

the HUMAN LIFE REVIEW



WINTER 2014

Featured in this issue:

William Murchison on Little Sisters vs. Big Brother
Peter Steinfels on George McKenna's Critique
George McKenna on Peter Steinfels's Response

STUDENT SPOTLIGHT

JONAS CUMMINGS • JASON MORGAN • JOSHUA J. CRADDOCK

Christopher White revisits Reagan's Defense of Life
Mathew Lu on Medieval and Modern Embryology
Laura Echevarria on The Meteoric Rise of Wendy Davis
Leslie Fain talks to Non-Christian Pro-lifers

BOOKNOTES

RITA MARKER • KATHRYN LOPEZ • JOHN GRONDELSKI • ELLEN FIELDING

Also in this issue:

Richard Doerflinger • Anne Hendershott • Mark Tooley
Anna Franzonello • Charles J. Chaput

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ABOUT THIS ISSUE . . .

. . . what better way to begin the *Review's* 40th anniversary year than with a celebratory cartoon, one drafted especially for us by the inimitable Nick Downes (see page 6). Our editor often comments on the buoyancy of humor; too much time in the anti-abortion vineyard, pondering the annual body count of babies sacrificed to the gods of convenience and “moving on,” can leave even hopeful souls feeling weighed down—and glum. Mr. Downes’s work here is buoyant indeed, and we heartily thank him for it.

Buoyancy also filled the nation’s capital this past January 22, as hundreds of thousands of young pilgrims arrived from all over the country, not to celebrate the 41st anniversary of *Roe v. Wade* but to protest it. The annual March for Life never ceases to invigorate us, so in an effort to encourage young minds to join the intellectual battle, we are introducing a “Student Spotlight” feature (page 59) in this issue. Jonas Cummings, Jason Morgan, and Joshua Craddock were students when the essays included here were written: welcome to them all. And congratulations to Mr. Cummings, whose “Model Opinion” was the winning entry in a recent contest for legal students sponsored by Americans United for Life. As it happens, all three of these essays concern legal themes; we look forward, however, to presenting a diversity of perspectives in this section.

We wish to welcome another newcomer to these pages—Peter Steinfelds, a former religion reporter and columnist at the *New York Times*, now co-director of the Fordham University Center on Religion and Culture. Mr. Steinfelds objected to George McKenna’s critique (“A Bad Bargain,” Fall 2013) of an essay he published in *Commonweal* last summer and says why—in no uncertain terms—in his response here (“‘Grand Bargain,’ No. Serious Rethinking, Yes,” page 14). Mr. McKenna, for his part, is back with something more akin to a peace offering (“A Rejoinder to Peter Steinfelds,” page 23). We thank both men for the provocative debate they have waged, one we hope soon to open up to other commentators.

“Booknotes,” which we introduced last year, has attracted the attention of regular contributors and doesn’t lack for content. Not so our (relatively) new “Letters” section, to which we hope more of our regular *readers* will be inspired to contribute. Write to us at the office (Human Life Foundation, 353 Lexington Avenue, Suite 802, New York, NY 10016) or email me at anne@humanlifereview.com. You may also use the “contact us” form on our website (www.humanlifereview.com).

Finally, our thanks to *Public Discourse*, *Crisismagazine.com*, the Philadelphia Archdiocese, *National Review Online*, and *The American Spectator* for permission to reprint the pieces which make up the complement of Appendices rounding out this very big and idea-rich issue.

ANNE CONLON
MANAGING EDITOR



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INTRODUCTION

“Are we there yet?” asks Senior Editor William Murchison in our lead article. “Have we got it quite in mind that *Roe v. Wade* and the abortion regime that it foisted upon us affirm only selected people’s freedoms, with minimal if any concern about the freedoms of others?” At issue in his “Little Sisters vs. Big Brother” are the freedoms of those who, like the Catholic order of nuns dedicated to the poor elderly, have been told by Kathleen Sebelius and the Department of Health and Human Services that they must comply with the contraceptive mandate in the Affordable Care Act—or else. Murchison makes the compelling case that, though “no one in 1973 could have foreseen” it, what has made such legal cases a reality is the “Pandora’s box” the Supreme Court opened with *Roe*—which set in motion the hard orthodoxy of the right to abortion which is being used to “smother” the liberties of free speech and religion.

This first issue of our 40th year continues with two essays, part of an ongoing debate taken up in our Fall 2013 issue, when George McKenna responded (in “A Bad Bargain”) to a June *Commonweal* article by Peter Steinfels on what Steinfels sees as the abortion “stalemate.” On page 14, Steinfels responds to McKenna’s critique (“‘Grand Bargain,’ No. Serious Rethinking. Yes.”) and then on page 23, George McKenna has his “rejoinder,” in the form of a “Dear Peter” letter. In this issue’s exchange, Steinfels writes that, though he accepts it, the question of the humanity of the unborn is “inherently” surrounded by “obscurity or ambiguity”; it is “counterintuitive” to accept that the tiny embryo has the “same moral status” as the infant. His “rethinking” proposes that Catholics stop advocating in the public square to protect unborn life from conception, but focus instead on a later date—he suggests eight weeks—and that the “current stalemate is at best an ongoing failure.” McKenna writes to Steinfels that “despite your having written two long pieces, *I do not really know what you are talking about*”; for his part, he finds nothing ambiguous in the humanity of the unborn from conception—what “animates everything I write on the subject” is that “deliberately killing a child in the womb is a grave moral offense,” a position he got not from his faith but from “the section on embryology in my biology class at the University of Illinois in 1955.”

Rereading the discussion, I wondered: Has Peter Steinfels ever been to a March for Life? Hard to believe he has, or he would be, as we were again this year, absolutely overwhelmed by the hundreds of thousands of young people and the energy, spirit, and civility they exhibit. It has become the largest civil-rights demonstration in America. Christopher White, who reported on the history of the March for us (Winter/Spring 2011) reflects in this issue on President Ronald Reagan’s 1983 *Human Life Review* article, “Abortion and the Conscience of the Nation,” and what things look like three decades later. While not being blind to the

“ravages of abortion”—starkly illustrated by the grisly figure of Kermit Gosnell—White’s observations still do much to contradict Steinfels’s gloomy assessment. For example, “According to Americans United for Life, in 2013 alone 60 new life-affirming laws” were passed in the U.S.; a spokeswoman for the pro-abortion Guttmacher Institute bemoaned the “incredibly dramatic” changes these laws brought, such as that “more than 50 abortion clinics across the country have closed or stopped offering” abortions. White also reports on recent polls that show we are “making substantial inroads” in “changing hearts and minds” to life.

Peter Steinfels uses the word “counterintuitive” when it comes to the moral status of the embryo, because of its size. But, while we may be emotionally less attached to something so tiny, size cannot be a logical criterion for the nature of a being. Smart people have been making illogical, emotionally clouded or agenda-driven arguments about abortion for decades. As Mathew Lu writes in “Embryology: Medieval and Modern” (page 35), many “abortion advocates have attempted to spread confusion and doubt concerning the beginnings of human life. . . . A particularly cynical strategy has been to invoke the authority of historical thinkers, especially those seminal teachers whom the Catholic Church has distinguished with the title of Doctors of the Church, to support the claim that . . . early abortion does not constitute homicide simply because the early embryo is not fully human.” For example, Catholics like Mario Cuomo and Nancy Pelosi refer to St. Thomas Aquinas’ uncertainty about humanity and ensoulment. But, as Lu demonstrates with welcome clarity, they ought to be embarrassed. Because they are then “in the curious position of embracing Aristotle’s embryology” over modern science. Aquinas “explicitly adopted” Aristotle’s views that an embryo was first vegetable, then mineral, then human (Aristotle also claimed that female fetuses developed later than males, as you will read). Aquinas based his moral and metaphysical theories on that flawed science. As Lu says, pointing to this kind of argument *today* is “at best incompetent and at worst intellectually dishonest.”

Political and personal ambition can both breed dishonesty and make one deaf to cries for justice. In our next article, Laura Echevarria follows the “meteoric rise” of “pro-abortion superstar” Wendy Davis, the Texas state senator who attempted to filibuster legislation in Texas banning abortion after 20 weeks. Photogenic, blonde Davis and her pink sneakers became a massive media story, with her playing the role of brave, spunky single mom standing up for women’s rights. Though the ban was something “reasonable and protective” for both mothers and babies, abortion-rights activists promoted a spin—the “war on women” theme again—and the media lapped it up. The adoring press, Echevarria writes, hadn’t really bothered to examine the back story Davis put forth to make herself sympathetic—poor, hard-working, single mom. In recent weeks, there has been controversy over her real biography (which involves giving up custody of her children so she could study at Harvard)—but even that, writes Echevarria, may only “temporarily tarnish her star,” because she is a darling of the pro-abortion left and the media.

We are now pleased to introduce in our inaugural “Student Spotlight” section a

INTRODUCTION

trio of articles. The first, by Jonas Cummings, a graduate of the Florida Levin College of Law, is the winning entry in a competition proposed by Americans United for Life, to develop a hypothetical judicial opinion that would reverse *Roe v. Wade* and *Planned Parenthood v. Casey*. We can see why Mr. Cummings won: He has done a superb job with his opinion, which systematically goes through the Court's reasoning in the decisions and points out how they are lacking in logic and Constitutionality. He is followed by Jason Morgan, a PhD student in Japanese legal history at the University of Wisconsin, who analyzes the "strange career of the right to privacy," asking: Was this "right" based on the famous "emanations" and "penumbras" surrounding the Constitution and the Bill of Rights a fabrication of activist judges? The third article is by Joshua J. Craddock, a recent graduate of The Kings College in New York, who looks at another infamous academic position, espoused by Australian ethicists Alberto Giubilini and Francesca Minerva, that infants may be killed after birth. While the infant is "certainly" a human being, they posit, she may not be a person "subject of a moral right to life." Craddock points out that in some ways, their argument is logically sound: "They correctly identify the moral equivalence between abortion and infanticide" so the "absurdity of the pro-choice position" is that "abortion is just as reprehensible as infanticide."

Our final article is by contributor Leslie Fain, who has an eye-opening report on non-Christian proliferers and how they are accepted—or not—by the pro-life community. Fain's article is by necessity largely anecdotal, but you will find her profiles of outside-of-the-mainstream proliferers thought-provoking. She makes the case that the pro-life movement would benefit greatly from including more non-Christians, and notes that both the March for Life in Washington, DC, and the fairly new Walk for Life in San Francisco have been increasingly welcoming of non-religious participants.

There is no room to describe all that is in this packed issue—take your time, there is much to inform, encourage, and inspire, and as always cartoonist Nick Downes will give you a chuckle-breather. Thank you, dear reader, for enabling us to forge on and celebrate our 40th Anniversary!

MARIA MCFADDEN MAFFUCCI
EDITOR

LETTERS

TO THE EDITOR:

I read with interest Professor George McKenna's article, "A Bad Bargain," in the Fall 2013 issue of the *Human Life Review*, pp. 21-28. Regarding the complete futility of supposing that the United States could somehow endure permanently "half slave and half free" on the issue of abortion, have you read the essay by John T. Noonan, Jr. "On the Dynamism of the Liberty," Inquiry 9 in his book *A Private Choice: Abortion in America in the Seventies* (Toronto: Life Cycle Books, 1979)?

Regarding the difficulty of imagining that anything so small as the human embryo in its earliest stages of development can be the bearer of human rights, I am reminded of a proof method used by the mathematicians, namely, proof by contradiction. To establish the validity of a given proposition, start by assuming it to be false, and examine the logical consequences of that assumption. If the result is a logical construction, then, assuming that mathematics is self-consistent, the initial proposition must be true.

In a certain sense the nation is engaged in a massive uncontrolled experiment of denial, testing the truth of the proposition that the humanity of the unborn child must be acknowledged and fully respected from the moment of conception. Biologically, that this is a new human life, from conception, is certain. Our novel encounter with the unborn, our newly acquired ability to manipulate, to exploit, and to destroy human life from its earliest stages, may be no less momentous for our civilization than the European discovery of the New World, and may call for an equally difficult adjustment for us to be able to "see" the humanity of the other.

—Edward Campbell
Houston, TX

[EDITOR'S NOTE: As it happens, *Inquiries Nos. 10 and 15* in Judge Noonan's book were reprinted in the Summer 1979 issue of the Review; they are now posted in an "Archival Spotlight" on our website: www.humanlifereview.com.]

TO THE EDITOR:

Your publication helps me keep up-to-date on life issues and allows me to speak intelligently on everything from abortion to euthanasia to cloning.

Thanks you for all that you do, and God bless!

—Grant Wilson
University of Illinois at Urbana-Champaign



Our 40th-Anniversary T-Shirt, featuring this cartoon, is available for purchase in the “Review Store” on the Foundation’s website: www.humanlifereview.com. Or you can send a check (\$19.95 each, postage included. M, L, XL) to the office, along with size specification, and we will mail your order.

Little Sisters vs. Big Brother

William Murchison

Are we there yet? Have we got it quite in mind that *Roe v. Wade* and the abortion regime that it foisted upon us affirm only selected people's freedoms, with minimal if any concern about the freedoms of others?

Seems we get a little closer to that understanding with every year that goes by. I refer to the case of *Little Sisters of the Poor v. Kathleen Sebelius*, Secretary of Health and Human Services. The mere title of the case speaks treatises and dissertations concerning the nature of the contest over unborn life: In this corner, ladies and gents, an order of nuns who care for the weak and the helpless; and in this corner the might and majesty of the United States government.

The Little Sisters case is far from the only suit to have arrived in consequence of the Affordable Care Act's varied effects on our lives. It shows in a particularly garish light, even so, how endless, how entangling are the effects of a decision the U.S. Supreme Court four decades ago saw as just another instrument for empowering The Downtrodden, viz., unwilling mothers. That the justices, far from settling anything, broke open Pandora's box is a point hardly anyone disputes. And now the Court must try—once more into the breach, dear friends—to quiet the latest fracas stemming from *Roe*. What are the odds?

No one in 1973 could have foreseen such a contretemps as produced the Little Sisters case. Nobody, for one thing, could have foreseen Obamacare and the federal takeover of private health insurance arrangements. Such a prospect was in its way as far-fetched as the prospect that the top tribunal of a democratic society would license the destruction of unborn babies. We know a lot now we didn't formerly know; what's more, we stand to learn a lot more.

At the start of 2014, there were 91 lawsuits pending against the directive—the mandate—the requirement—in the Affordable Care Act that employers' insurance plans cover contraceptive services and suchlike. The mandate had not been the most conspicuous feature of a law that embroiled the whole country as it worked its way through the legislative process. Afterwards, when employers began wrestling in earnest with the details and implications of the costliest, most far-reaching law in our history, the mandate acquired more prominence. This was because, besides being a mandate—a shut-up-

William Murchison writes from Dallas for Creators Syndicate and is a senior editor of the *Human Life Review*. His latest book is *The Cost of Liberty: The Life of John Dickinson* (ISI Books).

and-do-what-we-say directed at the whole American population—it could be read, and deserved to be, as an affront to religious liberty. It said that health benefits conferred under the act would include contraception and abortifacients for those who wanted such things. Wanting such a thing was the voluntary part, reserved for the individual; making it available was anything but voluntary on the providers' part, save in the case of churches, which were exempted from that provision of the law. Not so church-related institutions such as hospitals and universities.

A ruction arose on account of objections posed by religious institutions and for-profit concerns with religious scruples concerning such coverage. The Obama Administration, after some initial discombobulation and scrambling, offered what it called an “accommodation.” No such institution had to pay the coverage directly; it could sign a document expressing conscientious objection to birth control, whereupon the institution's health-care insurer would pick up the tab. OK? OK?

Definitely not OK, which is the point at which we encounter the Little Sisters of the Poor, an order of nuns founded in France in 1839 by St. Jeanne Jugan to care for the elderly poor. The order presently operates 30 homes in the United States and one in Canada. One might call the Sisters, who came to the United States in 1868, a paradigm of religious benevolence, meriting, if not claps on the back from government, at least a dose of amiable tolerance. We all remember tolerance—a prized concept on the cultural/political left, and perhaps for that reason reserved for the enjoyment of the left. The Department of Health and Human Services, headed by Secretary Kathleen Sebelius, wasn't going to accord priority to religious standards over individual preferences. What came the Little Sisters' way was the same blank incomprehension that met requests for tolerance on the part of other institutions when the topic of contraception came up. Employees who wanted it—free of charge, according to government standards—were entitled to it; they would, accordingly, get it. So there.

This very odd way of prioritizing values—free contraceptive devices measured as a higher good than any understanding supposedly planted by God—is characteristic of our times. The secular instinct these days nearly always beats the religious, being “personal” and all that good stuff.

Have religious understandings, with their intimate connection to human origins and destinies, no “personal” elements? Oh, well, you see, we're not talking these days about destinies; that's long-term stuff. We're talking about tonight, and next week, and the week after that. We're talking, in short, about sex—the topic formerly enshrouded by whispers and polite coughing. This was, as you know, prior to the great discovery of modern times; to wit, that

sexual choice is at or very near the top of those values associated with the American way of life.

A Congress and White House elected, in part, to defend and extend this understanding wasn't about to cut some slack in a new health plan for relics of the old whisper-and-cough regime. The new meaning of "choice" rode other meanings—including choice as to religious expression—into the dust. There the Washington power structure expected it would stay.

Quickly this vain supposition foundered. Quite a few of the lambs chosen for shearing in the interest of a national health insurance scheme proved unwilling to cede their right to choose in accordance with lights and standards of their own. The Little Sisters of the Poor, whose "values" statement commits them to "reverence for the sacredness of human life and for the uniqueness of each person," the poor and the weak in particular, can surely never have imagined itself suing the United States government for protection of their faith. Nevertheless, the Little Sisters could not do what the government asked them to do—namely, sign a declaration amounting to a cynical request that their insurers do the dirty work from which they themselves had chosen to abstain. In early January they would tell the U.S. Supreme Court directly of the government's blindness "to the religious exercise at issue: the Little Sisters and other Applicants cannot execute the [certification] form because they cannot deputize a third party to sin on their behalf."

The word "sin" rarely is seen in religious pleadings. That is because the First Amendment supposedly leaves to Americans the right of naming that which, on their own understandings, contradicts the word of the Lord. The Department of Health and Human Services, in devising the imagined accommodation for religious exercise under the health-care mandate, had undertaken to construe to its own satisfaction the meaning of sin. What could the Little Sisters mean by such a concept? Who were they to set up their theological insights against the government's understanding of human obligation and necessity? Could they not understand the great thing the government was doing on behalf of Americans lacking health insurance?

That would be, I imagine, the sort of rebuttal that Washington, D.C., saw as logical in the quest to crush rebellion. Shades of Cromwell's Roundheads, smashing rood screens and altar rails in order to rebuke Bad Theology and Wrong Thinking! A considerable Anglo-American history of dismissing Catholic teaching of one kind or another reinforces HHS's smooth certainties about contraception.

As it turns out, objections to government policy on the contraception mandate cross numerous theological lines. Meaning, if you please, this thing

isn't just some lace-trimmed Catholic obsession. Consider the case of the Hobby Lobby—the large, family-operated chain of craft stores operated explicitly along Christian evangelical principles. Hobby Lobby doesn't open on Sundays, the Lord's Day. It strives to do business in accordance with the highest standards of Christian behavior. As for contraception, the Green family, owners of the company, find “no moral objection to the use of 16 of 20 preventative contraceptives required in the [health-care] mandate.” Their objection, a strenuous one, is to providing Hobby Lobby employees, under any pretext, with “four possible life-threatening drugs and devices,” including Plan B and Ella. Hobby Lobby, in a lawsuit scheduled to be heard by the U.S. Supreme Court in late March, is as firm as the Little Sisters in scorning HHS's escape clause for the morally scrupulous.

Wheaton College's challenge to the government's tactics underlines further the pan-Christian nature of the reaction. Wheaton may be the most prestigious of all evangelical institutions of higher learning; its scholars and students alike take the faith with deep seriousness. Consider in this light the affirmation of its president, Philip Ryken, in behalf of the right of Catholic institutions to “have the freedom to carry out their mission without government coercion. That struggle for liberty is a struggle for our own liberty and, we would argue, a struggle for the liberty of all Americans.” Wheaton allows married students to obtain contraception on university health policies; like Hobby Lobby, the school excludes abortion-inducing applications from coverage.

There we go again: variant understandings of what it means to avoid or prevent pregnancy, a common understanding of what it means to turn the matter over to government. Whose indifference to the finer points of the matter was summed up by Solicitor General Donald Verrilli, Jr., arguing before the U.S. Supreme Court against the Little Sisters' rejection of the certification gambit. All the Little Sisters had to do, quoth Verrilli, was “self-certify that they are non-profit organizations that hold themselves out as religious,” then turn over to their self-insured group health plan their document of certification. Nothing to it. Just a flick of the wrist. “At that point, the employer-applicants [i.e., the Little Sisters] will have satisfied all their obligations under the contraceptive coverage provision.” Don't we see? Our government has contrived certain “obligations” for the sake of achieving a Greater Public Good. The corresponding obligation, on the part of the citizenry, is to accept the result. A signature? Whom did a signature ever hurt?

What a lot of trouble the Sisters had been to the government anyway. A Dec. 31 injunction issued by U.S. Supreme Court Justice Sonia Sotomayor, who is rarely called a tool of conservative interests, blocked the government

temporarily from requiring the Sisters' Colorado house to sign up or face an annual fine—some \$2.5 million—that represents a third of their budget. Things had gone that far. It was sign or pay: no difficult matter for the Solicitor General or, predictably, for the *New York Times*, whose editorial writers wrote off the signature provision as a “minor requirement.” For that matter, the editorial went on, the Justice Department had no way of compelling the administrator of the plan—Christian Brothers Employee Benefit Trust, a self-insured church plan—actually to provide the contraceptives. Slyly left out of the editorial was any mention of the fine facing the Little Sisters on account of their principled stand. Nor was there mention of another fact: Nothing stops a particular employee who is willing to pay for it from acquiring birth control devices. The dispute is over whether the employer should have to ante up or explicitly authorize someone else to do so.

This article, by the time it sees print, will likely have been overtaken by political and judicial events—of a sort favorable to respect for life and life's Author, one may only hope; the process is on the move, in any case. Rather than forecast outcomes before the high court, or even feats of faintheartedness on the part of White House officials rightly depicted as beating up on peaceful nuns, I suggest it makes sense to put the matter in context. The context is disagreeable enough at that. It shows us, in IMAX 3D, the despotic nature of the present “choice” movement. The choice the movement wishes to foist on us is no-choice: or, at the least, choice with hard consequences for failure to comply with the directives of the movement. Two-million-dollar fines and that sort of thing.

The choice movement has made up its collective mind concerning the correctness of its own reasoning. It will not be trifled with.

Thus: Because the prevention of pregnancy is an unalloyed Public Good (I am speaking of how the choice movement views things), government does right to spread the benefits of pregnancy-prevention as widely as possible. Prevention includes contraception, of course, but there is room under its large rubric for the means of pregnancy-destruction, which follows naturally from the minimally restricted right conferred by the U.S. Supreme Court in *Roe v. Wade* to abort a pregnancy undesired by the mother. *Roe*, as textually understood by the Supreme Court's 7-2 majority, dealt with a right that adhered to the mother, who, if she sought an abortion, was to have one. Her will overrode, and still overrides, considerations of an unborn child's inferential desires, not to say constitutional rights.

In latter times, exponents of “choice,” including President Obama, have begun devising strategies to restrict—paradoxically enough—such choices as friends and supporters of unborn life might make. One such instance came

before the Supreme Court in early January. The justices, in the case of *McCullen v. Coakley*, heard a challenge to a 2007 Massachusetts law that prevents one Eleanor McCullen, age 76, from approaching nearer than 35 feet to a given abortion clinic as she seeks to counsel women entering the clinic for an abortion. Ms. McCullen's free-speech rights, under the law's promptings, yield to the imputed right of another woman not to hear a plea that might displease her. It is all very strange in a land of liberty. The right to an abortion has, for abortion's exponents, hardened into an orthodoxy—one so strong and unquestionable as, in specific circumstances, to smother opposition.

The First Amendment to the Constitution guarantees among other blessings the free exercise of religion. Free exercise proceeds from free choice. However, in the Little Sisters case and the other cases working their way up to the Supreme Court, genuinely free choice obtains only for those interested in choosing a contraceptive or abortifacient. That's what they want? Well, that takes care of it. They must have it—or so anyway the government reasons. Congress debated, sort of, Obamacare, then passed it; the Supreme Court upheld the great majority of its provisions. Doesn't that end the debate? Our elected officials established a regime under which most employers must provide birth control. Let's get with it, therefore; notwithstanding that getting with it entails overriding the wishes of employers with conscientious objections to the provision of birth control.

Tough! Such is the response, just below the polished rhetorical surface, to objections such as the Little Sisters raise. Yes, the Constitution guarantees them religious freedom; but religious freedom doesn't mean the right in all circumstances to stand in the way of those desiring a higher social good than unenlightened minds apparently can conceive. To instruct the unenlightened as to their failures of logic, the federal government steps forward—the original patron of the right to abortion—treating the whole controversy as not so much a moral as a political/ideological one. A lot of powerful interests desire what the Little Sisters are being asked to provide; whatever supposed rights may adhere to the Little Sisters, there surely are ways of reaching a different outcome through persuasion or, failing that, raw force.

I would counsel that the matter has implications beyond the abortion controversies. There is apparent determination on the cultural left to impose all manner of restrictions on free thought concerning, shall we say, lifestyles. Not so long ago, the country was unanimous in according approval to the ancient institution of man-woman marriage. Barriers to gay marriage have been falling fast in recent months. As I write, an Oklahoma federal judge has

declared that the preferences of the majority of Oklahoma voters, in approving a constitutional amendment banning gay marriage, do not rise to the same level as the desire of gay couples to wed. We are moving rather rapidly toward a kind of orthodoxy on marriage choice. The choice is becoming—there remains vast opposition to it, I am glad to report—“Give me what I want or take the consequences.”

I am serious. A New Mexico photographer was recently sanctioned when she declined, for reasons of conscience, to photograph a gay wedding. Bakers have been sued for refusing—for religious reasons—to bake cakes for gay weddings. “I just didn’t feel that as a Christian,” NPR quoted one baker as saying, “that I would want to participate in a same-sex wedding by providing the cake and my talents and my business for that event.” The American Civil Liberties Union filed suit in behalf of the gay couple—and won. A local judge ordered the cake duly baked and provided to the happy couple, whose happiness has been shown to exceed in importance any satisfactions others might propose and claim.

These occasions may be blips on the radar screen. I would not these days count on their failure to multiply and grow in accordance with a hankering on the part of the cultural left for widespread enforcement of the new orthodoxy. Repeat after us, boys and girls: “The Right to Choose means the Right to Choose Rightly.” Good! Now, again . . .

What irony to find the United States Supreme Court invoked as potential guarantor of sanctions-free dissent concerning abortion and birth control. We are where we are now—everyone knows this—on account of the Court’s disposition to protect a different sort of “choice.” It turns out the kind of choice the Court loosed upon us has a different home and habitat—outside the circle of protections devised by the Founding Fathers for the sake of community peace and freedom of thought and action.

The Little Sisters vs. Big Brother—what a contest for an age of deep and abiding confusion.

“Grand Bargain,” No. Serious Rethinking, Yes.

Peter Steinfels

Many weeks ago, I all but completed a reply to the critique that George McKenna published in the *Human Life Review* of “Beyond the Stalemate,” my June 21 *Commonweal* article, on the current state and future prospects of Catholic opposition, moral and legal, to abortion. My article contained a number of pointed criticisms of the organized pro-life movement. So I was not surprised that McKenna’s analysis in the *Human Life Review* was less than enthusiastic.

I was surprised, however, that it went to such tortuous lengths to misrepresent my article. Why? Why had McKenna, a man not at all foreign to making and understanding distinctions and complexities in argument, so misread me? Puzzling over that has delayed my reply.

What I consider a gross misreading was not, McKenna acknowledges, his initial response.

At first reading, he believed that my approach was similar to the “Lincolnian position” on opposing slavery that McKenna had recommended to abortion opponents in 1995. “Recognizing abortion as a moral wrong,” that approach “warns of the futility of seeking an immediate ban, arguing instead for a pragmatic strategy.” Only upon “successive readings” did McKenna realize what my article was truly saying. Writers generally like to hear that their work has won “successive readings.” In this case I wish McKenna had quit when he was ahead.

It does not matter that McKenna’s critique contains a number of nasty barbs aimed at me and my religious views. What matters is that, while I strongly doubt that *Human Life Review* readers (or for that matter *Commonweal* readers) would completely agree with “Beyond the Stalemate” in undistorted form, an open-minded and accurate reading might at least provoke constructive thought. But that would require a return to the central concerns and argument of my article rather than what “successive readings” convinced McKenna I was really up to.

And what was that? My “underlying point,” he claimed, is to propose a “grand bargain” between the species of liberal Catholics he labels *Commonweal* Catholics and their “pro-choice brethren on the left.” And what were the terms of this “grand bargain,” in McKenna’s view? “We will eschew

Peter Steinfels, a former religion reporter and columnist at the *New York Times* and founding co-director of the Fordham University Center on Religion and Culture, is the author of *A People Adrift: The Crisis of the Roman Catholic Church in America* (2003).

any more public rhetoric about a ‘moment of conception’—if you will just agree with us that at some point in the pregnancy the occupant of the womb can be called human and thus entitled to the same legal protections we give to the already-born.”

All very interesting. And completely false.

Nowhere in my article did I propose such a “grand bargain,” nor did I have one in mind. Nowhere did I mention “pro-choice brethren on the left,” nor did I entertain any idea of winning over the “activists” McKenna supposes I had in mind. Nowhere did I mention eschewing “public rhetoric about a ‘moment of conception,’” nor did I advise dropping “the public insistence that life begins at conception.”

How did McKenna arrive at his strangely skewed interpretation of what my article was proposing? It wasn’t easy. Instead of taking my words at face value, he turned sleuth. He pursued an elaborate and sometimes quite speculative analysis of who my intended audience was. It couldn’t be the pro-life movement. (“In his article it is always a ‘they’ and . . . never a ‘we.’”) It couldn’t be the Church. (Steinfels is “angry at his Church.”) So it must be “the regular readers of *Commonweal*.” These, McKenna surmises, are desperate to relieve the tension that abortion has created with their non-religious or even anti-religious reformer friends on the left. Ergo the point of my article must be the “grand bargain.”

A remarkable bubble of speculation about my presumed audience, but let’s prick it with a fact. The original audience I was addressing with my argument was very much a representative of the pro-life movement and very much a representative of the Church. It was, in fact, Archbishop Charles J. Chaput. That is correct: Archbishop Chaput.

My *Commonweal* article was largely derived from a paper I was invited to deliver at a September 2012 Villanova Law School conference on the themes of Archbishop Chaput’s 2008 book, *Render Unto Caesar*. The archbishop was to deliver the keynote talk not long after I spoke, and although I know well how busy prelates are, I hoped that he might be in attendance to engage my suggestions. As it turned out, he wasn’t, but I also knew, of course, that like-minded people would be, as they were.

McKenna knows from his own experience that it is possible to address more than one audience at a time. So, yes, I was addressing *Commonweal* Catholics, although not with the problematic he conjectures. But I was also addressing whoever in the pro-life movement, or among pro-life sympathizers, and whoever in Church leadership, or among Church members, might share my concern that the anti-abortion cause was stalled. I tried to highlight this conviction of a stalemate when I reworked my Villanova paper for *Commonweal*,

replacing some reflections on other aspects of Archbishop Chaput's book with reflections on public reactions to the 40th anniversary of *Roe v. Wade*.

McKenna unfortunately conceives of the various possible audiences in bloc terms. There is the "pro-life movement." There is "the Church." There are "*Commonweal* Catholics." There are "pro-choice brethren on the left"—those anti-religious, more or less infanticidal "activists on the other side." He locates me in relation to each by selectively quoting phrases snatched from very different parts of my article.

Consider his conclusion that I could not be addressing a church audience because I am angry with the Church. Now I don't deny having been, and on more than one occasion, angry with the Church. Has McKenna ever been angry with the Church? Have the readers of the *Human Life Review*? A lot better and much holier people than all of us have been angry with the Church.

But what is the evidence for my anger? Steinfels "complains about [the church's] 'all-male clerical leadership,' its 'prudery' and hypocrisy during his childhood, and its continuing 'male bias.'" Actually I nowhere complain about hypocrisy, and here is the passage from which McKenna has plucked the word "prudery," a passage meant to disabuse readers of stereotypical suspicions that my anti-abortion convictions might simply be the product of youthful brainwashing: "Growing up Catholic," I wrote, "I did not hear priests rail against abortion. To the contrary, given the reticence, perhaps I should say prudery, of that environment, the subject was seldom mentioned." As for the Church's "all-male clerical leadership," the phrase appears thousands of words later when I am describing the obstacles the Church faces in advancing its anti-abortion case, including the ease with which it can be dismissed as reflecting "male bias." Is advertizing to these facts really beyond the pale? I do have my complaints about the church's all-male clerical leadership, but here I am not complaining. I am merely recognizing realities.

My relationship to the organized pro-life movement is more complicated. That movement is one of many bungalows and a few mansions. Most of them have not been especially welcoming to Catholics like me. Better a trophy atheist like Nat Hentoff than a troublesome Catholic archbishop like Cardinal Bernardin. Contra McKenna, I have not been "disdainful" of the movement. But whatever insufficient and often unavailing efforts I have made as a writer, editor, academic, voter, friend, family member, Catholic, and neighbor in support of unborn lives I have pretty much undertaken as an individual and not as a member of the organized movement. It would not have been honest to write "we" instead of "they" (and McKenna might have been the first to call me out on such dishonesty).

In this respect I am among a great number of pro-life Americans (and Catholics) who keep the pro-life movement at arm's length, in large part for the reasons set out in my article, including the criticisms that McKenna chooses to abridge and caricature as a "bill of indictment" rather than examine seriously. (For the record, at the Villanova conference a leading spokeswoman for Catholic pro-lifers acknowledged the validity of many of those criticisms.)

Such people fall outside of McKenna's tightly defined audiences. So do other people I have long had in mind when pondering this subject. They include individuals who couldn't be further from anti-religious or dogmatic pro-choice activists but, if they consider themselves pro-choice, do so reluctantly and with a troubled sense that they are not really facing up to moral concerns about fetal life. Many of them are either politically or culturally conservative, sometimes both. Some are Jewish, shaped by a tradition and sensibility that values unborn life but doesn't grant it, especially in early stages, a moral status equivalent to the newborn's. Then there are women I know who risked a complete upending of their lives to bear a child despite pressure to seek an abortion—and who nonetheless defend *Roe v. Wade*. There are pastors who tell me that the Church's anti-abortion political profile not infrequently undermines their own efforts at pro-life education and counseling. And finally there are *Commonweal* Catholics. Sure, a few of them may be longing for a separate peace with their pro-choice buddies, but most of them have simply been chafing at the sense that the Church's proclamation of the Gospel was being obscured by ill-chosen legal and political priorities. In other words, they long thought what Pope Francis has recently said.

