supreme Court confirmation hearings, Judge Sandra Day O'Connor said it would be "improper for me to endorse or criticize that decision" since it might well "come back before the Court in one form or another." Things had not changed much by 2005, when Judge John Roberts was pressed on *Roe* during his confirmation hearings for Chief Justice. Roberts said he "should stay away from discussions of particular issues that are likely to come before the court again."<sup>1</sup> Of the nine justices added to the Court since the 1973 *Roe* decision, most declined to discuss *Roe* in their confirmation hearings.<sup>2</sup>

Yet this was nothing more than a prudential or political decision on their part. Nominees are in fact free to discuss their views on *Roe* and other decisions, provided they make it clear that they are open to persuasion on the issues involved. What nominees *cannot* do is promise to vote a certain way on any issue. As now-Chief Justice Roberts rightly said, confirmation is "not supposed to be a bargaining process."<sup>3</sup>

The parties to any Supreme Court case are entitled to have justices who will study the facts and the law before reaching a decision. But, as two legal scholars recently wrote, the parties are *not* "entitled to judges who have no views of the law. An open mind is one thing; an empty head is another."<sup>4</sup>

### Why Not Shock the Senators?

Imagine for a moment a nominee who is interrogated about *Roe* and who makes the standard declaration about not deciding any case in advance, but then goes on to say: "I must add, Senator, that there has been overwhelming criticism of *Roe* by legal scholars. Some like its policy result, but say there's no constitutional basis for it. Others believe there *is* a basis, but that the Court failed to state it. Some say *Roe*'s history of abortion law is inaccurate. And some claim the courts—by failing to have a guardian argue for the unborn and by ignoring scientific evidence about the unborn—decided the case without considering the interests of a major party. These are serious objections which, if briefed in a case before the Court, would have to be considered."

Such an answer would stun the Democratic side of the Senate Judiciary

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Committee. Massachusetts Senator Edward Kennedy's formidable jaw would drop in amazement. Senator Patrick Leahy of Vermont would stare in disbelief. Senator Dianne Feinstein of California would be frozen in horror. Senators Joseph Biden of Delaware and Charles Schumer of New York might be speechless for the first time in their lives. But the Fearsome Five would quickly recover and start pelting the nominee with questions. An early one would be, "Aren't you really admitting that you would vote to overturn *Roe*?"

"No, Senator. I'm just saying these things would have to be considered if briefed. And if I were presented with such a case, I would study carefully the briefs of both sides, ask questions at oral argument, and confer at length with my colleagues on the Court. I'd try to reach the best possible decision—based on the facts, the law, and the Constitution."

How could anyone object to such an approach? The Fearsome Five would find a way; yet they would find it hard to bluster through the key point about scholarly criticism of *Roe*. Senator Biden himself, during Justice Antonin Scalia's 1986 confirmation hearings, acknowledged "overwhelming universal criticism . . . that *Roe v. Wade* was not a very well reasoned decision." Biden added: "Most constitutional scholars do not offer that as an example, whether they are for or against abortion, of a decision that is well written and well reasoned."<sup>5</sup> By the time of the Scalia hearings, Justice Harry Blackmun's *Roe v. Wade* opinion was a major embarrassment to many who liked its policy result. Its critics, then or later, included legal scholars such as Robert Bork, Archibald Cox, John Hart Ely, Charles Fried, Judge Henry Friendly, Gerald Gunther, John Noonan, and William Van Alstyne. The common criticism was that Blackmun had failed to show a constitutional basis for *Roe*.<sup>6</sup> Noonan and other law professors of a right-to-life persuasion, such as Robert Byrn, Joseph Dellapenna, Charles Rice, Lynn Wardle, and Joseph Witherspoon, went well beyond that point and challenged Blackmun on his history of abortion law and virtually every other aspect of the *Roe* opinion.<sup>7</sup>

#### Why So Much Timidity?

So why haven't any Supreme Court nominees been willing to take on *Roe* in their confirmation hearings? Well, Robert Bork did, and he was the only Supreme Court nominee since *Roe* who lost a confirmation vote in the Senate. I would argue that many Republicans and abortion foes have been overly traumatized by the role abortion played in Bork's defeat. Actually, his outspoken criticism of *Griswold v. Connecticut*, a 1965 case that struck down a contraceptive ban on grounds of a claimed privacy right, may have hurt Bork more than anything else.<sup>8</sup> *Roe* leans partly on *Griswold* for its privacy claim, but it's possible to oppose *Roe* without taking on *Griswold*. Bork was

brave and intellectually honest in taking on both at the same time, but it cost him dearly. He had other baggage as well: As a legal scholar, he had taken controversial positions on civil rights and the First Amendment—positions that worried many moderates as well as liberals. As Solicitor General of the United States in the Nixon Administration, he had played a difficult and honorable role during the Watergate scandal—but one that was a disaster from a public-relations standpoint. Bork’s enemies could and did exploit this during his Supreme Court confirmation hearings. They also distorted his decisions as an appeals court judge.<sup>9</sup>

The Bork defeat led to what many call a Republican “stealth strategy”: the selection of Supreme Court nominees who have little or no paper trail on abortion and other controversial issues, or are prepared to downplay whatever problematic paper trail they may have. The four Republican nominees confirmed since the Bork fight—Anthony Kennedy, David Souter, Clarence Thomas, and John Roberts—did not mention the scholarly criticism of *Roe*; instead, they shied away from abortion as much as possible. All said they believe the Constitution guarantees a right of privacy. Yet, while several specific rights related to privacy are guaranteed in the Constitution—for example, the Fourth Amendment’s ban on “unreasonable searches and seizures”—there’s no general right of privacy there. Bork stresses a key question: “Privacy to do what?” He adds, “People often take addictive drugs in private, some men physically abuse their wives and children in private, executives conspire to fix prices in private, Mafiosi confer with their button men [hit men] in private.”<sup>10</sup> Even Senator Leahy once said the Constitution “does not speak of a right to privacy.”<sup>11</sup>

After Bork’s defeat, Republican White House handlers urged Supreme Court nominees to be cautious and bland. As Justice Clarence Thomas said after his 1991 confirmation ordeal, “There is an inherent dishonesty in the system. It says, don’t be yourself. If you are yourself, like Bob Bork was, you’re dead.”<sup>12</sup> In the first part of his confirmation hearings, a Thomas biographer observes, many of Judge Thomas’s answers “were as frustrating to his supporters as they were to his critics. He seemed too cautious, too programmed. Where was the feisty Clarence Thomas, the independent thinker who reveled in the give-and-take of intellectual debate?” The biographer quoted Clint Bolick, a former Thomas staff member, who said his old boss “had been totally coached out of saying anything he thought.”<sup>13</sup>

White House handlers, then and now, could respond to such criticism by saying, “Well, we got him through, didn’t we?”

Yes, but there was a price to be paid. Thomas was seriously harmed by the defensive and evasive stance he took in the early phase of his confirmation



hearings. His coaches would have done far better to urge him to challenge the bullying tactics used by several senators on *Roe* and other issues. When he finally criticized senators, on his own initiative during the Anita Hill phase of the hearings, he was extremely effective.<sup>14</sup>

Nominees are not the only ones who have tiptoed around *Roe v. Wade*. Most Republican senators on the Judiciary Committee have done the same. In the early years, this was partly because so many committee Republicans were abortion *supporters* who were silent for tactical reasons. Today Senator Arlen Specter of Pennsylvania is the only *Roe* supporter left on the Republican side; but he's now the committee chairman—and a reliable questioner for the abortion forces. Some anti-abortion Republican senators probably have been silent on *Roe* in keeping with White House stealth strategy—or a stealth strategy designed for their own political careers. A few ardent pro-life senators, though, have addressed *Roe* in confirmation hearings.

There was improvement on the Republican side of the committee during the John Roberts hearings, but more is needed. The result of tiptoeing is that the Democratic side—which once included the occasional right-to-lifer but is now totally supportive of abortion—has been far more aggressive in promoting *Roe* than anyone has been in questioning it. The Fearsome Five, who see themselves as champions of the women of America (ignoring the many millions of pro-life women), can be merciless in interrogating nominees on *Roe*. Actually, as some commentators noticed during the Roberts hearings, the Five are not so fearsome when faced with someone who really knows the Constitution. They are intimidating only when one allows them to be.

#### The High Cost of Tiptoeing Around

Confirmation hearings can and should be educational; at their best, they are first-rate constitutional seminars. Yet they also offer great opportunities for showboating, a temptation many senators cannot resist. Beyond that, they offer a chance to haze nominees in a certain direction. (The word “haze” used to mean “herd,” as in driving cattle; sometimes the senators’ treatment of judicial nominees approaches “hazing” even in the modern, college-fraternity sense.) That’s what Democrats try to do with their questions about *Griswold* and privacy and their anecdotes about hard cases and botched abortions in the era when abortion was illegal. Democratic hazing of this kind may have helped influence Justices David Souter and Anthony Kennedy to reaffirm *Roe* in the 1992 *Planned Parenthood v. Casey* decision. But the hazing may have backfired with Justice Clarence Thomas, whom the Democrats subjected to relentless grilling on abortion.

There are four major problems with the timidity of committee Republicans:

1) They miss an extremely important chance to educate the public—and the media—about the constitutional wrongs of *Roe*; this failure undermines the substantial educational efforts of pro-life groups. 2) They often give the impression that they are *afraid* of *Roe* and that they agree with their Democratic colleagues that the women of America dearly love *Roe* and will end the political career of anyone who dares to oppose it. 3) They allow the Democrats to do most of the talking on *Roe*; as a result, nominees—at least subconsciously—may be afraid to overturn it. 4) They leave an impression of lack of candor that harms the pro-life cause and adds to the general rancor of abortion debates.

*Roe* cannot be overturned in the dead of night, nor in the arbitrary and unreasoned way in which it was written. If Republicans think that Chief Justice Roberts, for example, will write such a brilliant opinion overturning *Roe* that the opposition will be vanquished, they are sadly mistaken. He might vote to overrule *Roe*, and he might write a brilliant opinion, but no opinion can by itself win the country. There must be much educational preparation for the overturning of *Roe*, and it must be done with both intelligence and courage. Above all, it must be done with integrity. Only then will the overturning have a better chance of public acceptance than *Roe* itself has had. And only then will there be a chance to secure the kind of protective legislation for the unborn that will be needed in every state if *Roe* goes down.

With a view toward these goals, I'd like to describe briefly each Supreme Court confirmation hearing since *Roe* and then suggest that more and better questions could have a deeper impact on reporters, the public, and possibly even the Court.

#### **The Early Years: Stevens, O'Connor, and Scalia**

It seems incredible today, but the first Supreme Court nominee after *Roe*, appeals court Judge John Paul Stevens, was not even asked about *Roe* in his 1975 confirmation hearings. President Gerald Ford nominated Stevens to replace William O. Douglas, a key *Roe* supporter. The senators should have been curious about what Judge Stevens thought of *Roe*; but if so, they kept their curiosity to themselves. Abortion foes among them may have been encouraged by a 1973 Stevens ruling that a hospital which was private, but had received federal money, need not permit abortion on its premises.<sup>15</sup> After Stevens sailed through his confirmation with a 98-0 Senate vote<sup>16</sup> and joined the Court, he held a mixed position on public funding of abortion; but Stevens, now 85 and the senior associate justice, has been a firm supporter of *Roe v. Wade*.

Ronald Reagan campaigned in 1980 as a pro-life candidate, and the Republican platform that year pledged: “We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”<sup>17</sup> But during the 1980 campaign, Reagan also promised that “one of the first Supreme Court vacancies in my administration will be filled by the most qualified woman I can possibly find.”<sup>18</sup> He had a chance to keep this promise just months after he took office, when Justice Potter Stewart, a *Roe* supporter, announced his retirement. But the pool of women from whom to choose was quite small; there were far fewer women lawyers than there are today, and women’s share of federal judgeships was about six percent (whereas today it is 24 percent).<sup>19</sup> Reagan’s staff found a woman, Judge Sandra Day O’Connor of the Arizona Court of Appeals, who was well-qualified professionally. But as a state senator in 1970, O’Connor had voted to legalize abortion in Arizona. After *Roe*, she had voted against a resolution that called for constitutional protection for the unborn.

Despite private and urgent warnings from pro-lifers, President Reagan and his staff were quick and careless in the decision to nominate O’Connor. Just after the decision was made, Kenneth W. Starr, then an aide to Reagan’s Attorney General, submitted his hasty check of O’Connor’s legislative background on abortion. Of the 1970 abortion-legalization bill, Starr wrote: “There is no record of how Senator O’Connor voted, and she indicated that she has no recollection of how she voted.” Yet an *Arizona Republic* news story showed that O’Connor had voted for the bill.<sup>20</sup> Starr also claimed that O’Connor “knows well the Arizona leader of the right-to-life movement, a prominent female physician in Phoenix, and has never had any disputes or controversies with her.” The physician in question, Dr. Carolyn Gerster, testified at O’Connor’s confirmation hearings that the Justice Department had not verified that statement with her. Gerster said she had known O’Connor since 1972 and that they “were in an absolute adversary position” over abortion in 1973-74.<sup>21</sup>

Pro-life senators on the Judiciary Committee were in a difficult position. Most were Republicans who didn’t want to oppose a popular Republican president on his first Supreme Court nomination. And no one—Republican or Democrat—wanted to come out against the first woman ever nominated to the Supreme Court. A few pro-lifers, though, especially Senator Jeremiah Denton of Alabama and Senator John East of North Carolina, did engage in some hazing of O’Connor. They may have had some effect on her, although a wish to avoid embarrassing Reagan—at least while he was still in office—may have influenced her more. In her early years on the Court, O’Connor

was critical of *Roe v. Wade* and even said it was “on a collision course with itself.” She voted to allow abortion restrictions in several major cases; but in the 1992 *Planned Parenthood v. Casey* decision, she voted to affirm *Roe*’s key holding of a right to abortion.<sup>22</sup>

In her 1981 confirmation hearings, Judge O’Connor declined to give her views on *Roe*. Discussing any case that presented issues likely to return to the Court, she claimed, “would mean that I have prejudged the matter or have morally committed myself to a certain position”—and might even “make it necessary for me to disqualify myself on the matter.”<sup>23</sup> Senators could have challenged her on this; after all, O’Connor could have made it clear she was open to persuasion and was not pledging her vote. Yet Judiciary Committee members usually accept, however reluctantly, such statements from Supreme Court nominees. But senators did question O’Connor about her legislative record and her personal views on abortion. She was willing to discuss both, although she said a decision shouldn’t be based on a judge’s personal views. She opposed abortion, she said, “as a matter of birth control or otherwise” and even referred to “my own abhorrence of abortion as a remedy.” She also suggested that, after 1970, she wouldn’t have voted for “a simple repealer” of the Arizona abortion law, and she stressed that in 1974 she had voted for a Medicaid bill that barred abortion funding in most cases.<sup>24</sup>