So what, with all these kinds of people in mind, was I actually trying to propose rather than McKenna's imagined "grand bargain"? Apart from my review of the missteps and achievements of the Church and its pro-life allies in this struggle, my article rests on two sets of distinction. One is the distinction between what can plausibly be prohibited by law and what must remain in the realm of moral persuasion. The other is the distinction between what I believe, as a matter of both philosophical reasoning and religious teaching, is the truth about unborn lives and the protection owed them, on the one hand, and the obscurity and ambiguity that inherently surrounds some aspects of this belief, on the other.

These two distinctions are not extraordinary. What predisposition makes someone of McKenna's intelligence unable to fathom them or compelled to twist them this way or that until remolded to suit his polemic?

Take my view that there are some things that Catholics and the Church can achieve only by moral argument and witness, and that trying to achieve them by law will become an obstacle to achieving them at all. McKenna

remolds this into a “bifurcation,” a retreat to an in-house morality for “ourselves, our family, and close personal (presumably Catholic) friends” while content to “settle” on something else for the diverse, pluralist society. To do this, he has to ignore my specification of “what can be *legally* established in a diverse, pluralist society” (emphasis added for McKenna). He has to gratuitously add “presumably Catholic” to my reference to friends. (I have many non-Catholic friends, as Mr. McKenna probably does, too, and I had no such limitation in mind.) He has to skip over my statement that even if “the most logical marker (conception)” is not realistic in our society “*when it comes to the law*” (emphasis again for McKenna), Catholics should nonetheless “continue to insist that unborn lives deserve protection from their beginnings.” And he has to miss the point of my praise of Catholicism’s “heritage of philosophical reasoning” as a resource for “changing the culture.”

To be perfectly clear, I believe that the Church and its adherents should try to persuade everyone, Catholic and non-Catholic (although obviously the faithful above all), that human lives, from their earliest formation, deserve to develop and not be extinguished, regardless of what can be written into law.

In the same way, take my position regarding the true moral status of unborn lives, on the one hand, and my perception, on the other hand, of the ambiguity surrounding this status, particularly in early phases of fetal life, in the eyes of others. McKenna constantly blurs what I quite insistently state as my own conviction and what I state are the understandable convictions of others. He doesn’t mention my references to Orthodox Judaism or Christian thinkers who are otherwise quite countercultural. He dwells on my attention to the fetus’s sheer size and declares that I find it “hard to imagine ‘that anything so small can be the bearer of rights that would outweigh the drastic impact that its continued existence might have on the life of its mother or her family.’” No, I don’t find it hard to imagine. I simply find it easy to imagine that others find it hard to imagine. Yes, I do warn that the claim that this tiny entity should have the same moral status as an infant is “counterintuitive” and undercuts many of the analogies that pro-lifers regularly employ. But McKenna does not mention that I proceed to acknowledge how many once-counterintuitive aspects of reality we have come to accept. Finally he has to work himself up into a full rhetorical sweat: I recognize abortion as killing but am not “quite sure what it is killing.” I want to keep everything “as loosey-goosey as possible.” To my proposed strategy of legally protecting unborn lives “from the point where not one but a whole constellation of converging arguments and intuitions can be brought to bear,” he can only say, “Whatever that means.”

Well, I take the risk of spelling out very specifically what I, for one, think

that means—eight weeks of development—and why, because this is a question of political judgment, I’m open to other ideas.

Again, to be perfectly clear, I am not concluding that all the ambiguous, puzzling, counterintuitive, or problematic elements surrounding claims about the moral status of unborn lives in their early stages cannot be overcome. In God’s good time, they may be—by some combination, as I wrote, of “philosophical argument, moral credibility gained on other issues, and communal behavior that proclaims the sanctity of life at every stage.” But I am warning that all those ambiguous, puzzling, counterintuitive, or problematic elements do not spring merely from “ignorance or dogmatism or self-interest or hard-heartedness” in the minds of “pro-choice adversaries” or Church opponents but are inherent in “the situation itself.” These elements deeply affect the moral imaginations of all those people I mentioned above, people who are reluctantly pro-choice, or conflicted about abortion yet troubled by banning it, or repelled by a perception of pro-life denial of what they see as obvious complexities. Rather than speaking to the misgivings, doubts, and ambivalence about abortion felt by such people, proposing that virtually all abortion be outlawed from “the moment of conception” stiffens their resistance to reappraisal.

Finally, having imaginatively reworked my article into a proposal for a “grand bargain” between *Commonweal* Catholics and pro-choice activists, McKenna raises three reasons why it is a “bad bargain.” These are objections of course to what I never said, but perhaps they have at least some relevance to what I did say.

He elaborates the first two reasons with rhetorical questions. If, as I wrote, I see “no philosophical reason to depart from [my] original pro-life position” that human lives even in their earliest development should not be extinguished, why am I “departing from it now?” But I am not departing from it. What I am departing from is the assumption that this philosophical reason is so clear and forceful that, in our society and for any foreseeable future, it can win the day *as a matter of law*. Trying to do so, I believe, undercuts the effectiveness of the philosophical case even as a moral restraint.

McKenna’s second objection is that my argument “underestimates the dramatic significance of conception. Conception is the big bang . . . a ‘magic moment,’ and if we . . . belittle the significance of that moment, we start down the familiar slippery slope. Why forbid the killing at eight weeks? Why forbid it at 24 weeks? . . . Why not go all the way with Kermit Gosnell?”

I have no interest in belittling the significance of conception (although growing knowledge about early development may complicate our rendering

of it as a “moment”). But the problem today is not keeping from starting down the slippery slope. As I need not remind McKenna, legally we are far down that slope and morally and culturally we have already slipped a long way. The problem is working our way back up.

In that regard, although conception may be the “big bang” for McKenna and me, the burden of my article was to recognize that for many other people *who are not morally insensitive or unreasonable*, it is something less than that. It is precisely its “dramatic significance,” as distinguished from its moral significance, that we *overestimate*. We can and should continue to make the case, by reason and by witness, that conception is the “big bang,” but I see no reason why we cannot and should not simultaneously say: “OK, we understand how many people may have difficulty in seeing this big bang the way we do and therefore hesitate to engrave it in the law. We would like to persuade them otherwise, especially in terms of their personal moral choices, but meanwhile can’t we at least agree that for purposes of establishing legal protection we will emphasize the accumulation of other ‘bangs’ as well—not only the genetic identity and self-directing development that begins with conception, for example, but also heartbeat, brain waves, full array of incipient organs, responsiveness, human appearance?” Wouldn’t this convergence of bangs big and little be the basis for assembling the truly *commanding majority* that alone—and I emphasize this—can assure any legal limits to abortion *that will be both substantial and lasting*? Wouldn’t freeing ourselves from the burden of urging legal coercion regarding stages of fetal life whose moral status is much less open to demonstration actually increase the likelihood that the philosophical and moral case gets a hearing?

I can imagine McKenna immediately replying “no.” Perhaps I am wrong. Perhaps I should not conclude anything at all from his statement that my “proposal is futile”—given his fanciful rendering of my proposal as a grand bargain with the most doctrinaire or unthinking pro-choice Democrats. (Rehearse anti-Obama screed here.) The truth is that if I am looking for “takers” in a deal with anyone, it is among the same muddled or ambivalent middle that McKenna and many others have long recognized as critical in the abortion struggle.

Even then, his charge of futility could be right. (Of course it needs also to be measured against the possible futility of the present course.) At the Villanova conference, one respondent shrewdly noted that the kind of concerns about the moral status of the fetus so prominent in my argument were no longer even being contested but simply brushed aside by pro-choice activists, who were defining the question strictly as one of women’s agency. Point well taken, and one that makes all the more serious the tragic chasm that has opened

up between the pro-life movement and the world-historical movement for women's equality with its consequent disruption of traditional gender roles.

My response is that the approach I support, making the early stages of fetal life the focus for *moral* argument and persuasion and later ones for *legal* measures, is the very best means to get the human reality of unborn lives back into the debate. In this sense, the "heartbeat" legislation introduced by pro-lifers makes good sense, although the practical problems faced by that campaign would require another article.

If correcting McKenna's misrepresentations—at least to the point that *Human Life Review* readers might go directly to my text (accessible at <https://www.commonwealmagazine.org/beyond-stalemate>) and judge for themselves—were my only desire, this reply would have been submitted weeks ago. What has stalled these reflections is my bafflement over what lies behind McKenna's wildly imaginative and disparaging reconstruction of my argument. Why the acrobatics about my supposed audience? Why the inability or unwillingness to honor my distinction between advocacy for legal protection and advocacy for moral protection? Why the inability or unwillingness to recognize the difference between what I state about my own convictions and what I state about deep-seated obstacles to convincing reasonable others of those convictions?

Was my article's wording really that cryptic or obscure? Did I accidentally trespass on McKenna's paradigmatic distinction between Lincoln's moral absolutism about slavery and his political pragmatism about eliminating it by mounting a treacherous argument that, even at McKenna's first reading, looked suspiciously similar? Is this some kind of grudge match with *Commonweal*? Is that all it has taken to throw up this roadblock to serious discussion?

I can't believe that there isn't a more fundamental problem, and here is my best effort to locate it. McKenna's own original thinking about ends and means notwithstanding, he is deeply invested in the present course of the pro-life movement. He is confident that sooner or later it will prevail. If he admits to the present stalemate, and I am not sure that he does, it is still as the prelude to eventual victory. A proposal like mine is dangerously unsettling, all the more so because it comes from a quarter he obviously distrusts.

My own viewpoint is different. Despite the success of the Catholic Church and the pro-life movement in preventing abortion from being "mainstreamed" as merely another unfortunate medical procedure with no particular moral overtones, the current stalemate is at best an ongoing failure. At worst it threatens to erode even that important achievement of keeping abortion morally "apart." Here and there abortion opponents win a round, but for every action there is an equal and opposite reaction. And hard as it is for

pro-lifers to absorb, there is a *moral* component to the pro-choice insistence that abortion should always remain as a resort for women in excruciating circumstances. Perhaps the stalemate, with its post-*Roe* status quo, will continue. Perhaps, like the conflict over same-sex marriage, it will suddenly tip. If it tips, I doubt it will tip against legal access to abortion, not unless there is a massive change in the culture.

Advocacy for same-sex marriage has succeeded because, with strong support in the cultural elites, it was built on the stories of real people describing their hopes and travails. Abortion supporters have learned that lesson. What is needed is more “coming out.” Exhibit A: the November 16 issue of *New York* magazine, a barometer of liberal trends if ever there was one. It featured painful stories of “my abortion,” complete with first names and photos of the women who tell them. Of course the full stories are not here; one must read between the lines, especially about the multiple abortions, to register the full toll of betrayed affection and sexual chaos. What is told is sufficiently wrenching. The sense of moral turmoil and loss is palpable, as is the ghost of the “baby,” to quote more than a few of the women. Abortion providers frequently come off badly. But the only things consistently worse than the abortions are (a) boyfriends and (b) pro-lifers and the restrictions they have championed. The unstated message is powerful: Abortion should be made accessible, acceptable, affordable, untraumatic, uncomplicated, uncontroversial. That is, it should be “mainstreamed.” Why should Nicole and Dana and Mira and Heather and Charnae and Clio and Rachel and Yolanda and Monica and so many more be subject to these tortures? If such women, like the gay and lesbian members of your immediate family or circle of friends, cease to be anonymous and faceless, their cause will become all the more difficult to resist.

In sum, I do not have confidence that all Catholic pro-lifers need is principled persistence. They are not winning this debate, and they could yet lose decisively. I think that they should unsparingly examine the strengths and weaknesses of pro-life campaigns to date and seriously consider the wisdom of other strategies, primarily a different vision of what can be realistically accomplished by law, what must be accomplished by moral suasion and example, and the relationship between these two parallel efforts. It is true, as McKenna may worry, that any such self-critique or rethinking could rattle the troops in the field. Is the present impasse serious enough to take that risk? Or are things going well enough that it’s better to cut off any such proposals at the knees? Personally, I think that the impasse is very serious and the value of contemplating alternative approaches like mine is correspondingly high.

Rejoinder to Peter Steinfelds

George McKenna

Dear Peter,

I hope that you will not take it amiss if I write this in a more informal style than we've been using, but my feeling is that now may be a good time to engage in direct dialogue. Wasn't it something like that which you first proposed to Anne Conlon after reading my critique of your *Commonweal* article? Anyway, it seems like a good way to go. To answer my own question of "Who's he talking to?," I am talking to you, and not in an unfriendly way.

The two of us have much in common. We're close to the same age, we're both native Chicagoans, raised there in the '40s and '50s, and we both take our Catholic religion seriously. I know we both try to practice Christian *caritas*, though we inevitably fall short because we're sinners. So let me start off by apologizing for anything I wrote that might have caused you pain. I certainly didn't mean to. On the contrary, what you interpret as "nasty barbs aimed at me and my religious views" were really attempts to put into an understandable framework some of the remarks that you made about the Church, the Republican Party, and the pro-life movement. And when I say "understandable," I mean it in a double sense: not only comprehensible but understandable empathetically. Over the past 50 years we've journeyed through much of the same cultural territory, and we've probably had similar gut reactions to some of what we've seen along the way.

As you know, I was completely innocent of the provenance of your *Commonweal* essay. I didn't know anything at all about your conference or your plans to address Archbishop Chaput. But I don't understand how that pricks any "balloon" you think I might have launched. Inspired or informed by an earlier conference paper you delivered, you wrote an article in *Commonweal*. That particular article was all I had to work with. It seems to me that my own response stands or falls on my reading of it, not on any inside dope about how it all began.

All this by way of preface. But let me not presume on your time. I'll get down to business now and say what I need to say about your article and your response to my critique of it. Here it is, in a nutshell: Despite your having written two long pieces, *I do not really know what you are talking about.*

George McKenna is professor emeritus of political science at City College of New York, author of *The Puritan Origins of American Patriotism* (Yale, 2007), and co-editor of *Taking Sides: Clashing Views on Political Issues* (McGraw-Hill, 2013), now in its eighteenth edition.

Sometimes I think I do, but then I get tripped up by something else you say.

On the one hand, you insist that all you are doing is distinguishing between what, on the basis of both faith and reason, should be held and promoted, and “what can be legally established in a diverse, pluralist society.” What should be held and promoted is the moral proposition that “human lives, from their earliest formation, deserve to develop and not be extinguished, regardless of what can be written into law.” What can be legally established at this point in our history—abortion bans at some later point of pregnancy—necessarily falls short of what is morally optimal. Yours, then, is an argument that combines moral absolutism with political pragmatism.

If I got that right, then there is absolutely no distance at all between what you hold and what I argued in my “Lincolnian” piece in *The Atlantic*. Do you see why I thought that when I first skimmed over your article?

But then I found all this other stuff in it. I will summarize by calling it the dot-at-the-end-of my-sentence stuff. I’m referring to the argument, dear to the hearts of abortion defenders, that this . . . this *thing* down there can’t possibly be human because it’s no bigger than the dot at the end of this sentence. Of course, as you point out, by the time the woman discovers she is pregnant, the “dot” has already grown about seven millimeters and has begun to have a heartbeat. But it is small, no doubt about that. And yet, you quote Dr. Seuss: “A person’s a person no matter how small.” But then you qualify *that*: Seuss’s poem was about very little people, but not pencil points. The “sheer size” and the “sheer invisibility” of the creature in the womb make it difficult to compare it to an “obviously” human victim.

So where are we going with this? Although religion, science, and logic have firmly convinced you that the unborn baby is human from its earliest existence, it is not “obviously” human; its status is “ambiguous.” Ambiguous to whom? To prochoicers, for sure. What about to you? “Many, probably most, abortion opponents assume that this ambiguity exists only in the minds of pro-choice adversaries. *I am arguing that it also exists in the very situation itself.*” (Your italics.) Well, if it’s in the situation itself, then its humanity must be ambiguous in *your* mind, too, no? So it’s hard for *you* to imagine.

In your reply to me you say, “No, I don’t find it hard to imagine. I simply find it easy to imagine that others find it hard to imagine.” To which I am tempted to reply with a question: Why do you find that so easy to imagine, if you don’t actually share their view that it is hard to imagine the humanity of the fetus? But maybe we’re grinding the corn a little too fine here. What I was trying to say was that you seem to have accepted the pro-abortion position that the smallness of the little creature in the womb has to be considered among the criteria for determining its right to live. You reinforce that reading

when you cast doubt on whether there is any one “magic moment” in the life of an unborn child. Pregnancy, you say, is a nine-month process, so you can locate it at just about any point in the pregnancy: “the emergence of heartbeat, primitive nervous system, brain wave, quickening,” and so on. In your reply to me you put it slightly differently, but it comes to the same thing: Instead of a “big bang,” there is now an accumulation of big bangs and little bangs along the way.

But those aren’t “bangs.” They are stages of the continuous development of a human creature that already has 46 chromosomes, just like you and me. The little creature was created when a sperm with 23 chromosomes slammed into an egg with 23. That was the seismic event I had in mind. The “bang” metaphor loses its point when applied to the later, organic development of a being thus dramatically conceived. As I said in my critique of your article, once you start down the road of successive “bangs,” you can locate the origins of a human being at any stage you want, right up to the moment of birth (or, as Barbara Boxer might say, when you take it home from the hospital).

But, you say, “I am not backtracking.” You say you’re still going to stick with your original formulation about the humanity of the unborn child from its earliest moments. It’s just that there is a “gap” between “what a community like the Catholic people teaches as morally demanded, and therefore *what individual Catholics should urge with family and friends regarding their own actions, and on the other hand, what can be legally established in a diverse, pluralist society.*” (My emphasis.) In my critique I called that a “bifurcation,” and it still sounds like one. It is not as crude and reductive a bifurcation as the one Mario Cuomo advanced in his 1984 Notre Dame speech, but still, like Cuomo’s, it distinguishes between what we are allowed to say domestically and what we should say in the public square. In your response you took great exception to this interpretation. You scoffed at my suggestion that you’ve set up two different speech-worlds: one in the public sphere, and one at home, “with family and friends.” But I don’t know what other construction I can put on the words above, which I believe I have quoted in context.

Or was it that you were just distinguishing, Lincoln style, between what we should continue to hold morally and what we can reasonably expect to enact into law? If so, to whom were you proffering that advice? The most obvious audience would be the pro-life movement. But then it would be gratuitous. Over the last year, no state legislature has attempted to ban abortions “from the moment of conception” (which would be literally impossible). The very earliest ban was North Dakota’s at six weeks after the

woman's last period, which is where you were once ready to draw the line. Arizona also enacted a ban, but it was at twelve weeks. Texas's abortion ban—headlined in the national media because a state senator staged a filibuster against it—was at 22 weeks. So if you were offering this advice to a pro-life activist, he or she might say, "Why, thank you for that, but we've already become pretty pragmatic." This was not always so. In the '90s, when I wrote my *Atlantic* article, the dominant voices in the pro-life movement were still quixotically insisting on a constitutional amendment banning all abortions in the nation. Now their approach is to take down the abortion regime incrementally, one brick at a time.

Are you opposed to their approach? You don't address that question in your article. In fact, you don't address *them*. You say you "keep the pro-life movement at arm's length." But why? You seem to be giving them advice on how to proceed, so why don't you dialogue with them? You think of them as the cat's-paw of the Republican Party, whereas many of them were driven into the Republican Party by the party they had once supported loyally, almost religiously. You think of them as the enemy of the "women's movement," whereas the leading pro-life organizations today are headed largely by women, including the Human Life Foundation, the publisher of this journal. (It goes right down to the street level. When my daughter and I pray in front of abortion clinics, I'm the only guy there.) The original feminists, the nineteenth- and twentieth-century foremothers of feminism—women like Victoria Woodhull, Elizabeth Cady Stanton, Alice Paul, and Susan B. Anthony—hated abortion and spoke out against it in language that might make you wince: "murder," "foeticide." They didn't want to jail the women who had abortions, but none of them would dispute Alice Paul's characterization of abortion "as the ultimate exploitation of women." I respect you too much to think you'd buy into the Marxist-Marcusean proposition that the poor dears suffer from "false consciousness," failing to understand their true interests.

Your relationship to the Catholic Church, as I said in my critique, seems more complicated. There does seem to be a lot of anger at the way the Church in America operated in the 1950s, when you and I were coming of age. I can understand it and sometimes I've shared it. "Has McKenna ever been angry with the Church?," you ask. The answer is yes. But I try not to hold a grudge. The Church is my family, and on occasion I've had issues with some members of my family (the family I was raised with and the one I helped beget). But it never lasts long, because I have no place else to go. I can't desert my family.

I assume that that's the way you come out, too. But I see in your essay a lot of unresolved tensions between your allegiance to certain leftist political movements, particularly feminism, and your acceptance of the Church's

teachings on abortion. In your reply to me you refer to “the tragic chasm that has opened up between the pro-life movement and the world-historical movement for women’s equality with its consequent disruption of traditional gender roles.” Forgive me for what you call my “sleuthing,” but in my own way I was trying to grasp what you were doing in your essay. When I talked about a grand bargain—a term you never used but which seemed to fit—I saw it as an attempt to bridge that “tragic chasm.”

Maybe I was wrong, but don’t we all resort to sleuthing when we can’t otherwise figure out what someone is trying to say? I see that you did some sleuthing, too. You think that I am invested in a certain kind of historical triumphalism, the certainty that the pro-life movement is on the way to inevitable victory—and therefore I can’t abide the doubts you have raised about its future. Oh, Peter, you couldn’t be more wrong! Hegelians, Marxists, and Progressives believe in the inevitable triumph of political movements; Christians believe that God is in charge, and that His ways are not always ours. Come to think of it, even if I were not Christian I would never think of the certain triumph of any project I’m invested in. At my age I’ve seen so many of my great plans go down the tubes that I’d be a fool to believe I’m on the winning side of history.

Here is what I do believe, and what animates everything I write on the subject. I believe that deliberately killing a child in the womb is a grave moral offense. I acquired this belief not from a catechism but from the section on embryology in my biology class at the University of Illinois in 1955. At that time abortion was illegal in the U.S., so the issue wasn’t pressing, but *Roe v. Wade* changed everything. Throwing out even the most permissive abortion laws in all 50 states, it made the killing of unborn children a constitutional right. Later, I found out how that right was being exercised: by dismembering, poisoning, scorching with chemicals, and stabbing in the head those “products of conception” from which the Court had removed all solid protections. Some of the particular killing procedures I just mentioned have been outlawed, and others have been made obsolete, but the routinized killing of unborn children goes on at an average rate of nearly 3,000 per day, some of it less than ten minutes from my house, at a clinic that specializes in late-term abortions.

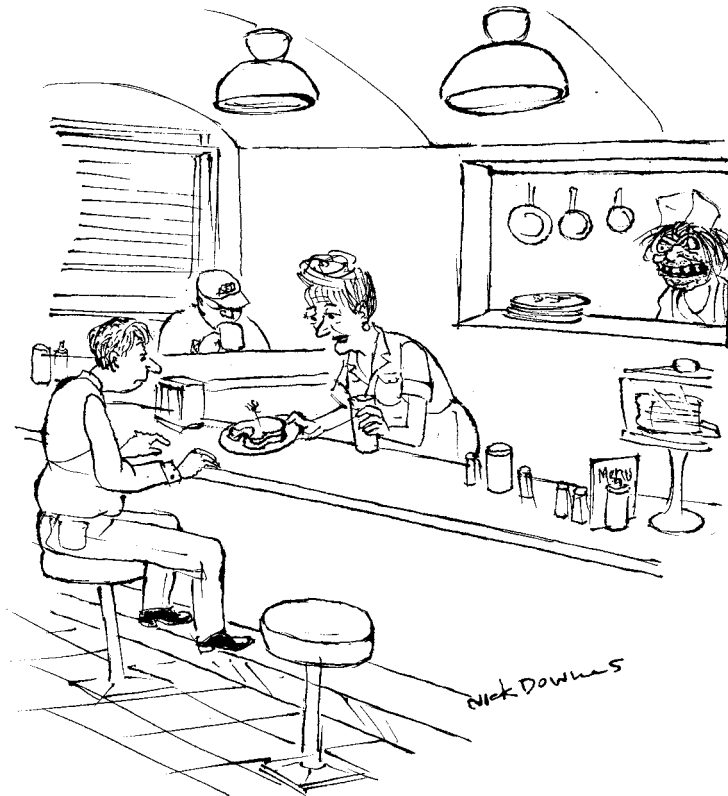
In changing the law, *Roe* changed me. When the Church, heroically, standing almost alone, came out so squarely against *Roe*, I finally realized how important it was for me to consider, and reflect upon, the whole body of its teachings. In a sense, then, it wasn’t religion that drove me to oppose abortion; it was abortion that drove me to deepen my religious engagement.

So now you know where I’m coming from. I’d be happy to talk it over

GEORGE MCKENNA

with you anytime over a cup of coffee or something stronger. My goodness, you needn't sit there puzzling for another two months over why I wrote such nasty, mean, unfair things about your article. Indeed, as you see from these pages, I consider your essay to be extremely thought-provoking. I'm not sure what it was saying, but isn't that often the way with provocative works? You have stirred the juices of supporters and critics alike, and for that I congratulate you.

With all best wishes,
George



"There's a bite out of your sandwich, but, just one, I'm happy to say."

Revisiting Reagan's Defense of Life

Christopher White

During his first term in office, President Ronald Reagan took to the pages of the *Human Life Review* to consider the aftermath of the first decade of legalized abortion in the United States (“Abortion and the Conscience of the Nation,” Spring 1983). For Reagan, how our country responded to the grave moral evil of abortion would be a reflection of our national character and the type of society we aspired to build. “*Roe v. Wade*,” he wrote, “has become a continuing prod to the conscience of the nation.”

The situation at the time of his writing was indeed grim. Ten years after the Supreme Court had allowed the legalization of abortion on demand, 15 million unborn children had been killed. Efforts were then underway to pass a constitutional amendment affirming that life began at conception, along with Senator Jesse Helms’s Human Life Bill and Congressman Henry Hyde and Senator Roger Jepsen’s Respect Human Life Act—and Reagan had thrown the full support of his office behind all of them.

“The real question today is not when human life begins, but, *what is the value of human life?*,” wrote Reagan in 1983. For Reagan, along with the best experts in science and biology, it was well established that life begins at conception. The question of his day, which remains ours today, is what we are to make of that life, its value, and its legal and moral significance.

Not long after Reagan’s passing, Senator (now Governor) Sam Brownback of Kansas reexamined the president’s essay (“Abortion and the Conscience of the Nation’ Revisited,” HLR, Summer 2004). “We need to reflect on whether we are closer to—or further away from—having a culture of life,” observed Brownback. Another decade later—and three decades following Reagan’s initial essay on the matter—it’s helpful to once more take stock of both our victories and the challenges that remain.

Reassessing the Damage

Today there are nearly 3,000 abortions performed each day in the United States, and since *Roe v. Wade*, almost 60 million children have been killed by abortion. In 1983 when Reagan penned his essay, pro-lifers felt challenged to inform and educate their fellow citizens about the reality of abortion, seeing it as their job to rouse the conscience of the nation. Gradually, we’ve seen an

Christopher White is the Director of Education and Programs at the Center for Bioethics and Culture and a 2013-2014 Robert Novak Fellow. He is also co-author of *Renewal: How a New Generation of Faithful Priests and Bishops Is Revitalizing the Catholic Church* (Encounter, 2013).

uptick in the number of Americans who self-identify as pro-life and a decrease in support for legal abortion. Shaping the conscience of a nation on matters related to abortion policy has been a long, slow battle, but one in which there have been laudable, incremental gains.

According to data from Americans United for Life, in 2013 alone, over 60 new life-affirming laws were passed around the country—and a total of more than 200 laws in over 30 states since 2010. Perhaps most significant was Arizona's 2012 passage of the "Women's Health Protection Act," which prohibits abortion at or after 20 weeks of pregnancy—though it was later struck down by the Ninth Circuit court, and the Supreme Court declined to hear it on appeal in January 2013. Even so, the state's efforts were heroic and set a precedent that many other states are likely to follow. While some might counter that passage of such a pro-life law was predictable for a conservative state, it was the New York State legislature—a state with some of the least restrictive measures on abortion—that successfully defeated Governor Andrew Cuomo's Women's Equality Act. Cuomo's act would not only have established as state law a fundamental right to an abortion at any point during a pregnancy and for any reason, but also would have allowed abortions to be performed by non-doctors. Even in this solid blue state, 80 percent of New Yorkers oppose the idea of allowing abortion during all nine months of pregnancy. In addition, despite efforts to market the act as a means of promoting women's equality, 73 percent of women opposed it.

Meanwhile, in the September 2013 issue of *The Huffington Post*, columnist Laura Bassett lamented the "dramatic toll" of state legislation on abortion clinics. According to Bassett, "more than 50 abortion clinics across the country have closed or stopped offering the procedure since a heavy wave of legislative attacks on providers began in 2010." In response to these closings, Elizabeth Nash of the pro-abortion Guttmacher Institute observed: "This kind of change is incredibly dramatic. What we've been seeing since 1982 was a slow decline, but this kind of change . . . [is] so different from what's happened in the past."

Last year Gallup polling revealed that a solid majority of Americans—64 percent—believe that abortion should be illegal after the first trimester, and an astounding 80 percent of Americans believe it should be illegal after the second trimester. This same poll found that 48 percent of Americans now identify as pro-life (compared to 46 percent of Americans who identify as pro-choice). Upon first read, the 48 percent figure might seem disheartening, but the fact is that in 1995 (when Gallup polling on the issue first began) only 33 percent of respondents identified as pro-life, with 56 percent identifying as pro-choice. Changing hearts and minds has been at the core of the pro-life cause since its beginning, and the trajectory of the poll results suggests that

we are making substantial inroads. As Reagan noted, the intellectual arguments are on our side, but that's only part of the battle. How then might we move toward creating a culture that is appalled by the horrors of abortion and is committed to recognizing the value of all human life at all stages?

Reagan's Prescient Wisdom

We might begin to build such a culture of life by stating the obvious (and backing it up with the facts): A human life is human life, regardless of location. In that seminal 1983 essay, Reagan cited the very common link between abortion and infanticide. If we as a nation are to permit the killing of children in the womb, what's to prevent us from killing newborns once they make it out of the womb—especially newborns deemed unworthy or defective?

In 1982 a court in Indiana allowed a child born with Down syndrome to be starved to death. While medical treatment was available to help this child, the parents opted not to move forward with the relatively routine procedure that would almost certainly have saved the child's life. In reflecting on this, Reagan declared: "I know that when the true issue of infanticide is placed before the American people, with all the facts openly aired, we will have no trouble deciding that a mentally or physically handicapped baby has the same intrinsic worth and right to life as the rest of us." Under the courageous leadership of Reagan and his Surgeon General C. Everett Koop, the U.S. Congress amended the Child Abuse Prevention and Treatment Act (originally passed in 1974) to require that handicapped newborns receive life-sustaining treatment, regardless of parental desires.

In April 2013, as evidence poured forth (though the story was initially ignored by most major media outlets) that Philadelphia abortionist Dr. Kermit Gosnell was regularly killing children after they had been born alive, political columnist Kirsten Powers took to the pages of *USA Today* to state what few others had been willing to say publicly:

Regardless of such quibbles, about whether Gosnell was killing the infants one second after they left the womb instead of partially inside or completely inside the womb—as in a routine late-term abortion—is merely a matter of geography. That one is murder and the other is a legal procedure is morally irreconcilable.

In an unforgettable and unprecedented way, the Gosnell case vividly showed the nation the true horrors of the abortion industry. Although this was not the first time that such atrocities had taken place, the sickening nature of Gosnell's practices—or of the practices of "clean," legally conducted abortions—has been conveniently ignored or suppressed in the past.

The basic details surrounding the Gosnell case provided the public with

accounts of jars containing fetuses and bags of blood and feces found in his abortion clinic (which was a state-licensed medical facility), padlocked emergency doors and blocked exit routes (presumably to prevent the patient from changing her mind), countless accounts of women who had barely survived their abortions (which had in many cases been performed without anesthesia), and surgical malpractice that the Grand Jury report noted on at least two occasions resulted in death (not to mention the deaths of the many children killed by abortion or post-birth). Repulsive? Absolutely. A common reality? One would like to think not, but news coverage following the trial revealed similar conditions for abortion clinics throughout the country. For example, in July of 2013, North Carolina's Department of Health and Human Services found almost two dozen health violations in its clinics, a clinic in Arlington, Virginia, was labeled as "blood spattered" and is currently undergoing investigation, 12 clinics in Maryland and 13 Texas abortion clinics received citations, along with another two clinics in Pennsylvania.

After the Powers editorial forced an end to the media blackout of the case, Americans of all political persuasions appeared to be horrified by what had taken place under the auspices of medical care. Meanwhile, while the trial was taking place, President Obama delivered the keynote address at Planned Parenthood's annual fundraising gala. While the President never once mentioned the word abortion, he praised Planned Parenthood for their work, concluding with: "Thank you, Planned Parenthood. God bless you."

How then fares abortion and the conscience of the nation, we may ask? The Gosnell case reminded the American people of the true horrors brought about by abortion—horrors that enjoy the protection of the law. Increasingly, Americans are realizing just how inconsistent this is with our supposed national values of life and liberty; the President, however, is seemingly unmoved.

Raw Presidential Power

When *Roe v. Wade* was decided, Justice White declared in his minority opinion that the decision was an act of "raw judicial power." As Reagan observed in his essay for this journal, "our nationwide policy of abortion-on-demand through all nine months of pregnancy was neither voted for by our people nor enacted by our legislators." Indeed, seven justices of the Supreme Court delivered a decision that for four decades has fiercely divided an entire nation. But if in 1973 it was the Supreme Court that overreached to force Americans to subscribe to abortion-on-demand policy, today it's the President who is forcing all Americans to pay for it.

As a built-in feature of the Affordable Care Act that was passed in 2010, there's a little-discussed requirement for a majority of plans to charge all

subscribers with an additional monthly fee of one dollar that goes directly toward abortion coverage. While users may opt out of this coverage, it's almost impossible to determine which plans contain this surcharge, leaving consumers with the intolerable challenge of determining whether or not they might be contributing toward abortion funding. A 2013 study from the Charlotte Lozier Institute found that between 71,000 and 115,000 abortions could be subsidized through federal dollars as a result of this initiative. Such concerns have led to the proposed HR7 No Taxpayer Funding for Abortion Act that is currently being considered by the United States Congress. This bill would permanently ban any federal funding of abortion and would ban any such funds from being placed in an alternate trust fund from which they could later be redirected toward abortion services.

Even if such a measure is enacted and made into law, American citizens are still forced to battle with the Health and Human Services Mandate, which requires certain organizations (including religious ones) and businesses to provide health insurance that covers abortifacients. Along with religious schools, hospitals, and charities that are being forced to comply, thousands of private businesses run by pro-life men and women across the country are left with little recourse but to violate their consciences and comply. The evidence suggests that the conscience of the nation continues to be pricked by the moral evils of abortion—and yet, unfortunately, a sitting president has successfully trapped his citizens into taking part in an enterprise that they fundamentally oppose.

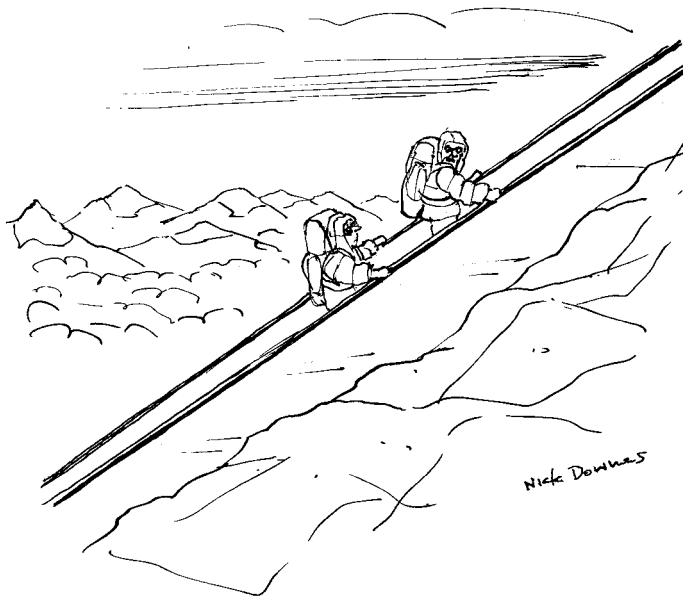
The Ravages of Abortion and the Consequences for the Nation

Reagan ended his 1983 essay with an appeal for prayer and perseverance; in reassessing that essay in 2004, Sam Brownback concluded on a similar note of optimism. For these two figures, pro-life warriors must also be happy warriors, because in promoting and defending the value of all human life, it's important to possess the very joy that life has to offer. As we again consider abortion and the conscience of the nation, 40 years after *Roe v. Wade*, we therefore need to remain optimistic, while also aware of the great evils that arise in a culture that permits abortion.

For Reagan, abortion boiled down to a question of value—how much do we value life? It was clear to him that abortion advocates refused to grant unborn life the same measure of value as theirs. Three decades later, similar logic has transformed not just the way we think about birth, but also the way we think about death. Today the states of Oregon, Washington, Vermont, Montana, and most recently (by decree of a single judge) New Mexico all permit physician-assisted suicide. If the old Hippocratic tradition where

doctors pledge first to do no harm was tossed out to make way for abortion, why not do the same for the elderly? This mindset also encourages conditional parenthood, where couples who do decide to have children are only willing to accept what they deem to be the perfect child. Hence, we've witnessed the dramatic rise of designer babies through egg and sperm donation, as well as sex-selective abortions. These are not tangential issues, but rather the inevitable outgrowth of a culture that has gotten the value question very wrong.

As we once more pause to consider the implications of our abortion culture and its consequences on our nation, we see very clearly how devaluing human life has not only perverted our sensibilities but reshaped our world. Yet, though the damage is inestimable, despair would only weaken our necessary efforts to counteract such a culture. A nation, after all, is made up first and foremost of its people—all its people, and not merely its presidents or politicians. As such, pro-life citizens must continue building a culture more hospitable to life and more unwelcoming to efforts to undermine it. If conscience is our compass, then a culture that allows abortion will always lead us wrong. Reorientation remains our great and worthy challenge today.



“It was even more dangerous before the escalator.”

Embryology: Medieval and Modern

Mathew Lu

Over the last several decades many abortion advocates have attempted to spread confusion and doubt concerning the beginnings of human life.¹ A particularly cynical strategy has been to invoke the authority of historical thinkers, especially those seminal teachers whom the Catholic Church has distinguished with the title of Doctors of the Church, to support the claim that (at a minimum) early abortion does not constitute homicide simply because the early embryo² is not yet fully human. Anyone familiar with the historical context of these thinkers should realize that their specific judgments regarding abortion are now obsolete in virtue of their primitive scientific understanding of embryology. In what follows, I begin by summarizing the Aristotelian embryology that gives the necessary context for understanding why these historical thinkers held the views that they did. I then explore how we should best understand their broader ethical views in light of our vastly superior contemporary knowledge of human embryology. Unsurprisingly, it turns out that if we apply the empirical findings of contemporary embryology to the metaphysical and ethical principles of the medieval thinkers, we arrive at a pro-life conclusion.³

Historical Background

In addressing the historical question of how pre-modern thinkers like St. Augustine or St. Thomas Aquinas considered abortion, it is vitally important to draw a clear distinction between the general moral principles they held and their application of those principles in specific judgments informed by what we might call their “scientific” (empirical) beliefs concerning embryogenesis. In general, the contemporary abortion advocates who appeal to these historical thinkers fail to make this distinction and simply parrot the historical conclusions without the context necessary to understand, much less evaluate, them. While it is certainly possible to find remarks from Doctors of the Church in conflict not only with the contemporary magisterial teaching of the Catholic Church but also with non-religious arguments from the Natural Law, those historical remarks mostly reflect their false empirical beliefs. Ultimately, those abortion advocates who embrace these historical judgments are in the rather curious position of embracing Aristotle’s embryology over that of contemporary medicine.

To unpack the issue honestly, we need to separate the more general

Mathew Lu is an assistant professor of philosophy at the University of St. Thomas in St. Paul, Minnesota, where he lives with his wife and sons.

metaphysical and ethical principles of these historical thinkers from their application in light of specific empirical biological claims about the development of human beings from conception through birth. To do this, we will need to understand the historical embryology, which comes primarily from Aristotle.⁴ The Aristotelian view was explicitly adopted by Thomas; however, even a figure like Augustine, who might not have had access to Aristotle's *Generation of Animals*, would nonetheless have held the same basic empirical biological understanding, simply because the Aristotelian view seems to have been the conventional understanding at the time.⁵

The Aristotelian embryology is often referred to as a “delayed hominization” view, in which the embryo goes through a number of ontologically distinct stages in the course of its pre-birth development, only the last of which is fully human. In general, Aristotle breaks down all of animate nature into three separate, hierarchically-related categories that (broadly) correspond to plants, animals, and human beings.⁶ These categories are differentiated by the specific powers that essentially characterize each level. At the lowest level, plants and other simple creatures manifest the vegetative powers of nutrition (i.e., taking in nutrients from the environment and metabolizing them) and reproduction, as well as growth and self-repair. These powers are the minimum necessary for organic life. Each higher category includes the powers belonging to those below it, so the next-higher level (animals) includes all of these vegetative powers and adds to them the characteristic animal powers of locomotion and sensation. Human nature encompasses all of the aforementioned vegetative and animal powers and adds to them the rational powers.

This three-fold division of animate nature is reflected as well in Aristotle's developmental embryology. The common medieval reading of that embryology held that in the course of its development the embryo substantially changes through all three categories of animate nature.⁷ So what begins as an essentially vegetative creature first transforms into an animal, and then at some point thereafter becomes fully human. As is clear from the following passage from the *History of Animals*, Aristotle thinks this account is supported by empirical observation.

In the case of male children the first movement usually occurs on the right-hand side of the womb and about the fortieth day, but if the child be a female then on the left-hand side and about the ninetieth day. . . .

About this period the embryo begins to resolve into distinct parts, it having hitherto consisted of a flesh-like substance without distinction of parts. . . .

In the case of a male embryo aborted at the fortieth day, if it be placed in cold water it holds together in a sort of membrane, but if it be placed in any other fluid it dissolves and disappears. If the membrane be pulled to bits the embryo is revealed, as big as

one of the large kind of ants; and all the limbs are plain to see, including the penis, and the eyes also, which as in other animals are of great size. But the female embryo, if it suffers abortion during the first three months, is as a rule found to be undifferentiated; if however it reaches the fourth month it comes to be subdivided and quickly attains further differentiation (583b3-26).⁸

Whether Aristotle performed these experiments himself or is simply reporting others' findings, it is obvious that the view is based on actual (albeit erroneous) observation.⁹ This reveals that Aristotle believed that an embryo possessed an animal soul around 40 days post-conception in the case of males and around 90 days for females. He notes two important physical markers of this change from vegetative being to animal: movement (i.e., "quickenings") and a "distinction of parts," by which he means the possession of observable organs (e.g., limbs, eyes, etc.).¹⁰

We can summarize the Aristotelian view as follows. From conception until 40 days (male) or 90 days (female) the embryo is essentially a vegetative creature, at that point it becomes an animal, and some time later it becomes a human being. There is some difficulty in establishing when the second transformation from animal to human being occurs, because, unlike the transformation from vegetative to animal creature, this change is not marked by any observable physical phenomena. Aristotle thinks that an animal can only be present insofar as its body possesses organs, which is why a "distinction of parts" is an important marker in his account. Once we find limbs, eyes, etc., we can know that an animal exists, because the exercise of the animal powers (sensation and locomotion) requires organs.¹¹ However, because the rational powers are not exercised by any specific organ, there's no way to know from empirical observation when the embryo has attained a rational nature.

This is because even if it is true that rational thought requires a brain, Aristotle does not regard the brain as the organ of thought. He holds that rationality is entirely immaterial and therefore there simply cannot be a material *organ* of thought. Accordingly, there is no observable physical marker of the transformation from the animal stage to the rational stage. Therefore, if you follow the Aristotelian embryology and want to be absolutely sure that the embryo is pre-rational, it is necessary to establish that it lacks organs (i.e., a "distinction of parts").¹²

I think that on some level the delayed hominization view is actually intuitive. On first consideration it makes a kind of sense that the conceptus should start out as a simple being that goes through a series of stages before becoming a full-fledged human being. The now-familiar sonogram images of embryonic development seem to support this kind of view.

However, once we begin to think through the full implications of the delayed hominization theory, we are presented with a number of difficulties. For one thing, the delayed hominization view fundamentally implicates Aristotle's hylomorphic metaphysics. On this view, all actual substances are composites of matter and immaterial form. For living creatures, the form is the soul that animates the matter that constitutes the body. This means that all living creatures are alive simply in virtue of being ensouled with the relevant kind of soul.¹³

On the delayed hominization view, the three stages of development involve the successive replacement of one kind of soul by another as the animating principle of the matter that makes up the body of the embryo. For Aristotle, the embryo is initially the result of the father's soul acting as the efficient cause upon matter inherited from the mother (the "catamenia"), with the semen functioning as the instrument of the father's soul. The mother's soul plays no role on this account. At conception, we have new vegetative substance, the composite of a vegetative soul/form (inherited from the father) and matter (inherited from the mother).

Since the ontogenesis of the conceptus is explained by the father's soul acting through the semen, the most natural next question is: What causes the transformation from vegetative to animal creature at 40/90 days? The embryo itself cannot be the cause of the change, because this change involves an increase in actuality, a movement upwards in hierarchy of being. One of the most fundamental ideas of Aristotle's metaphysics is the principle of proportionate causality, which states that whatever actuality there is in an effect must be present, in some way, in its cause. Basically, any changes within contingent reality must have some cause outside of itself. So the (efficient) cause of the embryo's transformation from a vegetative creature into an animal must come from something besides the embryo itself. And that is exactly Aristotle's view: The father's soul is also the ultimate efficient cause of the transformation from vegetative to animal being.

However, since this supposedly occurs 40 or 90 days after conception, this means that the father's soul must have some means of acting on the embryo up to three months post-conception. Aristotle accounts for this by claiming that the semen imparts a kind of "vital heat" to the mother's catamenia that actually persists within her until the embryo's transformation from vegetative to animal being.¹⁴ Once this occurs, the direct causal influence of the father's soul on the embryo is exhausted. It is important to note that the father's soul is *not* the efficient cause of the embryo's transformation from animal to rational being. Rather cryptically Aristotle merely says that the cause of this rational transformation must be

“divine” and come from “outside.”¹⁵ This is, again, a consequence of his view that rationality is entirely immaterial and thus the physical processes of reproduction and embryogenesis cannot themselves explain the ontogenesis of a new instance of rational nature.

We can now clearly see why many ancient and medieval thinkers thought that early abortion did not constitute homicide. Since they thought that the embryo only becomes a *homo* with the second ontological transformation into a rational being at some point more than 40/90 days after conception, the destruction of an early embryo before that time would not be the killing of a human being (i.e., a rational animal).

To summarize, the historical judgment that early abortion is not homicide¹⁶ reflects the following simple argument:

- (1) Homicide is the killing of a rational being.
- (2) Early embryos prior to 40 days are not rational beings.
- (3) Therefore, early abortion prior to 40 days is not homicide.

The argument brings together a general moral principle (1) with a specific claim about embryos (2). We have seen why the medievals held (2) in virtue of the delayed hominization theory. To resist this argument, we merely need to show that (2) is false. However, since (2) was itself held on the basis of an entirely outmoded theory of embryogenesis, this is not a difficult task. The theory of delayed hominization is untenable in light of contemporary empirical embryology.

Contemporary Evidence

The delayed hominization account receives little support from contemporary embryology. On the present understanding, the zygote that results from the fusion of spermatozoa and ovum is a new, independent biological organism. There follows a series of other developmental stages—morula, blastocyst, fetus, etc.—that constitutes a fundamentally continuous process of development and growth.¹⁷

This unbroken continuity means that there is no point in that development that could plausibly constitute an ontological inflection point.¹⁸ Ontologically speaking, this continuous pre-birth growth and development of the embryo into a fetus is analogous to the continuous post-birth growth and development of an infant into a child or an adolescent into an adult. With regards to the essence of the child, birth is not significant in and of itself, because it involves merely extrinsic changes. Just as who and what I am does not change because I leave one room and enter another, so birth does not make an essential difference to the nature of the child.

Because this development is continuous and unbroken, there is no empirical evidence to support the Aristotelian distinction into separate ontological stages. We saw that Aristotle himself pointed to the absence of organs and differentiated parts as the empirical ground of his judgment that the embryo before 40/90 days is essentially vegetative. However, with the benefit of modern microscopy, we can identify intracellular structures even within single cells that would qualify as “organs” in the relevant Aristotelian sense (e.g., organelles like mitochondria). This means, at the very least, that there is no stage in the contemporary account of embryonic development that could constitute Aristotle’s understanding of the vegetative stage, with its complete absence of a “distinction of parts.”

It should now be obvious how foolish it is to appeal to medieval judgments concerning the beginnings of human life. Since the medievals presupposed this Aristotelian embryology of successive ontological replacement, their beliefs about when a human being came into existence are wholly untenable in the face of the contemporary evidence concerning the continuity of development. Accordingly, any argument for the moral permissibility of abortion that rests upon the presuppositions of this ancient embryology is completely undermined. Those contemporary abortion advocates who invoke the judgments of medievals like Augustine or Thomas Aquinas on whether abortion ends a human life are nailing their colors to the mast of a scientific ship that sailed centuries ago. The fact that such advocates are often completely ignorant of all this only raises the irony to farce.

Expanding the Argument

At this point, my work is largely done, because there is not much more to say to anyone who insists on an empirical embryology two millennia out of date. Of course, it is much more likely that the abortion advocates’ appeal to Augustine et al. is merely a rhetorical trick intended to put their pro-life opponents off balance. In yet another irony, these abortion advocates are simply making a misplaced appeal to authority.

If we are charitable, however, we can recognize that these unwitting adherents of ancient Greek embryology are likely motivated by different considerations altogether. We can capture this if we return to the argument I considered earlier and, instead of building it on the basis of a flawed Aristotelian empirical embryology that presupposes delayed hominization, we revise it in what might initially seem like a more plausible direction.

- (1) Homicide is the killing of a rational being.
- (2) The unborn are not rational beings.
- (3) Therefore, abortion is not homicide.

We have now simplified premise (2') to eliminate reference to Aristotle's delayed hominization theory and it now simply asserts that unborn children are not rational beings. This formulation more closely captures the view of the contemporary so-called personist abortion advocates and is, I strongly suspect, what abortion advocates really have in mind when they appeal to the medievals. Invoking Augustine et al. is really just a ploy to give superficial respectability to what is not in fact an argument that the medievals would have accepted. To really understand what is at stake, we need to make clear what (2') really means.

Most personists think that simple observation supports the claim that the unborn are not rational beings. Their fundamental assumption is that rational beings must actively manifest rationality, such as by giving evidence of abstract thought, using language, etc. Obviously, unborn children do not do these kinds of things, and so the judgment that they are not rational beings seems to follow readily.

Of course, the same is true of children quite some time *after* birth. That fact becomes the basis of the depraved claims of personists like Michael Tooley, Peter Singer, et al. that infanticide is similarly not murder. While we might have hoped that the obvious evil of killing newborns would have led them to a serious rethinking of their positions, the fact is that the killing of the inconvenient weak and defenseless has long been a feature of human societies. In many ways, the contemporary barbarism of the abortion regime is a kind of return to the West's pagan past.¹⁹

In any case, the key presupposition of the personist view is that rational beings are essentially characterized by the active exercise of rational powers. This might seem obvious, and yet a moment's reflection shows that the *active* exercise of rational powers cannot be a necessary condition for personhood; otherwise, paradigmatic persons (i.e., normal adult human beings) would cease being persons when asleep. The natural rejoinder is that the sleepers will awaken and that is why they count as persons. But once the personist makes that move, he or she has conceded all the ground necessary for establishing the personhood of children who have yet to exercise any rational powers.

For at this point the personist is making an appeal to *potential*, and once we grant that the potential to manifest rational powers is sufficient to underwrite a claim to personhood, then the claim of immature human beings to personhood can be vindicated. The personist may try to escape this consequence by attempting to identify differences between the cases, such as the amount of time involved or the fact that the sleeping person had previously manifested rational powers. However, brief reflection will show

that these differences really have no moral significance in themselves. For instance, if we have very good reason to believe that an unconscious individual will wake up at some point in the future, even years hence, that should be enough to establish that killing him while unconscious would still be murder. The same would be true in the science fiction case of an astronaut in cryogenic suspension who is not due to be revived for several years. Thus, the amount of time involved is irrelevant.

Furthermore, though it is true that the sleeping person has previously manifested rational powers, it is clear that making this a necessary condition for personhood is simply *ad hoc*. Why should it matter what happened in the past? The very same personists who would present this argument against killing sleeping persons tend to argue that individuals in seemingly unrecoverable comas can be legitimately killed, so even for *them* the past exercise of rational powers does not of itself grant moral status. Instead, what underwrites the moral claim of the presently unconscious is the *future* exercise of rational powers, which is why making the *past* exercise of rational powers a necessary condition is merely special pleading.

Up to this point I have been discussing potential in the way that most personists tend to think about it, viz. future contingent possibility. So most personists think that “X has a potential to become Y” means that there is some possibility that X will become Y at some point in the future.²⁰ Michael Tooley has famously been rehashing this conception of potential for the last 40 years in his misguided arguments against the moral significance of potential. In his original formulation, he asks us to imagine a world in which a kitten could be turned into a rational being through the injection of a “special chemical.”²¹ His claim is that, in such a world, it would be correct to say that the pre-injection kitten has the *potential* to become a rational being, and yet that fact is not enough to make killing the pre-injection kitten an instance of the killing of a rational being. So analogously he suggests that even if at some point in the future a human infant will manifest rational powers, until it actually does so, such “potential” is not enough to underwrite a serious claim to a right to life.

Tooley (and others²²) who engage in this kind of reasoning are simply guilty of magical thinking. That is, they are basing their arguments against the moral significance of potential on the supposed moral significance of magic. For that is exactly what Tooley is presupposing in his “special chemical” that “could initiate a causal process that would transform a kitten into an entity that would eventually possess properties” such as rationality. The problem is that the kind of change Tooley is imagining here involves a change from an ontologically inferior substance into an ontologically superior

substance. However, for such a change to occur, according to the principle of proportionate causality, there must be some cause that possesses in actuality the reality manifested in the effect.²³ Specifically, only something that in some way already possesses rationality could be the cause of the substantial change of a non-rational being like a kitten into a rational being. No “special chemical” injection (i.e., material cause) could itself be the *ultimate* cause of such a change.²⁴

This kind of magical thinking is unsustainable because it presupposes the metaphysical possibility of uncaused realities. In contrast, what actually happens in human development is altogether different. Given what we now know about human embryology, the very same Aristotelian metaphysical principles that informed his secessionist embryology actually entail an entirely different account. Precisely because there is a fundamental continuity throughout embryological development, the very same substance—i.e., organism—remains throughout the growth and maturation of the individual human being.²⁵

We saw above how the causal principle led Aristotle to posit the continued activity of the father’s soul well into the gestation of the child in order to account for the ontological change from vegetative to animal being. However, since contemporary embryology reveals no evidence of anything to suggest the occurrence of such an ontological change, we should conclude that the same substance persists throughout. And since that self-same substance is clearly a rational substance at later points in its development, it must be a rational substance at all of the earlier moments of its existence (though it is true that those rational powers are at first in potency).²⁶

Ultimately, Tooley et al. fail to understand that potentiality is properly understood not in terms of what we might imagine could happen at some point in the future, but rather in terms of what effects can result from the available causal powers. In the specific case of human development, children ultimately manifest rational powers not because they are transformed from non-rational beings (like Tooley’s kitten) into rational beings during their development. Rather, the child’s ontological continuity as the same substance throughout its maturation entails that rationality is always already present in the child as an aspect of its human nature (though in potency).

Potential, then, is properly not about the *future* at all, but rather about the causal possibilities intrinsic to the nature of a thing in virtue of which it is the kind of thing it is. It is only because human nature is essentially rational that any individual human being contingently comes to manifest rational powers. Human nature is the proximate cause of our individual realization of the rational powers.²⁷ And, of course, that is why kittens (or any other kind

of non-rational being) never have turned—and never will turn—into rational beings. For even if such a change were possible, it would represent a change in the substantial nature of the kitten, which would thereby destroy the feline nature of the kitten. It would be an entirely new substance (a rational being), not a cat with rational powers.

If we bring this all together then, we can now see why (2')—which stated that unborn children are not rational beings—is false. Unborn children, from the beginning of their existence at conception, fully possess a human nature, even though aspects of that nature begin in potency. So, for example, we can properly say that the newborn infant who cannot even crawl is nonetheless a bipedal creature, because walking on two legs belongs to its nature as a human being. By the same token, that same newborn is a rational creature, despite its not manifesting any of the rational powers, simply because they belong to it in virtue of the child's possessing a human nature. Furthermore, both of these claims are true even if, as a matter of fact, the child never walks or exercises the rational powers because of some contingent accident (e.g., birth defects or accidental early death). Since that newborn is ontologically identical to all of her previous (and subsequent) time slices of existence, those essential properties belonged to her from the beginning of her existence at conception.

Ultimately, this testifies to the fact that one cannot ever be a “partial” human being. One either is a human being—i.e., possesses a human nature—or not. The same holds for the possession of a rational nature (which, in principle at least, non-humans could have); it is Boolean: One either has it or not. That is why Tooley's kitten does not have the *potential* to be a rational being. A kitten could only become a rational being (even in principle) by ceasing to be a kitten—i.e., by ceasing to have a feline nature. Once we understand this, we can see why anything that possesses a human nature is *ipso facto* a rational being. The contemporary empirical evidence for the continuity of embryological development thus informs the considered philosophical judgment that human nature is present throughout the development of every human being, and therefore that every human being is a rational creature from the beginning of his or her existence. Accordingly, the killing of the embryo is morally equivalent to the killing of any other kind of rational being.

I began by noting that the appeal of abortion advocates to the judgment of prominent medieval thinkers was at best incompetent and at worst intellectually dishonest. We should now be in a position to see more clearly why this is so. Not only can we set aside those historical judgments owing to their defective understanding of empirical embryology, but when we apply

the medieval thinkers' fundamental metaphysical and moral principles to our current understanding of embryology, we reach a very different conclusion from that trumpeted by the abortion advocates. At this point, the strong evidence for the full humanity of the embryo should be impossible to ignore, and the widespread failure of many people to see this testifies to their fideistic embrace of a deeply defective and irrational metaphysical vision of the world.

NOTES

1. This has included not only political figures such as (famously) Nancy Pelosi, but also scholars who really should have known better.
2. Except where explicitly discussing contemporary scientific embryology, I employ the word "embryo" in its original Greek sense of "unborn child," including what contemporary scientific terminology would regard as the fetus.
3. The same, unfortunately, cannot be said of Aristotle, quite simply because he allows for the moral permissibility of infanticide. See my "Aristotle on Abortion and Infanticide," *International Philosophical Quarterly*, 53, no. 1 (2013): 47–62. However, the medieval Christian philosophers who adopted the Greek philosophical tradition do have the moral principles necessary to support a pro-life conclusion precisely insofar as they (unlike the Greeks) embrace the principles necessary to recognize the fundamental dignity of all human beings.
4. I will summarize Aristotle's views below, but for a much more detailed exploration of his account of embryological development in the *Generation of Animals* and the *History of Animals*, see Alan Code, "Soul as Efficient Cause in Aristotle's Embryology," *Philosophical Topics*, vol. 15, no. 2 (1987): 51–59; John Cooper, "Metaphysics in Aristotle's Embryology," in *Knowledge, Nature, and the Good: Essays on Ancient Philosophy* (Princeton: Princeton University Press, 2004), pp. 174–203; Johannes Morsink, *Aristotle on the Generation of Animals: A Philosophical Study* (Washington, DC: University Press of America, 1982); Jane Oppenheimer, "When Sense and Life Begin: Background for a Remark in Aristotle's Politics (1335b24)," *Arethusa*, vol. 8 (1975): 331–342; and Anthony Preus, "Science and Philosophy in Aristotle's 'Generation of Animals,'" *Journal of the History of Biology*, vol. 3 (1970): 1–52.
5. Daniel Dombrowski notes that while it "must also be admitted that Augustine does not have a developed theory of the succession of souls (from a vegetative to a sentient to a rational state) such as we find in St. Thomas Aquinas . . . [nonetheless John] Connery is premature in dismissing a theory regarding the succession of souls in Augustine altogether, especially because of the Stoic transmission of the Aristotelian theory of succession of souls to the church fathers" (Daniel A. Dombrowski, "St. Augustine, Abortion, and Libido Crudelis," *Journal of the History of Ideas*, vol. 49, no. 1 (1988), 155).
6. Obviously the ancients were unaware of single-celled organisms and similar simple creatures. Nonetheless, we can classify them according to the Aristotelian schema as being essentially vegetative, because those are the organic powers they seem to possess.
7. This is clearly Thomas's reading as reflected in his *Summa Theologica*, I, 118, 2, ad 2, which is almost certainly based on Book II of Aristotle's *Generation of Animals*. For more specific analysis of Thomas' views, see Stephen J. Heaney, "Aquinas and the Presence of the Human Rational Soul in the Early Embryo," *The Thomist*, vol. 56 (1992): 19–48. Some modern scholars have suggested that Aristotle himself did not quite understand embryogenesis quite so explicitly as a successive replacement of one kind of creature with another (which has some strange metaphysical consequences); however, for our purposes the common medieval understanding is actually more important than Aristotle's own view, whatever it was.
8. Aristotle, *History of Animals*, trans. d A. W. Thompson in *The Complete Works of Aristotle: The Revised Oxford Translation*, edited by Jonathan Barnes (Princeton, NJ: Princeton University Press, 1984).
9. Even setting aside the supposed sex discrepancy, these observations are obviously mistaken, as fetal movement is felt by the mother at a much later date than Aristotle suggests. At the same time the "distinction of parts" occurs much earlier.

10. John Riddle notes that this 40-day marker actually found expression in medieval canons, “An old Allemanian sacramentarium around the year 1000 used the word ‘homicide’ and applied it to the mother who aborted a child whose members (that is, appendages) had formed. A woman ‘who has fornicated and neglected her fetus . . .’ and ‘cuts off her fetus . . .’ should be given a penance of ten years. But a woman who ‘kills her child . . . in her uterus before forty days . . .’ should receive only one year of penance. For one who kills her child forty days after conception . . ., this was homicide, and she was given a three-year penance” (*Contraception and Abortion from the Ancient World to the Renaissance* (Cambridge, MA: Harvard University Press, 1992), pp. 111-2.).
11. As he remarks in the *Generation of Animals*, “those principles whose activity is bodily cannot exist without a body, e.g. walking cannot exist without feet” (736b24). This reflects his hylomorphism, in that form and matter jointly constitute the animal; without physical organs, the essential animal powers would have nothing to animate and so simply could not be animal powers.
12. Aristotle himself seems to suggest this kind of cautionary principle in his only explicit discussion of abortion in the *Politics*, where he writes:

As for the exposure and nurture of infants, let there be a law against nourishing those that are deformed, but if exposing offspring because the number of children one has is prohibited by the customary rule, then a numerical limit must be set upon procreation. But if children are conceived by some of those who have intercourse in violation of this, an abortion must be induced before the onset of sensation and life. For what is holy will be distinguished from what is not by means of sensation and life (1335b19-26).

Since it’s the possession of the rational soul that would make abortion homicide, we might wonder why Aristotle would pick out the earlier transformation into an animal. Richard Kraut plausibly suggests the answer is that

since reasoning (unlike perceiving) does not have a physical organ . . . there is no further physical development to look for, if we wish to wait for the onset of the rational faculty. Reason enters the embryo, but the only thing we can say about when it enters is that this occurs at some point after the sense organs have formed That is why abortions should be induced before the embryo has the capacity for sensation: it is not because sensation is in itself morally significant, but because something morally significant happens at some unspecifiable time after the sense organs have formed. (Aristotle, *Politics Books VII and VIII*, translated with commentary by Richard Kraut (Oxford: Oxford University Press, 1997), p. 156).

For further discussion of how to read this passage from the *Politics*, see my “Aristotle on Abortion and Infanticide.”

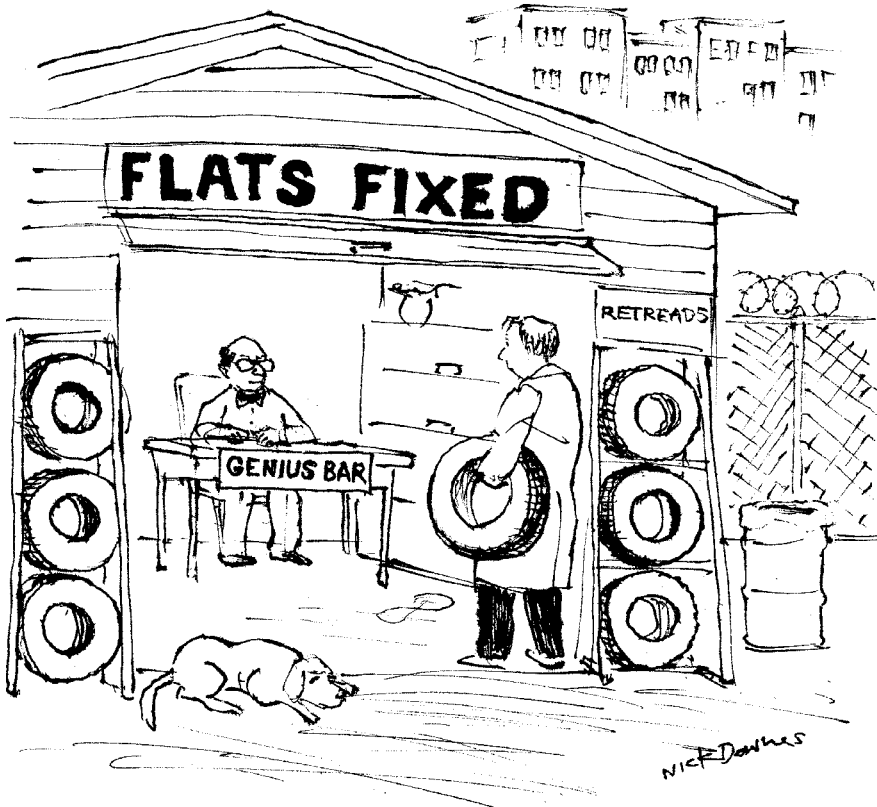
13. It is important to understand that for Aristotle the soul (*psyche*) of a living creature is not some kind of ghost in the machine. It is rather simply that aspect of the composite substance that is a living creature in virtue of which it is alive, and is not separable from the matter it informs (except conceptually).
14. Aristotle does not understand the semen in terms of spermatozoa (i.e., individual cells), but as a “foam-like” mass that achieves its effect by imparting a “vital heat” to the mother’s catamenia. This notion of vital heat also explains Aristotle’s curious case of (apparent) “spontaneous generation,” which might initially seem to contradict the principle of causality. In the kind of cases he has in mind, (e.g., maggots in rotting meat), the heat from decomposition is the proximate cause of the generation.
15. “It remains, then, for the reason alone so to enter [from outside] and alone to be divine, for no bodily activity has any connexion with the activity of reason” (736b26).
16. It is important to realize that both Augustine and Thomas regarded early abortion as an evil, even if they did not think it rose to the level of homicide *per se*. See John T. Noonan, Jr, “Abortion and the Catholic Church: A Summary History,” *Natural Law Forum*, vol. 12 (1967), 95-96 (Augustine) and 101-104 (Thomas). Thomas’s complicated position is most fully spelled out in Fabrizio Amerini’s *Aquinas on the Beginning and End of Human Life*, trans. Mark Heninger (Cambridge, MA: Harvard University Press, 2013).