Senator East quoted to her Justice White’s dissent in *Roe*, which called that decision “an exercise of raw judicial power,” and also quoted Justice William Rehnquist’s dissent. He expressed frustration over O’Connor’s refusal to discuss *Roe* and other cases that might return to the Court in different form. “I query as one lowly freshman Senator,” he remarked, “whether we are able really to get our teeth into anything.”<sup>25</sup> Senator Denton shared East’s frustration. He tried to get more information on O’Connor’s policy views on abortion, but concluded that the effort was “fruitless.” Perhaps he would have had more success had he been a lawyer instead of a retired admiral. On the other hand, it’s hard to argue with someone who has paid his dues as Denton had: A prisoner of war in North Vietnam for several years, he had suffered greatly from torture there. He may have had some impact on O’Connor when he mentioned his “cultural shock” upon returning to America and finding that abortion was both legal and “just an accepted thing.”<sup>26</sup>

The Senate confirmed O’Connor by a vote of 99-0. Abortion foes were surprised and pleased by her early votes to allow restrictions on abortion, but later dismayed by her decision to reaffirm *Roe*, and appalled by her 2000 vote to strike down a state ban on partial-birth abortion.<sup>27</sup>

In 1986 President Reagan had another Court vacancy to fill when Chief Justice Warren Burger announced his retirement. Initially a *Roe* supporter,

Burger had joined the opposition by the time he retired.<sup>28</sup> Reagan decided to move Justice Rehnquist up to Chief Justice and to fill the associate-justice slot with a conservative appeals court judge, Antonin Scalia. Reagan's popularity was still high; the Republicans still controlled the Senate; Scalia's professional background was impressive; and he was the first Italian American nominated to the Supreme Court. So liberals did not mount a major campaign to defeat him. They did, however, campaign against Rehnquist's elevation to Chief Justice; they couldn't prevent his confirmation, but did achieve 33 votes against him. Although he was a dissenter in *Roe*, he wasn't even asked about it at his confirmation hearings. Most of the overt attacks against him were based on ethics-related allegations, but liberals were deeply worried that he and Scalia would move the Court significantly to the right.<sup>29</sup>

During a debate in 1978, Scalia had said of abortion and other issues "on which there is no societal agreement" that the "courts have no business being there."<sup>30</sup> At his confirmation hearings, Senator Kennedy bluntly asked him whether he expected to overturn *Roe*. Scalia said it would be "improper" for him to answer, adding that "I have no agenda" and that "nobody arguing that case before me should think that he is arguing to somebody who has his mind made up either way."<sup>31</sup> Senator Biden tried to reach the same issue, at least indirectly, by asking whether a right to privacy is implicit in the Ninth Amendment. But Judge Scalia wasn't about to fall into that trap. "I think that's in effect asking me to rule on cases," he replied. He also noted that there "have been scholarly criticisms of the whole notion of right to privacy."<sup>32</sup> Scalia emerged unscathed from his confirmation hearing and was confirmed by a 98-0 vote.<sup>33</sup> To no one's great surprise, he turned out to be a solid vote against *Roe*. He contended that the Court had brought great trouble upon itself by intruding in an area where it didn't belong.

#### Roller-Coaster Time: Bork and Kennedy

When Justice Lewis Powell, another *Roe* supporter, announced his retirement in 1987, President Reagan named appeals court Judge Robert Bork to take his place. Conservatives were delighted by the nomination of a brilliant legal scholar who demanded strict adherence to the Constitution. They didn't realize at first that Bork's long paper trail could be his undoing. Nor did they realize how difficult the Democrats' control of the Senate would make the coming battle. Liberals, worried that Bork would move the Court well to the right, prepared a full-scale campaign against him, complete with newspaper and television advertising. It was the most highly politicized and bitter campaign ever waged against a Supreme Court nominee up to that time.

It was also arguably the most dishonest. Senator Edward Kennedy set the tone with a demagogic attack on Bork just after the latter's nomination was announced: "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution . . ." <sup>34</sup> As Bork wrote later, "Not one line of that tirade was true. It had simply never occurred to me that anybody could misrepresent my career and views as Kennedy did." But Kennedy and others continued to do so during the long confirmation hearings that followed. At one point, after Kennedy summarized what he said were Bork's views on curbing abuses of power by the executive branch, Bork responded that "those are most unfair characterizations of my views. Let me start—I hardly know where to start. . . ." After he explained his real views, Kennedy, of course, did not apologize. <sup>35</sup>

Bork's opponents realized, based on polling data, that they would be more effective if they stressed "privacy" and contraception rather than abortion. <sup>36</sup> They heavily stressed Bork's criticism of the *Griswold* decision. It did no good for Bork to say, as he did during confirmation hearings, that he didn't oppose the use of contraception and that he viewed the old Connecticut ban on contraception (the one struck down in *Griswold*) as "an outrage." He tried in vain to make the point that the question "is never whether you like the statute" but, rather, whether the statute is "contrary to the principles of the Constitution." <sup>37</sup>

Senators also asked him about *Roe v. Wade*. He was already on record against it, and he told the committee that *Roe* "contains almost no legal reasoning," adding that the Court didn't say why abortion "is a private act." Even if it is private, he remarked, "there are lots of private acts that are not protected," and the Court didn't explain "why this one is protected. We are simply not told that."

Under friendly questioning by Senator Orrin Hatch of Utah, Bork said that, without having all the facts on an abortion case, he didn't know how he would rule on it. He explained the points he would consider if faced with a challenge to *Roe*. Although showing that he would give an attorney supporting *Roe* every chance to make a case, he probably added to the worries of pro-*Roe* senators by even discussing the issue at length. And he may have alarmed them when he remarked, in speaking of the weight of precedent, that the *Plessy v. Ferguson* decision upholding segregation "was 58 years old when it was overruled, and a lot of customs and institutions had grown up around segregation." <sup>38</sup> At the time of the Bork confirmation hearings, the *Roe* precedent was only 14 years old.

Hatch tried to help Bork by mentioning prominent legal scholars who had criticized *Roe*.<sup>39</sup> Bork, however, did not expand on this point as he should have. An extended colloquy would have been educational for the media and the public and might have embarrassed the pro-*Roe* Democrats.

When the committee's lengthy interrogation of Bork was nearly over, Senator Leahy thanked the judge for answering all the questions Leahy had asked. "You have sat there and answered and answered and answered," the senator remarked, adding that "I applaud you for it." Then Leahy and his liberal colleagues proceeded to hand Bork's head to him. With help from moderate and conservative Democrats, and several Republicans, they defeated him by a 58-42 vote on the Senate floor.<sup>40</sup>

Reeling from the Bork defeat, weakened by the Iran-Contra scandal, and still facing a Senate controlled by the Democrats, the Republicans decided to play it safe. Reagan nominated Anthony Kennedy, a little-known appeals court judge from California, for the still-vacant Court seat. Generally viewed as a moderate conservative, Kennedy had written little or nothing about abortion, and he was not badgered about it in the way other nominees had been or would be.

Senator Howell Heflin, an Alabama Democrat, asked Judge Kennedy how he would approach a ruling on *Roe*. Heflin raised the issue of *stare decisis* ("to stand by things decided")—the legal doctrine of following precedents, sometimes even wrongly decided ones, to provide stability in the law. Many authorities say *stare decisis* has less weight in constitutional cases than others, because the only way to change a wrongly decided constitutional case is the extremely difficult course of constitutional amendment. Judge Kennedy mentioned the idea that *stare decisis* "should not apply as rigidly in the constitutional area," but did not actually endorse that principle. There was reason for *Roe* opponents to worry when he said, "It seems to me that when judges have announced that a particular rule is found in the Constitution, it is entitled to very great weight."<sup>41</sup>

Clearing a path that would be followed by other post-Bork nominees, Kennedy said there is a right to privacy in the Constitution, although he preferred to call it "the value of privacy." He didn't suggest what limits, if any, applied to that value. There was more reason to worry about him when he told Senator Leahy: "I think that the concept of liberty in the due process clause is quite expansive, quite sufficient, to protect the values of privacy that Americans legitimately think are part of their constitutional heritage."<sup>42</sup> That sounded open-ended, to say the least.

Conservative columnist Cal Thomas had written about a meeting between Judge Kennedy and Senator Jesse Helms of North Carolina, then the Senate's

leading abortion foe, that took place several weeks before the Kennedy confirmation hearings. According to Thomas, Helms told Kennedy, “I think you know where I stand on abortion,” and Kennedy smiled and replied, “Indeed I do, and I admire it. I am a practicing Catholic.” Senator Biden, the Judiciary Committee chairman at the time, asked Judge Kennedy about the Cal Thomas piece during confirmation hearings. Kennedy indicated the story was not totally accurate; he also said it “would be highly improper for a judge to allow his, or her, own personal or religious views to enter into a decision respecting a constitutional matter.” Senator Carl Levin, a Michigan Democrat who was not even a Judiciary Committee member, submitted a query to Judge Kennedy on the meeting with Helms.

Undoubtedly both Biden and Levin were genuinely curious about the meeting, but their questions were also a form of hazing. It’s one that goes back at least to 1957, when Supreme Court nominee William J. Brennan Jr. was asked about possible conflict between his Catholic beliefs and the U.S. Constitution and laws.<sup>43</sup> It’s possible that this religious hazing affected Brennan, Kennedy, and other judges, inclining them to bend over backwards to support legal abortion to prove that they were not influenced by their religious beliefs. Some years ago, a Philadelphia activist who was involved in sit-ins at abortion clinics told me that he and his colleagues always worried when Catholic judges presided over their trials. Because of the bend-over-backwards tendency, Catholic judges tended to treat them harshly—whereas Jewish judges were careful to protect the activists’ civil liberties and less inclined to throw the book at them.

While the Democrats hazed Kennedy on privacy and his conversation with Senator Helms, the Republicans said little if anything on *Roe*, apparently acquiescing in the stealth strategy. After his confirmation by a 97-0 vote, Justice Kennedy initially voted to restrict abortion. But like Justice O’Connor, he upheld legal abortion when push came to shove in the 1992 *Casey* decision. Although he voted to uphold a ban on partial-birth abortion in 2000,<sup>44</sup> it’s doubtful that he will ever vote to overturn *Roe*. (I hope he proves me wrong about this.)

#### **Another Roller Coaster: Souter and Thomas**

Of Republican nominees after *Roe v. Wade*, Judge David Souter would prove to be the greatest disaster for unborn children since John Paul Stevens. Both are honorable men (“So are they all, all honorable men . . .”),<sup>45</sup> but have terrible blind spots about the unborn. The double tragedy of the first President Bush’s selection of Souter is that he was replacing Justice Brennan, a behind-the-scenes architect of *Roe* who also supported public funding of



abortion and helped protect abortion clinics from regulation.<sup>46</sup> Replacing Brennan with a judicial conservative would have made an enormous difference and probably would have led to the overturning of *Roe*.

But Judge Souter, who had served on New Hampshire's supreme court and, for a short time, on a federal appeals court, had two friends in high places. One was his former employer and great admirer, Senator Warren Rudman of New Hampshire; the other was John H. Sununu, the President's chief of staff and a former governor of New Hampshire. Although on opposite sides of abortion—Rudman supportive and Sununu opposed—the two had worked together in Republican politics in New Hampshire. Indeed, Sununu was Rudman's campaign manager in a 1980 U.S. Senate race in which Rudman defeated a pro-life Democrat. Elected governor in 1982 with Rudman's strong support, Sununu told the senator, "Warren, anything you want in this state, you've got." Rudman asked that Sununu appoint Souter to the next vacancy on the state's supreme court, and Sununu replied, "Warren, it's done."<sup>47</sup>

In 1990, when Sununu was chief of staff to President George H. W. Bush, he helped Senator Rudman obtain a Souter appointment to a federal appeals court. Justice Brennan retired soon after, and Rudman lobbied Sununu and Bush to move Souter up to the Supreme Court. But Souter, asked to fly to Washington to meet with the President, did not want to be quizzed on *Roe v. Wade*. "I won't take a litmus test. . . . I won't discuss how I might rule in future cases," he told Rudman. So Rudman called Sununu and told him that "there's no sense in this if you plan on quizzing" Souter about abortion. According to Rudman's account, "John told me that absolutely wouldn't happen, and I reported that back to David, who agreed to go and meet the president." Bush liked Souter and promptly announced his nomination to the Supreme Court. Sununu apparently believed, and privately assured a key conservative, that Souter was "a home run."<sup>48</sup>

Senator Rudman thought Souter could help avoid a split in the Republican Party over abortion—and also be confirmed—"if he could avoid being pinned down on *Roe*." He didn't know Souter's views on abortion and, because of the politics of the confirmation process, didn't want to know. Yet he guessed that Souter "probably thought, as I did, that *Roe* had been wrongly decided, as a matter of constitutional law," but "would never vote to overturn the decision, knowing what turmoil that would cause in our society."<sup>49</sup>

Pro-and anti-abortion groups were both worried about Souter. He had been sensitive about doctors' conscience problems with respect to abortion. But he also had voted to allow the performance of abortions at Concord Hospital, where he was a trustee.

Democrats still controlled the Judiciary Committee and, as usual, did most of the hazing. But one pro-life Republican, Senator Gordon Humphrey from Souter's own state of New Hampshire, asked the judge some excellent questions. Souter generally declined to discuss *Roe*, remarking at one point that "I have not made up my mind" on it, or to say whether he thought abortion moral or immoral. That, he declared, would "play absolutely no role in any decision" he would make as a justice. He said he'd voted to allow abortions at Concord Hospital because it was "a community hospital . . . not tied to any sectarian affiliation" and one that "served people of all religious and moral beliefs." Responding to Senator Humphrey, he said his vote on that issue didn't imply that he felt the unborn aren't persons.<sup>50</sup>

Senator Humphrey made the point that "health of the mother" in *Roe* and other cases includes "emotional or mental health," which he called a "massive loophole." He asked Souter how to reconcile the fact that an unborn child can have a legal interest in an estate, yet under *Roe* have no right to life. Souter said something about weighing different interests of "potential parties"; but Humphrey, reading key quotes from the *Roe* opinion, contended that "there is no weighing in *Roe*. None. All of the rights and weight are assigned to the mother and nothing, zero, to the child." He also noted that the Supreme Court has recognized corporations—but not unborn children—as persons under the Fourteenth Amendment. "I have never in my life seen such a strained effort to rule out of the human race by legalistic means a whole class of human beings," Humphrey declared.<sup>51</sup>

Senators still didn't know much about Souter's abortion views at the end of the hearings, although they did know he thought the Fourteenth Amendment protects a privacy right. The Senate confirmed him by a vote of 90-9; ironically, the nine votes against him were cast by liberal Democrats. After Souter voted to uphold a right to abortion in the *Casey* decision two years later, a conservative remarked that "the posse is out looking for John Sununu."<sup>52</sup>

In 1991 Justice Thurgood Marshall retired from the Court. The old civil-rights lion (a *Roe* supporter) had been the first and only African American on the Court, and there was much pressure on President Bush to appoint another in his place. Bush chose Judge Clarence Thomas, a conservative who had served a short time on a federal appeals court. Liberals came out against Thomas, who opposed quotas in affirmative-action programs and had once praised an article that used natural-law theory to make a case against abortion. The same groups that had defeated Robert Bork united against Thomas.

Biden, Kennedy, and Leahy all grilled Thomas on abortion and *Roe* dur-

ing his confirmation hearings. Like other post-Bork nominees, he declined to state any views on *Roe*, but said there's a right to privacy in the Constitution. Senator Howard Metzenbaum, an Ohio Democrat, demanded to know whether Thomas thought "that the Constitution protects a woman's right to choose to terminate her pregnancy." Thomas replied that taking a position on that "would undermine my ability to be impartial." Metzenbaum repeated his question. Thomas said he had "no reason or agenda to prejudge the issue." Metzenbaum kept pressing him.<sup>53</sup> So did Senator Leahy, who was relentless in asking Thomas about any discussions he may have had about *Roe* when it came down—18 years earlier—while Thomas was in law school. Had he discussed it then? Had he *ever* discussed it? Had he ever said whether it was properly decided? Thomas said *Roe* may have been discussed in a law-school group he was in, but that he didn't remember "personally engaging in those discussions." Outside of law school, he suggested, there may have been discussions "in the most general sense that other individuals express concerns one way or the other, and you listen and you try to be thoughtful." But he said he had never "debated the contents" of *Roe*. Leahy kept going, finally asking whether Thomas had decided in his own mind whether *Roe* was properly decided. Thomas said he had not.<sup>54</sup>

Many critics later said Thomas had claimed he had never discussed *Roe* and contended that was a lie. But he didn't say he had never discussed it. He probably *should* have said, after answering the first question or two in Leahy's relentless litany: "Senator, with respect, I have already answered your question. But I don't think I should be interrogated on whether I had private conversations 18 years ago as a law student. I don't know of any other Supreme Court nominee who has been questioned in such a way." That might have taken the wind out of Leahy's sails.

After the last part of the Thomas hearings covered the sensational charges of sexual harassment that former Thomas staffer Anita Hill made against him, and Thomas offered a strong defense, the Senate confirmed him by the cliff-hanging vote of 52-48.<sup>55</sup> On the Court, Justice Thomas has been a firm vote against *Roe v. Wade*.

#### The Clinton Years: Ginsburg and Breyer

President Bill Clinton was fortunate in having two Supreme Court vacancies to fill early in his presidency, long before his impeachment battle. He was also lucky in having a Senate still controlled by Democrats. In 1993 Clinton chose Judge Ruth Bader Ginsburg to replace the retiring *Roe* dissenter, Justice Byron White. Before her service on a federal appeals court, Ginsburg had been a vigorous advocate for women's equality and had once

led the Women's Rights Project of the American Civil Liberties Union. She was an outspoken supporter of legal abortion, although she preferred an equal-protection approach to it rather than *Roe*'s privacy approach.<sup>56</sup> Senator Orrin Hatch, although a right-to-life advocate, had suggested to Clinton that he nominate Ginsburg or Stephen Breyer, another appeals court judge. Hatch later wrote that both "were highly honest and capable jurists" and "far better than the other likely candidates from a liberal Democrat administration."<sup>57</sup>

Ginsburg had an impressive résumé, and few senators wanted to oppose the second woman ever nominated to the Supreme Court. A no-nonsense personality, she took charge of her confirmation hearings and made it clear that she wouldn't discuss cases likely to come before the Court unless she had already written about them. But she had both written and spoken about *Roe*. Senator Metzenbaum told her that he was "puzzled by your often repeated criticisms . . . that the Court went too far and too fast" in *Roe*. Ginsburg explained that she felt a more gradual change would have helped the abortion side; she thought that "if *Roe* had been less sweeping, people would have accepted it more readily."<sup>58</sup> But Judge Ginsburg was quite clear about her bottom line. She told another senator that in the abortion decision, "It is essential to woman's equality with man that she be the decisionmaker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex." Senator Hatch later asked her some good questions on "substantive due process" in relation to *Roe*, but didn't budge her from her basic position.<sup>59</sup>

Most of the supposed pro-lifers on the Judiciary Committee were so silent on *Roe* that it was left to several representatives of pro-life groups to make the case against Ginsburg. Kay Coles James, then vice president of the Family Research Council, was effective in addressing Ginsburg's complaint that anti-abortion laws violate individual autonomy. James said that "a similar critique could be leveled at any law whatsoever. All laws direct human conduct in some fashion, and, to that extent, all laws deprive people of absolute autonomy." She wasn't willing to cede the feminist label to Ginsburg, either. Women need not "take the lives of their children in order to be equal to any man," James declared. "The real feminists are those who say I'm pregnant, I can bear children, and you had better be prepared to deal with it."<sup>60</sup> But the Senate confirmed Ginsburg by a vote of 96-3. Two votes against her were based on anti-abortion grounds, and the third on a fear that she would engage in judicial activism.<sup>61</sup>

In 1994 Justice Harry Blackmun, author of *Roe v. Wade* and many other abortion opinions, finally retired at age 85. Clinton nominated Judge Stephen Breyer to replace Blackmun. Observers described Breyer as pro-business,<sup>62</sup>

a stance that undoubtedly appealed to Senator Hatch and other Republicans. As an appeals court judge, Breyer had once voted to uphold a two-parent consent law for a minor's abortion. On the other hand, he had voted to strike down, on First Amendment grounds, a regulation barring abortion counseling in a federal family-planning program. In his confirmation hearings, Breyer said *Roe v. Wade* had been "the law of this country" for over 20 years; he added that the abortion right had been reaffirmed in *Casey* and was "settled law."<sup>63</sup> Senator Hatch brought up the *Griswold* case and told Breyer that "it has been a stretch" to use *Griswold* to justify abortion. Hatch also told him that "giving substantial deference to prior erroneous rulings" on constitutional issues "just permits the Supreme Court to amend the Constitution."<sup>64</sup> But other right-to-lifers on the committee showed little or no interest in pressing Breyer on *Roe*. The Senate confirmed him by a vote of 87-9. Justice Breyer wrote the majority opinion in the 2000 case of *Stenberg v. Carhart*, in which the Court struck down a state ban on partial-birth abortion. Justice Ginsburg also voted with the majority in that case.<sup>65</sup>

#### A New Chief Justice

The record of most pro-life senators in confirmation hearings was so poor that there was no place to go but up. In the 2005 hearings on President George W. Bush's nomination of the conservative John Roberts for Chief Justice, there was significant improvement. This was largely due to several senators who had joined the Judiciary Committee since the Breyer hearings. Senator Sam Brownback of Kansas was especially outspoken. Veteran member Orrin Hatch and newer members Jeff Sessions of Alabama and John Cornyn of Texas were helpful in countering the usual hazing from Democrats and from Senator Specter (who by then had become chairman of the committee).

With his impressive constitutional knowledge and attractive personality, Judge Roberts charmed the Judiciary Committee and the public; but he still had to run the gauntlet on abortion. Following the practice of other recent nominees, he declined to discuss *Roe* but said the Constitution includes a right to privacy. Specter pressed him hard on *stare decisis*, suggesting that there's such a thing as "super" *stare decisis* and even that *Roe* "might be a super-duper precedent" because the Supreme Court has had 38 chances to overrule it and has not done so. Roberts declared that *Roe* is "settled as a precedent of the court," is "entitled to respect," and entitled to even more respect because reaffirmed by *Casey*. Yet he also said that, while overruling a precedent is "a jolt to the legal system," *stare decisis* principles "recognize that there are situations when that's a price that has to be paid."<sup>66</sup> Senator Cornyn stressed that *stare decisis* hadn't kept the Court from overturn-

ing major precedents on segregation, homosexual activity, and the death penalty. And Senator Brownback said that “the Supreme Court has overruled itself in 174 cases, with a substantial majority of those cases involving constitutional, not statutory, issues.” (A recent Library of Congress study gives a higher number: 228 overruled decisions.)<sup>67</sup> Brownback cut to the heart of the abortion issue when he said that whether the unborn child “is a person or is a piece of property is the root of the debate. . . . If you’re a person, you have rights; if you’re a piece of property, you can be done with as your master chooses.”<sup>68</sup>

Earlier in the Roberts hearings, Senator Dianne Feinstein had used hard-case stories in support of *Roe*. “As a college student at Stanford,” she said, “I watched the passing of the plate to collect money so a young woman could go to Tijuana for a back-alley abortion. I knew a young woman who killed herself because she was pregnant.”<sup>69</sup> (No one asked Feinstein whether anyone had offered nonviolent alternatives to the desperate women.) Other Democrats had emphasized similar stories at prior confirmation hearings, but pro-life senators had not countered with hard cases that did not end in abortion and that turned out well. Brownback now did so, describing Jimmy, a young man with Down Syndrome who operates an elevator for senators. “His warm smile welcomes us every day,” Brownback remarked; but, alluding to prenatal testing and abortion, he added that “80 to 90 percent of the kids in this country like Jimmy never get here.”<sup>70</sup>

Brownback took this a step further when the committee met to vote on the Roberts nomination. He introduced a 14-year-old girl with Down Syndrome. “And it just seems so strange to me,” he commented, “that we want to celebrate her, and we do celebrate her, and yet in the womb 80 percent are killed.” He spoke of a “new eugenics” and suggested that when someone has a disability, “we should be standing up more,” rather than less, for that person. “Isn’t that the great heritage of this country?” he asked.<sup>71</sup>

The Senate confirmed John Roberts as Chief Justice by a vote of 78-22. The votes against him, all from Democrats, were based on worries about how he might vote on *Roe* and other issues.<sup>72</sup>

### Questions for the Future

This article, completed shortly before the confirmation hearings for Judge Samuel A. Alito, Jr., will reach subscribers after the hearings. I hope Alito, President Bush's nominee to replace Justice Sandra Day O'Connor, will have acknowledged—and declined to recant—his 1985 statement that “the Constitution does not protect a right to an abortion.”<sup>73</sup> And I hope pro-life Republicans on the Judiciary Committee will have asked good questions and

countered well the Democrats' hazing of Judge Alito.

There is no way to know when the next Supreme Court vacancy will occur; but it could be within a year or two. Here are some questions for the next nominee:

“Judge, in *Roe v. Wade*, the Supreme Court didn't even hear from an attorney representing unborn children before deciding that the Fourteenth Amendment doesn't protect them. If *Roe* is ever reconsidered, don't you think the Court should require the appointment of a guardian *ad litem* to represent the unborn?”<sup>74</sup>

“Some people are puzzled about why the Supreme Court treats corporations—but not unborn children—as persons under the Fourteenth Amendment. Could you please explain its reasoning?”

“Critics say *Roe* has given us a two-tiered system of justice, in which some human beings have rights and others do not. Now some people are trying to put handicapped babies and people with severe brain injuries down on that second tier with the unborn. I have to wonder: Who's next? Are we headed toward a system where those who have the most legal protection for their rights will be those who need it least—the healthy, wealthy, and powerful? Doesn't this go against equal protection of the laws in a profound way?”

“When the Court declared that it ‘need not resolve the difficult question of when life begins,’ didn't it make a confession of incompetence? I learned from high-school biology that life begins at fertilization. Aren't judges supposed to recognize scientific evidence when it bears directly on a case?”

“In *Doe v. Bolton*, the companion case to *Roe v. Wade*, the Court said that in making an abortion decision, a doctor may consider ‘all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health.’<sup>75</sup> Doesn't this mean that an abortion for a mother's ‘health’ can be an abortion for any reason at all?”

“Judge, you and others have said that even if a Supreme Court precedent is wrong, additional reasons are necessary if it is to be overturned—for example, that it has proved unworkable, or has warped a whole area of law. But suppose it has done great injustice to a whole class of human beings? Wasn't that the main problem with *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Buck v. Bell*, and *Korematsu v. United States*?<sup>76</sup> Isn't great injustice a good reason for overruling an erroneous decision?”

“Gianna Jessen was born in an abortion clinic in California after a saline abortion failed to kill her. She has cerebral palsy as a result of the abortion, but is happy to be alive. She once said, at a congressional hearing, ‘The best

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thing I can show you to defend life is my life. It has been a great gift.’<sup>77</sup> I have no question to ask about her, Judge. I just urge you to keep her in mind.”