17. For a nice summary of contemporary embryology see Maureen L. Condit, "A biological definition of the human embryo," in *Persons, Moral Worth, and Embryos*, ed. Stephen Napier (New York: Springer, 2011), pp. 211-37.
18. Some have suggested that totipotency and the possibility of twinning constitute adequate reason to deny the identity of the early embryo with the later embryo. In my judgment this reflects a misunderstanding of the ontological significance of twinning; see my "The Ontogenesis of the Human Person: A Neo-Aristotelian View," forthcoming in the *University of St. Thomas Journal of Law and Public Policy*.
19. Infanticide through exposure was not an uncommon feature of Greek life (as attested by the Oedipus myth), see Richard Harrow Feen, "Abortion and Exposure in Ancient Greece," in *Abortion and the Status of the Fetus*, ed. by William B. Bondeson, H. Tristram Engelhardt, Jr., Stuart F. Spicker, and Daniel H. Winship (Dordrecht, Netherlands: D. Reidel Publishing Co., 1983), pp. 283-300 and Cynthia Patterson, "'Not Worth Rearing': The Causes of Infant Exposure in Ancient Greece," *Transactions of the American Philological Association*, vol. 115 (1985): 103-123. As David Bentley Hart helpfully shows in his *Atheist Delusions* (New Haven, CT: Yale University Press, 2009), it is really the rise of Christianity in the West that more than anything else has transformed the Western moral sensibility and introduced the fundamental claims of universal human dignity.
20. It's also possible that some of these personists think of potential in terms of possible worlds, where to say X has the potential to be Y means that there is some possible world in which X is Y. However, either kind of argument is mistaken from the perspective of Aristotelian metaphysics, which understands potential in terms of essences, as I will explain below.
21. Michael Tooley, "Abortion and Infanticide," *Philosophy and Public Affairs*, vol. 2, no. 1 (1972): 37-65. He has continued to recycle this line of reasoning, largely unchanged, ever since this article. See, for example, his contribution to Michael Tooley, Celia Wolf-Devine, Philip E. Devine, and Alison M. Jaggar, *Abortion: Three Perspectives* (Oxford; New York: Oxford University Press, 2009).
22. Daniel Boonin makes a similar mistake in his *A Defense of Abortion* (Cambridge, UK; New York: Cambridge University Press, 2003) when he writes that one, "could, I suppose, characterize [an anencephalic] fetus as a person whose capacity for thought simply happens to be "blocked" by a contingent fact about its head. But then it is difficult to see why we should not also call the spider crawling up my window a person. If he were able to develop a big enough brain, he too would be able to function as a person, so he is simply a person whose capacity is blocked by the fact that he will never have a large enough brain" (24). Nothing "blocks" the spider's development precisely because his nature as a spider simply does not include that potentiality.
23. It is true that Tooley et al. would not accept this Aristotelian metaphysical principle, but that refusal is simply further evidence of their embrace of uncaused realities (i.e., magic).
24. It is possible, in principle, that the special chemical could be an instrumental cause in the reconfiguration of matter that makes it apt to receive the form of a rational being from the outside. However, the ultimate cause of the ontological transformation would still be outside. This is, in fact, probably the best way to characterize actual conception from a contemporary Thomistic perspective, that the fusion of the parental gametes results in matter apt to be ensouled or animated from outside. As we saw above, Aristotle makes the same appeal to something "outside" without specifically having in mind anything like the Creator God.
25. In my view, the same organism/substance persists from the zygote through natural death. Those who deny this are left with the difficult question of explaining why, *ceteris paribus*, the early embryo reliably develops into the later embryo/fetus. Unless some compelling causal story can be told about why early embryos normally become human fetuses (and not something else, like rabbits or peanuts), then such critics also have a Tooley-esque magic-causation problem.
26. The formal argument would go like this:
 - (1) Any essential (intrinsic) property that a substance possesses, it possesses at all moments of its existence.
 - (2) Rationality is an essential property of human beings.
 - (3) Therefore, all human beings possess rationality at all moments of their existence.

Premise (1) simply restates the definition of an essential (intrinsic) property, a property that makes a substance the *kind* of substance that it is. For human beings these would include properties like *life*, *animality*, etc. This is contrasted with accidental (extrinsic) properties that a substance can gain or lose without changing the kind of thing it is, e.g., *location*, *size*, *weight*,

etc. Establishing that the embryo is a rational being, therefore, simply requires that we establish that it possesses a human nature (i.e., is essentially a human being). Since there is no ontological change in the course of its development, then the rational nature it clearly manifests later in the course of its self-same life must have been present in some way from the beginning of its existence as that self-same substance (i.e., conception).

27. For an Aristotelian-Thomist, the ultimate cause of any reality is pure Act itself, though that causal power can be exercised through any number of intermediates.



Wendy Davis:

The Meteoric Rise of a Pro-abortion Superstar

Laura Echevarria

“**S**uperstar.” “Courageous.” A “national hero.” These are all terms that have been used in the mainstream media to describe Wendy Davis.

It seems like the American Political Dream come true—Davis’s meteoric rise from junior senator in the Texas legislature to a gubernatorial candidate—all from a single, over-the-top filibuster.

Davis entered the national spotlight in 2011. The petite Democrat from Fort Worth filibustered against legislation that would have cut over \$4 billion from the budget of public schools; in the process, the name Wendy Davis made its way into national news stories. But the education budget of Texas doesn’t galvanize the frenzied devotion of feminist groups, and Wendy Davis’s fame was still just a blip on the radar of national politics.

Until last summer.

Abortion legislation was introduced in Texas (and later passed and signed by Governor Rick Perry) to prevent abortions after 20 weeks, classify abortion clinics as ambulatory surgery centers, and require abortionists to have admitting privileges at local hospitals. The legislation was reasonable and protective—for both mother and child—and a majority of voters both in Texas and across the U.S. found it something they could support. But it riled pro-abortionists and groups like Planned Parenthood and NARAL. Even groups like the Texas branch of the ACLU flexed their social media muscles by asking for support for Wendy Davis during her filibuster of the bill.

Senate Democrats in Texas knew that it would be impossible to prevent passage of the legislation, but they wanted to make a show of doing so. They tapped Davis because of her personal history.

A Single Mom Makes Good

According to the official bio on the state senate website of Wendy Davis,

Wendy has been taking on tough fights her entire life. She began working after school at 14 to help support her single mother and three siblings. By 19, Wendy was a single mother herself, working two jobs to make ends meet in hopes of creating a better life for her young daughter.

Laura Echevarria was the director of media relations and a spokesperson for the National Right to Life Committee from 1997 to 2004. Now a writer living in Virginia, she teaches composition at a small college while working on her master’s in English education. She continues to host her own blog at www.lauraechevarria.com.

Through a brochure laid on her desk by a co-worker, Wendy learned of a paralegal program at Tarrant County Community College that she thought could be the ticket to creating that better life for her young daughter. After two years of community college, Wendy transferred to Texas Christian University. With the help of academic scholarships and student loans, Wendy not only became the first person in her family to earn a bachelor's degree, but graduated first in her class and was accepted to Harvard Law School.¹

Davis was able to rise above her own difficult teenaged years—which involved the same kind of circumstances that pro-abortion groups often claim require a “right” to abortion on demand. But Davis, like most pro-abortion activists, draws a different moral from her story: She believes it shows that she should have “choices” and that abortion should therefore not be limited. In response to comments made by Governor Perry about her personal story, Davis said,

My story, my personal story, is my story. I have the ability to make choices and I had opportunities that I was able to take advantage of in my life. Other women of course should be able to define their own destinies and this idea that the heavy hand of government should somehow come in and tell her how to do that is deeply resented in [a] state like Texas. It's deeply resented everywhere, but if you know anything about Texas, we hold very strongly to our traditions and our values where personal liberties are concerned.

At the time of this writing, controversy over the official biography of Wendy Davis has tarnished her star, but probably only temporarily. Her official bio does not contain outright lies, but it does have holes. The *Dallas Morning News* released a political story on their website, noting:

Davis was 21, not 19, when she was divorced. She lived only a few months in the family mobile home while separated from her husband before moving into an apartment with her daughter.

A single mother working two jobs, she met Jeff Davis, a lawyer 13 years older than her, married him and had a second daughter. He paid for her last two years at Texas Christian University and her time at Harvard Law School, and kept their two daughters while she was in Boston. When they divorced in 2005, he was granted parental custody, and the girls stayed with him. Wendy Davis was directed to pay child support.²

Democrats in the Texas Senate chose Wendy Davis for the filibuster because they knew that her story as a single, struggling mother would make her a sympathetic figure to the press and to supporters of abortion on demand. Davis has not been heavily criticized in the major media for the omissions in her bio and likely won't be. Defenders, including Davis herself, have argued that critics have no ground to stand on because “they don't understand what it means to live a life like mine.”³

The Filibuster Heard Across the U.S.

When Wendy Davis took to the floor of the Texas Senate, abortion supporters filled the gallery and rotunda of the Texas State Capitol in a show of support. But it was all orchestrated. Supporters were bused in by pro-abortion groups from all over the state, and the 500,000-plus tweets about the Davis filibuster were planned in advance. According to the *Washington Post*'s "The Fix," "The hashtag #standwithwendy, which racked up 547,000 tweets during the course of Davis' speech, was actually coined—and promoted—by the Texas branch of the American Civil Liberties Union."⁴ And the support of many big names in pro-abortion politics was still to come. For example, Cecile Richards, president of Planned Parenthood and daughter of the late Ann Richards, former governor of Texas, was on hand at the Capitol to show her support.

During the filibuster, when it was decided that Davis broke procedural rules by stopping to put on a back brace, angry tweets poured out from Davis supporters and groups like MoveOn.org and ThinkProgress. Nancy Pelosi tweeted her support and the president's Twitter account, run by his Organizing for Action group, tweeted, "Something special is happening in Austin tonight: ...#StandWithWendy."

But the visitors to the Capitol building were not representative of Texas voters. Prolifers were urged to stay away from the building for their own safety. Later, the Texas Department of Public Safety (DPS) released a statement that it would be increasing inspections of bags entering the Capitol after it received information that individuals were planning to use objects to interfere with the debate. The DPS press release stated,

During these inspections [of all bags and purses entering the Capitol building], DPS officers have thus far discovered one jar suspected to contain urine, 18 jars suspected to contain feces, and three bottles suspected to contain paint. All of these items—as well as significant quantities of feminine hygiene products, glitter and confetti possessed by individuals—were required to be discarded; otherwise those individuals were denied entry into the gallery.

In the interest of the safety and security of Texas legislators and the general public, these inspections will continue until the conclusion of Senate business.⁵

As midnight drew closer, it was determined that Wendy Davis had violated the procedural rules a third time—which effectively ended the filibuster. Those present in the visitors' gallery interrupted the proceedings with yelling and chanting. The chanting was so disruptive it impeded the legislative process and prevented the legislation from being voted upon in a timely fashion. Ultimately, this prevented the bill from being signed before the midnight deadline.

According to the *Austin-American Statesman*,

The vote began at 11:45 p.m. For the next 15 minutes—far longer, actually—spectators in the gallery overlooking the Senate floor unleashed a tremendous and sustained scream that drowned out every effort to establish order. With so many loud protesters outside the chambers, apparently there weren't enough DPS troopers available, and spectators were escorted out very slowly.⁶

Davis supporters—and opponents of the bill—referred to the chants and yells as “the people’s filibuster.” Pro-abortion Democrats encouraged the mob of protesters filling the gallery above the Senate floor. According to the NBC affiliate in Dallas-Fort Worth,

[Texas Lt. Governor] Dewhurst denounced the protesters as an “unruly mob.” Democrats who urged them on called the outburst democracy in action.

In either point of view, a raucous crowd of chanting, singing, shouting demonstrators effectively took over the Texas Capitol and blocked a bill that abortion rights groups warned would close most abortion clinics in the state.

“They were asking for their voices to be heard,” said Sen. Wendy Davis of Fort Worth, who spent nearly 11 hours trying to filibuster the bill before the outburst. “The results speak for themselves.”⁷

The results do speak for themselves but not for the reason Davis thinks they do. The results show that pro-abortion opponents have no qualms breaking rules if they feel they can achieve their goal. To them, rules, decorum, and the democratic process are secondary to their ideological purposes.

The Reason for the Legislation

The driving impetus behind the legislation was the horrific story of Kermit Gosnell’s clinic in Pennsylvania. Significantly, if Gosnell’s clinic had been regulated like an ambulatory surgery center, Karnamaya Mongar, a victim of one of Gosnell’s botched abortions, might not have died. David Freddoso, writing for the *Washington Examiner*, observes,

The grand jury noted that even after Gosnell’s unqualified, unlicensed staff had (at his direction) given her a lethal overdose of local anesthetic, she might have still been saved but for the clinic’s “cluttered,” “narrow, twisted passageways” which “could not accommodate a stretcher” to get her out. Mongar still had a pulse when paramedics arrived, but they lost a critical 20 minutes just trying to get her out of the building.

The grand jury concluded that, had Gosnell’s clinic been regulated like other “ambulatory surgical facilities”—say, your average plastic surgeon’s office—then health inspectors “would have assured that the staff were all licensed, that the facility was clean and sanitary, that anesthesia protocols were followed, and that the building was properly equipped and could, at least, accommodate stretchers.”⁸

Interestingly, following her appearance at the National Press Club in August

2013, *The Weekly Standard* asked Wendy Davis about the Gosnell clinic and the revelation that he was killing babies born alive after 23 weeks gestation. Davis stated, “I don’t know what happened in the Gosnell case. But I do know that it happened in an ambulatory surgical center. And in Texas changing our clinics to that standard obviously isn’t going to make a difference.”⁹

But according to the grand jury report in the Gosnell case, Gosnell’s clinic was not treated as an ambulatory surgery center. While Pennsylvania’s *legal* definition of ambulatory surgery centers would have also included abortion clinics, the Pennsylvania Department of Health did not treat them as such. The grand jury notes that, had they been so treated, the law would have required yearly inspections of the Gosnell clinic.¹⁰

During the filibuster, Davis ignored the very recent horrors revealed in the Gosnell case and argued that the Texas legislation was driven by partisan politics,

This bill, of course, is one that impacts many, many people. And it’s one that took extraordinary measures in order for us to be here and to converse on it today. Members, I’m rising on the floor today to humbly give voice to thousands of Texans who have been ignored. These are Texans who relied on the minority members of this senate in order for their voices to be heard.

These voices have been silenced by a governor who made blind partisanship and personal political ambition the official business of our great state. And sadly he’s being abetted by legislative leaders who either share this blind partisanship or simply do not have the strength to oppose it. Partisanship and ambition are not unusual in the state capital, but here in Texas, right now, it has risen to a level of profound irresponsibility and the raw abuse of power.

The actions intended by our state leaders on this particular bill hurt Texans. There is no doubt about that. They hurt women; they hurt their families. The actions in this bill undermine the hard work and commitment of fair-minded, mainstream Texas families who want nothing more than to work hard, raise their children, stay healthy, and be a productive part of the greatest state in our country. These mainstream Texas families embrace the challenge to create the greatest possible Texas. Yet they’re pushed back and they’re held down by narrow and divisive interests that are driving our state. And this bill is an example of that narrow partisanship.

Today I’m going to talk about the path these leaders have chosen under this bill, and the dark place that the bill will take us . . .¹¹

Among abortion supporters and pro-abortion groups, these words were a rallying cry, and they show just how extreme Wendy Davis is. As an attorney, she is well aware of the scope of *Roe v. Wade* and its companion ruling *Doe v. Bolton*, yet she talks about SB5—protective legislation for both women and their unborn children—leading Texans to a “dark place.” Ironically, during the filibuster, she also accused colleagues who supported the legislation and oppose *Roe*’s far-reaching, extra-Constitutional foundation as engaging in a

“raw abuse of power,” echoing Supreme Court Justice Byron White’s 1973 dissenting opinion in *Doe v. Bolton*, terming the majority’s decision to legalize abortion as an “exercise of raw judicial power.”

The Media’s Failures

But reporters didn’t note the irony or the very recent example of why the legislation was necessary. Their failure to revisit the sickening story of Gosnell was a failure to report the salient facts, as they had shrunk from doing from the eruption of the Gosnell case. In a column in *USA Today*, columnist Kirsten Powers wrote,

A Lexis-Nexis search shows none of the news shows on the three major national television networks has mentioned the Gosnell trial in the last three months. The exception is when *Wall Street Journal* columnist Peggy Noonan hijacked a segment on *Meet the Press* meant to foment outrage over an anti-abortion rights law in some backward red state.

The Washington Post has not published original reporting on this during the trial and *The New York Times* saw fit to run one original story on A-17 on the trial’s first day. They’ve been silent ever since, despite headline-worthy testimony . . .

You don’t have to oppose abortion rights to find late-term abortion abhorrent or to find the Gosnell trial eminently newsworthy. This is not about being “pro-choice” or “pro-life.” It’s about basic human rights.

The deafening silence of too much of the media, once a force for justice in America, is a disgrace.¹²

Not surprisingly, David Freddoso points out that at the time of his story in June, the *pink sneakers* Davis wore during the filibuster were mentioned 90 times in print and 15 times in broadcast news stories. Somehow, stories that should have been about women and children’s lives became style segments about a state senator.

But major media outlets failed to report the reasons for the filibustered legislation. Instead, the narrative Wendy Davis wanted—that women would be denied basic reproductive healthcare because abortion clinics would have to close—was repeated in story after story.

In interviews, Davis was thrown softballs, as John McCormack, writing an article for “The Blog” at *The Weekly Standard*, noted. The kinds of questions the major media asked her in major interviews included, “What was it like standing for that long?,” “Why did you decide to wear your running shoes? Let’s take a look at those . . . they’ve kind of been rocketing around the Internet,” “Senator, do you think a 20-week ban on abortion is acceptable? Do you think it’s reasonable?” McCormack points out that not once was Davis asked to explain the difference between abortions beyond 20 weeks of pregnancy and infanticide.¹³

But Does a Pro-abortion Position Help or Hurt Davis?

Davis's political star has risen, and through the power of the filibuster (and the influence of pro-abortion ideologues), she is now a candidate for governor of Texas. She has been making the rounds in the national media and has raised money for her gubernatorial run from donors both inside and outside of Texas. Currently, neither she nor her Republican opponent Greg Abbott—the solidly pro-life attorney general of Texas—faces any serious challengers for the March 2014 primaries.

But her rise to fame is based on the filibuster, and her popularity with pro-abortion groups is based on her extremism on this issue. So the question is: Does it help or hurt her? Well, it depends on which Wendy Davis you are referring to.

During the filibuster, Wendy Davis characterized SB5 as onerous legislation and argued that the bill “create[s] provisions that treat women as though they are not capable of making their own medical decisions.” She also stated,

I think there's certainly an argument that can be made, that indeed this [bill] does impose an undue burden, and that indeed it is a substantial obstacle on a woman's ability to have an abortion. And, of course, were this to become law that will be an argument most certainly made by proponents who believe that this law is in violation of the Constitution.

This provides that the reason it's not an undue burden is two-fold. One, because the woman has adequate time to decide whether to have an abortion in the first 20 weeks after fertilization. And members, we've heard some stories from testimony, women who routinely have missed periods, they have menstrual cycles that are not reliable, and sometimes it actually is later than 20 weeks when a woman discovers that she's pregnant. We've also heard that sometimes medical treatments that a woman is receiving can interfere with that cycle and, and also throw her into a situation where she doesn't understand, by virtue of a missed period, that she is pregnant until beyond this time.

And of course we also know, as has been provided in multiple evidence to us on this bill, that sometimes fetal abnormalities, in fact many times, are not discovered until after this point in time. The other reason that the section by section analysis indicates that this would not impose an undue burden or a substantial obstacle on a woman's ability to have an abortion is because “the act does not apply to abortions that are necessary to avert the death or substantial and irreversible physical impairment of a major bodily function of the pregnant woman.”¹⁴

Davis repeatedly argued that abortions after twenty weeks are necessary for fetal abnormalities or because dating a pregnancy is a difficult and inexact science. She also argued that the state's position that an unborn child feels pain was not supported by the evidence. Yet to make those arguments she had to ignore reams of testimony presented on the state and national level providing ample evidence to the contrary. But facts would have destroyed

the narrative that abortion is healthcare.

Davis's filibuster has certain political drawbacks—in trying to position herself as a viable gubernatorial candidate, she needs to be seen as more than the “abortion filibuster” candidate and is beginning to distance herself from being seen as too extreme on the abortion issue.

In her speech before the National Press Club, she deftly sidestepped a question about whether there should be limits to abortion. Her response?

You know the Supreme Court has made that decision. And it's one of the protected liberties under our Constitution. And I respect the Constitutional protections that are in place today whether it be for this purpose or whether it be for other protected purposes in the Constitution, I don't think we can pick and choose.¹⁵

This is the pro-abortionist's safety net—*Roe v. Wade* and *Doe v. Bolton*, which legalized abortion on demand throughout all nine months of pregnancy. Davis is aware of this, but stating that abortion is a Constitutional right is always the go-to reason for pro-abortion politicians to oppose any reasonable legislation. What these same politicians ignore is that, over the years since *Roe*, the U.S. Supreme Court has repeatedly ruled in favor of protective legislation.

A few months later and Wendy Davis had further evolved. Speaking before students at the University of Texas in Brownsville, Davis the Candidate claimed to be pro-life. According to the *Valley Morning Star*, Davis said,

“I am pro-life,” she said, borrowing from the label anti-abortion activists assign themselves. “I care about the life of every child: every child that goes to bed hungry, every child that goes to bed without a proper education, every child that goes to bed without being able to be a part of the Texas dream, every woman and man who worry about their children's future and their ability to provide for that future. I care about life and I have a record of fighting for people above all else.”

As I pointed out in a previous article in this journal (Summer 2013), the attempt by pro-abortionists to redefine themselves by using the term “pro-life” is becoming more common among pro-abortion groups and their supporters. This is largely because, over the years, “pro-choice” has lost its strength and the term “pro-life” has gained in favorability.

In November, Michael J. New, assistant professor of political science at the University of Michigan–Dearborn and an adjunct scholar at the Charlotte Lozier Institute, noted,

A few weeks ago, Democratic political consultant Jason Stanford authored a *Politico* op-ed claiming that Davis's position on abortion will actually help her during her upcoming campaign.

[However,] there is plenty of survey data indicating that abortion after 20 weeks of gestation is unpopular. Three separate national polls conducted this summer

by *National Journal*, Rasmussen, and *NBC/Wall Street Journal* all indicated that a clear plurality of Americans support banning abortion after 20 weeks of gestation. Furthermore, key demographic groups support 20-week abortion bans. The two polls which broke down the results by age found a plurality of young adults supported such a ban. Even more important, in each of these three polls, women were actually *more* likely than men to support banning abortion after 20 weeks gestation.¹⁶

Davis has become the darling of the pro-abortion left. But, as we have seen repeatedly, a pro-life position actually gives a political candidate a 2-to-1 advantage over a pro-abortion candidate. Davis may have been the hero of the hour back in June, but she will have to run on something more substantial than a filibuster if she wants to have any impact in the polls. And, because of the media coverage of the filibuster, redefining herself as “pro-life” will likely fail with all but the most ill-informed voters.

However, should Wendy Davis find herself on the national stage as a candidate, redefining herself as “pro-life” now may have a more serious impact among undecided voters later.

A Cautionary Tale

For Davis and other pro-abortion candidates, abortion on demand is not nearly as popular among voters as it is among abortion supporters. In order to be a viable candidate, Davis has to be seen as more than just the abortion-filibuster candidate. The coverage of the filibuster and Davis’s subsequent rise to political heights proves once again that the majority of the mainstream media is complicit in the promulgation of the “right” to abortion on demand.

For proliferators, the filibuster and the sudden rise of Wendy Davis is an example of how a candidate can be created by an issue. Before the filibuster, Wendy Davis was one out of hundreds of state legislators. Now, she has name recognition, a gubernatorial campaign, and a book deal for a memoir to be published in the fall of 2014.¹⁷

Her star is in the political firmament, but how long or how brightly it burns will depend on whether she can move beyond her pink sneaker moment and redefine herself as a more “mainstream” candidate.

The pro-life movement needs to ensure that the public never forgets the extremism of Wendy Davis or her abortion filibuster.

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A Model Opinion Returning Abortion to the States

Jonas Cummings

[Editor's Note: *The following is a hypothetical judicial opinion submitted in response to a fact pattern developed by Advocates for Life, the legal advocacy arm of Americans United for Life. AUL challenged law students to write an opinion envisioning the language of a Supreme Court decision that would reverse Roe v. Wade and Planned Parenthood v. Casey. In this hypothetical case, "State" passed a law defining abortion as a homicide under its criminal code and prohibiting the procedure throughout pregnancy (save for limited exceptions)—a direct challenge to the Supreme Court's rulings in this most controversial area. Submissions were evaluated along two dimensions: scholarly excellence and tone. This opinion was awarded first place in the competition.*]

In his now vindicated dissent from *Lochner v. New York*, Justice Holmes reminded us “[the Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.” 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). It is with these words in mind that we reexamine the Court's pretense of authority to decree a right to abortion.

The Court has been asked to revisit the central holdings of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Roe* found in the Fourteenth Amendment a fundamental right to abortion, and in doing so struck down the abortion laws of every state.¹ A fierce debate unabated by the passage of forty years continues to divide the nation over abortion. Whereas that debate once was resolved in state capitals far from Washington, *Roe* ventured to settle the matter judicially. As a consequence the issue has dominated our country's federal elections and strained our civil discourse in the decades since *Roe*.

Our Constitution does not answer every question or resolve every dilemma, nor was it supposed to. In their wisdom the framers understood that a large and diverse country will invariably have diverse values, and the imposition of a single solution will tend to divide rather than unite the country. Some values are so rooted in our Constitution and traditions that no state may disregard them, but as to others we must be prepared to tolerate variance. Thus there is a heavy price to be paid when our judiciary squelches democratic debate to impose a solution unmoored from our charter or history. The Constitution was designed to accommodate a people with wide-ranging opinions, and this accommodation is achieved by leaving the resolution of

Jonas Cummings received a B.A. in political science from the University of North Florida and his Juris Doctor from the University of Florida Levin College of Law.

those difficult questions on which the Constitution shines no light to the democratic process.

Our Constitution provides no guidance on the question of abortion. The language and history of the Fourteenth Amendment afford no support for the premise that “liberty” encompasses a special right to end a pregnancy at will. We therefore visit anew the question whether Due Process requires a right to abortion, and conclude that *Roe v. Wade* and *Planned Parenthood v. Casey* were decided in error. Balancing the government’s valid interest in protecting human life with an individual’s interest in obtaining an abortion is a task appropriately left to the states, subject to rational basis review.

I. Facts

A. Procedural Background

The Court has appellate jurisdiction. U.S. Const., Art. III, § 2, cl. 2. Appellees, a group of abortion providers, initially sought injunctive relief in federal district court from enforcement of Chapter 1, §2(1) of the State’s criminal code. The newly amended section criminalizes pre-viability abortions, which the State acknowledges to be in direct conflict with *Roe* and *Casey*. The District Court ruled for appellees and granted injunctive relief during the litigation. The Circuit Court of Appeals affirmed the District Court’s decision, reasoning that *Roe* and *Casey* invalidated the State’s prohibition of pre-viability abortions. The State petitioned for certiorari and requested the Court to revisit its holdings in *Roe v. Wade* and *Planned Parenthood v. Casey*. The United States has joined the State as amicus curiae in seeking reversal of *Roe* and *Casey*. Having appellate jurisdiction to review the Circuit Court’s decision, the Court has granted certiorari and agrees to review its prior holdings.

B. The Statute

The State amended Chapter 1, §2(1) of its criminal code to include voluntary abortion under its prohibition against homicide. Prior to the amendment, the statute exempted from punishment those abortions performed by licensed physicians upon consenting patients.² In 2013, the State’s legislature struck the old section and replaced it with a new provision that declares abortion to be a criminal homicide. The amended section reads as follows:

This chapter [Chapter 1] applies to abortions performed by licensed physicians. ‘Abortion’ means the act of using or prescribing any instrument, medicine, drug, or any other substance, device or means with the intent to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child. Such use, prescription, or means is not an abortion if done with the intent to save the life or

preserve the health of an unborn child; remove a dead unborn child caused by spontaneous abortion; or remove an ectopic pregnancy.

State Crim. Code Ch. 1, §2(1) (amended 2013). This amendment was accompanied by numerous findings of fact by the Legislature. We paraphrase those findings below:

(1) The life of each human individual begins at fertilization. This is not an opinion but a demonstrated scientific fact.

(2) The laws of State and of many other jurisdictions reflect the medical and societal consensus that human life begins prior to birth. Unborn children receive legal recognition in other areas of law, including fetal homicide prosecutions, wrongful death actions, and probate matters. The lack of recognition for unborn children in the law of abortion is thus anomalous.

(3) Abortion presents significant health risks to women. More comprehensive data than that available in 1973 indicates abortion is not safer than childbirth. Additionally, studies show that abortion presents a risk of serious complications in subsequent pregnancies. The State has a strong interest in preventing these adverse health outcomes.

(4) The State rejects the notion that abortion is necessary to achieve gender equality. The impressive achievements of women in the State need not come at the expense of unborn children.

(5) For the aforementioned reasons, the Supreme Court's abortion decisions are fundamentally flawed.³

The amendment left intact two other provisions of Chapter 1. First, the State's chapter on criminal homicide does not apply to "the consensual good faith performance of medical practice, including diagnostic testing, therapeutic treatment, and the lawful prescription and use of medication, when provided to a pregnant woman by a physician or other licensed health care provider." State Crim. Code, Ch. 1 §2(2) (1973). Second, women are exempt from prosecution for the deaths of their own unborn children.⁴

We also take notice of definitions laid out in Chapter 1 of the State's criminal code, which predated the current amendment.⁵ Under this chapter, homicide is defined as "the knowing or intentional killing of one human being by another." State Crim. Code, Ch. 1 §1(1). A "human being," in turn, is defined to include "an unborn child at every stage of gestation from conception until live birth." State Crim. Code, Ch. 1 §1(2). Under Chapter 1, an "unborn child" means "a member of the species homo sapiens, at any stage of development, who is carried in the womb." State Crim. Code, Ch. 1 §1(3). Thus, the State recognized the unborn as potential homicide victims even prior to the law before us. The State once made a *sui generis* exception to its homicide laws for consensual abortions as *Roe* and *Casey* commanded, but now seeks to challenge that mandatory exception.

II. History

The Court is careful that its decisions be guided by history. There is no novelty in giving legal recognition to the interests of the unborn. When the Court declared a right to abortion in *Roe v. Wade*, the majority gave insufficient attention to the extensive historical record establishing that the unborn have been the object of state protection for centuries, including in the law of abortion. Indeed, *Roe* has been roundly criticized for its flawed historical analysis on this point.⁶ Among the questionable historical claims made in *Roe* were that (1) abortion, even after quickening, was not a crime at common law, 410 U.S. at 135-36, and (2) even when abortion was outlawed it was done exclusively in the interest of protecting maternal health. *Id.* at 151. The first historical finding was significant to *Roe* because it enabled the Court to rationalize that a right to abortion was rooted in the nation's history. *See id.* at 140-41. The second finding allowed the Court to reason that, since advances in medical technology had made abortion safer than it had been in the nineteenth century, abortion laws had lost their *raison d'être*. *See id.* at 148-49, 151.

However, neither of those historical findings was accurate. Abortion after quickening was a well-established crime according to the most preeminent common law authorities. The legislative history and judicial construction of anti-abortion statutes passed by more than thirty states during the nineteenth century further demonstrates that the principal concern was protecting prenatal life, contrary to *Roe's* historical claims. We therefore turn to discuss the treatment of abortion under the English common law and in the United States prior to *Roe v. Wade*.

A. The Common Law

Abortion of an animated fetus was a crime under England's nascent common law at least as early as the publication of two thirteenth century commentaries, *Fleta* and Henry de Bracton's *The Laws and Customs of England*. The early common law was substantially influenced by Aristotelian notions of personhood and ensoulment, which Britain received from the Normans following William's Conquest in 1066. Aristotle and his adherents, such as Thomas Aquinas, believed in a theory of "mediate animation," i.e., that a fetus became a human being some time during the middle of a pregnancy. According to Aristotle, male fetuses received a human soul at 40 days, and female fetuses at 90 days, although the moment the unborn child began to stir was also critical in determining whether animation had occurred.⁷ This latter criterion of movement evolved into the common law benchmark

called “quickening”—the point where a fetus’s movements become detectable, which typically occurs 16 to 18 weeks into the 38-week gestational period.⁸ According to Bracton and *Fleta*, abortion after animation or quickening was equivalent to homicide.⁹

Three centuries after Bracton’s treatise, the renowned jurist Edward Coke led a reform movement to consolidate the jurisdiction of England’s royal and ecclesiastical courts under its royal courts alone. By 1600, the consolidation was nearly complete and Coke set about chronicling the laws of England in his authoritative *Institutes*. Coke recorded that performing an abortion on a woman “quick with childe,” while not murder, was “a great misprision” under the common law. E. Coke, *Third Institute*, 50 (1628).¹⁰

Similarly, William Blackstone, whose writings were well known by the framers of both the Constitution and the Fourteenth Amendment, echoed Coke’s description of the legal status of abortion under the common law. Blackstone commented it was a “great misprision” to “kill a child in its mother’s womb.” W. Blackstone, *Commentaries*, 198.¹¹

Roe disputed Coke’s and Blackstone’s accounts of abortion as a crime past quickening. The Court in *Roe* claimed it was doubtful whether abortion, even after quickening, was ever a crime at common law. 410 U.S. at 135-36. The majority opinion relied on Cyril Means, *id.* at 136, n. 26, whose work cited two fourteenth-century cases as evidence that abortion was not a crime at all under the English law.¹² These two cases, called “The Abortionist’s Case” and “The Twinslayer’s Case,” involved defendants accused and acquitted of criminal abortion.¹³ Means interpreted these cases to stand for the premise that abortion was never a crime in principle.¹⁴ That interpretation misreads both cases, however. The acquittals in these early cases resulted from problems of proof, not because the act in question was regarded as innocent. Destro, *Abortion and the Constitution: The Need for a Life Protective Amendment*, 63 Calif. L. Rev. 1250, 1269-70 (1975). The most reliable common law authorities—Bracton, *Fleta*, Coke, and Blackstone—each confirm that abortion past quickening was indeed a crime. The ratification of Coke’s and Blackstone’s thinking on abortion in England and in America for centuries afterward only reinforces support for their view that the common law disapproved of abortion.¹⁵

Justice Blackmun, writing for the *Roe* majority, also took the view “that adoption of the ‘quickening’ distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.” 410 U.S. at 151-52. This characterization turns the meaning of the quickening distinction on its head. There is no evidence that the purpose of the common

law's quickening distinction was simply to protect maternal health. On the contrary, the very fact that the common law prohibition coincided with the moment when humanity, according to its primitive scientific knowledge, believed life to begin strengthens rather than undermines the claim that the common law's interest was protecting unborn life. Moreover, the quickening distinction could not have represented an informed rejection of the theory that life begins at conception because the common law's formulators lived centuries before modern embryology established that human life begins at fertilization.