NOTES

1. U.S. Senate, Committee on the Judiciary, Hearings on *Nomination of Sandra Day O'Connor*, 97<sup>th</sup> Cong., 1<sup>st</sup> sess., 9-11 Sept. 1981, 108; and transcript of “Hearings on the Nomination of Judge Roberts,” 13 Sept. 2005 (print preview format), 3, [www.nytimes.com](http://www.nytimes.com).
2. The late Chief Justice William Rehnquist is not included among the nine. Already on the Supreme Court, and a dissenter in *Roe v. Wade*, he was not asked about *Roe* in his 1986 confirmation hearings for Chief Justice. See U.S. Senate, Committee on the Judiciary, Hearings on *Nomination of Justice William Hubbs Rehnquist*, 99<sup>th</sup> Cong., 2<sup>nd</sup> sess., July-Aug. 1986.
3. Roberts hearings (n. 1), 14 Sept. 2005, 66.
4. Michael Stokes Paulsen and John Yoo, “Make Miers Pass a ‘Litmus Test,’” 18 Oct. 2005, [www.latimes.com](http://www.latimes.com).
5. U.S. Senate, Committee on the Judiciary, Hearings on *Nomination of Judge Antonin Scalia*, 99<sup>th</sup> Cong., 2<sup>nd</sup> sess., 5 & 6 Aug. 1986, 214.
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  46. Mary Meehan, "Justice Blackmun and the Little People," *Human Life Review* 30, no. 3 (Summer 2004), 86-128, 102-107, & 112-114.
  47. Warren B. Rudman, *Combat: Twelve Years in the U.S. Senate* (New York: Random House, 1996), 28-31 & 159-160. John H. Sununu, the former governor, should not be confused with his son, John E. Sununu, who is now a U.S. Senator from New Hampshire.
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  50. U.S. Senate, Committee on the Judiciary, Hearings on *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States*, 101<sup>st</sup> Cong., 2<sup>nd</sup> sess., Sept. 1990, 115-117, 168-170, 189, 211, & 174-175.
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- be Associate Justice of the Supreme Court of the United States*, 103<sup>rd</sup> Cong., 1<sup>st</sup> sess., 20-23 July 1993, 148-149.
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63. Nancy E. Roman, "Breyer's Record Mixed on Abortion-Rights Issue," *ibid.*, 23 May 1994, A-1 & A-11; and U.S. Senate, Committee on the Judiciary, Hearings on *Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States*, 103<sup>rd</sup> Cong., 2<sup>nd</sup> sess., 12-15 July 1994, 280-281 & 268-269.
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65. Helen Dewar, "Breyer Wins Senate Confirmation to Top Court, 87 to 9," *Washington Post*, 30 July 1994, A-9; and Walsh and Goldstein (n. 27).
66. Roberts hearings (n. 1), 13 Sept. 2005, 1-7.
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68. *Ibid.*, 14 Sept. 2005, 7.
69. *Ibid.*, 12 Sept. 2005, 32.
70. *Ibid.*, 14 Sept. 2005, 9-10.
71. Transcript of "Senate Panel's Debate on the Confirmation of Judge Roberts," 22 Sept. 2005 (print preview format), 45-46, [www.nytimes.com](http://www.nytimes.com)
72. *Congressional Record* (daily ed.), 109<sup>th</sup> Cong., 1<sup>st</sup> sess., 29 Sept. 2005, S10631-S10650.
73. Quoted in Jo Becker and Charles Babington, "No Right to Abortion, Alito Argued in 1985," *Washington Post*, 15 Nov. 2005, A-1 & A-9.
74. There were guardians *ad litem* (guardians who represent minors or legal incompetents in lawsuits) in some other abortion cases at the time. See U.S. Senate (n. 7), 169-170, 240-241, 248, & 528.
75. *Doe v. Bolton*, 410 U.S. 179 at 192.
76. These cases upheld, in the order named: slavery, segregation, compulsory sterilization, and exclusion of Japanese Americans from the West Coast during the Second World War.
77. U.S. House, Committee on the Judiciary, Subcommittee on the Constitution, Hearing on *Origins and Scope of Roe v. Wade*, 104<sup>th</sup> Cong., 2<sup>nd</sup> sess., 22 April 1996, 28-29.



"It doesn't have to be this way, Harry—we could attend couples counseling."

# The Abortion Mythology of *Roe v. Wade*

Gregory J. Roden

The phoenix, the mythical bird that was said to rise anew from its own ashes, was invoked at the beginning of the document that was to become the theoretical cornerstone of Harry Blackmun's *Roe v. Wade* opinion: "The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?" by Cyril C. Means Jr., counsel for NARAL. The article's opening paragraph reads: "In ancient Eastern folklore, the phoenix was a fabulous bird, said to live for five hundred years in the Arabian desert, then to build its own funeral pyre, on which it would burn itself to ashes, out of which it would then arise young again. Is it the destiny of elective abortion to recapitulate the career of the phoenix?"

Although it didn't have a catchy title, Cyril Means's law-review article would come to have more influence on the American system of law and society than perhaps any other. Means's use of mythology at the opening of his article speaks volumes of what the reader should expect to find therein—more of the same.

Means's article propagated one primary myth and two ancillary ones. The principal myth hatched in *The Phoenix* was that abortion was not a common-law crime. The two ancillary myths were that a) given the first myth, abortion was freely available (and by implication, more socially acceptable) at the time our Constitution was adopted and b) given the first two myths, there was no historical recognition of the fetus as a person. Consider this bold portrait Means paints in the article's introduction: "It reveals the story, untold now for nearly a century, of the long period during which English and American women enjoyed a common-law liberty to terminate at will an unwanted pregnancy, from the reign of Edward III to that of George III. This common-law liberty endured, in England, from 1327 to 1803; in America, from 1607 to 1830. Thus its life-span closely approximated the semimillennium of the phoenix."

The article was published in 1971, before *Roe v. Wade* and *Doe v. Bolton* were first argued before the Supreme Court in December of that year, and was submitted to the Court prior to the first hearing. Sarah Weddington, who represented Jane Roe, made good use of Means's mythology in the first

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oral argument (December 13, 1971):

Your Honors, in the lower court, as I'm sure you're aware, the court held that the right to determine whether or not to continue a pregnancy rested upon the Ninth Amendment—which, of course, reserves those rights not specifically enumerated to the Government, to the people. I think it is important to note, in a law-review article recently submitted to the Court and distributed among counsel by Professor Cyril Means Jr., entitled “The Phoenix of Abortional Freedom,” that at the time the Constitution was adopted there was no common-law prohibition against abortions; that they were available to the women of this country.

Here, Weddington referred to the first two of Means's myths—that there was no common-law prohibition against abortion and that abortion was freely available at the time the Constitution was adopted. The third myth, that there was no historical recognition of the fetus as a person, Weddington would parrot a few moments later:

The Constitution, as I read it, and as interpreted and as documented by Professor Means, attaches protection to the person at the time of birth. Those persons born are citizens. The enumeration clause, we count those people who are born. The Constitution, as I see it, gives protection to people after birth.

Later in his article, Means claimed to be the sole author of this new history of the common law: “No modern American scholar has shown any awareness of it.” In other words, Means's understanding of the common law as it applied to abortion put him in a crowd of one. Nevertheless, Blackmun relied heavily on Means in formulating his *Roe* opinion, citing the article four times and an earlier Means article three times. And though the theory of the *Roe* opinion was initially questioned even by some abortion proponents, with passage of time and the numerous affirmations of *Roe*'s result, others would lend their professional credentials to Means's mythology. Most notably, a gaggle of historians were to submit amicus briefs supportive of the new abortion mythology in the *Webster v. Reproductive Health Services* and *Planned Parenthood v. Casey* cases.

Still, Means's mythology was based on a precarious foundation. In the “Phoenix” article he analyzed two cases—he named them *The Twinslayer's Case* and *The Abortionist's Case*—that were supposed to be notable in that they did not result in convictions for murder in two incidents of assault upon pregnant women. A reading of these cases reveals that the convictions failed for evidentiary and procedural reasons—phenomena inherent in all of criminal law. Still, even without examining these cases in depth, we can see the first and most obvious problem with Means's mythology: These cases did not involve elective abortions. Rather, they were concerned with malicious criminal assaults upon pregnant women. If these cases were good law, then

any person would have a constitutional right to punch a pregnant woman in the abdomen; privacy and liberty concerns of the woman are nowhere to be found in these cases.

Since the *Roe* opinion there have been a number of persuasive articles picking apart the legal theory, or lack thereof, in the Means mythology. But there is one document that stands out in attacking Means's work most directly, by providing English common-law cases proving the criminality of abortion: the *amicus curiae* brief submitted by the American Academy of Medical Ethics (AAME) through its attorney Joseph W. Dellapenna, professor of law at Villanova University.

The AAME Brief cites over 50 common-law cases attesting to the criminality of abortion in 13th- and early 14th-century England. Professor Dellapenna records 16 cases providing "clear records of punishments," and 37 judgments of "'not guilty' (rather than dismissal)" which "prove that the indictments . . . were valid under the common law" in the general time that *The Twinslayer's Case* and *The Abortionist's Case* were recorded. Additionally, the AAME Brief provides citations to a number of other common-law cases recorded in later years. Two of these cases reported in the AAME Brief will allow the reader to see for himself how an honest examination of the common law totally repudiates Means's thesis. The first case, *Rex v. Beare*, is an interesting study. The account presented in the AAME Brief had originally been written for a magazine geared toward the general public—and thus provides a unique insight into how such a case was understood in its own day:

*Rex v. Beare*

(Derby, England, Aug. 15, 1732)

2 *The Gentleman's Magazine* 931 (Aug. 1732)

ELEANOR MERRIMAN, now the Wife of *Ebenezer Beare*, indicted for a Misdemeanor, in endeavouring to persuade Nich. Wilson to poison his Wife, and for giving him Poison to that End.

Indicted a second time by the Name of *Eleanor Beare*, for a Misdemeanor, in destroying the Foetus in the Womb of *Grace Belfort*, by putting an iron Instrument up into her Body, and thereby causing her to miscarry.

Indicted a third time, for destroying the Foetus in the Womb of a certain Woman, to the jury unknown, by putting an Iron Instrument up her Body, or by giving her something to make her miscarry. Pleaded Not Guilty . . . .

To the Second Indictment:

COUNSEL [FOR THE KING]: Gentlemen, you have heard the Indictment read, and may observe, that the Misdemeanor for which the Prisoner stands indicted, is of a most shocking Nature; to destroy the Fruit in the Womb carries something in it so contrary to the natural Tenderness of the Female Sex, that I am amazed how ever any Woman should arrive at such a degree of Impiety and Cruelty, as to attempt it in

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such a manner as the prisoner has done, it has really something so shocking in it, that I cannot well display the Nature of the Crime to you, but must leave it to the Evidence: It is cruel and barbarous to the last degree.

Call *Grace Belford*.

GRACE BELFORD [sic]: I lived with the Prisoner as a Servant about ten Days, but was not hired, and was off and on with her about fourteen Weeks: When I had been with her a few Days there came Company into the House, and made me drink Ale and Brandy (which I was not used to drink) and it overcame me; my Mistress sent me unto the Stable to give Hay to some Horses, but I was not capable of doing it, so [I] laid me down in the Stable; and there came to me one Ch—r, a young Man that was drinking in the House, and after some Time I feared I was with Child by Ch—r; upon that, my Mistress asked me if I was with Child, I told her I thought I was; Then she said if I could get 30 shilling from Ch—r, she would clear me from the Child, without giving me Physik. A little Time after, some Company gave me Cyder and Brandy, my Mistress and I were both full of Liquor, and when the Company was gone, we could scarce get up the Stairs, but we did get up; then I laid me on the Bed, and my Mistress brought a kind of an Instrument, I took it to be like an Iron Skewer, and she put it up into my Body a great Way, and hurt me.

COURT: What followed upon that?

EVIDENCE: Some Blood came from me.

COURT: Did you miscarry after that?

EVIDENCE: The next day after I went to *Allesiree*, where I had a Miscarriage.

COURT: What did the Prisoner do after that?

EVIDENCE: She told me the Job was done. I then lodged two or three Nights with one *Ann Moseley* (now *Ann Oldknowles*) and coming on Morning to see the Prisoner, I called for a Mug of Ale and drank it, and told her I was going home; then came in *John Clark*, and on the Prisoner's saying I was going home, he said he would give me a Glass of Wine to help me forward, which accordingly he did, out of a Bottle he had in his Pocket, then I took my leave of him; and when I was a little Way out of Town, I fell down at a Style, and was not well, I lay a little while, then got up, and went to *Nottingham* that night.

Call *Ann Oldknowles*.

COURT: Do you know any Thing of *Grace Belford* having a Miscarriage?

EVIDENCE: I know nothing, but that when she lay with me, I saw all the Symptoms of Miscarriage on the Bed where she lay.

Call *John Clark*.

COURT: Do you know the Prisoner?

EVIDENCE: Yes, I have frequented her House.

COURT: Did you ever hear her say anything that she had used Means to make a Woman with Child miscarry, by putting any kind of Instrument up their Bodies, or by giving them any Thing to take inwardly?

EVIDENCE: Yes, I have.—

COURT: Have you seen her Instrument for that Purpose, or have you seen her use any Means to make any Woman with Child miscarry?

CLARK: No, but I have heard her say she had done it, and that she then had under her one *Hannah* ——, whose other Name I know not.

COURT: Have you heard her say she had been sent for these wicked Practices, or

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had any Reward for causing any one to miscarry?

CLARK: I heard her say she had been once sent for to *Nottingham*, and, as I remember, she said she had five Pounds for the Journey.

PRISONER: Did you not say you never heard me say any thing of using any Means to cause Miscarriage in any Person, or saw me use any Means for that End?

CLARK: No, I said I never saw you do any thing that Way, but had heard you say you had done it. Would you have me forswear myself?

PRISONER: No, but I would have you speak the Truth.

CLARK: I do.

Then the Prisoner called several Persons to speak in her Behalf, but only two appeared, and they only gave her Friends a reputable Character, and said the prisoner had a good Education, but they knew nothing of the latter Part of her Life.

MR. MAYOR: The Prisoner at the Bar has a very bad Character and I have had frequent Complaints against her for keeping a disorderly House.

Many evidences were ready in Court to have proved the Facts she stood charged with in the third Indictment: but his Lordship observing that the second Indictment was proved so plainly, he thought there was no Necessity for going upon the third. His Lordship summed up the Evidence in a very moving Speech to the jury, wherein he said, he never met with a Case of barbarous and unnatural. The Jury, after a short Consultation, brought the Prisoner in Guilty of both Indictments, and she received sentence to stand in the Pillory, the two next Market-Days, and to suffer close Imprisonment for Three Years.

*Derby, August 18, 1732.* This day *Eleanor Beare*, pursuant to her Sentence, stood for the first Time in the Pillory in the Market place; to which Place she was attended by several of the Sheriff's Officers; notwithstanding which, the Populace, to show their Resentment of the horrible Crimes wherewith she had been charged, and the little Remorse she has shown since her Commitments, gave her no Quarter, but threw such quantities of Eggs, Turnips, etc. that it was thought she would hardly have escaped with her Life: she disengaged herself from the Pillory before the Time of her standing was expired, jumped among the Crowd, whence she was with Difficulty carried back to Prison.

*Rex v. Beare* provides a unique firsthand perspective on how a common-law court prosecuted abortion; it clearly attests to the common-law prohibition of abortions resulting in a stillborn child. The crime earned Eleanor Beare two days in the pillory and three years in prison. So much for Means's primary myth. Also of great interest is the recounting of Eleanor Beare's sentence in the pillory. It assures us that the "Populace" did not buy into Means's second myth at all. The "Populace" expressed their displeasure with the crimes of Eleanor Beare in a most demonstrative way.