Fully understanding the common law's approach to abortion before the nineteenth century therefore requires recognizing that it was necessarily informed by mankind's limited state of knowledge at the time. The biological sciences were far from discovering when mammalian life begins at the time the common law was forming; consequently, society relied on such crude criteria as quickening to determine when life begins. The fact that abortion became a crime as soon as the fetus was believed to become alive, at quickening or "animation," supports the premise that the common law was concerned with protecting the prenatal being. Contrary to the *Roe* Court's analysis of the common law's permissive attitude toward abortion before quickening, *see* 410 U.S. at 140-41, we do not believe this stemmed from an ancient belief in a "right" to abortion. Such an interpretation of the common law imposes an anachronism: Our ancestors could not be understood to endorse a "right" to abortion that overrides the interests of the unborn, because our ancestors did not yet even know when unborn life begins. Rather, it seems clear that the absence of penalties for abortion before quickening reflected humanity's unawareness that life starts at conception, for as we observe in the nineteenth century, once science made clear that each human life commences at fertilization the law evolved to reflect this new understanding.

B. Abortion in the United States Before *Roe v. Wade*

The American colonies inherited the common law of their English settlers. From the colonial era until the mid-nineteenth century, abortion after quickening was a felony in nearly every jurisdiction, as it had been in England.¹⁶ Not long after our nation's birth however, the common law formulation, built around the myth of mediate animation, began to be replaced by statutory prohibitions covering the full duration of pregnancy as the science of human reproduction started to shine new light on the mechanisms of prenatal development.

If it was "not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States [in 1973] [were] of relatively recent

vintage,” *Roe*, 410 U.S. at 129, perhaps that is because knowledge of when human life begins was also of relatively recent vintage. As one scholar summarized:

Only in the second quarter of the nineteenth century did biological research advance to the extent of understanding the actual mechanism of development. The nineteenth century saw a gradual but profoundly influential revolution in the scientific understanding of the beginning of individual mammalian life. Although sperm had been discovered in 1677, the mammalian egg was not identified until 1827. The cell was first recognized as the structural unit of organisms in 1839, and the egg and sperm were recognized as cells in the next two decades. These developments were brought to the attention of the American state legislatures and public by those professionals most familiar with their unfolding import—physicians. It was the new research finding which persuaded doctors that the old “quickenings” distinction embodied in the common and some statutory law was unscientific and indefensible.¹⁷

By the middle of the nineteenth century it had become clear, as a scientific matter, that life originates at conception rather than in mid-pregnancy as previously believed.

The American Medical Association (AMA) responded to these developments in human embryology. By 1857 the AMA had launched a vigorous campaign to encourage state legislatures to outlaw abortion from conception.¹⁸ The AMA grounded its case in the need to protect unborn life, based on the knowledge that a living human organism exists from the moment of fertilization. *See* 12 Trans. of the Am. Med. Assn. 73-78 (1859). The association articulated its reasons in 1859:

The first of these causes is a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.

The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life. . . .

The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, and to its life as yet denies all protection.

Id. at 75-75. Therefore, it is clear that the AMA’s campaign to restrict abortion was motivated by the profession’s intent to safeguard human life. It is a reasonable inference that state legislatures were influenced by these arguments. In 1840, only eight states had laws prohibiting abortion; by 1865, twenty-six of thirty-six states had criminalized abortion, as well as six of ten

territories.¹⁹ By the time the Fourteenth Amendment was drafted in 1868, twenty-eight states and eight territories had outlawed abortion. J. Mohr, *Abortion in America*, 200 (1978).

Roe incorrectly surmised that the purpose of abortion laws adopted in the nineteenth century was protecting maternal health. 410 U.S. at 151. *Roe* pinned support for this claim on a single New Jersey case, which interpreted New Jersey's abortion law as a health regulation aimed at protecting women from the risks of abortion. *Roe*, 410 U.S. at 151, citing *State v. Murphy*, 27 N.J.L. 112, 114 (1858). But *Roe* entirely ignored the decisions of eleven state courts identifying preserving prenatal life as the purpose of their anti-abortion laws.²⁰ As one court remarked about their state's anti-abortion statute:

[The] manifest purpose is to restrain after conception an unwarranted interference with the course of nature in the propagation and reproduction of human kind ... We are forced to concede that when ... two germs, male and female, are brought together, that fuse themselves into one, a new being, crowned with humanity and mentality, comes into life. If this be true, does not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life ... ?

Trent v. State, 15 Ala. App. 485, 486 (1916). We therefore cannot accept *Roe*'s historical conclusion that abortion regulations adopted during the nineteenth and twentieth centuries were designed only to protect maternal health.

Appellees further contend that certain nefarious purposes lay behind the abortion laws of the nineteenth century, such as coercing women into compliance with Victorian sexual mores. The State does not advance these as justifications. Even if such ulterior motives did lie behind abortion laws, appellees overstate their significance. It would be folly to attribute the ill motives of some interest groups supporting a piece of legislation to all others behind it. Even the noblest legislation may have sponsors who do so for ignoble reasons. If the Constitution required the invalidation of a law each time an interest group favored it for inappropriate purposes, so few laws could stand that society would be practically ungovernable. Behind any given legislation, proper and improper motives may coexist, but the improper motives alone do not necessarily render the legislation unconstitutional. See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002); *Bd. of Educ. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226 (1990).

Having concluded our historical analysis, we find deep roots in this nation's history and traditions of protecting unborn life through restricting abortion. While it is true that abortion was not punished before quickening at the time of the nation's founding, this reflects not a historically recognized abortion

right but an incomplete understanding of human biology. One relatively stable constant throughout our history has been to regulate abortion from the time we understood life to begin, whether from quickening as in the eighteenth century or from conception, as biology established in the nineteenth century to mark the beginning of life.

III. Discussion

We now address the merits of the case. Appellees urge us that the rule of *stare decisis* requires us to reaffirm *Roe* and *Casey*. There has been a constitutional right to abortion for four decades, and appellees argue that the country has ordered its living and thinking around the new status quo; that overturning *Roe* would interfere with the reliance interests of women throughout the country; and that insufficient cause exists to justify such disruption. Appellees maintain the Court ought to find a right to abortion either in a concept of “privacy” or personal autonomy under the liberty guaranteed by the Fourteenth Amendment, or in equal protection. We do not agree for the reasons that follow.

A. *Stare Decisis*

Respect for precedent is a cornerstone of our system of law. However, even the rule of *stare decisis* cannot take priority over sound constitutional jurisprudence. “*Stare decisis* is not . . . a universal, inexorable command,” particularly in cases involving constitutional interpretation. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting). Precedents involving constitutional interpretation receive less solicitude under the rule of *stare decisis* because erroneous decisions are uniquely durable. Wayward interpretations risk entrenchment because correction through legislative action, shy of amending the Constitution, is virtually impossible. *Planned Parenthood v. Casey*, 505 U.S. 833, 954-55 (1992) (Scalia, J., dissenting). Thus the Court has a duty to reconsider interpretations that “depar[t] from a proper understanding” of the Constitution. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557 (1985).

The Court has, in practice if not in word, shown little regard in the past for *stare decisis* with respect to its abortion decisions. In *Planned Parenthood v. Casey*, the Court so thoroughly overhauled *Roe v. Wade* that only a shell of *Roe* remained. *Casey* reaffirmed *Roe*’s discovery of a right to abortion, 505 U.S. at 846, but left little else intact. *Roe* established a trimester framework²¹ for evaluating abortion regulations, 410 U.S. at 163-64; *Casey* did away with it. 505 U.S. at 872-73. *Roe* characterized the right to abortion as fundamental, 410 U.S. at 162-64; *Casey* did not so describe it. 505 U.S. at 954 (Scalia, J.,

dissenting). *Roe* subjected regulations affecting pre-viability abortions to strict scrutiny, 410 U.S. at 162-64; *Casey* would subject such laws to an “undue burden test.” 505 U.S. at 874. *Roe* rejected any state interest in protecting fetal life before viability, 410 U.S. at 163-64; *Casey* found states have a “substantial and legitimate” interest in protecting unborn life throughout pregnancy. 505 U.S. at 875-76. In light of the Court’s demonstrated willingness to uproot *Roe*, we cannot accept that the *Roe-Casey* line is so embedded in our jurisprudence that we must now bow uncritically to the precedential force of these opinions. *Roe* and *Casey* may be abandoned consistent with principles of *stare decisis* in constitutional cases.

1. Prudential Considerations

In *Planned Parenthood v. Casey*, we articulated some prudential concerns that influence whether the Court should overrule precedent: whether the rule set forth is unworkable; whether the rule is subject to reliance interests that would lend special hardship to overruling a precedent; whether related principles of law have so far developed that the old rule is merely the remnant of an abandoned doctrine; and whether facts have so changed, or come to be seen so differently, that the old rule is deprived of significant application or justification. *Casey*, 505 U.S. 833, 854-55. We do not believe these concerns weigh against overturning *Roe* and *Casey*.

Casey’s “undue burden test” has proven unworkable by failing to provide meaningful guidance to the states on the permissible scope and manner of abortion regulations. Instead, the test has created inane distinctions in the case law,²² evidence of a standard that is little more than an empty vessel into which judges may pour their own policy preferences. Insofar as the test requires judges to evaluate whether a law places a “substantial obstacle” in the path of a woman seeking an abortion, the standard does nothing “to prevent ‘judges from roaming at large in the constitutional field’ guided only by their personal views.” *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965) (Harlan, J., concurring in judgment). *Casey*’s “undue burden test,” unanchored as it is in our history and jurisprudence, is troublesomely vulnerable to manipulation.

No substantial reliance interests prevent *Roe* from being overturned. Reproductive planning could take immediate account of this decision, and individuals continue to have many alternatives for controlling whether to bear or beget a child. There is also no evidence to support *Casey*’s undeveloped claim that a vague reliance interest on legal abortion has become established due to “decades of economic and social developments.” See *Casey*, 505 U.S. at 956-57 (Scalia, J., dissenting).

Facts may also change or come to be understood so differently as to erode

the doctrinal underpinnings of a previous decision. Unlike *Roe* and *Casey*, we now recognize that the decision to abort implicates more than merely “potential” life. See *Roe*, 410 U.S. at 162; *Casey*, 505 U.S. at 852. Perhaps “potential life” would have been an accurate description of the ovum or sperm cell, either of which may “potentially” form part of a human being, yet neither of which is by itself a human being. But that is not what is at stake in the abortion context. The fetus represents *existing* human life rather than just the potentiality of life, for it is settled biological knowledge that human life begins with fertilization.²³ Each individual thus traces the beginning of her being to conception. This scientific understanding is not a new factual development since 1973, but one *Roe* and *Casey* failed to appreciate when they characterized the state’s interest as only in protecting “potential” life. The fact, then, that a genetically unique individual comes into existence at conception distinguishes abortion from other constitutionally protected methods of controlling procreation, such as contraception. Whereas contraception prevents the inception of new life, abortion purposefully extinguishes a life that has already begun. *Roe* found such a likeness between abortion and contraception that it held a right to abortion naturally followed from the Court’s decisions on birth control. 410 U.S. at 169-70 (Stewart, J., concurring). That reasoning, however, rests on a false equivalence between preventing pregnancy and ending a pregnancy. In light of our appreciation today for the unavoidable truth that abortion exterminates an existing human life, we can no longer consider deriving a right to abortion from a right to use contraceptives doctrinally tenable.

Furthermore, there is little reason for *stare decisis* to lend special protection to decisions that, by their very terms, set themselves on a path toward obsolescence. *Casey* made clear that after viability, whenever viability occurs, a state may go so far as to prohibit abortion. 505 U.S. at 860. *Casey* further contemplated that advances in medical technology would cause viability to occur sooner and sooner. *Id.* In 1973, viability occurred around 28 weeks; today it is already attained around 23 weeks.²⁴ In another forty years this point will no doubt be even earlier, and it may continue to come earlier until eventually viability exists shortly after conception. Yet there is no principled reason why the state should be restrained from protecting an 18-week-old fetus in 2013 but not in 2053. Given how *Roe* and *Casey*, by their *own* terms, allow the abortion right to diminish with time and technology, we do not see why this supposed right should have the permanence appellees insist on under the banner of *stare decisis*.

The Court ultimately has a responsibility to reconsider precedents that are unsound in principle and unworkable in practice. *Garcia*, 469 U.S. at 546. *Roe* and *Casey* are both. We have already expressed our concerns with the

unworkability of the undue burden standard. Most disturbing however, *Roe* is unsound in principle because it disregarded the Court's obligation to identify the constitutional basis of its decisions. Neither any value marked out as special by the Constitution nor the history of the country provides any support for *Roe*'s discovery of a fundamental right to abortion. For that reason, *Roe* represents a raw exercise of judicial power and little more than an expression of that majority's policy preferences, the likes of which had not been seen since *Lochner v. New York*.

2. Institutional Legitimacy

We are finally told we must reaffirm *Roe* and *Casey* to maintain institutional legitimacy. We disagree. "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). The inescapable shortcoming of *Roe* and *Casey* is their failure to explain the constitutional origins of a right to abortion. We acknowledge the Constitution speaks in general terms and cannot be applied with the precision of a code, but that does not dispose of the responsibility to trace fundamental rights back to a constitutional source. That responsibility is a duty, for each time the Court declares a new fundamental right it profoundly hampers the people's ability to govern themselves. Because the judiciary has the extraordinary power to veto state action running afoul of the Constitution, *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816); *Cohens v. Virginia*, 6 Wheat. 264 (1821), the legitimacy of a court's exercise of such power depends upon whether it can articulate the constitutional basis of its decisions. This is where *Roe* and *Casey* were so clearly defective. As Professor Ely remarked: "At times the inferences the Court has drawn from the values the Constitution marks for special protection are controversial, even shaky, but never before [*Roe*] has its sense of an obligation to draw one been so obviously lacking." Ely, *The Wages of Crying Wolf*, 82 Yale L.J. 920, 936-37 (1973). Uncritically perpetuating *Roe* and *Casey* threatens the institution's legitimacy substantially more than discarding these relics of judicial invention.

B. The Constitution and Abortion

Having concluded *stare decisis* does not require reaffirming *Roe* and *Casey*, we consider whether Due Process incorporates a right to abortion as an original matter. Due Process analysis properly applied follows two stages. First the Court must ascertain whether a state's action, such as criminalizing abortion, encroaches on a right deemed fundamental or involves a suspect classification.

If, and only if, the Court finds that a fundamental right or suspect class is implicated must the law stand up to strict scrutiny in the second stage.²⁵ Strict scrutiny requires the government to show that its law is narrowly tailored to achieve a compelling interest. *Aptheker v. Secy. of State*, 370 U.S. 500, 508 (1964); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969). If the right affected is not fundamental, and no suspect classification is involved, the law must only survive rational basis review. Rational basis review shifts the burden to the complainant, who must show the law is not even rationally related to a legitimate government purpose. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955).

Before we evaluate the state's interest in protecting unborn human life, we must first examine the various theories advanced to justify a fundamental right to abortion. Although identifying a constitutional connection only begins the Due Process analysis, it is a necessary starting point in order that the judiciary's proclamations have legitimacy. What eluded the majorities in *Roe* and *Casey* is that *before* the Court can reach the balancing stage, or think about a decision's implications for future cases, "it is under an obligation to trace its premises to the charter from which it derives its authority." Ely, 82 Yale L.J. at 949.

1. Privacy and "Liberty" Under the Fourteenth Amendment

Roe's central holding found that a fundamental right to abortion extended from a general right of privacy, said to be part of the "liberty" guaranteed by the Fourteenth Amendment. *Roe* posited that this right to privacy, though not explicitly mentioned in the Constitution, was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. By this conclusory statement, *Roe* determined the states must permit abortion on demand under the Fourteenth Amendment's Due Process Clause.

The Due Process Clause, as its name implies, was originally intended as only procedural in nature. By its own terms, the clause does not protect any substantive liberties but ensures no person shall be deprived of life, liberty, or property without due process of law. Yet we also cannot ignore that our decisions have long recognized a substantive dimension to Due Process that gives heightened protection to essential rights against infringement.

To be sure, the ability to have a legal abortion is a "liberty" interest afforded some protection against arbitrary government interference by the Fourteenth Amendment. But this fact alone provides no justification for the Court to subject abortion regulations to any higher level of scrutiny than the baseline of rational basis review. In order for strict scrutiny to apply to the curtailment of a certain right, there must be more to the interest than that it simply involves "liberty" in the absolute sense of the word. For a right to be classified as "fundamental,"

and therefore specially protected by strict scrutiny, it should be rooted in the Constitution, its framers' intent, the nation's traditions, or perhaps the necessities of a democratic form of government. States have wide discretion to govern where fundamental rights are not involved; but where a law involves a right deemed fundamental, the government must defend the law against strict scrutiny. Only a right ranked as "fundamental," though, could justify the burden strict scrutiny imposes on democratic self-governance.

Fundamental rights, therefore, are not simply those that comport with a judge's personal philosophy. Fundamental rights are those rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Justice Cardozo referred to such a right as a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). While these are admittedly imprecise formulae, giving content to this Constitutional concept "certainly has not been one where judges have felt free to roam where unguided speculation might take them." *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds). Rather, it is a process of striking a balance between liberty and the needs of organized society. In seeking this balance the Court must have "regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke." *Id.*

Thus, the Court emphasizes the wisdom of history and tradition when proclaiming what rights are considered fundamental. As our historical analysis in Section II showed, the laws of our country and of our English ancestors exhibit a centuries-old tradition of protecting unborn life by proscribing abortion. The English and American common laws forbade abortion from the instant the unborn child was believed to become alive, which was at quickening according to humanity's state of knowledge at the time. As science dispelled the myth of "mediate animation" in the nineteenth century, proving that the life of a human individual begins with conception, legislatures reacted by prohibiting the procedure throughout pregnancy. When the Fourteenth Amendment was ratified in 1868, at least 36 states and territories proscribed abortion. *Roe*, 410 U.S. at 174-75 (Rehnquist, J., dissenting). Every state in the union but Kentucky had laws against the procedure by 1909.²⁶ Until 1969,²⁷ none doubted whether such laws were compatible with the liberty guaranteed by the Fourteenth Amendment, including the amendment's drafters themselves. Although a reforming trend to liberalize abortion laws set in during the mid-twentieth century, all but four states resisted permitting abortion on demand even as of *Roe*.²⁸ Against this background it is clear that a right to abortion is not "so rooted in the traditions and conscience of

our people as to be ranked as fundamental.”²⁹

The right to abortion finds little more support in precedent. The Court has recognized that the liberty guaranteed by the Fourteenth Amendment embraces more than freedom from physical constraints. In *Meyers v. Nebraska*, 262 U.S. 390 (1923), we construed “liberty” to protect the right of a teacher to deliver instruction in a foreign language. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), we held that Due Process protects the right to educate one’s child at a parochial school.³⁰ We have also said “liberty” protects a right to procreate, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); a right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); and a right to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965).³¹ However, none of these cases can fairly be read as endorsing the all-encompassing right to privacy that *Roe* and *Casey* would read into them, let alone a form of privacy broad enough to encompass a fundamental right to abortion. “Unlike marriage, procreation, and contraception, abortion ‘involves the purposeful termination of a potential life.’” *Casey*, 505 U.S. at 952 (Scalia, J., dissenting), citing *Harris v. McRae*, 448 U.S. 297 (1980). We therefore believe “*Roe* reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce*, *Meyer*, *Loving*, and *Griswold* and thereby deemed the right to abortion fundamental.” *Casey*, 505 U.S. at 953 (Scalia, J., dissenting).

The Constitution itself says absolutely nothing, clear or murky, about privacy or abortion. *Roe* presumed that certain rights addressed in the Constitution manifesting a concern for isolated aspects of privacy—specifically, those addressed by the First, Third, Fourth, and Fifth Amendments—hinted at a more general right to privacy. 410 U.S. at 152-53. However, the precision with which the framers spoke only proves that the things explicitly mentioned are protected, if it does not indicate a desire of the framers to do anything but enshrine a general right to privacy. The framers rejected sweeping proclamations in favor of meticulously identifying specific liberties for protection, a feature that undercuts rather than supports *Roe*’s expansive interpretation of the Bill of Rights. That the first eight amendments concentrated on protecting carefully selected rights, such as the freedom of speech, freedom from arbitrary government searches, and freedom from self-incrimination, argues against any claim that the framers intended instead to create an open-ended right to privacy or abortion.

We acknowledge that the specific freedoms enumerated in the Bill of Rights do not form an exhaustive list of individual liberties. Indeed, the Ninth Amendment, which admonishes us that the Constitution’s enumeration of certain rights shall not be construed to deny others retained by the people, forecloses such a limiting interpretation. But the Ninth Amendment also is

not an independent wellspring of substantive rights, nor is it a license for judges to upend the careful balances forged by democratic debate in order to freely impose their own moral values under the guise of Due Process.³² Such a radically undemocratic approach would do more harm to fundamental principles of self-governance than whatever marginal benefit may be achieved by allowing wandering judges to manufacture new entitlements. Fundamental rights must be based on more than a judge's personal ideals. In order that Due Process not become a vehicle for the judicial branch to usurp the functions of the legislative branch, fundamental rights must find their origins in a recognized source. Such recognized sources include the text of the Constitution and the values clearly marked out for special protection therein; the framers' intent or thinking on a specific issue; the history and traditions of our people; and the democratic nature of our government. And yet, none of these sources of constitutional law supports a right to abortion. Neither the text of the Constitution nor any specific value fairly inferable therefrom supports a constitutional command that states *must* permit abortion. Neither the framers of the Bill of Rights nor of the Fourteenth Amendment seem to have remotely contemplated a right to abortion. The history of our country does not support such a right, nor is a right to abortion necessary in order for women to effectively participate in our democracy. Without a foundation in any recognized constitutional authority, proclaiming a fundamental right to abortion represents an illegitimate exercise of judicial value-imposition.

Even if we agreed that the Constitution creates a general right to privacy, it would not necessarily follow that such a liberty embraces a right to abortion. The relationship between abortion and privacy is tenuous at best, for there is nothing private about abortion; it does not occur in the privacy of the home, like sex, the use of contraceptives, or reading obscene materials, but at the hands of strangers in a public clinic.³³ Moreover, abortion affects interests other than those of the woman making the decision to end her pregnancy, for each abortion ends the life of another human being. Privacy, therefore, could no more encompass a right to abortion than it could encompass a right to engage in child neglect or animal abuse.

Based on the doctrinal infirmities that finding a broad constitutional right to privacy or abortion would present, we reject the holdings of *Roe* and *Casey* that "privacy" requires states to permit abortion.

2. Personal Autonomy

Appellees advance the argument, alluded to in *Planned Parenthood v. Casey*, 505 U.S. at 857, that a fundamental right to abortion is inferable from the value of personal autonomy. Appellees would ground this inference in

the Fourteenth Amendment's general protection of liberty in the Due Process clause. Unlike "privacy," the argument asserts that a fundamental right to abortion may be discovered within the undefined parameters of the concept of personal freedom.

We repeat our observation that the mere fact that "liberty" is burdened is insufficient to justify requiring laws to stand up to any higher standard than a rational relationship to a legitimate government interest. Laws prohibiting drug use and prostitution also burden liberty, for example, but these do not invoke strict scrutiny.

In support of the argument, appellees cite the well-known hardships of pregnancy and childbearing discussed in *Roe v. Wade*.³⁴ 410 U.S. at 153. *Roe* and *Casey* seem to assume a fundamental right to abortion follows from these hardships. *Roe*, 410 U.S. at 153; *Casey*, 505 U.S. at 852-53. The trials and difficulties of childbearing are serious indeed, and ought not be taken lightly. However, the fact alone that abortion restrictions cause financial, social, or personal distress is constitutionally irrelevant. Many laws create burdens or cramp some individuals' lifestyles, but that alone does not render a given law unconstitutional, especially when one looks to the other side of the scale: abortion laws may limit reproductive choice, but they do so in order to protect human life.

As we acknowledged in Section III.B.1 above, our precedents protect a range of personal liberties relating to education, child rearing, marriage, and procreation. *Ante* at 22-23. But just as these precedents do not endorse the sweeping right to privacy *Roe* would extrapolate from them, they also stop short of endorsing the all-encompassing right of personal autonomy *Casey* would find in them. One would search the Constitution and our precedents in vain for any such far-reaching proclamations of unlimited personal liberty. We have never held there is a general right to do as one pleases so long as one harms no one else. Put another way, we have never imported John Stuart Mill's "harm principle" as a rule of Due Process jurisprudence. To the contrary, we have expressly rejected such an unlimited right of individual freedom. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding the detainment of a citizen who refused vaccination).

What is more, a right to abortion does not follow from a right of personal autonomy any more than it would follow from a general right of privacy. Deducing a right to abortion from the concept of personal autonomy assumes a state of affairs where only the individual exercising the liberty bears the consequences of her decision. This is not the case with abortion. "One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus." *Casey*, 505

U.S. at 952 (Scalia, J., dissenting). To view “the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person’s body.” *Michael H. v. Gerald D.*, 491 U.S. 110, 124, n. 4 (1989). Every time a woman decides to terminate a pregnancy, another human being, with its own unique qualities and whose life and development have already begun, suffers the destruction of its own body, its own future, and its very existence.

Inferring a fundamental right to abortion from a broad right of personal autonomy shares the same infirmities as drawing such a right from the notion of privacy. The inference has no support in the text of the Constitution or any clear value designated for special protection therein; the framers did not contemplate or intend such a broad entitlement; the nation’s history and traditions do not support it; nor is such a right necessary to democratic self-governance.

3. Equal Protection

Justice GINSBURG has proposed that a right to abortion may be grounded in the concept of equal citizenship. The concept has origins in Footnote 4 of *United States v. Carolene Products*, 304 U.S. 144, 152, n. 4 (1938), which suggested the Court may give enhanced protection to the rights of “discrete and insular minorities” whose interests are unlikely to receive adequate consideration in the political process. *Id.* Under this argument, states must permit abortion on demand because women almost exclusively bear the burdens of pregnancy,³⁵ and therefore abortion regulations discriminate against women.

Although gender is a quasi-suspect class, *Craig v. Boren*, 429 U.S. 190, 197 (1976) (articulating intermediate scrutiny standard for gender classifications), abortion regulations do not involve gender classification. The Equal Protection Clause applies where a law’s purpose is to classify citizens; a disparate effect on one gender alone is insufficient to invoke intermediate scrutiny. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). The fact that only women may become pregnant does not turn abortion regulations into gender classifications.³⁶ In *Geduldig v. Aiello*, 417 U.S. 484 (1974), we held it was not a denial of equal protection for California’s disability insurance system to exclude pregnancy-related disabilities while covering some disabilities affecting only men. The Court explained that the scheme classified citizens into pregnant persons and non-pregnant persons; although the category of pregnant persons includes only women, the category of non-pregnant persons includes both men and women,

and thus the system did not necessarily classify citizens according to gender. *Id.* at 497, n. 20. Similarly, abortion regulations affect pregnant persons without affecting non-pregnant persons. Whereas only women make up the category of pregnant persons, both men and women comprise the unaffected category of non-pregnant persons. Abortion regulations then do not inevitably create a gender classification.

The Court further applied *Geduldig* in finding that protesters who blocked access to an abortion clinic did not engage in gender discrimination in violation of federal civil rights laws. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). There, the Court reasoned that two categories of persons were involved: protesters and those seeking abortions. While only women comprised those seeking abortions, there were also women among the protesters. *Id.* at 269-70. Similarly, abortion regulations involve both those seeking abortions and their unborn children; whereas only women comprise those seeking abortions, female as well as male fetuses are among the unborn children the state aims to protect. Thus, abortion regulations do not invariably discriminate against one gender over another. Perhaps even more significantly, *Bray* interpreted federal laws designed to effectuate Equal Protection. *See* 506 U.S. at 759, *citing Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). If hindering access to abortion clinics does not constitute gender discrimination under federal civil rights laws, it is unlikely consistent with *Bray* that abortion regulations constitute gender discrimination in violation of the Equal Protection Clause. Based on the reasoning of *Geduldig* and *Bray*, we reject that abortion regulations inevitably create impermissible gender classifications.

Finally, it is quite significant that the state's objective in regulating abortion—the protection of human life—is both gender-neutral and independent of any purpose to classify the sexes. Indeed, safeguarding human life is among the most basic purposes of government. Although abortion regulations disproportionately affect women, this is a collateral consequence of nature rather than of a legislative purpose to single out women for differential treatment. There is, after all, *no other way* for a state to effectively assert its interest in protecting unborn life than by restricting abortion should it choose to do so. Hence, the state cannot avoid disparately affecting women if it is to advance its overridingly compelling interest in protecting human life. For that reason, there is no evidence that the State's purpose in restricting abortion relates to discriminating against women or anything other than its gender-neutral goal of preserving human life.³⁷

Equal Protection is therefore no more a basis for a fundamental right to abortion than privacy or autonomy. Without any connection to the

Constitution, history, or democratic governance, there is no support for this claimed right. Where, as with abortion, the Constitution does not designate any value involved for special priority or protection, the Court has no authority to restrike the balances arrived at by the several states beyond upholding the basic requirement of rationality.

4. The State's Interest: Human Life and Personhood

The defects of *Roe* and *Casey* do not stop at the disordered methodology by which they discovered a right to abortion. *Roe* and *Casey*'s assessment of the state's interest in protecting unborn life and prenatal personhood is similarly flawed.

A reading of *Roe* suggests the question of when life begins is highly uncertain. 410 U.S. at 159-60. It is not. Every medical, biological, and physiological authority makes clear that life commences with fertilization, at which point a genetically unique human organism comes into existence.³⁸ The scientific issue of when life begins is thus not a subject of legitimate dispute, though it does not resolve the philosophical question of when "personhood" begins.

Roe conceded if the unborn are "persons," any claim of a right to abortion would necessarily fail. 410 U.S. at 156-57. But it is often incorrectly assumed that the fetus must be a person in order for the state to constitutionally regulate abortion. While fetal personhood would be sufficient, it is not necessary to the constitutionality of anti-abortion laws. Because abortion is not a fundamental right, a state need not prove that a fetus is a person so as to satisfy strict scrutiny. Rational basis review is the appropriate test for abortion regulations. Therefore, even if the unborn occupy a legal status less than that of personhood, a state may successfully defend an abortion restriction as rationally related to its legitimate interest in protecting human life.

Assuming, *arguendo*, that the Fourteenth Amendment did encompass a fundamental right to abortion, *Roe* erred by implying a state would have to establish the personhood of a fetus in order to have a compelling interest. We have never held that the state interest required to justify forcing a person to refrain from an activity, even a constitutionally protected activity, must implicate the life or constitutional rights of another person. *Ely*, 82 Yale L.J. at 926. Animals and draft cards certainly are not "persons" in a constitutional sense, but even highly guarded First Amendment rights do not outweigh the government's compelling interest in forbidding their destruction, even if done in the exercise of political speech that lies at the heart of First Amendment protection. *See U.S. v. O'Brien*, 391 U.S. 367 (1968). A state's interest in protecting human life is surely at least as compelling as preventing the destruction of

animals or draft cards. Why a right to abortion, which in contrast to freedom of speech is not even remotely inferable from the Constitution, should overwhelm so compelling an interest is beyond reasoned judgment.

Our cases also already recognize states have a compelling interest in protecting fetal life after viability. *Roe*, 410 U.S. at 163-64; *Casey*, 505 U.S. at 870-71, 879. Our precedents further admit states have a “substantial and legitimate interest” in protecting unborn life throughout pregnancy. *Casey*, 505 U.S. at 875-76. But *Roe* and *Casey* failed to explain in constitutional terms why viability should be the magic point after which a state’s interest counts as “compelling.” Such an arbitrary dividing line is unsupported by any constitutional authority.³⁹ *Webster v. Reproductive Services*, 492 U.S. 490, 518 (1989); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 461 (1983) (O’Connor, J., dissenting). “[T]he State’s interest, if compelling after viability, is equally compelling before viability.” *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting).

Finally, we must reject *Casey*’s assumption that the Court has the power to forbid states from defining the word “person” to include the unborn. *See Casey*, 505 U.S. at 851.⁴⁰ *Casey* held that states are not free to define the word “person” to include the unborn for purposes of their own laws. *Id.* However, the Court lacks the authority to mandate a meaning of the word “person” in any context other than as it is used in the Constitution. Of course, it is the province of the judiciary to say what the law is. *Marbury v. Madison*, 1 Cranch 137 (1803). Therefore it is well within the Court’s power to say what the word “person” means as it is used in the Constitution. Although we may disagree with *Roe*’s interpretation that the word “person” as used in the Fourteenth Amendment includes only postnatal beings, at least it is within the Court’s power to make that interpretation.⁴¹ But the Court lacks any power to set an exclusive definition of the word “person” for the entire nation, for all purposes, from which none may deviate. To decide the unborn are not “persons” under the Fourteenth Amendment is only to say the unborn cannot assert Due Process rights under the United States Constitution. It does not mean states cannot define the word “person” more broadly to include the unborn for the purposes of their own laws. Certainly, states may not adopt a *less* inclusive definition of the word “person” lest they run afoul of the Fourteenth Amendment, but we overreach by telling the states they *cannot* adopt a *more* inclusive meaning of the word “person.” Beyond the requirement of rationality, the judiciary has no power to dictate to the states the *outer limits* of personhood. Men and women of good will may disagree on what it means to be a person, but we cannot say it is irrational to define the word “person” to

include every biological human being, as State has done.

Casey's response here is simply inadequate. To say a state may not extend personhood to the unborn because the question of fetal personhood is unsettled and a fundamental right is involved is to beg the question: It assumes the right to abortion must prevail even before the required balancing of interests takes place. See Epstein, *Substantive Due Process By Any Other Name*, 1973 Sup. Ct. Rev. 159, 182. If the question of fetal personhood is unsettled, as it certainly is, one must recognize there is no more a consensus the unborn *are not* persons than there is a consensus the unborn *are* persons. The Court thus did not merely take a neutral or “correct” position on fetal personhood by declaring states must permit abortion. Instead, the Court simply replaced one arational judgment with another equally arational one—its own—and decided the rest of the country *must*, not simply *may*, reject fetal personhood as well. If it is arbitrary to adopt a theory of fetal personhood just because the issue is unsettled, *Casey* acted just as arbitrarily by selecting the equally questionable position that the unborn *cannot* be persons. “We could as well claim that the Court, by adopting another theory of life [or personhood], has decided to override the rights of the unborn child...” *Id.* We reject that the Court has the power to merely substitute one arational judgment over another and foist it upon the nation. Today we restore the Court to its appropriate position of neutrality on the question of fetal personhood. Where a state has clearly articulated it intends to include the unborn as “persons” for the purposes of its laws, a judgment which we cannot say is irrational, the Court has no authority to override the State.

IV. Application

Where fundamental rights are not infringed, as here, the Court has no authority to second-guess legislative balances. Where reasonable people disagree, a state may choose to act one way or the other. See *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955). The judiciary’s oversight in such cases is limited to assessing whether the State’s action is rationally related to a legitimate government interest.

The State has asserted interests in protecting human life and in protecting women’s health. These are unquestionably legitimate interests. We have already recognized a state has a substantial and legitimate interest in protecting human life throughout pregnancy. *Casey*, 505 U.S. at 875-76. The State’s abortion regulation rationally relates to this interest by preventing the destruction of the fetus.⁴² That the State does not punish women for the

abortion of their own unborn children does not deprive the law of its rational relationship to protecting human life. A state may reasonably determine that the distress and anxiety associated with an unwanted pregnancy reduces or eliminates the criminal culpability of the pregnant woman.

The law also bears a rational relationship to protecting women's health. Numerous long-range studies now show abortion may be associated with dangers not previously contemplated, including an elevated risk of complications in future pregnancies. We need not delve into whether we agree with the conclusions reached in these studies, but we note there is genuine ambivalence regarding the medical and sociological data. In these circumstances, a state may choose one position or the other. It is sufficient for our purposes that the State has marshaled a substantial body of data in support of its conclusion that abortion endangers its citizens' health.

V. Conclusion

Today we honor Justice Holmes' admonition that the Constitution is made for a people of fundamentally differing views, and the happening of our disagreement with certain laws or policies does not resolve whether they conflict with the Constitution. *Roe v. Wade* and *Planned Parenthood v. Casey* marked illegitimate excursions into the realm of value-imposition and a departure from the judiciary's role as interpreter of the law, an endeavor incompatible with our democracy and the separation of powers carefully constructed by the Constitution. The Court lacks the authority to proclaim a fundamental right to abortion, to devalue the state's interest in protecting human life, or to command the country to obey its exclusive definition of personhood. The Court lacks this authority for a simple reason: It has no basis in the text of the Constitution or the framers' intent; in the history of the country; or in the demands of democratic participation. From time to time the judiciary strays from its humble role in our democracy, but today we reignite the torch of self-governance.

NOTES

1. While four states, Alaska, Hawaii, New York, and Washington, had already legalized abortion up to 24 weeks as of 1973, *Roe v. Wade* and its companion, *Doe v. Bolton*, 410 U.S. 179 (1973), would find even these laws were too restrictive for failing to include broad "health exceptions" for late-term abortions. *Doe* would require states to allow post-viability abortions for such reasons as the mother's psychological and emotional wellbeing—which apparently was also a constitutional command. *See id.* at 192 (discussing the breadth of a "health" exception). Thus, *Roe* struck down the abortion laws of all 50 states, not just those of the 46 states where it was generally proscribed.
2. "This chapter does not apply to acts which cause the death of an unborn child if those acts were committed during an abortion performed by a licensed physician to which the pregnant woman

- consented.” State Crim. Code Ch. 1, §2(1) (1973).
3. See Prenatal Right to Life Restoration Act of 2013, Findings of Fact, H.R. _____, _____th State Leg. (2013)
 4. “Nothing in this chapter shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.” State Crim. Code, Ch. 1, §2(3) (1973).
 5. The fact these definitions predate the amendment is significant because it rebuts any charge that these definitions were recently created solely to provide pretext for criminalizing abortion.
 6. See Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Ford. L. Rev. 807 (1973); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250 (1975); Dellapenna, *The History of Abortion: Technology, Morality and the Law*, 40 U. Pitt. L. Rev. 359 (1979).
 7. See, for example, Aristotle, Hist.Anim. 7.3.583b; Gen.Anim. 2.3.736, 2.5.741; Hippocrates, Lib. de Nat.Puer., No. 10.
 8. Dorland’s Illustrated Medical Dictionary, 1261 (24th ed. 1965).
 9. 2 H. Bracton, On the Laws and Customs of England 341 (S. Thorne ed. 1968) (stating that abortion, whether by physical trauma or poison, was a homicide “if the foetus is already formed or quickened, especially if it is quickened.”); *Fleta*, Book I, c. 23 (Selden Soc. ed. 1955).
 10. Professor Cyril Means has argued that Coke intentionally distorted the law to fit the position he once took when arguing a case as attorney general in 1601. However, it is unsubstantiated speculation to argue Coke was still politicking for a position he took 27 years earlier.
 11. The language of this comment clearly indicates a concern for “a child in its mother’s womb,” rather than maternal health or any other interest.
 12. Cyril Means was legal counsel for the National Association for the Repeal of Abortion Laws (NARAL). The article Justice Blackmun relied on was: *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971).
 13. Means, Note 12 *supra*, at 337-41.
 14. *Id.*
 15. Even if Coke and Blackstone did misrepresent the common law on abortion, their views would likely not have persevered as long as they did, as widely as they did, unless thought to have independent merit. See Destro, 63 Calif. L. Rev. at 1273.
 16. Abortion may also have been a misdemeanor offense even before quickening in many states. Dellapenna, 40 U. Pitt. L. Rev. at 388-89.
 17. *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 474 (testimony of Victor Rosenblum, Professor of Law, Northwestern Univ.).
 18. Abortion advocates have argued the medical profession secretly pushed anti-abortion laws as a form of anti-competitive legislation designed to push midwives out of business. More recent scholarship puts the lie to this myth. See Balch and Horan, *Abortion and the Constitution: Reversing Roe Through the Courts*, 67 (Georgetown University Press) (1987).
 19. See Quay, *Justifiable Abortion—Medical and Legal Foundations* (pt. 2), 49 Geo. L.J. 395, 406-22 (1961); Dellapenna, 40 U. Pitt. L. Rev. at 389.
 20. *State v. Howard*, 32 Vt. 380 (1859); *Dougherty v. People*, 1 Colo. 514 (1872); *State v. Miller*, 90 Kan. 230 (1913); *State v. Tippie*, 89 Ohio St. 35 (1913); *Trent v. State*, 15 Ala. App. 485 (1916), cert. denied 198 Ala. 695 (1917); *State v. Ausplund*, 167 P. 1019 (Ore.) (1917); *Nash v. Meyer*, 31 P.2d 273 (Ida.) (1934); *Bowlan v. Lunsford*, 176 Okla. 115 (1936); *State v. Cox*, 84 P.2d 357 (Wash.) (1938); *Anderson v. Commonwealth*, 58 S.E.2d 72 (Va.) (1950); *State v. Siciliano*, 121 A.2d 490, 494 (N.J.) (1956).
 21. *Roe* held that no state interest was important enough to justify abortion regulations during the first trimester. During the second trimester, the state could regulate abortion only to the extent necessary to safeguard maternal health. Only during the third trimester, when the fetus was viable, could the state regulate or prohibit abortion in the interest of protecting prenatal life.
 22. For example, a state may not outlaw partial-birth abortion if only a fetus’s limb is pulled into the cervix, lest the availability of other abortion procedures be jeopardized, *Stenberg v. Carhart*, 530 U.S. 914 (2000); but the government may ban the procedure if the fetus is pulled into the cervix up to its navel. *Gonzalez v. Carhart*, 550 U.S. 124 (2007). The gruesome facts of the procedure, described at length in those opinions, remain the same either way. The only differ-

- ence in the Court was its composition.
23. We cite the following definition of zygote, which is the immediate product of fertilization: “Zygote: This cell results from the union of an oocyte and a sperm. A zygote is the beginning of a new human being (i.e., an embryo). The expression ‘fertilized ovum’ refers to a secondary oocyte that is impregnated by a sperm; when fertilization is complete, the oocyte becomes a zygote.” (emphasis added). Keith L. Moore and T.V.N. Persaud, *The Developing Human* (Philadelphia, W.B. Saunders Company, 1998), p. 2.
 24. The technology enabling premature infants to survive is continuing to improve. Thus far, medical technology has allowed one infant to survive who was born at 21 weeks and 6 days. See Morgan, Goldenburg, and Schulkin, *Obstetrician-Gynecologists’ Practices Regarding Preterm Birth at the Limit of Viability*, J. Matern. Fetal. Neonatal. Med. 21 (2): 115-21 (2008).
 25. Save for content-neutral restrictions on speech and gender classifications, which are subject to intermediate scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (articulating intermediate scrutiny for content-neutral time, place, and manner restrictions on speech); *Craig v. Boren*, 429 U.S. 190 (1976) (articulating intermediate scrutiny for gender classifications).
 26. Kentucky had no legislation on abortion because its courts had already declared abortion illegal throughout pregnancy. *Peoples v. Commonwealth*, 9 S.W. 810, 811 (Ky. 1888) (“As already stated by the common law, if life be destroyed in the commission of an abortion, whether the woman be quick with child or not, it is murder, or at least manslaughter, in the destroyer.”).
 27. The earliest opinion finding an abortion law in contravention of the federal constitution was that of the California Supreme Court in *People v. Belous*, 458 P.2d 194 (Cal. 1969).
 28. See Note 1, *supra*.
 29. Justice O’Connor’s plurality opinion in *Casey* would accuse us of fixing the “outer limits” of the liberty protected by the Due Process Clause at those enjoyed by individuals in 1868. 505 U.S. at 847-48. That is untrue; we have looked at the entire span of our country’s history, along with its evolving practices and traditions, in determining whether our history supports a right to abortion. Even this broader view fails to support such a right, as our country has limited the ability to have an abortion throughout the majority of its existence.
 30. *Meyers* and *Pierce* do not support the argument that the Constitution supports rights having no textual or historical basis. Both decisions find justification in the liberties explicitly protected by the First Amendment; *Meyers*’s holding clearly relates to the freedom of speech, while *Pierce* relates to important aspects of the freedom of association and of the free exercise of religion. Though neither opinion explicitly relied on the First Amendment, this is because the First Amendment had not yet been incorporated against the states when they were decided. See *Gitlow v. New York*, 268 U.S. 652 (finding the First Amendment applies to the states through its incorporation into the Fourteenth Amendment’s Due Process Clause).
 31. Even *Griswold v. Connecticut*, thought to be *Roe*’s strongest precedent, did not go so far as to declare an unlimited right to privacy. *Griswold*’s holding rested on the Constitution’s express guarantee against unreasonable searches and seizures. *Griswold* struck down Connecticut’s law prohibiting the use of contraceptives because there was no conceivable enforcement mechanism that would not violate individuals’ freedom from intrusive government searches of the home; a connection to the Fourth Amendment was thus discernible. 381 U.S. at 485-86. *Roe*, by contrast, lacked any such discernible relationship to the Constitution.
 32. Appellees take for granted that the “other rights” the Ninth Amendment alludes to would necessarily be fundamental rights, with the concomitant requirement that strict scrutiny protect these residual rights. But the Ninth Amendment provides no guidance on what level of scrutiny should apply with these supplemental liberties. We think our current approach to Due Process, which requires all abridgments of liberty to at least meet the rational basis standard, while also classifying rights firmly rooted in our history as fundamental, dovetails with the Ninth Amendment’s design to protect rights not explicitly mentioned in the text of the Constitution.
 33. See O’Meara, *Abortion: The Court Decides a Non-Case*, 1974 Sup. Ct. Rev. 337, 340.
 34. “The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing

- stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.” *Roe*, 410 U.S. at 153.
35. One could dispute whether only women bear the burdens of childbearing. Child support laws in every state impose heavy economic costs on men for having a child, even though men have significantly less choice in childbearing than women.
 36. Very recently, a small number of men have surgically acquired the ability to become pregnant. The State’s anti-abortion law would apply as much to these men as to any pregnant woman.
 37. Even if abortion regulations had the purpose of abridging the rights of women, of which there is no credible evidence, we do not necessarily think this would call for intermediate scrutiny. Though we do not reach the issue today, we think applying elevated scrutiny to safeguard the rights of insular minorities was originally intended and should be reserved for those interests which, “*as compared with the interests to which they have been subordinated*, constitute minorities unusually incapable of protecting themselves.” Ely, 82 Yale L.J. at 934. Under this framework, the Court would examine the vulnerability of the group whose rights are subordinated relative to the vulnerability of the group whose rights are strengthened. Abortion regulations may subordinate the interests of women, but they do so relative to the unborn rather than relative to men or any other dominant group. Women may be a legislative minority relative to men, but they are certainly not a legislative minority compared with the unborn whose interests are served by anti-abortion legislation. *Id.* Both sides in the debate have their advocates, but whereas women vote and hold seats in legislatures, the unborn can do no such thing for themselves. Thus, abortion regulations do not invoke concerns about abuse of power by a dominant legislative group that typically underlie equal protection scrutiny.
 38. William J. Larsen, *Human Embryology* (New York: Churchill Livingstone, 1997), p. 1; Ronan O’Rahilly and Fabiola Muller, *Human Embryology and Teratology* (New York: Wiley-Liss, 1994), p. 20; Keith L. Moore and T.V.N. Persaud, *The Developing Human* (Philadelphia, W.B. Saunders Company, 1998), p. 2.
 39. *Casey*’s justification for making viability the dividing line is an empty tautology: “[T]he concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.” 505 U.S. at 870. The Court simply provides the definition of viability as the justification for making viability the point at which the state’s interest becomes compelling. This is no reason at all.
 40. “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” *Casey*, 505 U.S. at 851. By *Casey*’s lights, therefore, no state is allowed to define the word “person” to include the unborn.
 41. Many commentators have criticized *Roe*’s reasoning regarding the question of personhood. Horan and Balch have noted the inconsistency between *Roe*’s employment of elaborate methods of constitutional interpretation to discover a right to abortion and its resort to strict constructionism in order to read the unborn out of the meaning of the word “person.” John Hart Ely criticized *Roe*’s interpretive method for concluding the word “person” contemplated only post-natal beings.
 42. The only circumstance under which a regulation would fail rational basis review is where it prohibited abortion even where the mother’s life is endangered. It would be hard to see how a law rationally relates to protecting human life if it mandates the sacrifice of one life for another. We are satisfied that the law’s provisions permitting abortion in the case of ectopic pregnancy, and insulating doctors from culpability when engaged in providing medical care for the mother, will be broad enough to allow a woman and her doctors to make the decisions necessary to preserve her own life.

One “Right,” Many Wrongs:

The Strange Career of the Right to Privacy

Jason Morgan

The connection, if any, between the so-called “right to privacy” and the United States Constitution is notoriously tenuous. Even those who applaud the invocation of this right to privacy in *Griswold v. Connecticut* (1965) have lamented the almost magical conjuring of privacy out of, if not quite thin air, then something close: the “emanations” and “penumbras” surrounding the Constitution and the Bill of Rights. If activist judges wish to establish new and lasting rights that all who have even occasional recourse to reasoned thoughtfulness might conceivably accept, then even the staunchest political foes seem willing to agree that those rights ought to be grounded in solidier stuff than vapors and shadows.

And yet, a sizable subset in legal philosophy holds that this young right brought into the world by Louis Brandeis has grown to a formidable stature all its own, so that there is no longer any need to appeal to the pedigree of its ancestors. The right to privacy has largely disavowed those ancestors anyway, and now tries to make a go under its own steam, confident in its standing as an indispensable—indeed, fundamental—building block of American freedom. The child has become a man, and the man, like Julius Caesar’s adopted son, Octavian Augustus, has conquered the world on his own terms.

There is an existential problem with this adulatory view of the “right to privacy,” though: Not only is this “right” a dangerous interloper (and thus unworthy of its pretended patrimony), it is also internally incoherent. In this article, I attempt to show how the right to privacy is unrelated to the United States Constitution, and also how privacy as pleaded by numerous jurists from Louis Brandeis to William O. Douglas (in *Griswold*), Harry Blackmun (in *Roe*), and Anthony Kennedy (in *Lawrence v. Texas*) is so gratuitously applied that it cannot even be said to cohere into any discernible “right” to which serious minds might appeal. Finally, I shall try to show how the right to privacy, so construed, has not only *not* advanced freedom, but actually made a cruel mockery of the ideal.

The right to privacy cannot possibly be Constitutional, because the right and the document are ontologically unrelated to one another. The United

Jason Morgan, a PhD student in Japanese legal history at the University of Wisconsin, was born in southern Louisiana and grew up in eastern Tennessee. His conversion from pro-choice to pro-life was instantaneous when he encountered Genocide Awareness Project images on a busy city street ten years ago.

States Constitution is a moral document. It is premised upon the existence of an ordered society whose members are familiar with, and abide by, the Judeo-Christian tenets found in the Pentateuch, the later books of the Torah, and the New Testament. Many of the 13 original colonies were founded by deeply religious men whose desire to live according to their biblically formed consciences led them across the ocean to an often punishing life (and, frequently, an early death) in the New World. Although there were a handful of radicals and freethinkers among the men who met in Philadelphia to craft the document inaugurating the federal system, most of the Founding Fathers were steeped in the Christian Faith, and took seriously the teachings of the Bible. For example, John Quincy Adams, reflecting upon a letter written in 1779 by his father, John Adams, said:

The highest glory of the American Revolution was this: It connected in one indissoluble bond, the principles of civil government and the principles of Christianity.¹

And as Alexis de Tocqueville later observed during his travels in a young America, a democratic republic remains healthy only so long as its citizens remain moral. Without a higher authority (such as a state-sponsored church, or a Christian monarch, or a learned aristocracy) to teach them, the people in a democratic republic must take their moral education upon themselves; the men who framed the Constitution stated explicitly that this ongoing attention to moral rectitude amongst the general population was the *sine qua non* of the continued existence of our republic.

Just as important for our purposes in this article, the Constitution is also a social document. The education in the classics from which many of the Founding Fathers benefited, along with their lived experimentation with the grand Lockean Bargain that upended the rigidly hierarchical social model of England, ensured that most political thinkers in the colonies would understand politics in terms of a Lockean-Aristotelian anthropology: Man is a political animal, and men come together voluntarily to form governments for the protection of their inalienable, God-given natural rights. The state of nature is primordial chaos, the war of all against all—a Miltonian vision of hell whose first resident, it should be remembered, was the original individualist. In the new dispensation in the New World, men would be free to live according to their own properly formed consciences, but as part of a wider society that was not spiritually neutral, not unconcerned with the well-being of its several citizens, and not mired in a moral relativism which left each man free to invent his own universe of right and wrong.

The history of Constitutional jurisprudence until the unfortunate appointment of Oliver Wendell Holmes² to the Supreme Court in 1902 in

large part bears out this social and moral nature of our founding documents, even, or especially, when the morality of the Constitution was warped to fit a social expediency. The right to privacy, though, which Louis Brandeis invented and which other jurists of Holmes' anti-social bent put to great use, undermines both the social and moral premises of the Constitution. An examination of the Constitutional arguments advanced in *Griswold v. Connecticut* will help to outline the sophistry of the "right to privacy" argument.

In his appeal to the Supreme Court in the ongoing *Griswold v. Connecticut* case, attorney Fowler Harper filed a statement with the Court alleging that the 1879³ Connecticut statutes (Sections 53-32 and 54-196) forbidding the sale of contraception were in violation of the United States Constitution, Amendments One, Four, Nine, and Fourteen (J97).^{*} Later in this same brief, Harper also alleged that the unassuming but wildly multi-talented duo of Connecticut laws was also somehow in violation of the United States Constitution, Amendments Three and Five (J100). I hope to show, *seriatim*, that all six of these Constitutional lines of attack are untenable. I will deal with Amendments Fourteen, Five, and Nine first, those being the easiest to dismiss, and then turn to the more formidable arguments from Amendments Four, Three, and One.

Perhaps the most important of these six allegations to dismiss first is also among the most crucial to the appellants' case. The argument based on the Fourteenth Amendment, which, it has often been asserted, "incorporates" the Bill of Rights at the individual level, fails in the *Griswold* case at two levels. First, as was demonstrated clearly in the *Slaughterhouse Cases* (1873) (H270-274), the Fourteenth Amendment grew out of a particular historical circumstance, openly acknowledged by the Amendment's authors as having deeply informed their conception of the Amendment's scope. Therefore, the Fourteenth Amendment argument is moot from the beginning—"incorporation" is a counterfeit coin whose broad circulation nevertheless does not make up for its *prima facie* worthlessness.⁴ Second, even if we allow later Supreme Court repudiations of its *Slaughterhouse* logic to stand, the Fourteenth Amendment operates in precisely the opposite direction of the *Griswold* case; whereas Harper twisted the Fourteenth Amendment to his own radically antisocial ends, the Amendment's original language was, beyond question, designed to integrate an entire class of social pariahs into a wider societal milieu. Privacy and solitude were not the boons for which

^{*} In this essay (J) refers to *Griswold v. Connecticut: Birth Control and the Constitutional Right of Privacy* (Lawrence, KS: University Press of Kansas, 2005) by John W. Johnson, and (H) refers to *American Legal History: Cases and Materials* (4E), ed. Kermit L. Hall, Paul Finkelman, and James W. Ely, Jr. (New York/Oxford: Oxford University Press, 2011).

slaves and Union soldiers fought; rather, they fought for a more perfect realization of a just society founded, ultimately, on the divinely ordained rights that legitimate governments could only protect, and then only as part of a cooperative social compact. Far from splitting and wedging one man off from his neighbor, the Fourteenth Amendment was designed to bring enemies, and even masters and slaves, into union with one another as equals in the sight of God.

Harper's argument from the Fifth Amendment in his *Griswold v. Connecticut* appeal is tautological, and contributes, as far as I can see, nothing of substance to his case. Yes, if one wished to purchase prophylactics in Connecticut under the existing statutes prior to 1964, one would have had to incriminate oneself in the process by identifying one's desire to engage in an illicit trade. But one struggles to see how the Fifth Amendment can plausibly be applied here. If something is illegal—that is, if a state legislature has declared it to be impermissible within the bounds of a given state—then it stands to reason that expressing a desire to participate in that illegal something can also *ipso facto* be incriminating. Simply because some illegal activities may be carried out more readily with the assistance of a physician (J157) does not mean that those activities are any less illegal than if the layman had tried to engage in them on his own. A diploma from a medical school is not a license to flout the law. The “right to privacy” thought to inhere in the Fifth Amendment (J160-161) applies strictly to trials and investigations before the law, but even then the Brandeisian “right to be left alone” does not mean that the government must stop insisting that you quit an illegal activity if you refuse to testify regarding your participation in it. You are not somehow more free to commit crimes by virtue of the Fifth Amendment; you are simply at liberty not to admit to it if you have (although you are still fully liable for the consequences of your actions if found guilty).⁵

Finally, the Ninth Amendment argument is perhaps even more specious than the previous two. The Ninth and Tenth Amendments are certainly among the most powerful protections against federal tyranny that our Founding Fathers left us, but there is no “right to privacy” lurking between the lines of those two paragraphs. To show that the centers of these two Amendments are not hollow, the last two original additions to the Bill of Rights are worth quoting in full:

Bill of Rights, Article IX: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people (H694).

Bill of Rights, Article X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people (H694).

The argument from the Ninth Amendment in the *Griswold* case can be effective only if some mysterious, buried “right of privacy” had truly been discovered in the Constitution by Justice Douglas. To put the matter litotically, this discovery is not without its critics. And in any event, a cryptic right, no matter how skillfully excavated by latter-day Constitutional spelunkers, surely cannot trump the legislative and police power of the states, to which, in tandem with the people (whose will is manifested in the legislature), the Tenth Amendment relegates the balance of the unenumerated powers. In this way, half of Harper’s Constitutional groundwork crumbles into nothingness before the battle is even joined.

The other half of Harper’s argumentative schematic—i.e., reliance upon Amendments One, Three, and Four—is seemingly more formidable, but here history joins with logic to neutralize these three avenues of attack as well.

Taking the remaining Amendments in descending order, the Fourth Amendment protections of “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” (H693) would appear at first to offer strong support to the appellants’ case in *Griswold v. Connecticut*. Here, Thomas Emerson appealed to the 1886 Supreme Court decision in *Boyd v. United States*, in which the Court “[e]xcoriated law enforcement officials for entering and searching a man’s home without legal authorization: ‘It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property’” (J113). It is disingenuous to leave the matter there, though. What Johnson fails to mention here, and what Emerson obviously was at pains to conceal, was that the ruling in *Boyd* was limited just 20 years later, in *Hale v. Henkel* (1906), which held that evidence obtained under the cover of a warrant could be admitted at a subsequent trial. As the Court prudently recognized, the “castle doctrine” applies to defense of one’s domicile against hostile intruders—it does not create a sphere within the home into which the operation of the law cannot reach.⁶

Not only this, but Johnson also pointedly fails to mention, in the context above or anywhere else in his book, that the World Health Organization has listed oral contraceptives (estrogen and progestogen) as Group I carcinogens. There is therefore an unasked question as to whether the state could legitimately extend its police powers to include the confiscation of dangerous substances, especially when those substances are potentially being consumed by underage girls.⁷ This approach also completely leaves aside the abortifacient nature of such substances, which destroys, along with the child’s

life, all of the rights it possesses as an individual equal in the eyes of the law. It seems absurd on its face to suggest that intrinsically harmful substances, which potentially destroy innocent life, should be allowed to proliferate simply out of an abstract reverence for the Fourth Amendment. However we parse this line of reasoning, we find that the Fourth Amendment argument is hardly absolute, and therefore a poor choice upon which to situate one of the cornerstones of one's appeal.

The Third Amendment argument may be dispensed with along equally diverse lines of attack. For the sake of argument, let us suppose that there is some special quality to the Third Amendment that does not allow it to stand or fall along with its close cousin, the Fourth Amendment. It would seem to stand to reason, though, that if the Fourth Amendment is not absolute, neither should be the other Amendment dealing with intrusion into one's home. But we need not bring in the Fourth Amendment at all in order to show that the Third Amendment is clearly not applicable in *Griswold v. Connecticut*, because the plain language of the Third Amendment makes it difficult to contend that the Third Amendment was intended for anything other than the quartering of soldiers:

Bill of Rights, Article III: No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law (H693).

Perhaps there is some subtlety here that I have not detected. But, as far as I have been able to find out, no one in the Connecticut state legislature at any time suggested that soldiers should be quartered in anyone's home, whether during times of peace or in the midst of any war. The appellants in the *Griswold* case may have felt besieged at times, but surely this psychological duress cannot be elevated to the level of "war," regardless of how strained the civil relations may have become between the opposing teams of lawyers in the case.

As demonstrated above, with the exception of *Boyd v. United States* in 1886, the Supreme Court has often decided in favor of bracketing the Fourth Amendment when the prerogatives of the state, whose suspicions have been duly channeled through, and confirmed by, the independently functioning judiciary system, override the prerogatives of the individual who is believed to be breaking the law. Because the United States is a society, and because its Constitution is a moral and social document, the right to privacy, which has occupied the Bill of Rights like a squatter since Louis Brandeis' ill-considered *Harvard Law Review* article, is quickly put to flight when reason and common sense are allowed back in to smoke the squatter out.

Of all the six Amendments enlisted by the *Griswold* appellants in support of their case, the First Amendment appears at first glance to be the most

formidable. And yet, once the true nature of contraception is properly understood, it becomes clear why state legislatures would wish to limit their citizens' access to such dangerous material. As I have sketched above, oral contraceptives are potent carcinogens with inherent abortifacient properties, making them morally illicit as well as deleterious to the health of the women (and often, sadly, teenage girls) ingesting them. Apart from these chemically harmful aspects, though, the use of contraception is so inimical to the integrity of families—the basic building-block of society—that the state is not only within the parameters of legitimate police power in outlawing it, but is actually negligent if it does not. Going one step further, any state that actively encourages the use of contraception has abdicated its legitimacy; it is at this point that St. Augustine's observation that laws which contradict the natural law are not laws at all becomes operative, and the competence of the state to govern its citizens effectively must be closely and continuously evaluated.

Consider, for example, some statistical evidence concerning the use of contraceptives (and here I use the term broadly to include any method, whether chemical or physical, of separating the spiritual and procreative meta-aspects of sexual intercourse from the merely bodily interaction that it entails). Apart from the carcinogenic and abortifacient dangers of oral contraception, studies have also linked estrogen and progestogen treatments to increased risk of heart attack,⁸ stroke,⁹ and blood clots.¹⁰ But the social costs of contraception use of any kind perhaps far outweigh the already serious medical risks involved with many types of chemical contraception. In *Adam and Eve after the Pill*,¹¹ for example, Hoover Institute fellow Mary Eberstadt outlines the extraordinarily corrosive effects that contraception has had on the American social fabric since human trials of “the pill” were carried out by John Rock and Gregory Pincus in 1954.¹² As Pope Paul VI presciently foresaw in his encyclical *Humanae Vitae* (1968); as Bl. John Paul the Great outlined in his epochal *Theology of the Body* teachings,¹³ and as Eberstadt confirms, contraception radically alters the way in which men and women interact with one another,¹⁴ leading to rampant promiscuity¹⁵ and pornography consumption,¹⁶ widespread sexually transmitted disease infection,¹⁷ increased divorce¹⁸ and adultery¹⁹ rates, increased rates of child abuse (sexually, physically, verbally, and emotionally),²⁰ “fatherless neighborhoods” (especially in low-income areas) filled with single mothers—often on welfare and food stamps—unable to care for the children whose fathers had been “liberated” by contraception to treat women as vehicles for the slaking of desire,²¹ and, most important, an utter failure to see members of the opposite sex as possessing inherent dignity or any value beyond one's own sexual satisfaction.²² It is not hyperbole to say that no other invention or substance

has caused as much damage to the fabric of American or any other society as contraception.²³ The scene in Hogarth's dystopian "Gin Lane" print seems positively idyllic in comparison with the aftermath of 50 years of desecralized sex in the United States.

The Supreme Court has often held²⁴ that the free speech clause in the First Amendment is not absolute. For example, one cannot plot to assassinate political leaders, commit acts of terrorism, or otherwise engage in criminal behavior, even if these plots get no farther than mere planning and communicating. It is true that, after *New York Times Co. v. Sullivan* (1964), libel laws were considerably loosened, and the truth or falsehood of published statements concerning public figures was no longer the standard courts were allowed to employ when determining whether those who felt they had been libeled in the press had an actionable case.²⁵ And the Supreme Court recently overturned the Stolen Valor Act,²⁶ finding that egregiously false statements made by those who claim military service or decoration with no basis in fact still qualifies as protected speech. But other legislation, banning the use of billboards for advertising tobacco products, for example, or requiring that warning labels be placed in prominent positions on cigarette and alcohol packaging, has been upheld by courts because of the legitimate interest that the state can, and should, take in preventing its citizens from engaging in potentially hazardous behavior.

The potential for harm is even greater, however, with contraception. Because the use of contraception harms, not only individuals, but the underlying fabric of society, and because the United States Constitution is a moral and social document meant to safeguard individual liberty as a function of providing for "the general welfare," the state should exercise its (legitimate) police power in preventing doctors from prescribing contraception to, or even discussing contraception with, their patients. As outlined above, a license to practice medicine is not a license to engage in recklessly harmful behavior, nor is it a license to flout the law or the well-being of society as a whole. It is entirely reasonable that any legitimate state should invoke its police power in restricting speech by proscribing medical consultations regarding contraception of any kind.

Even if we dismiss all of these Constitutional arguments out of hand, though, and somehow, for the sake of argument, allow that, despite all evidence to the contrary, there is some kind of "right to privacy" either in the Constitution or in subsequent Constitutional jurisprudence, we are still forced to contend with the internal inconsistency of this right itself. In 1890, Louis Brandeis and his former law partner Samuel D. Warren published "The Right to Privacy" in the *Harvard Law Review*. But nowhere, I argue, do Warren or

Brandeis imply that this right to privacy should take on the atomizing, anti-social character that later jurists, and especially Douglas and Blackmun, saw as the fundamental nature of this specious “right.”

Consider, for example, Brandeis’ and Warren’s own words. It should be noted from the outset that the two scholars were addressing a very particular situation, namely, the prurience of gossip columnists hounding Warren after his marriage to Delaware Senator Thomas Bayard’s daughter, Mabel. So, Brandeis’ and Warren’s insistence on “protect[ing] the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds” should never have been extrapolated beyond the bare facts of their article’s inspiration (H418b-419a). But even those more intellectually adventurous than either Brandeis or Warren should have been stayed by other passages in the article, in which the two men firmly ground the justification for their call for privacy in the greater well-being of society. In a technical sense, the law-of-torts component to the 1890 article makes a clear case for linking the invasion of the right to privacy (and the tort claims that may subsequently arise due to “emotional distress”) to actions “viewed as wrong[s] to society,” which follow “the same principle adopted in a large category of statutory offences” (H420b). Warren and Brandeis then go on to make the justification for their jurisprudential innovation even more explicitly social: “[T]he protection of society must come mainly through a recognition of the rights of the individual” (H420b). The words themselves are undeniable, but even cursory reflection will reveal that, perhaps without knowing it, Brandeis and Warren have neatly summarized the Lockean Bargain with which we began this essay, and especially the Jeffersonian dispensation of this bargain that has colored so much of Constitutional jurisprudence since the promulgation of the founding documents of the United States.

But even if we disavow this seminal article, which both champions and critics of the right to privacy alike cite as the epochal initiation of this ongoing legal debate, we are still faced with the corpus of Brandeis’ remaining career at the bar, which has in many ways become virtually synonymous with the pioneering use of social evidence to show the harmful effects of bad legislation upon society as a whole. Indeed, the first such instance of a lawyer using social statistics in support of his case is *named* for Brandeis. The “Brandeis Brief,” which Brandeis and his legal team submitted in conjunction with their arguments in the landmark 1908 Supreme Court case *Muller v. Oregon*, is the *locus classicus* of this entirely novel approach to legal reasoning (H468-470). Much of this brief, written by the father of the “right to privacy” himself, is taken up with showing that the failure to protect workers in potentially

harmful industrial trades would have the same “Bad Effect upon Morals” (H470b) as that occurring in England under similar circumstances. To return to Brandeis’ own words in “The Right to Privacy,” there is a cruel irony in his avowal that “the right to life has come to mean the right to enjoy life,” when the “right to privacy” Brandeis invented in this article was later used, first to undermine public morals in *Griswold v. Connecticut*, and later to permit the destruction of 55 million lives and counting, in the wake of *Roe v. Wade*. One wonders whether even the first crusader for privacy rights in the United States would approve of, or even recognize, the twisted application of his invention to later, much more sinister causes than its author could possibly have imagined.

In this short essay, I have tried to show that the so-called “right to privacy” is a figment of its creators’ vivid juridical imaginations, with no basis in the United States Constitution. I have also sought to demonstrate that the outcome of the application of the right to privacy in *Griswold v. Connecticut*, not to mention the outcomes of *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), have, far from advancing freedom (the putative justification for the invention and continued existence of the right to privacy), actually led to unprecedented levels of, at best, license, and at worst epidemics of sexually transmitted diseases, broken families, and abortion. Furthermore, I have argued that the right to privacy, whatever it may be, has no internal consistency, and has been inverted from its original iteration.