Now for the third myth, that the unborn were never recognized as persons. Consider this reporting of another case in the AAME Brief:

*Rex v. Tinkler*

King's Bench, 1781

Report in the *Newcastle Chronicle*, Nov. 24, 1781, at 2

Tuesday last Margaret Tinkler, midwife, was executed near Durham, for a crime in acting or recommending certain means to destroy an infant, which was effected; and finally with the death of the mother. Before she left the jail for execution, she confessed to a worthy clergyman, and Mr. Smith, surgeon in Newcastle, then present, that she only recommended the means, but that the act itself was done by the deceased woman . . . [Her plea of pregnancy failed.]

*Rex v. Tinkler* repudiates Means's third myth by illustrating two different common-law doctrines. The first is that under the common law the death of the mother as a result of an abortion was murder; a rule that Means admitted was always applicable regardless of the stage of pregnancy. The basis for this rule was that the abortion was always an unlawful act, from the moment of conception, and one for which the mother's consent was not valid. As the mother's consent to the procedure was not valid—in contrast to a valid consent, for a bona fide medical procedure—the actions of the abortionist were beyond mere negligence, and were held to be criminal assault. It was the existence of the unborn child with an inherent right to life, and the state's interest in protecting its "person," that animated this rule. Sir Matthew Hale summed up the "death of the mother" rule in this manner: "But if a woman be with child, and anyone gives her a potion to destroy the child within her, and she takes it, and it works so strongly that it kills her, this is murder, for it was not given to cure a disease, but unlawfully to destroy her child within her, and therefore he that gives a potion to this end must take hazard, and if it kill the mother, it is murder, and so ruled before me at the Assizes at Bury in the year 1670."

The second manner in which *Tinkler* repudiates Means's third myth has to do with the little procedural note at the end: "Her plea of pregnancy failed." The common law required a stay of execution of a female should she be found to be pregnant with a living child—a "quickened" fetus. As the authoritative common law treatise William Blackstone's *Commentaries on the Laws of England* informs us, if a plea of pregnancy was entered "[T]he judge must direct a jury of twelve matrons or discreet women to enquire the fact: and if they bring in their verdict quick with child (for barely, with child, unless it be alive in the womb, is not sufficient) execution shall be staid generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all"—note the imperative command "the judge *must*." Accordingly, Tinkler's plea failed because she was not pregnant. In other words, the plea did not fail because it was not procedurally valid. The only time a plea would fail as a matter of procedure was in the case a condemned woman, who already had such a stay by operation of the plea, was found to be pregnant again. Blackstone explained the exception this way, "For she may now be executed before the



child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice.” Still, even here, the execution had to take place before the unborn child was known to be alive under their primitive medical science, i.e. before the child was “quick.”

As Means himself was to admit in the “Phoenix” article, “this had been the rule in England from at least as early as 1349.” Yet, Blackstone found the origin of the rule to be much earlier, “[T]he laws of ancient Rome; which direct, with the same humanity as our own, ‘*quod praegnantis mulieris damnatae poena differatur, quoad pariat:*’ which doctrine has also prevailed in England, as early as the first memorials of our law will reach.” Thereby, the state recognized that the unborn child had a right to life separate from his mother, who had been condemned to death. In the “plea of pregnancy” rule, the state recognized the child as a separate legal entity from his mother, in other words, a person. As the state affirmatively acted to protect the life of the unborn child of a condemned woman, it is then obvious that under the common law the unborn child was held to be a separate person (and not just a part of the mother) when the state had direct jurisdiction over the life of the child.

Although Means’s article discussed both of these well-known common-law doctrines illustrated by *Rex v. Tinkler*, Blackmun chose to ignore them. Both the “murder of the mother by abortion” rule and the plea of pregnancy are diametrically opposed to the result Blackmun reached.

In *Planned Parenthood v. Casey*, the Court reaffirmed the *Roe* opinion by a flawed application of the doctrine of *stare decisis*, which basically means that the court adheres to its own precedent. As the court stated in *Casey*: “Because neither the factual underpinnings of *Roe*’s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973.” Yet there was no underpinning more central to the *Roe* opinion than the myth that abortion was legal under the common law. That the *Casey* court made this statement without even a discussion of the numerous common-law cases put forth in the AAME Brief is an obvious indictment of the *Casey* opinion as well. That *Roe* was “rightly decided” has become the mantra of the pro-abortion forces, to drive from their minds the evidence of how badly it was decided. It’s long past time for candor on this fundamental issue.

# Irish Pro-lifers: The Road Ahead

*Patrick Kenny*

**T**he pro-life movement in Ireland is still trying to recover from the body blow it received in the 2002 referendum. The 1992 “X Case” had legalized abortion up to the moment of birth, and after ten years of pro-life campaigning the Irish government had finally yielded and allowed a referendum on the subject. The mainstream pro-life groups, with the approval of both the Irish bishops and the Vatican, supported the government’s wording for the referendum—but more radical pro-life groups sought a rejection of the wording on the basis that it didn’t go far enough. As a result of this split, pro-lifers lost the referendum—by less than one percent. Inevitably, relationships between the two sides of the pro-life family were damaged. Now the fractured pro-life movement faces two new challenges, one from the government-sponsored Crisis Pregnancy Agency and the other from a series of European cases sponsored by a Planned Parenthood affiliate and aimed at undermining Ireland’s pro-life ethos.

## **The Crisis of a Pregnancy Agency**

The Crisis Pregnancy Agency (CPA) was established by the Irish government in 2001 in response to concerns about the numbers of Irish women traveling to Britain for abortions. While technically legal as a result of the 1992 X Case, abortions are not performed in Ireland because of the ethical guidelines of the Medical Council and the technical difficulties of introducing abortion legislation under the terms outlined in the X Case. But the situation remains precarious: With another hard case like that of the 14-year-old rape victim in the 1992 case, or a different government intent on forcing through abortion legislation, Ireland’s resistance to abortion could crumble as it has in practically every other Western nation.

Despite the lack of abortion on Irish soil, Ireland has an abortion rate of approximately 11 percent; just over 6,000 Irish women travel to Britain for abortions each year. This number has been relatively steady for several years, though it represents an increase of 37 percent since the mid-1990s—an increase almost certainly due to the legalization of abortion information in 1995. There is little doubt that the Irish abortion rate would rival that in most other Western European countries if abortion were available in Ireland.

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The official aim of the Crisis Pregnancy Agency is to reduce the number of unwanted pregnancies by the provision of education, advice, and contraceptive services; to reduce the number of women who opt for abortion by offering services and supports to make other options more attractive; and to provide continuing support and medical services after pregnancy. The agency is extremely well funded. The professionalism and reach of its advertising and communications campaigns rival anything to be found in the private sector, an oddity in a country where public-information and social-marketing campaigns operate on the tightest of budgets.

Pro-lifers greeted the launch of the CPA with cautious hope. It had become clear that merely keeping abortion away from Irish shores did not in itself protect the lives of Irish unborn babies; there was a growing awareness that legal protection against abortion must go hand in hand with the provision of help and positive alternatives to those contemplating abortion. The pro-lifers lobbied the government for the establishment of an agency that could learn from the mistakes of other countries and implement the best practices to reduce the abortion rate.

Almost immediately after the program's launch, however, the cautious hope turned to dismay. A clue to what lay ahead could have been found in the name of the agency itself. Many pro-lifers use the term "crisis pregnancy," but they tend to be deaf to the connotations of this phrase. For many women, an unwanted pregnancy is a "death of self" experience; it feels exactly like a "crisis." It *is* a crisis, in the sense that it may bring to an end their plans for study or for developing a career. But to use the language of crisis is to suggest that extreme measures might be called for—on the principle that desperate times call for desperate measures. As a result, the extreme response of abortion might begin to look more morally justifiable. A "crisis" allows abortion and all it involves to be rationalized and excused.

Moreover, while the stated aim of the CPA is to reduce the number of women who go to Britain for an abortion, most of its efforts in practice are aimed at encouraging greater use of contraception and also at facilitating the provision of information on abortion services in Britain. This entire program of action seems to fly in the face of several decades of evidence revealing that these two strategies will in fact *increase* abortion rates.\*

The CPA has also been given responsibility for the public funding of pregnancy-counseling agencies. There are two counseling agencies that have traditionally been pro-life: CURA and LIFE. Together they received just 6.6

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\* The two periods that saw the sharpest increases in the number of Irish women traveling to Britain for abortion were immediately following the legalization of the contraceptive pill in 1979 and immediately following the legalization of abortion information in 1995.

percent of the CPA's special-project funding for 2003, the last year for which figures are available. Most of this special-project funding, therefore, goes to agencies that facilitate abortion services abroad as well as to a variety of "sexual health" organizations.

In 2003 the CPA developed what it calls the "Positive Options" campaign, which provides women facing unwanted pregnancies with information on all of the options they have, including abortion. Among the agencies being promoted as part of this campaign is the Irish Family Planning Association, an affiliate of the International Planned Parenthood Federation and a longtime advocate for legal abortion in Ireland. The CPA—an agency putatively established to reduce the number of women seeking abortions—has itself ended up facilitating that very option.

The CPA established a service-level agreement with all of the counseling agencies it was funding. As part of this agreement, each organization would distribute a leaflet to clients giving details of all the other agencies providing help with all of the options. Furthermore, if the agency in question did not provide information on all "positive" options (including abortion), then it had to agree to refer clients to another organization that did. This, of course, should have posed difficulties for the two pro-life counseling agencies funded by the CPA. LIFE, an independent, non-denominational agency, refused to sign the agreement—and faced the potential loss of its funding as a result.

CURA, an official Catholic agency run by the bishops, took a decidedly different path. In early May of 2005, four volunteer counselors with CURA wrote a letter to the weekly *Irish Catholic* newspaper to reveal publicly for the first time CURA's new policy of distributing the Positive Options leaflet. It subsequently emerged that they had met with CURA's National Co-ordinator in October 2004 to discuss their concerns and had written to Bishop John Fleming of Killala, the President of CURA and a member of its National Executive, in January 2005. They received no response until the publication of their letter in the *Irish Catholic*.

Once they went public, however, the response from CURA was swift and decisive. CURA's National Co-ordinator, Louise Graham, in a response in the *Irish Catholic*, defended the CURA policy on the basis that they had received advice from an unnamed moral theologian that the policy was morally acceptable and that, far from facilitating abortion, they were providing each woman with "an opportunity to further consider her options and the likelihood that she will make a fully informed decision."

The net result of the policy is that women who wanted an abortion were being referred by an official Catholic "pro-life" counselling agency to a Planned Parenthood affiliate, which would in turn help facilitate that

abortion in another country. Such a policy amounts to formal cooperation with serious wrongdoing, and not only places the woman and her unborn at risk of an abortion but also places the pregnancy counselors in a difficult position with respect to the moral philosophy CURA purports to support.

The controversy took a decisive turn at the end of May 2005, when the National Executive of CURA expelled the four counsellors, claiming that the women, who between them had 70 years of service in the agency, had broken CURA's confidentiality agreement by commenting about its policies in public. There were no congratulations for these selfless volunteers, who were calling a Catholic agency back to its original mission of protecting life; instead, four middle-aged women who had given years of service were publicly humiliated and dismissed from their volunteer posts. There was no inquiry, no dialogue, and no opportunity for a defense. Were such an approach to be taken with paid employees in the private sector, legal action would be swift and the result certain; in an official Catholic agency, however, a witch hunt was conducted to expel those who had spoken out.

Following a public outcry in the Catholic press, the Bishops' Conference at its summer meeting requested CURA to discontinue the distribution of the CPA leaflet. They maintained that the leaflet was unacceptable because it implied that abortion was a positive option and they objected to the fact that most of the agencies listed in the leaflet would help women obtain foreign abortions. Bishop Fleming, the CURA president, still maintained that it was "not just a black and white matter" and that the policy was aimed at slowing down the decision-making process so that women could make a more informed decision.

Significantly, however, the bishops did not reinstate the four volunteers; instead, they asked for those involved to "seek ways of achieving healing and reconciliation." At the time of writing there has been no attempt on the part of CURA to contact the four dismissed volunteers, and the row has deepened, with several other volunteers leaving the agency in support of the four women.

Serious questions remain unanswered about the role of the Church in this controversy. How could a Catholic agency with a 20-year pro-life track record capitulate so easily to the requests of the Crisis Pregnancy Agency? How could this occur when a small non-denominational body like LIFE could resist the demands of the State body? How could Bishop Fleming oversee such a change of policy? Why did the bishops decide to act only when a public spotlight was turned on CURA's role in facilitating foreign abortions?

The pro-life community faces further battles with the Crisis Pregnancy Agency in the years ahead. The CPA is slowly but steadily moving towards

a position where it will practically control all pregnancy-counseling operations in Ireland, certifying which ones meet its standards of appropriate “non-directive counseling.” The current chairperson of the Agency, Olive Braiden, has recently called for the introduction of abortion legislation in Ireland, an extraordinary move for someone with the job of actually reducing the number of Irish women who choose abortion.

### **A Challenge From Europe**

But even as the Crisis Pregnancy Agency poses problems on the domestic front, a potentially more serious threat looms on the European stage. A case is currently making its way through the European Court of Human Rights (ECHR) aimed at undermining Ireland’s constitutional protection for the unborn.

According to official court documents, the case has been brought by an Irish woman referred to only as “D” in an effort to protect her identity. She became pregnant with twins in 2001. In early 2002 an amniocentesis test indicated that one fetus had stopped developing at eight weeks and that the second fetus had a fatal chromosomal abnormality. “D” decided that she could not carry the pregnancy to term and traveled to England for an abortion.

“D” is claiming that her rights under the European Convention on Human Rights have been infringed on a number of grounds. Specifically she is claiming that she was subjected to “inhuman and degrading” treatment because of the lack of abortion services in Ireland and that she was discriminated against as a pregnant woman. She is also claiming that legal restrictions on the ability of her doctor to make a referral to an abortion clinic on her behalf are a denial of her rights to information under the Convention and that the lack of abortion in Ireland constitutes a disproportionate interference with her private and family life.

The ECHR is not part of the official EU legal infrastructure. Rather it forms part of a cooperative effort on the part of European nations to develop a common platform for human rights across the continent. It differs from the European Court of Justice in that it has no direct legal effect in individual countries. In one case in which the ECHR had found Ireland to be in breach of the Convention, the Irish government simply ignored the issue for ten years.

However, a change to the law in 2003 meant that the European Convention on Human Rights was incorporated into Irish law—and that Irish citizens can now enforce their rights under the Convention in the Irish courts. Such a scenario could see a woman pleading that the lack of abortion in Ireland is an infringement of her rights under the Convention, and an Irish judge being obliged to give due consideration to the judgments of the ECHR. (It is as yet

unclear what weight such a judgment would have, especially if it conflicted with Irish constitutional law.)

The ECHR has refused to rule on the right to life in any cases that have come before it to date, most recently in a case where a Vietnamese woman living in France claimed that her unborn baby's rights were infringed after she was accidentally aborted when the doctor confused her with another woman.

Ireland's Pro-Life Campaign has been given leave to make a submission to the Court in defense of the unborn. The best that can be hoped for with this case is that the Court maintains its consistent position and refuses to rule on the right to life, referring it back to domestic courts. The first stage for the Court is to decide if the case is admissible; if it is, judgment is expected within a year.

The Irish Family Planning Association, which is "sponsoring" the case, presumably by providing both legal and financial resources, has revealed that it has another three cases for the ECHR in the pipeline should this one fail. Frustrated by a pro-life consensus on the ground in Ireland, it seems to have embarked on a plan to join the twin powers of judicial activism and the might of international institutions in its efforts to introduce abortion in Ireland. If the IFPA manages to humiliate Ireland often enough abroad, it hopes public opinion will eventually capitulate and demand abortion legislation.

This resembles the strategy that the Dutch Women on Waves (WOW) organization adopted when it sailed into Irish waters five years ago. WOW arrived in Ireland intending to bring pregnant women out to international waters and perform surgical abortions on them on the high seas. Such a move might have been legal, though it certainly called into question the traditional pro-choice call for *safe* abortion.

WOW was intent on doing this in the full glare of an international media spotlight, hoping to embarrass Ireland into falling in line with the rest of the Western world. They hoped for violent demonstrations and an embarrassing show of political incompetence on the part of Ireland's pro-lifers. They were instead met with attractive, calm, and professional pro-life spokespeople. The international media soon lost interest and went home, and WOW sailed away never to return.

But given the domestic and international challenges to the pro-life consensus, Irish pro-lifers still have their work cut out for them. They will have to call upon all of their considerable political and media skill in order to keep Ireland abortion-free.

## APPENDIX A

[*Jo McGowan is a columnist for Commonweal magazine where this commentary first appeared in the July 15 issue. The two letters to the editor and Ms. McGowan's reply appeared in the September 9 issue. © 2005 Commonweal Foundation; reprinted with permission. For subscription information, please visit the magazine's website at [www.commonwealmagazine.org](http://www.commonwealmagazine.org).]*

### Another Modest Proposal

*Jo McGowan*

I am crazy about stem cells. They have such investment potential that I had been trying to convince my husband, who loves playing the market, to look into getting some before the price skyrocketed. He said he had to do more research first, but I decided not to delay.

I'll have to confess that the first batch I got was pretty expensive. I had to borrow the money to do it, and it took quite a while before I could find someone willing to sell. But it was totally worth it. I keep them in the deep freeze and take out just the exact amount I need each time.

I bought them initially for my daughter who has a degenerative disorder. We had been told that she might respond to stem-cell treatment, so every day I mix a spoonful in her lentil soup (we are vegetarians, and I can't stand the idea of people killing animals so they can enjoy steak or chicken. The worst is veal: unborn calves! But don't get me started on *that*) and I can already see some improvement in her general alertness.

At first, of course, I was very strict about using the stems only for the child. They are expensive, after all, and I wanted them to last for as long as possible. And then, there is so much hype about where they come from and all—it seemed, at least in the beginning, that only really crucial situations could justify their use. But one afternoon my older daughter cracked her head on a cupboard door, and she was in severe pain. I could see the swelling before my eyes, and I suddenly thought, why not? Is she any less important? Maybe they would help her too.

I quickly made a little paste out of peanut butter and the stems (they are a bit granular, in case you didn't know) and applied it to the bump. A second later, she looked at me in astonishment and said that the pain had vanished.

Not long after that, my husband was clipping his nails and by accident, cut one too deep. Let me try some magic, I thought, and spread a thin film of stems (mixed with olive oil this time; I didn't tell him what it was) over the cut. Within a minute, that nail had grown back.

Well, now I was excited. What else could these cells be used for? But before I started experimenting, I told my husband we just had to stop thinking of stem cells as such a precious commodity. Sure, they were still expensive, but the only way we would really unleash their full potential was to be prepared to take some risks. Were we brave enough, were we generous enough to try?

My husband remained skeptical. He said he wanted to do more research, and I



must confess that I have begun to find his attitude a bit tiresome. He is a self-admitted Luddite (he doesn't know how to drive, let alone use a cell phone or a computer) and is always suspicious of new things. But he kept asking where exactly they came from—he had heard something about human embryos being the source—and wanting to know how we would be able to keep up a guaranteed supply if they did turn out to be as marvelous as they now appear. I told him these things were all just details. The important thing was to keep trying new applications. If the need exists, the supply can be organized. Besides, what did it matter where they come from as long as they work?

But, he countered—and this nearly killed me—he said he found it unsettling to consider using an embryo's cells to help our daughter. What about the embryo's life? How was our child more important than someone else's? He even said he would give his own stem cells if they would help our daughter. I explained about the difference between an embryo's stem cells and a middle-aged adult's, and pointed out that we were talking about our *daughter*. But he didn't seem convinced.

Well, there was a lot more of this sort of hesitancy, but while he was worrying about his issues, I kept thinking about the way that nail had grown back. I had also heard about the momentous, noble research being done on stem cells to cure Alzheimer's and Parkinson's—I am all for it—but what about skin tone and suppleness? At forty-seven, I don't mind admitting that things aren't what they used to be in the elasticity department. Why should I look haggard if I don't have to? Is there a law that forty-seven-year-old women have to look raddled and drawn? I don't think so!

One night while my husband was away, I took a large spoonful of stems (my supply was getting low, but I had already applied for another loan) and mixed them carefully with homemade yoghurt, some chick-pea flour, a little salt, and a few other special ingredients. The exact recipe is available on my Web site, and I do accept Visa.

I rubbed this mixture all over my body and went to bed without bathing. In the morning, after my shower, I was amazed to discover that my skin was similar to that of an eighteen-year-old girl. When my husband returned, he found this oddly horrifying, but that was to be expected from him. The important thing was that my experiment had worked.

It is obvious to me that stem-cells hold enormous promise for ordinary people like you and me, provided we have the courage to get involved with the research and implementation *now*. Buy a jar, use it liberally, and get past the squeamishness that holds back all scientific progress. I would suggest trying it on toast and using it as shampoo. For those of you with pets, see how they respond to it in their diets. And let all those Luddites know: the well-being of our disabled children and parents will not be held hostage to their well-meaning but outdated scruples.

## APPENDIX A

### LETTERS

#### AN IMMODEST PROPOSAL

As scientists and readers of *Commonweal* for forty years, we are disappointed that you would print Jo McGowan's column on stem cells ("Another Modest Proposal," July 15). Such a dismissive treatment of a serious, promising subject did not belong in your journal. We have tried to discern what *Commonweal* expected to gain by such a shallow treatment. It would not engage thoughtful readers and it will most certainly reinforce the opinions of the seemingly ubiquitous uninformed. It is immodest to propose dismissing stem-cell research.

ELLEN S. DICKINSON  
CHARLES DICKINSON  
*Amherst, Mass.*

#### A DIFFICULT MORAL QUESTION

Jo McGowan's column on stem-cell research was a great disappointment. I usually find her work to be well-written and insightful, but this latest column was, to my mind, a silly flight of fancy that bordered on the uncharitable. Proponents of stem-cell research are by and large not looking for the secret to ageless skin or the quick repair of a torn fingernail. Most are faced with frightening, debilitating, and often terminal conditions. Though we may have moral questions about the sources of stem cells, the economic cost of such research, and the uses to which it might be put in our for-profit world, simply dismissing the moral complexity of the issue with flippant high-horsery serves no good purpose. As many Catholic moral theologians have pointed out, the moral demand to alleviate human suffering deserves consideration, even as we continue to explore and debate the moral status of human embryos.

Does McGowan want to take the argument about embryonic stem-cell research down the dead-end path the abortion debate has led us? Will a useless exchange of jargon and vitriol, slippery slope imaginings, and snide rhetoric help resolve this difficult moral question? When I read her essay, I couldn't help feeling—as I do when faced with much anti-abortion rhetoric—that, although I tend to agree with her underlying principles, I find her style lacking in compassion. *Commonweal's* editors should have sent this one back for a rewrite.

MATTHEW HARRIGAN  
*Chicago, Ill.*

#### THE AUTHOR REPLIES

I am sorry to have offended. Black humor seems to me an appropriate way to address an issue that I believe is an absurd and appalling use of scientific talent. The Dickinsons complain that my treatment of the embryonic stem-cell research was shallow; but what they really seem to be objecting to is the depth of my conviction that the use of embryos for such purposes is evil. Thoughtful readers may disagree without being accused of ignorance.

Matthew Harrigan's letter was more disturbing because of its personal nature. I approach the subject of embryonic stem cells as the mother of a child who was nearly aborted by her birth mother and who now suffers from a severe neurological disorder. The irony that stem cells from a child not so lucky might help cure her condition is part of what makes me believe we are probably in the middle of a

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science-fiction movie and just don't know it.

Mr. Harrigan says that people interested in the "promise" of stem-cell research are not talking about repairing torn fingernails but about serious, life-threatening diseases. Granted—at least for the moment. My guess is it won't be long before the cosmetics industry gets into the act. But regardless of how debilitating or painful the conditions are—and believe me, I live with this reality every day: the diapers, the convulsions, the tube feeds, the wheelchair—we cannot consider using human lives to alleviate them.

I believe embryonic stem-cell research is part of a greedy culture that wants everything, including perfect health and eternal life right here on earth and will stop at nothing to get it. We are all going to die one day and while we have a duty to relieve suffering when we can, we cannot do so without regard to the cost. As Catholics, we know that perfection is not possible this side of the resurrection and that this life is not all there is. Everything we believe rests on this promise. I do not think there was anything snide in my essay. True compassion cannot spring from the destruction of an innocent life.

Jo McGOWAN



*"Sorry to bother you, but, do you know how to get bloodstains out of a cotton shirt?"*

## APPENDIX B

[Robert P. George is McCormick Professor of Jurisprudence and director of the James Madison Program in American Ideals and Institutions at Princeton. He is a member of the President's Council on Bioethics. The following appeared Oct. 3 in the Weekly Standard. © Copyright 2005, News Corporation, Weekly Standard, All Rights Reserved.]

### **Fetal Attraction**

*Robert P. George*

The journal *Science* late last month published the results of research conducted at Harvard proving that embryonic stem cells can be produced by a method that does not involve creating or destroying a living human embryo. Additional progress will be required to perfect this technique of stem cell production, but few seriously doubt that it will be perfected, and many agree that this can be accomplished in the relatively near future. At the same time, important breakthroughs have been announced by scientists at the University of Pittsburgh and the University of Texas demonstrating that cells derived harmlessly from placental tissue and umbilical cord blood can be induced to exhibit the pluripotency of embryonic stem cells.

("Pluripotency" is the potential of a cell to develop into multiple types of mature cells.) One would expect that advocates of embryonic stem cell research would be delighted by these developments. After all, they point to uncontroversial ways to obtain embryonic stem cells or their exact equivalent and to create new stem cell lines that are (unlike lines created by destroying embryos) immediately eligible for federal funding. Yet some advocates seem to be unhappy at the news. Why?

The likely answer is ominous.

Up to now, embryonic stem cell advocates have claimed that they are only interested in stem cells harvested from embryos at the blastocyst (or five-to-six-day) stage. They have denied any intention of implanting embryos either in the uterus of a volunteer or in an artificial womb in order to harvest cells, tissues, or organs at more advanced stages of embryonic development or in the fetal stage. Advocates are well aware that most Americans, including those who are prepared to countenance the destruction of very early embryos, are not ready to approve the macabre practice of "fetus farming." However, based on the literature I have read and the evasive answers given by spokesmen for the biotechnology industry at meetings of the President's Council on Bioethics, I fear that the long-term goal is indeed to create an industry in harvesting late embryonic and fetal body parts for use in regenerative medicine and organ transplantation.

This would explain why some advocates of embryonic stem cell research are not cheering the news about alternative sources of pluripotent stem cells. If their real goal is fetus farming, then the cells produced by alternative methods will not serve their purposes.

Why would biomedical scientists be interested in fetus farming? Researchers know that stem cells derived from blastocyst-stage embryos are currently of no therapeutic value and may never actually be used in the treatment of diseases. (In

a candid admission, South Korean cloning expert Curie Ahn recently said that developing therapies may take “three to five decades.”)

In fact, there is not a single embryonic stem cell therapy even in clinical trials. (By contrast, adult and umbilical cord stem cells are already being used in the treatment of 65 diseases.) All informed commentators know that embryonic stem cells cannot be used in therapies because of their tendency to generate dangerous tumors. However, recent studies show that the problem of tumor formation does not exist in cells taken from cows, mice, and other mammals when embryos have been implanted and extracted after several weeks or months of development (i.e. have been gestated to the late embryonic or fetal stage). This means that the real therapeutic potential lies precisely in the practice of fetus farming. Because the developmental process stabilizes cells (which is why we are not all masses of tumors), it is likely true that stem cells, tissues, and organs harvested from human beings at, say, 16 or 18 weeks or later *could* be used in the treatment of diseases.

Scientists associated with a leading firm in the embryonic stem cell field, Advanced Cell Technology, recently published a research paper discussing the use of stem cells derived from cattle fetuses that had been produced by cloning (to create a genetic match). Although the article did not mention human beings, it was plain that the purpose of the research was not to cure diseased cows, but rather to establish the potential therapeutic value of doing precisely the same thing with human beings. For those who have ears to hear, the message is clear. I am hardly the first to perceive this message. *Slate* magazine bioethics writer Will Saletan drew precisely the same conclusion in a remarkable five-part series, the final installment of which was entitled “The Organ Factory: The Case for Harvesting Older Human Embryos.”

If we do not put into place a legislative ban on fetus farming, public opposition to the practice could erode. People *now* find it revolting. But what will happen to public sentiment if the research is permitted to go forward and in fact generates treatments for some dreadful diseases or afflictions? I suspect that those in the biotech industry who do look forward to fetus farming are betting that moral opposition will collapse when the realistic prospect of cures is placed before the public.