Opponents of the views expressed in this article will surely find in it much fodder for disagreement. Nevertheless, my personal experience in researching this topic convinces me that the more one investigates the “right to privacy,” the more one finds that it is wholly divorced from nearly all pre-Holmes Constitutional jurisprudence in the United States. Furthermore, I am confident that candid minds examining the evidence for the harmfulness of contraception will, at least, take pause at the gravity of the statistical litany against a far from universally beneficial regimen of drugs and practices. Finally, I end with a challenge to the “privacy righters”: If the right to privacy is truly in the Constitution, may we rely on something more substantial than “emanations” and “penumbras” for its defense? And if such a right is merely a juridical invention, how do its pedigree and its aftermath square with anything more than the most superficial definitions of “liberty”?

NOTES

1. John Quincy Adams, letter dated April 27, 1837.
2. “I think it desirable at once to point out and dispel a confusion between morality and law” (H364a-b).

3. Johnson, following his protagonists' prejudices closely, refers to the Connecticut statutes as "archaic" (J234 and elsewhere). It should be noted, however, that every one of the six Amendments that the Griswold legal team invoked in support of their attack upon public morality predated the "archaic" law they were trying to overthrow.
4. I am aware that it is more than a little unpopular to argue in favor of the *Slaughterhouse* ruling.
5. See *Fisher v. United States*, 425 U.S. 391 (1976).
6. Even Thomas Cooley's "Treatise on Constitutional Limitations" (1868) allowed that there were "cases where it becomes necessary for the public authorities to interfere with the control by individuals of their property, and even to destroy it, [. . .] where [. . .] some controlling public necessity demands the interference" (H362b-363a). Cooley called for broad latitude for the "preservation of public morals," and even for "the compulsory observance of the first day of the week" (H363b).
7. Scruples over the Fourth Amendment do not prevent, and rightfully so, law enforcement officials from raiding drug houses, or bomb-making warehouses, or headquarters for criminal violence or prostitution rings, or other private buildings where vicious and/or potentially harmful activities are carried out, or where there is a strong suspicion of such (validated by a warrant obtained from a sitting judge).
8. <http://www.ncbi.nlm.nih.gov/pubmed/3287933>
9. <http://www.ncbi.nlm.nih.gov/pubmed/10997772>
10. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1436047/>
11. Mary Eberstadt, *Adam and Eve after the Pill: Paradoxes of the Sexual Revolution* (San Francisco: Ignatius Press, 2012).
12. Take contraception's extraordinary ability to increase abortions, for example. The evidence linking contraception with abortion is plentiful. See, e.g., a study by José Luis Dueñas et al. entitled "Trends in the Use of Contraceptive Methods and Voluntary Interruption of Pregnancy in the Spanish Population during 1997-2007," *Contraception* 83, pp. 82-87; and Boris P. Denisov et al., "Divergent Trends in Abortion and Birth Control Practices in Belarus, Russia and Ukraine," *PLoS ONE* 7 (11), 2012. The Supreme Court's own logic, in *Casey v. Planned Parenthood*, also acknowledges the iron link between contraception and abortion: ". . . for two decades of economic and social developments, [people] have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."
13. See, e.g., Karol Józef Wojtyła, *Love and Responsibility (Miłość i odpowiedzialność)* (San Francisco: Ignatius Press, 1993).
14. An exhaustive breakdown of the altered social landscape in the United States since the 1960s can be found in a 2010 Pew Research Social and Demographic Trends report, entitled "The Decline of Marriage and Rise of New Families," accessible at <http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/2/#ii-overview>
15. See Meg Jay, "The Downside of Cohabiting before Marriage," *New York Times Sunday Review*, April 14, 2012.
16. For a sobering insight into the epidemic of pornography consumption in the United States, especially amongst the young, see the statistics collated at <http://www.loveisfaithful.com/protect-your-family/5-shocking-statistics/9-shocking-statistics>.
17. The author of one recent U.S. Centers for Disease Control and Prevention survey on STDs referred to an "ongoing, severe epidemic of STIs" in the United States. The statistical breakdown is available at http://vitals.nbcnews.com/_news/2013/02/13/16951432-ongoing-severe-epidemic-of-stds-in-us-report-finds?lite
18. Although now entering a period of nominal decline, the divorce rate doubled over the past 20 years. See <http://www.cdc.gov/nchs/fastats/divorce.htm>
19. <http://www.nytimes.com/2008/10/28/health/28well.html>
20. See Priscilla K. Coleman et al., "Abortion and Increased Risk of Child Abuse: Child Maltreatment and Perinatal Loss," *Acta Paediatrica*, 2005: 94.
21. See, for example, Charles Murray's groundbreaking contrast between a fictional Fishtown and Belmont in *Coming Apart: The State of White America, 1960-2010* (New York: Random House, 2012). I am aware that it is even more unpopular to agree with Charles Murray than with the *Slaughterhouse Cases*.
22. Donna Freitas, *The End of Sex: How Hookup Culture Is Leaving a Generation Unhappy, Sexually Unfulfilled, and Confused About Intimacy* (New York: Basic Books, 2013); Kathleen A.

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Bogle, *Hooking Up: Sex, Dating, and Relationships on Campus* (New York: New York University Press, 2008); Laura Sessions Stepp, *Unhooked: How Young Women Pursue Sex, Delay Love and Lose at Both* (Riverhead Books, 2008); and another Donna Freitas title, *Sex and the Soul: Juggling Sexuality, Spirituality, Romance, and Religion on America's College Campuses* (Oxford: Oxford University Press, 2008).

23. For a summary of the culture of contraception and its societal effects, see <http://www.dioceseoflincoln.org/SouthernNeRegister/bcc/bcc050313.aspx>.
24. For example, *New York v. Ferber* (1982), which upheld states' rights to forbid the production, ownership, and sale of child pornography; *Chaplinsky v. New Hampshire* (1942), which exempted "fighting words" from First Amendment protection; *Virginia v. Black* (2003), which struck down a statutory proscription of cross burning but maintained that cross burning carried out with an intent to intimidate could be proscribed; and the entire corpus of patent, trademark, and copyright law in the United States.
25. But see *Gertz v. Robert Welch, Inc.* (1974).
26. *United States v. Alvarez* (2012).



"Someday, this will all be yours."

Personhood and After-Birth Abortion

Joshua J. Craddock

What should happen to a child born alive after a failed abortion? In March, Alisa LaPolt Snow, a representative of Florida Alliance for Planned Parenthood Affiliates, told the state House of Representatives that the decision whether or not to kill such an infant should be one “between the patient and the health care provider.”¹

That is the kind of decision that Philadelphia abortionist Kermit Gosnell faced every day. Gosnell regularly delivered and then killed infants in his clinic by “snipping” their necks with scissors.² When an investigation into Gosnell’s clinic revealed his gruesome practice, the news horrified the nation. Yet within days of Gosnell’s conviction on more than two hundred criminal counts, including three counts of first-degree murder, new evidence emerged that Houston’s abortionist Douglas Karpen similarly twisted the heads off infants just after birth.³

Academics have long asked the boorish obvious question: “Why do such infants deserve to live?” Most recently, two Australian ethicists ignited controversy last year by suggesting that infanticide or “after-birth abortion” should be tolerated in all cases where abortion is. Given recent events, it is time to re-examine the argument for after-birth abortion advanced by Giubilini and Minerva.⁴ When this argument is rigorously examined, the careful reader will discover that it rests on a fundamental misunderstanding of human personhood and fails to justify its own ethical reasoning.

The Australian ethicists contend that although fetuses and newborns “certainly are human beings,” they are not persons “subject of a moral right to life.”⁵ According to the authors, a person is “an individual who is capable of attributing to her own existence some (at least) basic value such that being deprived of this existence represents a loss to her.”⁶ Newborns do not have the mental development necessary to value their existence, to create expectations about the future, or to possess self-awareness. Therefore, “killing a newborn could be ethically permissible in all the circumstances where abortion would be.”⁷ Since abortion enjoys wide legal protection, “after-birth abortion” should too. Mothers and families experience physical, psychological, and financial burdens when they care for unwanted children or give children up for adoption. The decision to end newborn life should be left up to them.

There is little new or innovative about the Australians’ argument.

Joshua J. Craddock, 22, is a graduate of The King’s College in New York City. He currently works as an international representative for Personhood Education at the United Nations.

Princeton's Professor of Bioethics Peter Singer wrote in 1979 that "human babies are not born self-aware, or capable of grasping that they exist over time. They are not persons."⁸ He provocatively concluded that "the life of a newborn is of less value than the life of a pig, a dog, or a chimpanzee." The authors, in the tradition of infanticide advocates like Peter Singer, Steven Pinker, Michael Tooley, and John Harris, justify their arguments by pointing to the newborn's lack of self-awareness.

This reasoning undoubtedly finds its roots in the Kantian theory of rationality. For Kant, humanity includes only those who possess rationality. If the Categorical Imperative—the requirement upon moral actors to treat human beings as an end to themselves and never as a means—does not apply to non-rational creatures (even if they are human beings), rationally self-aware actors have no first-order duties to those other beings. Perhaps some second-order duty to care for newborns might exist if that care improves the happiness of others who have emotional relationships to the infants, but these second-order duties are no stronger than those owed to the family pet. Because only "the interests of the actual people involved matter,"⁹ "the best interest of the one who dies is not necessarily the primary criterion for the choice."¹⁰ In either case the baby is a means: staying alive for others' happiness or dying to avoid costs on others.

But why should self-awareness be the criterion for ascribing moral value to human life? Not only is this asserted criterion completely arbitrary and unsubstantiated, but it leads to bizarre conclusions. Why should individuals with more numerous and noble aims or high intellect not be considered *more* persons than those with fewer long-term aims or less brain development? A functionalist criterion for personhood implies that individuals who perform the chosen function more excellently should have higher human value. Individuals suffering from severe Alzheimer's disease or under general anesthesia, who are not "in the condition of experiencing that harm"¹¹ or cannot "create future expectations,"¹² could no longer be considered moral persons. We know, however, that the human under general anesthesia retains his identity despite his temporary lack of self-awareness, so his personhood must cohere in some other underlying nature.¹³ The person is not a consciousness that *inhabits* the physical body; rather, the person *is* a living bodily entity.¹⁴

Living human beings are valuable because of what they are, not because of some arbitrary attribute that comes in varying degrees and may be gained or lost during their lifetimes. Other positions can be reduced to absurdity. Humans must have some essential nature that is intrinsically valuable. Unless this fact is accepted, it is impossible to say why objective human rights apply

to anyone and impossible to claim that “all men are created equal.”

The Australian authors reject this answer, however, claiming that “merely being human is not in itself a reason for ascribing someone a right to life.”¹⁵ To support this assertion, they point to acceptance of embryo destruction in embryonic stem cell research (ESCR), abortion, and capital punishment. This shallow reasoning ignores the possibility that these practices may also be unethical, though permitted in some jurisdictions by law—a classic fallacy confusing what *is* with what *ought* to be. Since ethics operates in the realm of how one ought to act, examples of embryo destruction, abortion, and capital punishment provide no reason to reject the proposition that the essence of being human implies a right to life. Additionally, they do not address more complex formulations of the proposition, for example, that the essence of being human implies a right to life but that this right can be negated by heinous criminal behavior (as in the case of capital punishment).

Giubilini and Minerva can only identify what is, rather than what ought to be, because they cannot justify their own ethical reasoning. Editor Julian Savulescu, in defending the journal’s choice to publish Giubilini and Minerva’s work, writes: “the goal of the Journal of Medical Ethics is not to present the Truth or promote some one moral view.”¹⁶ Detached from standards of absolute truth or morality, the Australian authors cannot justify why their ethical framework is preferable to any others (and *do not even bother trying!*) or even why “persons” should carry moral weight in the first place, undercutting their Kantian deontological claims. Their reasoning cannot draw prescriptive conclusions about ethical human behavior.

The authors can only rely on consequentialist utilitarianism, which measures the quality of an act by the net pleasure it creates. They say the family must weigh “the costs (social, psychological, economic)”¹⁷ against the potential benefits when deciding whether to kill the newborn. If morals are determined by aggregate costs and benefits, sacrificing Christians in the Circus Maximus would be morally justifiable. After all, the Christian’s pain is outweighed by the thousands of cheering fans experiencing pleasure from his death, and persecuting Christians enjoyed broad social acceptability (as ESCR, abortion, and capital punishment do today). Some level of deontological ethics must be considered in addition to democratic sentiments and consequential considerations; otherwise any heinous act both popular and pleasurable becomes ethical.

Even on utilitarian grounds, their case is untenable. Costs to the newborn are non-existent, they say, because she is a non-person. An individual only experiences harm if she is “in the condition to value the different situation she would have found herself in if she had not been harmed.”¹⁸ They say

“a person might be ‘harmed’ if something were done to her at the stage of fetus” that adversely affects her quality of life, such as “her mother took drugs during pregnancy,” even if she was not aware of it.¹⁹ Once she has the capacity to be aware of the situation, she has been harmed.

This is counter-intuitive to the point of unreasonableness. If a pregnant mother takes Thalidomide (a morning-sickness medicine known to cause birth defects), Giubilini and Minerva say harm occurs when the child is mentally developed enough to realize she is missing limbs. Was the drug neutral in terms of harm at the time it caused her arms and legs to be malformed? Surely some real harm to her body was incurred at the time of injury, not simply at the time she had the capacity to discover she had no legs.²⁰ Costs for the newborn must then be calculated in the utilitarian framework, creating a much higher standard for after-birth abortion than the authors suggest.

In one way, the ethicists’ argument is logically sound: They correctly identify the moral equivalence between abortion and infanticide. There exists no intrinsic characteristic bestowing human value upon newborns and not fetuses. While consistent, the view that both may be killed holds little intuitive appeal. Killing newborns offends the average person’s moral sensibilities. Intuitively, the public is repulsed by the actions of Kermit Gosnell and Douglas Karpn when their deeds are brought to light. The thought is horrifying to most people, as evidenced by the overwhelming outrage in response to Giubilini and Minerva’s paper. Since the conclusion is so outlandish, perhaps the commonly held premises need reexamination. Yet the ivory-tower speculation of today often becomes the public-policy talking points of tomorrow. Such theories of personhood should be refuted and rejected from the start.

Giubilini and Minerva accidentally make a pro-life argument by pointing out the absurdity of the pro-choice position when taken to its logical conclusion. If fetuses truly are morally equivalent to newborns, abortion is just as reprehensible as infanticide. Giubilini and Minerva either prove that infanticide should be legal or that society’s definition of personhood must be reconsidered and abortion, like infanticide, should be illegal. Given the moral morass of the former, readers should choose the later.

NOTES

1. John McCormack, “Planned Parenthood Official Argues for Right to Post-Birth Abortion,” *The Weekly Standard*, 29 Mar. 2013.
2. Jon Hurdle and Trip Gabriel, “Philadelphia Abortion Doctor Guilty of Murder in Late-Term Procedures,” *New York Times*, 14 May 2013: A12.
3. Anna Higgins, “Preventing the Suffering That Abortion Inflicts,” editorial, *The Washington Times*, 30 May 2013.
4. Alberto Giubilini and Francesca Minerva, “After-birth abortion: why should the baby live?”

Journal of Medical Ethics, 23 Feb. 2012. Web, accessed 25 Nov. 2012, <http://jme.bmj.com/content/early/2012/03/01/medethics-2011-100411.full>

5. *Ibid.* 4, p. 2.
6. *Ibid.* 4, p. 2.
7. *Ibid.* 4, p. 2.
8. Peter Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1979), 122-123.
9. *Ibid.* 4, p. 3.
10. *Ibid.* 4, p. 2.
11. *Ibid.* 4, p. 3.
12. *Ibid.* 4, p. 2.
13. Scott Klusendorf, "Peter Singer's Bold Defense of Infanticide," *Christian Research Journal* 23, 3 (2009).
14. Robert P. George and Patrick Lee, "The Wrong of Abortion," ed. Andrew I. Cohen and Christopher Wellman, *Contemporary Debates in Applied Ethics* (New York: Blackwell Publishers, 2005).
15. *Ibid.* 4, p. 2.
16. Julian Savulescu, "'Liberals Are Disgusting': In Defence of the Publication of 'After-Birth Abortion,'" *Journal of Medical Ethics Blog*, 28 Feb. 2012. Web, accessed 25 Nov. 2012, <http://blogs.bmj.com/medical-ethics/2012/02/28/liberals-are-disgusting-in-defence-of-the-publication-of-after-birth-abortion/>
17. *Ibid.* 4, p. 3.
18. *Ibid.* 4, p. 2.
19. *Ibid.* 4, p. 2.
20. Josh Brahm, "Refuting Those 'After-Birth Abortion' Philosophers," *Live Action News*, 31 Mar. 2012. Web, accessed 05 Dec. 2012.



"No shirt, no shoes, no service."

Talking to Non-Christian Prolifers

Leslie Fain

After Alexandra G. was raped at age 13, her mother opted not to take her to a doctor or a counselor, but to an abortion clinic. “She was a child of the ’60s, vehemently pro-choice,” said Alexandra of her mother. “She scheduled an abortion. I refused it.”

The 13-year-old’s arguments and pleas were ignored. Neither her mother nor the doctor at the clinic could understand why the teen did not want an abortion. In response to her protests that an abortion would take the life of her baby, the doctor calmly drew three circles on a piece of paper, and tried to reassure her that it was not a baby inside her, but merely cells he would scrape out.

“The counseling the clinic offered wasn’t counseling,” said Alexandra, who now lives in England. “They showed me a see-through vagina and told me about contraception, led me into a room, and told me to put on a paper gown. They put me to sleep, I woke up in agony, and they gave me some cookies and juice.”

At age 17, Alexandra became pregnant again, this time by her boyfriend. Although she was on birth control, looking back, she says that she was using it ineffectively. Her mother told her to have an abortion or get out of the house. With nowhere else to go, Alexandra submitted to another abortion, which left her with secondary infertility. Later medical treatment would disclose that one of her ovaries was fused to her uterus. Her tubes were so scarred that dye would not go through them. Meanwhile, her relationship with her mother, which was already strained, continued to go downhill.

Years later she confronted her mother. “I said to her, ‘You were pro-choice, but where was my choice? If there had been someone out there protesting at the time I had my abortion, I probably would have run into her arms. I really did want to keep my babies. I really wanted them.’”

People are listening to Alexandra now. Today, like many other post-abortive women, Alexandra volunteers as a sidewalk counselor with 40 Days for Life, a Christian organization. The difference between Alexandra and most other female pro-life activists, however, is that she is not a Catholic or an evangelical, but a self-proclaimed witch.

It is difficult to find polls or statistics that tease out the pro-life views of

Leslie Fain is a freelance writer who lives in Louisiana with her husband and three sons. She can be reached at lwfain92@gmail.com.

non-Christian religious people. Alexandra, who has created a Facebook page called Pro-life Pagans, reported that there are a lot of pro-life pagans, adding that “a lot of pagans are not willing to come out of the broom closet.”

Most of the discomfort Alexandra has experienced from Christian proliferators has occurred online. Many Christians tie pagans like Alexandra to religions in the Bible that participated in child sacrifice. This disturbs her, because she and others like her define themselves as neo-pagans, who tend to revere fertility and childbirth.

In addition to having a Wiccan administrator for the Pro-Life Pagans page, Alexandra also has an atheist, a Mormon, and a Catholic administrator. It's become an ecumenical group.

Thus far, Alexandra has not really had any negative interactions with participants in 40 Days for Life. When 40 Days for Life participants engage in prayer, Alexandra respectfully doesn't join in. She hands out flyers and at one point was bringing her own Pro-life Pagans sign, but eventually had to stop using it because the pro-choicers became too aggressive, encircling her and the other pro-life activists, blowing horns in their ears and bubbles in their faces.

The fact that she is not a Christian pro-lifer can sometimes be used to advantage. Once, when 40 Days for Life was protesting in front of a clinic that faces University of Central London student housing, some students began complaining that the protest was disturbing them. The students then got into a debate with a priest who was there, saying that the pro-life position was merely religious. Alexandra shocked them by asking what their response would be to a pro-life witch. “I'm a practicing witch,” she told them. According to Alexandra, “They had nothing to say.” Then she started talking to them about abortion using secular arguments, and they listened.

After years of infertility, Alexandra's story took a positive turn when she and her husband conceived their son Sebastian. She refers to her pregnancy as a fluke, but it may well have been a miracle. Today, when Alexandra protests in front of clinics, she brings the medical records that document her infertility, along with her son's baby book. In addition, Alexandra's mother eventually changed her abortion stance to pro-life without exceptions after Alexandra explained to her the reality of abortion.

Sebastian has autism and keeps her very busy, but if she had the time she would like to volunteer as a counselor at a crisis pregnancy center (CPC). She cannot volunteer, however, because the CPC in her local area will not allow non-Christians as peer counselors. For her part, Alexandra said she does not understand why she could not volunteer at a CPC and counsel women not to abort, and perhaps a Catholic or Evangelical could come in afterward to pray with the women.

“I have a story to tell,” she said.

For this article I contacted Heartbeat International and Care Net, the two largest pregnancy care affiliate organizations, as well as Birthright International. Even after talking to representatives from these organizations, however, it was difficult to gauge how many CPCs accept non-Christian volunteers.

Debora Myles, director of communications and marketing for Heartbeat International, explained that since they are a Christian organization, their materials are based on Biblical principles, and each of their approximately 1,800 pregnancy help affiliates worldwide usually adopts a statement of faith. One example of a statement of faith, Myles pointed out, is the Nicene Creed. Although they are not required to agree with a particular statement of faith, each affiliate does agree to abide by the Commitment of Care and Competence. Heartbeat International does not restrict affiliates from using non-Christian staff, board members, or volunteers. At any rate, Heartbeat International has no statistics on which, if any, of their affiliates use non-Christian volunteers, staff, or board members.

Care Net has over 1,180 affiliate CPCs in the United States and Canada. Cynthia Hopkins, vice president of Center Services and Client Care, said that all board members, staff, and volunteers of the center are required to agree with Care Net’s Statement of Faith and uphold all of the principles and requirements set forth in Care Net’s Core Values. “Because Care Net is a Christian ministry, non-Christians are not eligible to serve as volunteers, board members, or employees at Care Net affiliated pregnancy centers,” Hopkins said.

Birthright, which is based in Canada and has 300 CPCs across the world, has no religious requirements for staff, board members, or volunteers, according to Mary Berney, co-president. “The main requirement that we have for a Birthright volunteer is that they be 100% pro-life,” said Berney. “We are a volunteer organization and we look for men or women who are dedicated to Life and want to help girls and women bring their babies to term. We do this by helping the mother.”

The Nurturing Network (TNN), which receives referrals from CPCs, is an organization that helps women in crisis pregnancies across the U.S. and in 30 countries. TNN helps women bring their babies to term by meeting their immediate needs, whether through finding them a family to live with across the country, helping them get out of an abusive relationship, or finding them a new job, medical care, or counseling. Mary Cunningham Agee, TNN’s founder and president, said “[V]olunteers from every background have donated their time, training and expertise as TNN Resource Members

Our goal is to be as welcoming and inclusive as possible with respect to both clients and members. The Nurturing Network does not use faith as a ‘litmus test’ for service. Our detailed online member applications are designed to gain a specific understanding of the support a volunteer would like to offer from many perspectives—and then make an informed introduction to an appropriate client when an opportunity to serve a woman directly presents itself.”

Are Christians Shutting Out Non-Christian Pro-lifers?

Although it is difficult to pinpoint how many non-Christian religious pro-lifers there are, identifying non-religious pro-lifers is somewhat easier. According to information on Secular Pro-Life’s (SPL) website, there are at least 6 million non-religious pro-lifers in the United States, and that is probably a conservative estimate. SPL was founded by attorney Kelsey Hazzard, a non-Christian who started the group when she was a college student to bring together people of all faiths or no faith in defense of unborn human life. Members strive to use only philosophical and scientific arguments to argue against abortion.

Secular Pro-Life, Pro-Life Pagans, and Pro-Life Humanists, a newer group for secular pro-lifers, are not the first groups to accommodate or recognize non-Christian pro-lifers. In 1976, Doris Gordon, a Jewish atheist, founded Libertarians for Life, which is open to non-religious and religious Libertarians. There is also the Atheist and Agnostic Pro-Life League, which for the most part has an online presence. The Jewish Pro-Life Foundation seeks to save Jewish lives by promoting alternatives to abortion in the Jewish community.

On another front, non-Christian pro-lifers may have more opportunity to get involved than ever before. National, secular pro-life organizations such as the Susan B. Anthony List, Americans United for Life, and Students for Life of America have no qualms about hiring non-Christian staff or using non-Christian volunteers when they are filling positions. This is not an exhaustive list; it just represents a sampling of pro-life organizations contacted.

However, since the pro-life movement is overwhelmingly made up of Christians, some non-Christian pro-lifers can experience discomfort. One of those non-religious pro-lifers is Sarah Terzo, 38, a writer who lives in New Jersey. Terzo is a lesbian and an atheist who agreed with legal abortion until she was about 14. That was when she saw a postcard put out by Human Life International that featured a life-sized 8-week-old unborn baby on one side of the card and a picture of an aborted baby of the same age on the other.

“I immediately knew that this was a child, this was a baby, and at that

moment, I dedicated my life to fighting abortion,” said Terzo. “From the time I saw that picture, I knew that I had to do whatever I could to help babies like that. My pro-life journey began then.”

Because she has rheumatoid arthritis and fibromyalgia, Terzo is limited in the pro-life activities she can participate in. Despite finding it difficult to walk and stand for long periods, she is able to do a lot from home, including networking with other proliferers, participating in online discussions, distributing pro-life material, and working on her pro-life webpage, www.clinicquotes.com. She also writes for Live Action, LifeNews, and Secular Pro-Life, and runs a pro-life Facebook group and two Facebook pages.

For Terzo, being part of the pro-life movement has sometimes been isolating.

It has been hard. I often run into a lot of Christian rhetoric, and while I respect a Christian’s right to talk about [his or her] religion and to evangelize when [he or she] feels it’s appropriate, it does make me feel very alienated sometimes. For example, when I listened to one of the webcasts that was done a while back, I felt bad that those running it spoke as if all the listeners were Christian. When the webcast was going on and on about how we all oppose abortion because we are Christians, and as Christ instructs us, we must spread the word in our churches, I wished that he would have taken a moment to give a nod to those listening who might not have been Christians, instead of automatically assuming that only Christians are pro-life. A simple “We are happy to have pro-lifers of all different backgrounds listening, but now I’d like to talk to my fellow Christians,” or something like that, would help a lot of people like me feel a little more welcome.

Terzo said she often feels like a second-class proliferer.

I have had many proliferers tell me that I can’t be pro-life because I am not a Christian, tell me that I can’t have moral values if I’m not a Christian, tell me that I’m going to hell—which is always unpleasant—unless I accept Jesus. I have to admit that I am not always as tolerant of these things as I should be, I tend to feel frustrated and have, unfortunately, sometimes gotten into arguments, but I am making an effort to ignore it. I find myself wishing that people would just leave it alone and focus on the unborn. But I see that I, too, have a responsibility in this to keep quiet and just ignore it rather than complaining and making it worse.

As alienating as being an atheist can be, Terzo said that being gay and in the movement is even more difficult. “Most people don’t really know that I am a lesbian proliferer. I seldom talk about it. My byline on Live Action says that I’m a member of the Pro-Life Alliance of Gays and Lesbians (PLAGAL)—and Live Action has always been wonderful and has been willing to work with me from day one.”

Terzo remembers back in college, when she was following March for Life events, that PLAGAL wanted to walk in the March for Life under the PLAGAL banner. When members of PLAGAL showed up with their banner,

the late Nellie Gray, founder of the March for Life, told them that they would be arrested if they showed up again. “They tried to reason with her, but she said that if they showed up with their banner the police would be on hand to arrest them,” said Terzo. “I believe PLAGAL caved in and did not march. All they were asking for was a chance to march with a banner like all the other groups.”

There are not as many non-Christian proliferers in the movement as Terzo would like to see. “There are a number of non-Christians that I’ve met online. Now that we have Facebook, it’s easier for us to organize and meet one another,” she said. “I think it’s a wonderful thing that groups like Secular Pro-Life and the very active Facebook page Pro-Life Pagans exist. Secular Pro-Life is filling a huge void—for a very long time, there was no group for atheists and agnostics in the pro-life movement.” Pro-life Humanists is another group that was formed recently to represent non-religious proliferers.

Terzo desired to counsel abortion-minded women at her local crisis pregnancy center, so she picked up an application. It required her to get a recommendation from her home church and a statement from her pastor. When she discussed these requirements with the staff, they informed her that non-Christians were not allowed to volunteer there. “If I had been offered the chance to do clerical work, I would probably have done it,” said Terzo. “I’m sure it would have bothered me a bit, and made me feel a little excluded, but I would have been grateful to help in any way I could.”

Muslim Prolifer Says Focus Should Be on Life, Not Religious Differences

Angel Armstead, 34, is a 2008 convert to pro-life and a 2010 convert to Islam. Armstead became pro-life purely through philosophical and scientific arguments.

I actually spent some time studying the issue on the Internet. I know there is a lot of bad info on the net so I looked at both sides. I was also at that time in college and we got to look at fetal skulls and that gave me a better idea of fetal development. I didn’t really talk much about it until I saw that there were atheist proliferers. For a long time I thought it was just a religious issue.

Armstead, a writer, is not currently participating in pro-life activities, but donates to pro-life organizations frequently. In the future, she sees herself adopting a child and assisting young women with unplanned pregnancies. Armstead hasn’t met other Muslim proliferers, but she wonders if they would feel welcome in the movement. She was once part of a pro-life group on Facebook, but got tired of the anti-Islam posts and eventually left. “I know Muslims and Christians are not going to agree on certain religious issues but we should focus on what we do agree with,” said Armstead. “If the issue is

truly about human life and not religion then Christians should be able to work with anyone in order to save lives. That should be the main focus. That should get the attention of anyone Muslim or otherwise.”

Suzy Ismail, a visiting professor at DeVry University in North Brunswick, New Jersey, is also a Muslim prolifer. In an article written for *Public Discourse*, Ismail stated: “Modernity encourages us to view ‘unwanted’ life as a burden that will hold us back. For Muslims, however, just as for many in other faith traditions, life must be acknowledged, always and everywhere, as a true blessing.”

Ismail laid out her case for defending the sanctity of life according to Islamic teachings. In pre-Islamic times, according to Ismail, female infanticide was prevalent throughout Arabia. The Quran, however, prohibited these practices. She added that many verses in the Quran point to the sanctity of life, including, “Kill not your children for fear of want: We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin” (17:31).

Ismail recounts how she truly began to understand life’s fragility after losing two babies in utero, one just weeks prior to giving birth. “While the religious injunctions reverberate through faith on a spiritual level, the blessings of life touch us daily on a worldly level, as well. As the mother of three beautiful children, I can truly attest to and appreciate the gift of life. But I also understand how heartbreaking it is to lose it.”

Some Christians See Non-Christian Pro-lifers as Needed and Would Welcome Their Involvement

Rod Murphy, director of Problem Pregnancy of Worcester, Inc., in Massachusetts and author of *Stopping Abortions at Death’s Door*, would have no problem accepting the help of non-Christians at the crisis pregnancy center (CPC) he directs. In the early days of the clinic there was a rabbi who volunteered and helped women with spiritual matters, but Murphy “never had a secularist or atheist come to me to want to volunteer. We never had the opportunity to say yes or no. We would say yes if [she] had a legitimate interest in helping women and babies.”

If Murphy (who apparently works behind the scenes) has a bias against any category of people volunteering at his clinic, it would be men. “Men wouldn’t fit well because our pregnant clients think that men are the enemy when they are abandoned.”

On the other hand, if a group of lesbians, for example, wanted to help CPCs stop abortions, he would be willing to talk to them, vet them, and possibly write a recommendation letter to another CPC, so they would be

given a chance. (Murphy went on to offer that if a non-Christian prolifer is interested in counseling at a CPC and would like a recommendation from him, she can call him at 774-230-1756.)

Murphy speculated that CPC staff may be reluctant to accept lesbian proliferers as volunteers because they are suspicious of feminist ties they may have, and fear they may try to sabotage pro-life efforts. But the real problem, according to Murphy, is the scarcity of young proliferers—whether Christian or not—willing to work in the trenches. Participating in the March for Life is one thing, but being involved in the day-to-day operations of the pro-life movement is something else. “There is a lot of talk, but not a lot of action.” Murphy’s advice to non-Christian proliferers is to become trained as sidewalk counselors. “A non-Christian proliferer who wants to protest or do sidewalk counseling in front of a clinic has as much of a right to show up as anyone else.”

Murphy said the pro-life movement would benefit from secular and religious proliferers positioned in front of abortion clinics—even if they just stood there. “There are many abortion facilities that do not have anybody outside when pregnant clients go in. All you need is someone out there, willing to save some babies,” he said. He thinks sidewalk counseling offers the best opportunities for non-Christian proliferers who want to get involved.

“There are girls who tell us they said, ‘God, if you don’t want me to do this, put somebody in my way.’ Just being there saves babies, and you don’t have to belong to any organization to do it.”

Like the non-Christian proliferers interviewed for this piece, Murphy, a practicing Catholic, believes that secular arguments are more effective in convincing women not to abort their babies. He recalled a man outside a Portland, Maine, Planned Parenthood clinic reading loudly from the Bible to women going into the building. “He isn’t going to reach her,” concluded Murphy. “Most of these women are unchurched. A woman who reaches her secularly, practically, they are likely to get more bites.”

“Our counselors talk to women practically,” he continued. “They have real-world problems. You don’t have a place to live? We’ll get you an apartment. Child care problems? We’ll get you some child care.”

Murphy acknowledges that at the March for Life and other pro-life events, the atmosphere might be off-putting to non-Christians because of the prayers and references to Jesus Christ and God. “I can see how an atheist or someone who doesn’t believe would feel out of sorts,” he said. “It’s the same for Catholics. When we go to evangelical pro-life meetings, [it can] make us uncomfortable, and I suspect it is true the other way around.”

If you want to be part of the pro-life movement, though, you have to get used to being a little uncomfortable, he added.

March for Life: We Have a Wide Tent for Prolifers

Many years have passed since PLAGAL members were told to leave the March for Life. Bethany Goodman, an evangelical who is assistant director of March for Life, said the fact that more non-Christians and seculars are becoming actively pro-life is good for the movement. She added that it should not come as a surprise that seculars and Christians would arrive at the same conclusions on the life issue. “Christians cite Biblical truth in talking about pro-life issues, along with science and natural law,” she said. “Secular proliferers can look to natural law and science, and use those natural human rights arguments. All of these reasons complement each other and make sense because truth is truth.”