The ideal legislation to protect human life and preserve public moral sensibilities would ban all production of human embryos for research in which they are destroyed. Unfortunately, Congress is not prepared to pass such legislation. Indeed, a bill passed by the House of Representatives to ban the production of human embryos, for any purpose, by cloning has been stymied in the Senate. (In this one instance, many American liberals decline to follow the lead of Europe—where many jurisdictions ban all human cloning, including the creation of embryos by cloning for biomedical research—or of the United Nations General Assembly, which has called for a complete cloning ban.) So what can be done?

One possibility is to make a pre-emptive strike against fetus farming by banning *the initiation of any pregnancy* (whether in a human uterus or artificial womb) for purposes other than the live birth of a child. This has been recommended by the

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President's Council on Bioethics. Another possible approach would be to add to the safeguards already in the U.S. Code on fetal tissue, stating that it is unlawful for anyone to use, or engage in interstate commerce in, such tissue when the person knows that the pregnancy was initiated in order to produce this tissue. An effective strategy would eliminate what would otherwise almost certainly emerge as a powerful incentive for the production of thousands of embryos that would be destroyed in perfecting and practicing cloning and fetal farming.

My suspicions and sense of urgency have been heightened by the fact that my home state of New Jersey has passed a bill that specifically authorizes and encourages human cloning for, among other purposes, the harvesting of "cadaveric fetal tissue." A "cadaver," of course, is a dead body. The bodies in question are those of fetuses created by cloning specifically to be gestated and killed as sources of tissues and organs. What the bill envisages and promotes, in other words, is fetus farming. The biotechnology industry put an enormous amount of money into pushing this bill through the New Jersey legislature and is now funding support for similar bills in states around the country.

So we find ourselves at a critical juncture. On the one hand, techniques for obtaining pluripotent stem cells without destroying embryos will, it appears, soon eliminate any plausible argument for killing pre-implantation embryos. This is great news. On the other hand, these developments have, if I am correct, smoked out the true objectives of at least some who have been leading the charge for embryonic stem cell research. Things cannot remain as they are. The battle over embryonic stem cell research will determine whether we as a people move in the direction of restoring our sanctity of life ethic, or go in precisely the opposite direction. Either we will protect embryonic human life more fully than we do now, or we will begin creating human beings precisely as "organ factories." Those of us on the pro-life side must take the measure of the problem quickly so that we can develop and begin implementing a strategy that takes the nation in the honorable direction.

## APPENDIX C

[Ronald Bailey is the science correspondent for Reason magazine and the author of Liberation Biology: The Scientific and Moral Case for the Biotech Revolution. Reprinted from the Wall Street Journal © 2005 Dow Jones & Company. All rights reserved.]

### No Shortage of Funds

Ronald Bailey

The National Institutes of Health spent \$24.3 million dollars on human embryonic stem-cell research last year. Critics of President Bush's policy of limiting federal funding to only those stem-cell lines derived before August 2001 worry that this amount—relative to NIH's annual \$30 billion budget—is not enough. Persuaded of the importance of this research, the U.S. House of Representatives voted in May to lift President Bush's funding restrictions. Senate Majority Leader Bill Frist announced this summer that he supported that legislation. The Senate is poised to vote on the issue later this fall.

But do stem-cell researchers really need the Feds? Already there is nearly \$4 billion in private and state monies committed to stem-cell research over the next decade, with another three-quarters of a billion dollars under active consideration.

Setting aside commercial efforts like those of the California biotech company Geron, consider a few examples of private funding for academic stem-cell research. The Starr Foundation is providing \$50 million over three years for human embryonic stem-cell research at three New York City medical institutions, including the Sloan-Kettering Memorial Cancer Center. Weill Cornell Medical College, also in New York City, has established the Ansary Center for Stem Cell Therapeutics with a \$15 million grant from philanthropists Shahla and Hushang Ansary.

In California, UCLA has established an Institute for Stem Cell Biology and Medicine with \$20 million in funding over the next five years. Stanford University created the Institute for Cancer/Stem Cell Biology and Medicine, with \$120 million in funding. An anonymous donor gave Johns Hopkins University a \$58.5 million gift to launch an Institute for Cell Engineering. The University of Minnesota has set up a Stem Cell Institute with a \$15 million capital grant. A grateful patient pledged \$25 million over the next 10 years to finance stem-cell research at the University of Texas Health Science Center in Houston.

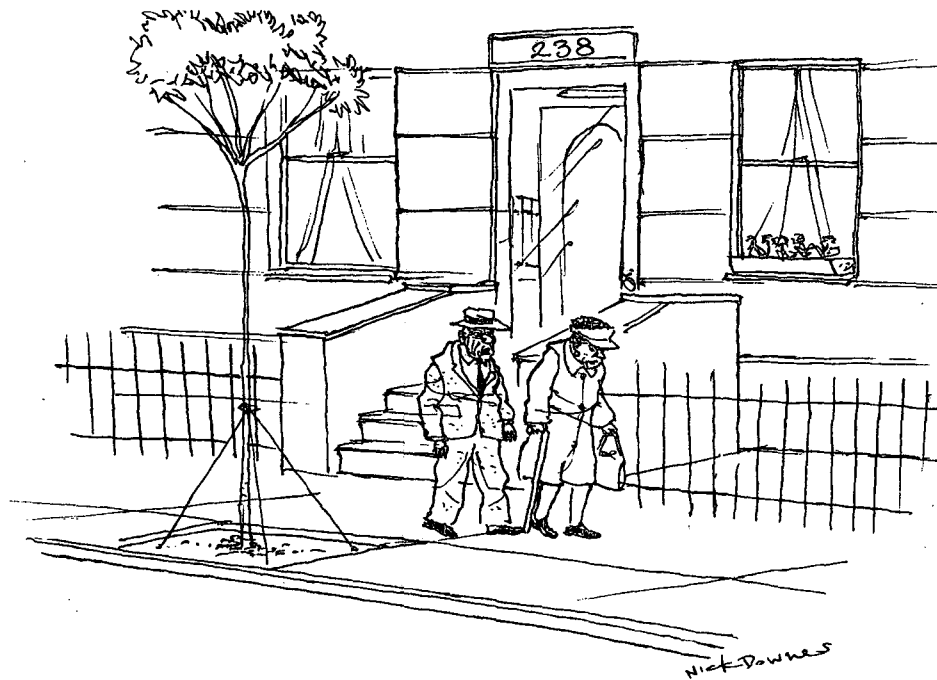
States are also pouring money into stem-cell research. Last November, California voters passed a \$3 billion initiative to create a California Institute of Regenerative Medicine that aims to fund stem-cell research at \$300 million annually for the next ten years. New Jersey has allocated \$150 million to construct a new stem-cell research center. Connecticut passed legislation authorizing \$100 million in spending on both adult and embryonic stem cell research over the next 10 years. Illinois's governor, Rod Blagojevich, moved \$10 million of state public health research funding to establish a new stem-cell research institute called the Illinois Regenerative Medicine Institute.

On the drawing boards, a bill proposing to use \$10 million from the state's

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tobacco settlement proceeds for stem-cell research has already been introduced in North Carolina. The Texas House of Representatives approved a measure to sell \$41.1 million in bonds for a stem-cell research facility at the University of Texas Health Science Center at Houston. There's a bond measure pending in the Pennsylvania State House. Meanwhile legislation has been introduced in the New York State Assembly to create the New York State Institute for Stem Cell Research and Regenerative Medicine with annual funding of \$100 million.

One real question is whether stem-cell researchers even need the Feds. Here is another: Is it possible that President Bush's restrictions on federal funding have generated more funding for this research than would have otherwise been available?



*"They say ninety is the new eighty."*



## APPENDIX D

[Wesley J. Smith, a senior fellow at the Discovery Institute and special consultant to the Center for Bioethics and Culture, is the author, most recently, of *Consumer's Guide to a Brave New World*. The following appeared in the Dec. 12 issue of the *Weekly Standard*. © Copyright 2005, News Corporation, *Weekly Standard*, All Rights Reserved.]

### Umbilical Accord

Wesley J. Smith

Four million babies are born in this country every year, bearing gifts of inestimable value. Foremost among these, of course, is the love they bring into the world and elicit from it. More practically, however, these infants bring with them something that we are learning has great potential to alleviate human suffering: the stem cells contained in the blood of their umbilical cords.

For example, as reported in the peer-reviewed medical journal *Cytotherapy* (Vol. 7, 368-373), umbilical cord blood (UCB) stem cells have restored feeling and some mobility to a woman who had been paralyzed with a spinal cord injury for 19 years. While we must remember that one dramatically improved patient does not an efficacious treatment make, the potential for cord blood to treat paralysis was further boosted with the recent announcement that rats with spinal cord injury also showed moderate improvement after being treated with human UCB stem cells (*Acta Neurochirurgica*, Vol. 147, 985-992).

That's not all. In a study published in the *New England Journal of Medicine* (352:20, May 19, 2005), infants with Krabbe's disease, a terrible illness that results in progressive neurological deterioration and death in early childhood, showed impressive improvement when treated before the onset of symptoms. UCB stem cells have also successfully treated sickle cell anemia. So far 67 human afflictions have been successfully treated with umbilical cord blood stem cells, and more may soon be added to the list. In animal studies, researchers have demonstrated the potential of UCB stem cells to treat stroke (*Annals of the N.Y. Academy of Sciences*, Vol. 1049, 84-96). Some of these cells also appear to be "pluripotent," that is, potentially able to transform into all tissue types—the characteristic supposedly making embryonic stem cells superior to adult stem cells, according to many researchers (*Cell Proliferation*, Vol. 38, 245-255).

And there is even more good news about umbilical cord blood stem cells: Unlike embryonic stem cells, UCB stem cells don't cause dangerous tumors. Moreover, they are easier to tissue-type to prevent rejection than are bone marrow stem cells. And here's another big plus: This research is *utterly uncontroversial*. No embryos are being cloned. No embryos are being destroyed.

Despite all this, umbilical cord blood stem cells remain woefully underutilized in research laboratories and medical clinics. This is primarily a supply problem. Rather than being "banked" (deep frozen and stored) for future use, most cord blood is still thrown away. As a result, most of the banked umbilical cord blood is maintained privately by parents for the potential future use of their own children,

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and is thus unavailable for wider use.

Congress, supported by President Bush, has before it a bipartisan plan that, if passed, would dramatically increase the amount of cord blood available for medical use and in research. The Bone Marrow and Cord Blood Therapy and Research Act of 2005 (S. 1317) would create a national UCB distribution system supported by about \$175 million over five years. Among its provisions, the measure would:

- \* establish a system of publicly funded UCB banking, allowing parents to donate cord blood at no cost;
- \* dramatically increase the genetic diversity of stored UCB stem cells, so the banked stem cells will have sufficient genetic diversity to assure potential patients of obtaining a good match and avoiding tissue rejection;
- \* provide sufficient funds to ensure quality control of the banked stem cells;
- \* create a clearinghouse for information sharing and sample exchanges among regional storage facilities, so a California patient could obtain stem cells from, say, Missouri, if the latter sample is the best genetic match.

The cord blood legislation is supported across the political spectrum. No senator has publicly announced his opposition. The House version has already been passed by an all but unanimous 431-1.

Yet despite this widespread enthusiasm, the measure is stalled in the Senate. Majority Leader Bill Frist wants the bill moved to the floor for an immediate vote. To do so in the waning days of this session, he would need the unanimous consent of all senators. That isn't a problem for the majority party. According to Eric Ueland, Frist's chief of staff, "Republican senators are, to a member, ready to vote for and pass this legislation." What about across the aisle? "Democrats have paid lip service to the bill," Ueland says, but their "leadership is working behind the scenes to hold it up and prevent it from coming to a vote."

How could this be, when Democrats so often beat their breasts about the necessity of getting revolutionary stem cell treatments to suffering patients? I called Senate minority leader Harry Reid's office to find out. For some reason, my call has yet to be returned. So the hold-up appears to be with one or more Democratic senators.

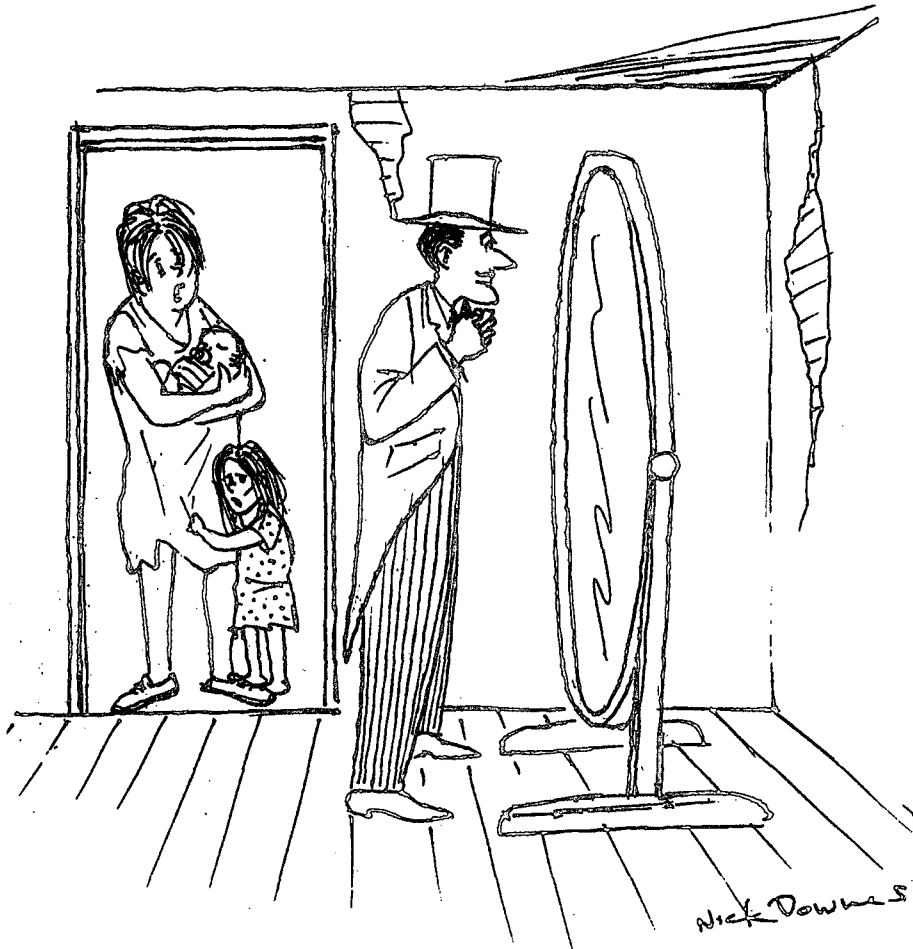
Since these obstructionists don't have the courage to speak publicly, we can only engage in conjecture about their motives. According to one Senate source with whom I spoke, the bill is being held hostage to ensure a floor vote on increased federal funding of more controversial embryonic stem cell research. But with President Bush vowing to veto that bill, and its earlier passage in the House well below override levels, federal embryonic funding will almost surely not become law. The point thus would seem to be to embarrass the president by having his policy rejected by the Senate. If so, the delay is senseless in light of the fact that Frist supports the embryonic stem cell bill and has already promised its sponsors a Senate floor vote early next year.

This may be seen by some senators as a clever political ploy, but coming at the expense of desperately ill people, the delay is immoral. As Senator Sam Brownback

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told me, "The politics over unrelated controversial and unproven technologies is getting in the way of a practical and readily available technique that would start saving lives soon after this bill became law."

Time is of the essence. If the bill is not passed before the next recess, it may take another six months to reach the Senate floor for a vote—assuming it ever does. Every day that the bill is bottled up is a day preventing patients from receiving desperately needed help.



*"Dear, have you been totally upfront with me about our finances?"*

## APPENDIX E

*[Ramesh Ponnuru, a senior editor at National Review, is at work on a book about the sanctity of life and American politics. The following appeared on National Review Online (nationalreview.com) on October 12, 2005 and is reprinted with permission.]*

### **Bad News for Pro-lifers**

*Ramesh Ponnuru*

Karlyn Bowman, who studies public opinion for the American Enterprise Institute, has compiled poll data about abortion from several years into one handy document. Her conclusion is that public opinion on the issue has been “remarkably stable.” When Gallup asked whether abortion should be available under all, some, or no circumstances, respondents split 21-54-22 in April 1975. In May 2005, they split 23-53-22. That is impressive stability.

Yet there has been some movement. In some respects, opinion seems to have shifted first in a pro-choice direction and then in a pro-life direction. The high tide for the pro-choicers seems to have been in the mid-’90s. In February 1995 the split was 33-50-15. (Scan pages 6-7 of the document yourself and you’ll see that none of these three dates were outliers. Each was consistent with the findings of other polls taken around that time. The trend appears to be real.)

Everyone who has looked at the polls on abortion knows how much the specific wording of the question matters. The polls on *Roe* come out much more pro-choice than the polls on the circumstances under which abortion should be legal. The polls on whether someone considers himself pro-life or pro-choice come out somewhere in between.

On those latter polls, too, there has been movement. In September 1995, Gallup found that 56 percent of the public considered itself pro-choice and only 33 percent pro-life. By August 1997, however, that 23-point gap had shrunk to 3 points (47-44). With one exception, which looks like a blip, the gap stayed in the single digits through May 2005 (48-44), which is where Bowman’s compilation leaves the story.

But all of a sudden, and without attracting much notice, the pro-choicers have pulled away again. A July poll had pro-choicers outnumbering pro-lifers by 51 to 42 percent. By late August, the gap had grown to 54-38. A SurveyUSA poll taken around the same time found a similar result. It seems as though two-thirds of the pro-life gain on this front over the last decade has been erased.

So what explains how the pro-lifers have risen and then fallen? I have a theory, which I retain the right to modify or discard if a better one comes along.

There are a lot of possible explanations for the upward trend over the last decade, and probably several of them played a role. But I think the most powerful explanation, especially given that the pivotal years are 1995-97, is the pro-life campaign against partial-birth abortion. When the major pro-life proposal was a constitutional amendment to ban abortion, people who opposed an amendment tended to think of themselves as pro-choice. The legislative campaign against

partial-birth abortion, which began in the summer of 1995, changed what some people thought about first when they thought about abortion. If being pro-choice meant being for partial-birth abortion, and being pro-life meant being against it, those people were on the pro-life side.

My guess is that the campaign also drove the drop in the percentage of people who supported abortion's availability in all circumstances—which occurred around the same time. (A number of other questions show a contemporaneous pro-life trend, although the magnitudes vary.)

So what has happened over the last few months? It's tempting to put forward the Terri Schiavo case, which was widely discussed as a Waterloo for pro-lifers. But Schiavo died at the end of March, and the Gallup numbers for May were, as I noted, still showing near-parity for pro-lifers.

I can only assume that it was the retirement of Justice Sandra Day O'Connor at the beginning of July, and Bush's initial nomination of John Roberts to replace her, that has driven people back into the pro-choice camp. The Supreme Court vacancy made *Roe* the first thing people think about when they think about abortion. And the public supports *Roe* for a variety of reasons (including the mistaken beliefs that it legalizes abortion only in the first three months and that to overturn it would be to ban all abortions). Moreover, the debate over *Roe* has been pretty one-sided. The leading pro-choice spokesmen in politics have been saying that *Roe* is vitally important but threatened. The leading pro-life figures, President Bush and congressional Republicans, have mostly tried to change the subject rather than to make the case that the country can live without *Roe*.

If my theory is correct, the recent pro-choice wave may subside when the confirmation hearings are over. It is true that the Supreme Court will probably decide two abortion cases this term: one concerning parental consent and another partial-birth abortion. While there will be attempts to claim that *Roe* is under attack in the cases, the specific issues involved tend to play to pro-life strengths. This pro-choice moment may not last long—unless, that is, a third vacancy opens up during this term.

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[Clarke D. Forsythe is an attorney and director of the Project in Law & Bioethics at Americans United for Life, Chicago. The following first appeared on National Review Online ([nationalreview.com](http://nationalreview.com)) November 30, 2005 and is reprinted with permission.]

### Supreme Opportunity

Clarke D. Forsythe

An overwhelming majority of Americans (70-80 percent) support notifying parents before an abortion on a minor girl, and for good reason. Minors are usually too immature to assess the safety of abortion clinics, the alternatives to abortion, or to recall their own medical history. In addition, they need the guidance of parents to assess the risks of abortion—like increased risk of placenta previa and premature births in future pregnancies, increased alcohol and drug abuse after abortion, or the increased risk of suicide after abortion.

And parental notice is necessary to enable parents to care for their daughter afterwards. If parents don't know what their daughter has been through, how can they check for any signs of extensive bleeding, fever, infection, or psychological distress? Even if there's a life-threatening medical emergency, parents need to be notified, if only after the emergency subsides.

For these reasons, the Supreme Court has repeatedly approved parental-notice laws—at least rhetorically—since 1981. While half the states have parental-notice or consent laws, half have no laws in place, including New Hampshire. Most laws are passed only to be bottled up for years in litigation filed by Planned Parenthood or abortion clinics.

Today, the Supreme Court will hear arguments in *Ayotte v. Planned Parenthood* about the validity of the New Hampshire parental notice of abortion law, which a federal appeals-court decision struck down last year.

There are two major questions in this case. First, will the Court uphold the law and allow parents to have notification in New Hampshire? Second, will the Court recognize the mess it has created with its vague and contradictory decisions and clarify the standards for federal courts to assess critical requirements like parental notice?

New Hampshire patterned its law after the Minnesota parental-notice law which has been in effect for nearly 20 years with a positive impact on reducing adolescent pregnancy, birth, and abortion rates. The Supreme Court upheld the Minnesota law in 1990.

The New Hampshire law (copying the Minnesota law) has a narrowly drafted exception for real, life-threatening medical emergencies. The general rule for medical treatment is that parents must give consent (not just notice) before a doctor can treat any minor child, unless there is a life-threatening medical emergency. While some state legislatures have adopted exceptions to this general rule over the past decades—for prenatal care, sexually transmitted disease, and drug addiction—the exceptions are relatively narrow.

Planned Parenthood challenged the New Hampshire law because Planned Parenthood insists that parental-notice and consent laws in every state must have a “health” exception rather than a “medical emergency” exception.

But the Supreme Court has created its own unique and unlimited definition of “health” in abortion law, defining “health” as “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.” “Health” means emotional well-being without limits. Thus, a “health” exception in abortion law is virtually the opposite of a real “medical emergency.”

Any potential emotional reservation a minor girl might have about a pregnancy (including pressure to have the abortion from her 22-year-old “boyfriend”) would be a “health” reason for the abortion without parental notice. Since this unlimited “health exception” would swallow the requirement of parental notice, the Supreme Court should reject the “health” exception and uphold the New Hampshire medical emergency exception.

**B**eyond the specifics of the New Hampshire law is the larger question of the mess the Supreme Court has created with its vague and contradictory decisions over the past 32 years. Thirteen years ago, in its 1992 *Casey* decision, the Supreme Court said that it was clarifying its judicial standards for reviewing state legislation (what lawyers call the “standard of review”) and wanted federal courts to be more deferential toward state regulations of abortion.

Exactly the opposite has happened. Substantial confusion abounds in the federal courts over the standards that the Supreme Court issued in *Casey*. The courts apply different standards—harsh, intermediate, and deferential—to assess the validity of state legislation. An increasing number of federal courts have expressed confusion as to whether they should apply harsh, intermediate, or deferential standards to assess state abortion legislation.

Some federal judges have been quite blunt in expressing their frustration over this confusion. As the Seventh Circuit appeals court wrote in 2002: “When the Justices themselves disregard rather than overrule a decision . . . they put courts of appeals in a pickle.” In 2003, the Sixth Circuit appeals court wrote: “We cannot ignore the difficulty of legislating against a backdrop of constitutional standards that invite state regulation on one hand while barring it with the other.”

The most recent expression of growing frustration came from federal judge Sandra Beckwith this past September. In reviewing Ohio’s parental consent for abortion law—which has been bottled up in court for seven and a half years—she emphasized that “applying the standards . . . is not an easy task in abortion cases . . . because . . . it becomes evident that it is difficult or impossible to apply predictably the legal standards that do exist.” Noting that the Supreme Court was scheduled to hear the *Ayotte* case, Judge Beckwith practically begged the Court to fix the mess: “At a minimum . . . [this] Court hopes that the *Ayotte* Court will take the opportunity to clarify the *Casey* undue burden standard.” These are just three of several examples.

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The Court could—and may—uphold the New Hampshire parental-notice law without addressing or resolving the confusion that it has created. The Court is long overdue to correct this situation, but, since the Court ignored the confusion in 2000 in its *Stenberg* decision, there's no guarantee the Court will fix the mess in *Ayotte*.



*"Remember, men, anything short of victory, and civil war buffs will be replaying your defeat in battlefield reenactments for generations to come."*



## APPENDIX G

[*Alicia Colon is a columnist for the New York Sun. The following appeared in the Sun (www.nysun.com) on December 2, 2005 and is reprinted with the author's permission.*]

### **Resisting a Culture of Death**

*Alicia Colon*

One of the city's finest writers, Nat Hentoff, has been at the Village Voice for more than 50 years. While one can label this publication as a left of center staple, the award-winning Mr. Hentoff is much harder to categorize. Earlier this month, the Human Life Foundation honored him with its Defender of Life Award and in his acceptance speech he identified himself as "a Jewish, atheist, civil libertarian, pro-lifer."

There is a big distinction between being merely anti-abortion and being pro-life. Mr. Hentoff has consistently been a defender of all human life, whether it be a Baby Doe or a Terry Schiavo, and while I can differ with him on subjects like the Patriot Act and the death penalty, I do not know of anyone more principled or morally pure on this particular issue.

How I wish the award ceremony had been televised on C-Span or elsewhere so that the nation could have heard the warning hurled by the man who introduced Mr. Hentoff, Wesley Smith. Mr. Smith is a senior fellow at the Discovery Institute in California who is a consultant to the Center for Bioethics and Culture and the International Task Force on Euthanasia and Assisted Suicide.

He asked: "Does human life have ultimate intrinsic value, simply and merely because it is human?" Traditionally, the philosophy of America has been to answer this question in the affirmative. However, Mr. Smith said, a growing number of voices these days are responding in the negative: "They claim that being 'human' isn't what gives moral worth, it is being a 'person.'"

Mr. Smith continued: "The Princeton University bioethicist Peter Singer has claimed there are two crucial characteristics that earn a human being or an animal the status of 'person,' and they are rationality and self-consciousness. Singer claims that some animals (whales, dogs, cats, pigs, etc.) can be considered persons; while other forms of life are not persons, including all unborn human life, newborn human infants, people with advanced Alzheimer's or other severe cognitive disabilities because they are not self conscious or rational."

I had been aware of Mr. Singer's theories, which justify infanticide and involuntary euthanasia of cognitively disabled people, but what I found highly disturbing in Mr. Smith's speech was the idea that Mr. Singer is being roundly applauded by other bioethicists for voicing pragmatism at the expense of human life.

More and more intellectuals and medical scientists are posing the question, "Do we have a duty to die?" In other words, shouldn't we kill ourselves rather than be a burden to others when we become ill or just plain old? Baby boomers—are you listening? There's a brave new world out there, but more and more it resembles the Third Reich.

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Mr. Hentoff recognized how this culture of death is escalating in this country during the Schiavo case. When he accepted his award he spoke of how during the extensive coverage of the case, those who were most closely concerned with it were totally ignored. He spoke of the 29 national disability rights organizations that filed legal briefs and lobbied Congress to demonstrate that Schiavo was a disability-rights case, not a right-to-die case. Instead, attention was focused on the Christian Right and other religious pro-lifers.

Mr. Hentoff also urged us to see the film "39 Pounds of Love." It's a documentary about Ami Ankilewitz, an American-born Israeli who at the age of 1 was diagnosed with a rare form of muscular dystrophy. He is immobile, except for one finger, which he uses to work as a 3-D animator. Although his doctor predicted that he'd die before the age of 6, he has survived for more than 30 years and is considered a medical miracle. He's a truly inspiring individual, but one who would probably fail to impress the Peter Singers of the world.

Mr. Hentoff used to belong to the ACLU, but he has accused the once respectable civil libertarian organization of "engaging in a minuet of death" by litigating in favor of ending the lives of the most vulnerable in society.

It was from a Nat Hentoff column that I learned of the bombing of a Catholic kindergarten by the Sudanese government. If there are attacks on the innocent anywhere, we can be sure that Mr. Hentoff is there fighting the good fight.

Mr. Smith said it best. "For decades he has connected the dots for his vast audience, expertly charting the consequences of our steady, but not always slow, slide down the slippery slope toward a veritable culture of death."

Mr. Hentoff is the best proof that you don't have to be religious to be pro-life.

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