On a personal level, Goodman said she is seeing her generation, the Millennials, as more open to the truth about life as a human-rights issue.

Does the March for Life now allow groups like PLAGAL to march with their PLAGAL banner in the event, unlike in years past? “Yes,” said Goodman. “We encourage any group that is focused on the pro-life issue, and that issue alone, in good taste and in good will, to participate in the march with the express purpose of advocating for the right to life for the unborn.”

“We are open to anyone who is pro-life,” she said. “We have a wide tent for pro-lifers.”

Terzo said Goodman’s comments are good news. “I’m glad that people from different walks of life can march together in unity. I think that seeing the signs and banners from many different groups really emphasizes how diverse the pro-life movement is, and shows that the stereotype that all proliferers are the same is not true,” she said. “I think it’s a win-win situation for everyone, because not only will it encourage more gay and lesbian people to become involved in the movement and raise the morale of the ones that are already there, it will challenge members of the public who feel that being pro-life is an exclusively conservative, Christian thing.”

Although the March for Life was founded by Gray, a conservative Catholic, the event has featured (and continues to feature) proliferers from other faith traditions and political persuasions. In years past, for example, Rabbi Yehuda Levin spoke at the March for Life on at least three occasions. In 2014, evangelical icon Dr. James Dobson and his adopted son, Ryan, spoke to proliferers, along with a heterogeneous mix of pro-life elected officials that included Rep. Dan Lipinski (D-IL), Washington State Democratic Legislator Roger Freeman, Majority Leader Eric Cantor (R-VA), Rep. Chris Smith (R-NJ), and Rep. Vicky Hartzler (R-MO).

Although many of the outside group events surrounding the March for

Life are religious in nature, Goodman singles out some offerings that would also appeal to non-Christian and secular pro-lifers. “The 5K run/walk is one example of an activity anyone can participate in to advocate for the sanctity of life, as well the March for Life-sponsored Rose Dinner.” In addition, Goodman encouraged secular pro-lifers to talk to elected representatives and senators about life issues as an important part of their March participation.

“It’s powerful for non-religious pro-lifers to go to their [representatives], and say, ‘This is why I am pro-life.’ From there, non-Christian pro-lifers can go back to their communities and get involved at the local level.”

The Right to Life Is Not Just a Religious Issue

Other non-Christian pro-lifers have had different experiences from those of Terzo or Armstead. Monica Snyder, 28, of Sacramento, had the honor of being the first non-religious pro-lifer among the speaking lineup at the Walk for Life West Coast, representing Secular Pro-Life (SPL).

“I’ve always found people at the Walk friendly, but I’ll admit I am surprised and touched by this level of acceptance,” said Snyder, an agnostic. “I really do hope this is a sign of things to come!” She stated that her goals as an SPL representative were to let other pro-life secularists know they are not alone—indeed, they are welcomed—and to let religious pro-lifers know they are eager to work alongside them.

“The Walk was fantastic!” added Snyder.

At Secular Pro-Life we’ve had an outpouring of support from people who [heard the] speech and are excited to have us in the pro-life movement. It has been so encouraging. During both the Walk and the SFLA (Students for Life of America) conference the next day, I was able to meet fellow nonreligious pro-lifers and pro-lifers of faith interested in increasing the diversity of our movement. We exchanged contact information, and I’m really looking forward to working with them going forward. The whole experience has been incredibly inspiring and uplifting, and I can’t thank the Walk organizers enough for giving SPL a voice and a part to play.

Penelope Whisnant, one of the co-founders of the Walk for Life West Coast, said Snyder was chosen to speak for several reasons, including her participation in the event since 2006 and her commitment to the pro-life cause. “The pro-life cause is not just a religious cause, although most pro-lifers are religious; it is a human-rights movement and as such we do not need to bring God, religion, or the Bible into the argument against abortion and for life. Reason alone is sufficient.”

“You need look no further than this country’s founding documents, where the Declaration of Independence talks about how we are endowed with ‘certain unalienable rights, that among these are life, liberty, and the pursuit of

happiness,’” continued Whisnant. “Life is the first one mentioned—and it’s unalienable. You can approach the pro-life argument from many angles, and we must be open to all these angles and all those willing to defend life.”

“This is the first time we’ve had someone who is not affiliated with any religion speak at the Walk. However, this is totally in line with what we envisioned for Walk for Life from the beginning,” said Whisnant. “We always wanted it to be for everyone of good will who acknowledges that abortion hurts women, children, men and society, whether they have a faith or no faith. They are all welcome and we want them and their groups to have a presence at Walk for Life.”

“I have been pro-life for as long as I can remember,” commented Snyder. “My parents are both passionately pro-life, and they raised me to be the same way.” She has memories of participating with her family at pro-life protests, they worked with local CPCs, and her father volunteered as a sidewalk counselor. At one point, her parents invited an abortion-minded woman to live with them during the duration of her pregnancy. “Now, many years later, the woman’s daughter recently graduated high school. The example my parents set has had quite an impact on me,” said Snyder.

For Snyder, her experience in the pro-life movement has been mostly positive. “In my experience working with SPL, most religious proliferers have been friendly and welcoming. We regularly have people tell us that, while they are Christian, they are so glad we exist to show that religious reasons are not the only reasons to be pro-life. Many of SPL’s supporters are, in fact, religious, but work with us to raise awareness of the non-religious pro-life stance.”

That’s not to say there hasn’t been occasional friction. “We do, on occasion, come across religious proliferers who believe it’s wrong to purposefully leave God or their faith out of their arguments, and there can be some tension in those conversations,” said Snyder. “However, for the most part I’ve found people take a very ‘live and let live’ approach. We use secular arguments, other people use religious arguments, but we are all on the same team. We all want to make abortion unthinkable.”

Snyder said religious proliferers have been far more reasonable than secular pro-choicers. “Religious proliferers tend to be pretty welcoming, but secular prochoicers have been, for the most part, considerably more hostile. In fact, some secular prochoicers refuse to believe secular proliferers exist! They’ve accused us of being a ‘secretly religious’ group—a Trojan horse trying to sneak into the atheist and agnostic communities with our pro-life message. It’s pretty amazing,” said Snyder.

“Religious and non-religious proliferers work together best when we stick

to common ground,” said Snyder. “Our common ground includes the non-religious reasons to be against abortion. When the pro-life movement focuses primarily on religious reasons to be against abortion, secularists—both pro-life and pro-choice—are disconnected.”

“That’s not to say religious proliferers must hide their faith. It’s simply to say it means a lot to pro-life secularists to know we have a place in the movement,” she continued. “The Walk organizers are doing an excellent job of conveying this message by having both religious and secular speakers this year. Secular proliferers are more likely to build ties with the overall pro-life movement when we feel free to be secular within the movement.”

How the Movement Could Benefit from More Involvement from Non-Christian Pro-lifers

Despite the hurt feelings and occasional lack of inclusion, Terzo says pro-life gays and atheists should not give up, especially in light of various secular pro-life groups that are popping up.

What could pro-life organizations willing to include non-traditional proliferers do to make them feel welcome? “I think just reaching out to nontraditional groups. Send an invitation out to the groups like Secular Pro-Life and post notices in forums that non-Christian proliferers frequent and simply tell them that they want them to be there,” said Terzo. “Just plain general encouragement. I think if the March for Life included a speaker who was nontraditional, that would help too. Maybe including secular speakers and allowing secular leaders to take part in planning some of these events would help.”

Terzo added that March for Life’s welcome to nontraditional proliferers is important. “It will communicate to people outside the movement that our message is universal, and they may find pro-life arguments harder to dismiss,” Terzo continued. “It may also cause people on the fence to be curious about why gay people are pro-life, and help start conversations, leading to the opportunity for the pro-life message to be shared. So this isn’t just good for PLAGAL, it’s good for the movement and ultimately good for unborn babies—and that, of course, is the most important thing.”

Terzo believes that the pro-life movement needs help from non-Christians, because Christians can’t do it alone. Like many people, Terzo sees the U.S. becoming more secular; in response,

[W]e need to bring others into the fold. Christians don’t have the numbers to reverse abortion on their own. Religious arguments only work on religious people. In order for pro-life laws to be passed and pro-life candidates to be elected, more support is needed. Nonreligious people need to be persuaded to embrace the pro-life cause, and

that will probably not happen if the movement is exclusively Christian. People from all walks of life need to band together before abortion will be defeated. It just can't be a Christian-only movement, we have to appeal to more people. As long as pro-life is perceived as a bunch of Christians telling people what to do, mainstream people won't listen. The movement needs wider support.

How might the pro-life movement benefit from the help of Muslims like Armstead? "I think one of the biggest benefits is it dispels the argument that pro-life is only a conservative, Christian, white male belief," said Armstead. "But also the more the better."

Walk for Life's Whisnant agreed that it is beneficial to the pro-life cause to have atheists and agnostics joining to defend life, because it demonstrates that this is not just a religious movement, as the media wants people to believe, but also a human-rights movement that all people of good will should join.

"How I wish that the secular pro-life movement would grow," added Whisnant. "Imagine if most secularists were pro-life—we wouldn't have abortion. We live in an ever-growing secular society, so if we want to change society's view on abortion, we have to bring secularists on board."

Alexandra G. created the Pro-Life Pagans Facebook page as a way to find fellow travelers. As a result, she said something she hears a lot is, "I thought I was the only one." As more pro-life non-Christians of all stripes are seen actively working in the movement, it may move other, likeminded people to say, "I thought I was the only one," and come out of the woodwork to take their stand for life.

BOOKNOTES

FIVE DAYS AT MEMORIAL: LIFE AND DEATH IN A STORM-RAVAGED HOSPITAL

Sheri Fink

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Reviewed by Rita L. Marker

The drugs were federally controlled substances, kept locked away and signed out when needed, their misuse subject to criminal penalty. But these were extraordinary times. Even the firmest rules softened in the intense heat.

During the last week of August 2005, the nation was absorbed in the drama of Hurricane Katrina. Television screens were filled with images of people fleeing to safety after a catastrophic failure of the levee system flooded New Orleans. Conditions at the New Orleans Superdome, where thousands had taken shelter, were heart-wrenching. Virtually every news broadcast led with reports about horrendous conditions in the city.

During this time, outside of media scrutiny, the storm's aftermath was creating desperation at Memorial Medical Center—a place where, for decades, people had gone for refuge during hurricanes. So when Hurricane Katrina began bearing down on New Orleans, many of those who worked there brought their families, friends, and pets to ride out the storm. By the time the storm hit, there were nearly as many non-patients as patients and staff at Memorial.

People brought coolers and grocery bags. In the past, a picnic-type atmosphere would often reign as the hurricane passed over and then, the next day, it would be time to go home.

But that didn't happen in August 2005.

Sheri Fink, a physician and Pulitzer Prize-winning journalist, has portrayed the day-to-day events at Memorial Medical Center in a meticulous account that takes the reader inside the medical center during those five fateful days, masterfully weaving together the stories of patients, doctors, and staff. Rarely have I read a book so gripping and so thought-provoking.

The book is divided into two parts: "Deadly Choices," which recounts conditions within the medical center during the five days of the hurricane and subsequent flooding, and "Reckoning," which describes the investigation of the euthanasia deaths that allegedly took place on the last two of the five days at Memorial.

It is almost impossible to fully absorb the horrors that happened in this

brief window of time. To those who lived through it, however, those few days seemed like an eternity. Unbearable heat, no electrical power, and lack of sleep fatefully affected decision-making ability. The author provides valuable lessons in right and wrong, while still recognizing the good intentions that often lead to very bad actions.

The first day mirrored other days when a hurricane was anticipated. As the second day dawned, everyone felt that, once again, New Orleans had dodged the bullet. But that soon changed.

Day three was pivotal. A canal had been breached. Trees were down. The water was rising. Conditions rapidly deteriorated in the city and in Memorial. With electricity down and the hospital turning to back-up generators, the air conditioning went out, leading to sweltering heat. Water climbed up the emergency room ramp. There were reports of looting and gunshots could be heard. Fink recreates the scene as physicians, nurses, and staff began making some deadly choices.

Sandra Cordray, Memorial's community relations manager, took charge of communicating with executives at Tenet Healthcare (Memorial's Texas-based parent company), begging for assistance and stating in an e-mail, "WE NEED PATIENTS OUT OF HERE NOW." But Tenet responded that other hospitals in New Orleans were waiting for the National Guard and that Memorial needed to do the same. Tenet ended its message, "Good Luck."

But there wasn't any good luck. And hospital leaders began to make incredibly bad decisions.

One of those physicians was Dr. Ewing Cook, a pulmonologist who had retired from clinical practice a year before but was now a chief medical officer at the facility. He, his wife, his daughter, three cats, and a large dog were there. The Cooks always stayed for hurricanes. Dr. Cook took responsibility for a section of the 4th floor to replace his son—also a physician—who had gone home the night before and could not get back. Cook decided that all but the most essential treatment and care should be discontinued.

Steps were taken to prioritize the order in which patients would be evacuated. Breaking with protocol, Memorial's doctors made the decision to evacuate the sickest patients last. One doctor who agreed with the plan explained that he thought such patients would not want to be saved at the expense of others. Among those to be evacuated last were patients with Do Not Resuscitate (DNR) orders. The physician who made that suggestion later explained that he thought the law required patients with a DNR to be certified as having a terminal or irreversible condition. He was tragically mistaken. No law requires such a diagnosis for a DNR order.

As one elderly woman was being moved to the evacuation site, someone

noticed that she had a DNR order and other patients were put in front of her. Her daughter later explained that her 93-year-old oxygen-dependent mother had been admitted just for the storm and was not terminally ill. She said, “When I made my mother a DNR, I did not know it meant ‘do not rescue.’”

Another patient not slated for evacuation because of a DNR order also was not close to death. In fact, her DNR status dated from more than 10 years earlier, when she had decided that, if her heart stopped, she wouldn’t want it to be restarted. Fortunately, her son and daughter-in-law—against doctors’ orders—carried her out of Memorial and put her on a boat that was at the edge of the ambulance ramp.

At one point on the third day, Dr. Richard E. Deichmann, chairman of medical services and in charge of organizing physicians, turned Coast Guard rescuers away. Deichmann told them to come back in the morning because the staff needed rest. When a senior Coast Guard officer tried to persuade staff to continue evacuating patients, hospital leaders yelled at him and turned him away again.

As conditions deteriorated, evacuations were handled miserably, and seemingly every possible mistake was made, there were clear signs that the overworked and exhausted staff were still caring for patients.

Among them was Dr. Anna Pou, a surgeon already known for caring for the poor. During those days at Memorial, she cared for patients, changed their diapers, dipped rags into water to make cool compresses and said prayers with anxious nurses. Pou considered the evacuation system heart-wrenching, but by the third day she sensed that doctors wouldn’t be able to save everyone. Later, she said that the goal in a disaster must be to do “the greatest good for the greatest number of people.”

By day four, the back-up generators were out. Water was out. Toilets were backed up. There were no working phones. The only lights were flashlights. The unbearable conditions had grown even worse.

Euthanasia—directly ending the lives of some patients—was being seriously considered. One doctor who was considering it said that “time had come to feel magnified,” even though a few days earlier the mere prospect would have been unthinkable.

As more physicians and staff became aware of the possibility of hastening the deaths of some patients, even those who were uncomfortable with the prospect said little or nothing to oppose it. One exception was a young internist who was new to Memorial. He was clearly concerned for the sickest patients and, on the fifth day, when another doctor raised the idea, he said, “I can’t be part of anything like that,” explaining that he disagreed one hundred percent. He noted that it had only been two days since the floodwaters

rose, and the hospital still had food and water.

Yet instead of striving to stay and protect patients, the doctor became desperate to get out of Memorial, texting his sister and a friend that “evil entities” were discussing euthanasia for patients. He begged them to get him out of there.

Less than 72 hours after the hurricane had hit, the staff were drenched with perspiration. They were dirty and had had little or no sleep. The heat was stifling and the stench was intense. Pets—those that were still alive—were wandering everywhere. Bodies of patients were being taken to the chapel.

There was still plenty of pain medication, but more doctors were leaving—some on a staff fishing boat that had pulled up to the hospital. The able-bodied—doctors, nurses, family members—continued to leave ahead of patients.

When an emergency mortuary team arrived at Memorial, they found 45 bodies—the largest number of any health facility struck by Hurricane Katrina.

Two days after the last living patients and staff had left Memorial, an attorney from a facility whose patients had been moved to Memorial to wait out the storm sent a fax to Louisiana officials alleging that deadly doses of morphine had been administered to some patients when it seemed likely that they couldn’t be successfully evacuated.

The task of investigating the allegation fell to Arthur “Butch” Schafer, an assistant attorney general in the state’s Medicare Fraud Control Unit. Schafer, an experienced criminal prosecutor, initially thought the allegations were outlandish. But as he and his partner, Special Agent Virginia Rider (a 10-year veteran of the Fraud Control Unit), delved deeper into the situation, they uncovered information that would eventually lead to one physician and two nurses being arrested and charged with the deaths of four patients. The facts surrounding the investigation, the personalities involved, and the political considerations leading to the eventual outcome of the case are stunning.

Five Days at Memorial raises soul-searching questions, the most insistent of them being, “What would I have done in that situation?”

We’ve all said, “I’d never do that.” However, we also know that there have been many times in our lives when we’ve done things we’ve thought we’d never do.

The question for us, then, should be not “What would I have done?” but “What should I do in such a situation?”

Reading about the deadly decisions made at Memorial confronts us with the reality that we could easily fall into the trap of rationalizing behavior that, bluntly put, is just plain wrong. But unless we are willing to face that possibility, we may find ourselves, like those at Memorial,

someday doing what should not be done.

If you are going to read only one book in the near future, I would recommend *Five Days at Memorial*.

—Rita L. Marker is an attorney and executive director of the Patients Rights Council.

REDEEMING GRIEF: ABORTION AND ITS PAIN

Anne R. Lastman

(Gracewing Publishing, 272 pp., 2013, \$20.25 paperback)

Reviewed by Kathryn Jean Lopez

Every now and again someone comes along and says something that diagnoses our problem so clearly and yet so deeply that it needs to be read, re-read, savored, talked about, and used as a catalyst for dedicated action. Such is Anne R. Lastman's book *Redeeming Grief: Abortion and Its Pain*. If you have ever wondered what is wrong with our world, you must read *Redeeming Grief*. If you've suffered or watched others suffer through the effort to make sense of a world that ignores, denies, and rejects the most basic and obvious natural gifts, condemning anything more morally demanding than nostalgic adherence to habits, customs, and norms as unfit for the modern world (and certainly for the public square), read *Redeeming Grief*.

Lastman's book, issued by the Australian Catholic publishing house of Gracewing, is based on the author's two decades of experience providing post-abortion counseling. However, the grief it walks through and seeks to heal is unfortunately international in scope. Although *Redeeming Grief* is steeped in a Catholic context of prayer and healing—it even has its mystical moments—Lastman points out that, "One does not have to be Catholic or even a Christian to understand the power of healing and the love of God." Her message is mercy in both the most personally practical and culturally transformative ways.

Lastman explains her own connection to the topic in this way:

It is through my experience of grief following my own two abortions that I have come to the belief that it is only through the mercy of God, and my own profound rediscovered love for him, which has brought me through the darker times. It is this knowledge and understanding that allows me to be able to help and show other women how to let their grief, following their abortions, become a redeeming grief. Not a destructive grief leading to self-annihilation but a grief surrounded with haloes. Grief always means love lost, or someone or something special no longer with us. Grief

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always means profound loss. We do not grieve for something or someone which is or who is not of value in our own lives.

In the case of abortion, of course, what we grieve is the death of a child. And this death leaves deep wounds. Abortion is a deeply intimate type of violence, occurring within the very womb of a mother (who we pretend isn't really a mother, insisting that her abortion is a declaration of independence or empowerment rather than a violation of herself). Abortion affects lives—changing not just the woman who aborts her child, not just the father (whatever his involvement), not just family and friends, but even our law, which once acted in part as a moral teacher and now merely adapts to endorse and accommodate actions—“choices”—that are poisonous to individual lives and to the healthy living out of our lives together in society.

Lastman writes:

Since the sexual revolution of the sixties, the advent of public acceptance of and demand for abortion, and the disintegration of family life, children have been deprived of the most basic of human rights. Their right to be children, to be happy, to be protected, to be educated and to be valued has been eroded and all in the name of the so-called equality of the sexes. The living children of a society that demands and applauds abortion are wounded children and as wounded children can only become wounded adolescents and wounded adults. This then continues the suffering which began when a generation of men and women began to compete against one another (not complement) and decided that they did not need one another, and began to slowly but surely destroy sacred relationships and the family.

Do read this book if you know firsthand this kind of pain, or care about people experiencing this pain, or want to do something about this pain and the poisonous culture of death. The politics of abortion will not change for the better until we confront what abortion means and what it does to us in our souls, our daily lives, our institutions, and our public policies. The growth toward a healthier conception of human life is a gradual, persistent thing, as anyone knows who takes part in the work of supporting women and men seeking something other than abortion in difficult situations, or anyone who helps with the healing after a gravely wrong choice has been made.

Lastman's deep compassion for women in such a situation displays an authentic “new feminism.” It is difficult to imagine, she writes, “that a woman, who is designed by God to be a life-giving and nurturing being, can agree to the abortion of her own child.” And yet, we know the reality. In choosing abortion, Lastman writes, a woman breaks “the invisible bond of love between herself and her offspring, but also negate[s] her own self respect, her womanhood, feminine design and emotional and spiritual well being.” Simply put, “the person after the abortion is no longer the person she was before,”

Lastman writes. “It is almost as if two people die on the surgical table, one physically and one spiritually and emotionally.”

“From the moment of conception to the last breath taken naturally, the dignity of human life cannot be compromised,” Lastman writes, emphasizing that our obligation doesn’t stop with seeing the unborn child safely through to delivery. Building and nourishing and supporting a culture of life is about love, love that ultimately becomes possible through knowledge of the love of God for every living being, whatever our usefulness or productivity, talents or knowledge, heroism or grave mistakes. *Redeeming Grief* is a wake-up call about the “enormous damage that is done to or by the woman herself, or society, by its pseudo cavalier behavior towards her,” before, during, and after an abortion. (Relatedly, Lila Rose’s Live Action investigatory videos have opened up a window into what a woman hears as she makes this momentous decision, and how delusional and nonsensical the counsel she receives within the walls of the abortion clinic can be, as clinic workers’ faux sensitivity only postpones the point at which a woman confronts the reality of her “choice.”)

Redeeming Grief is a public service. Read it and weep, because the suffering it describes is grave and penetrating, and its dimensions are legion. Hope and the change it can catalyze first require honesty. Lastman’s book offers a dose of honesty and a conscience-rocking reality check.

—*Kathryn Jean Lopez, editor-at-large of National Review Online and a director of Catholic Voices USA, also blogs at K-Lo at Large on Patheos.com.*

**CONSCIENCE AND ITS ENEMIES:
CONFRONTING THE DOGMAS OF LIBERAL SECULARISM**

Robert P. George
(ISI Books, 290 pp., 2013, \$29.95)

Reviewed by John M. Grondelski

Robert P. George, the McCormick Professor of Jurisprudence at Princeton, is one of America’s leading contemporary pro-life intellectuals. His *Embryo: A Defense of Human Life* (2nd ed., Princeton: Witherspoon Institute, 2011), co-authored with Christopher Tollefsen, is a robust philosophical defense of the right to life. His other works (including *Body-Self Dualism in Contemporary Ethics and Politics*, *In Defense of Natural Law*, *Natural Law and Moral Inquiry*, *Reason*, and *Morality and Law*) all seek to incorporate

natural law (in its “basic goods” version as articulated by John Finnis, Germain Grisez, et al.) into contemporary law, politics, and jurisprudence. Few people have made such a dedicated effort to re-articulate the abiding value of natural law for American positive law.

George’s latest book is a collection of 28 essays on various topics, 12 of which are of direct interest to pro-life readers. Indeed, of the four “parts” into which the book is divided, Part III—entitled “Life and Death”—includes six chapters explicitly on pro-life themes.

Pro-abortionists have long pretended that the “pro-choice” position respects the conscience rights of all sides of the abortion debate. However, the recent fight over forcing Americans to pay for abortions and contraceptives (that in many cases are actually abortifacients) as part of Obamacare exposes a ruse that goes back to *Roe*. Immediately after the 1973 decision, abortion advocates demanded that Justice Blackmun’s “private choice” be given social sanction and approval, most directly by paying for abortions under Medicaid. Abortionists have never accepted losing that battle in both the Supreme Court (in *Doe v. Beal*) and Congress (through the Hyde Amendment), and they continue their struggle to make public policy mirror their belief that abortion is no different from a tonsillectomy. (I choose the word “belief” deliberately because, as George points out, while some politicians are fond of demanding that public policy reflect “science” on this issue, they frequently conflate “science” with their ideologically-driven agendas.)

Obamacare is obviously the biggest opportunity to write that belief into public policy; however, as George points out in “Conscience and Its Enemies,” the effort to subvert conscience goes back to the attempt to force every OB/GYN medical student to participate in abortions and every obstetrician to provide them, regardless of whether it violated their consciences. George rigorously yet masterfully shows the logical fallacies underlying these arguments, and their real consequences for real people—for example, by driving pro-life doctors and pharmacists out of the profession.

“When Life Begins” is a philosophical riposte to a statement by Nancy Pelosi that “I don’t think anybody can tell you when . . . human life begins.” George is clear, stating: “Treating the question as some sort of grand mystery or expressing or feigning uncertainty about it may be politically expedient, but it is intellectually indefensible” (p. 165). He then shows us why. “Embryo Ethics” develops the theme in a much lengthier and more thorough manner, in the course of which George tosses out a lot of philosophical garbage. Along the way, he disposes of three philosophical cul-de-sacs—“ensoulment,” twinning, and attaining certain capacities—often used to pretend either that life has not begun or that we face some epistemological

black hole when trying to answer this question. “Human embryos are embryonic humans” (p. 170).

“The Personal and the Political” makes relatively short (eight pages) shrift of the “personally-opposed-but-politically-supportive” pro-abortionism of many politicians, a spin given its most vocal defense by Mario Cuomo. “A Right to Life Denied or a Right to Life Honored” cuts through much of the confusion about the growing euthanasia movement, at the root of which George discerns “the distinction between what has been called ‘direct killing,’ where death (one’s own or someone else’s) is sought either as an end in itself or as a means to some other end, and accepting death (or the shortening of life) as a foreseen side effect of an action (or omission) whose object is something other than death . . .” (p. 198). “The ‘Relics of Barbarism,’ Then and Now” compares the 19th and 21st century Republican parties in terms of the moral dilemmas the GOP battled at its founding and today. Back in the 1850s, the new party branded slavery and polygamy the “twin relics of barbarism” and did all it could to put them on the road to extinction. Today, Republicans face the “twin relics of barbarism . . . in [the] distinctively modern garb . . .” of *laissez-faire* abortion that pretends the unborn, like slaves, are non-persons and of redefinitions of marriage that pretend that society has no right legally to protect and prefer the union of one man and one woman. Admitting that “[a]n influential minority in the Republican Party proposes abandoning or at least soft-pedaling” (p. 205) its social policy, George urges the GOP to “be mindful of [its] heritage” and “act on moral convictions that gave birth to the Republican Party and made it grand” (ibid.). Elsewhere, in chapter one, the author warns against those who pit “economic” against “social” conservatism, arguing in “Common Principles, Common Foes” that both originate from the former and oppose the latter. An economically prosperous society is unlikely to be built by self-indulgent, half-educated children coming in large part from broken families, and a socially healthy society is less likely to produce or condone crooked, untrustworthy businessmen.

George also pays tribute, in Part IV, to “Good Guys and . . . Not-So-Good Guys,” providing short biographies of various people who shaped his thought. He points to the contradictions in the life of Harry Blackmun, the tax lawyer in the grey flannel suit who has been lionized by the Left for *Roe*. Richard Neuhaus, who as a Lutheran pastor marched with Martin Luther King, was de-lionized, “gave it all up,” for being intellectually honest about the unborn as the contemporary civil-rights issue and dissenting from the orthodoxy of *Roe*. Bernard Nathanson, who had a hand in approximately 80,000 abortions—including that of his own child—eventually fell in love with the

truth, becoming sufficiently alive in conscience to repudiate the evil he had done and to take on the role of pro-life herald. Elizabeth Fox-Genovese and Gene Genovese, historians and intellectuals, knew that the national stain of “non-persons” excluded from Constitutional protection did not end with *Dred Scott*—and stood for today’s disenfranchised.

ISI Books was established to give undergraduates a rigorous, intellectual grounding in conservative thought as future movers and shakers in American learned circles. While I fear the identification of pro-life thought with conservatism—since liberalism has no business, on its own terms, supporting the deprivation of the rights of the most vulnerable—the practical effect of the attenuation of pro-life liberalism is that the mission has defaulted to the Right. Given that reality, kudos to ISI for making this important work available, especially to today’s young people.

—John M. Grondelski was formerly Associate Dean of the School of Theology at Seton Hall University in South Orange, NJ.

RICH IN YEARS:

FINDING PEACE AND PURPOSE IN A LONG LIFE

Johann Christoph Arnold

(The Plough Publishing House, 183 pp., 2013, \$12 paperback)

Reviewed by Ellen Wilson Fielding

Author Johann Christoph Arnold is a lifelong member of the Bruderhof, a smallish Christian community of about 2,600 members worldwide. It was founded by his father in Germany in 1920 and is marked by a radically communal, Book-of-Acts way of living. Arnold himself was born in England after his family fled the Nazis; they then moved first to Paraguay and eventually, when Arnold was 15, to New York State.

Arnold, then, is no stranger to swimming against cultural currents, either by inheritance or life circumstance. Over the years he has countered a variety of publicly propagated evils, including racial discrimination in the 1950s and 1960s and, in the post-*Roe* era, various forms of pro-life and pro-family work, including a very moving book on the need to forgive those who have wronged us, *Seventy Times Seven: The Power of Forgiveness*.

His most recent book, *Rich in Years: Finding Peace and Purpose in a Long Life*, recognizes his own passage across the borderland of old age (he is now approaching his mid-70s and dealing with some health problems).

His aim in writing was to present a variety of personal and, yes, countercultural examples of the search for meaning in the frequently shadowed years of our gradual decline towards death.

This is a brief, plain-spoken, and heavily anecdotal book—indeed, its great strength lies in presenting the stories of real-life people who grapple with illness, loss, retirement, decreased mobility, chronic and debilitating health conditions—in fact, the full gamut of diminishment that can be experienced in the final decades of life.

Arnold groups his story-studded reflections in chapters devoted to the major tasks of our own personal “end-times”: “Growing Older,” “Accepting Changes,” “Combatting Loneliness,” “Finding Purpose,” “Keeping Faith,” “Living with Dementia,” “Moving Forward,” “Finding Peace,” “Saying Goodbye,” “Continuing On,” and “Beginning Anew.” The chapter titles themselves are teaching tools for old age: Each starts with a verb, as if to remind us that age like every other stage of human life presents us with things to do, even if the “doing” in question is actually admitting to ourselves (and, perhaps more difficult, to others) that there are things we can no longer do, whether driving a car or living alone, or, for those sidelined to wheelchairs, walking.

To work through each challenge, each message from mind and body (or from observant and caring friends and family) that it is time to contract, to do *less*, demands a degree of engagement and assent as great as that of the child, adolescent, and young adult who are challenged at each stage of their young lives to expand and do *more*. Gracious, unembittered aging, the kind that continues to seek and find purpose in a seemingly “diminished thing,” cannot be achieved by passivity and defeatism.

Some of the elderly in Arnold’s book deal with the special dismemberment of losing a spouse after 40 or 50 or more years together. Some struggle to attain perspective and peace after long years of regretting past mistakes they are still trying to forgive themselves for. Some face dementia.

This is less a “how to” book than a “let’s see” book—Let’s see what well-meaning though imperfect human beings have learned about life by the end, and what they have done about it. Let’s see how it feels to be inside the aging and recalcitrant body (and mind), old with living, learning, suffering, doing, but strangely young in spirit.

For Arnold, his wife, his family, and community, the ultimate explanation of the meaning of life at all stages, including old age, rests with God. As he writes near the close: “As we enter the twilight of our lives, my wife and I have often asked ourselves what is really important. Again and again, we have come to feel that it is to prepare, as best we can, for the moment when

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God calls us, and to help others when they face death; to stand at their side and help them to cross the bridge from this place to the next.”

Although not all readers can find rest in the faith of Arnold and his wife, the portraits of old age lived well in this book should assist many in approaching their own final years.

—*Ellen Wilson Fielding is a senior editor of the Human Life Review and author of An Even Dozen (Human Life Press).*



“I don’t like the look of your tooth.”

APPENDIX A

[Richard M. Doerflinger is Associate Director of the Secretariat of Pro-Life Activities, United States Conference of Catholic Bishops. This essay appeared Feb. 10, 2014, in Public Discourse: Ethics, Law, and the Common Good, the online journal of the Witherspoon Institute of Princeton, NJ (www.publicdiscourse.com) and is reprinted with permission.]

On Abortion Rates: Good News and Cause for Reflection

Richard M. Doerflinger

American abortion rates are falling significantly. Although the Guttmacher Institute tries to hide the chief causes of this trend, cutting through the spin reveals that pro-life laws and attitudes help reduce the abortion rate and the abortion ratio.

On an issue associated with tragedy and mourning, there was good news this month. A new study finds that in 2011, the US abortion rate—the number of abortions per 1000 women of reproductive age—reached its lowest point since the Supreme Court’s *Roe v. Wade* decision legalized abortion in 1973. Abortions dropped to just over a million a year, from a high of 1.6 million in 1990.

And yes, see how jaded we have become. Only a million innocent lives destroyed each year? Still, things could be far worse, and they have been.

The study was published by the Guttmacher Institute, described by the Washington Post as a “pro-abortion-rights think tank.” Guttmacher is a former research affiliate of Planned Parenthood, the largest abortion provider in the nation. Because it is trusted by abortion providers and gets its information directly from them, Guttmacher’s abortion data are often more complete than those gathered by the federal government from state health departments. But the group also has an ideological agenda. So as we welcome its data, we need to be cautious of its “spin.”

That spin is in full gear. Based on little evidence, the authors dismiss the possibility that the decline in abortion could be due largely to the passage of pro-life state laws. (Even here, though, they make exceptions—conceding that abortion rates may be reduced by bans on public abortion funding, and by laws requiring women seeking an abortion to make two visits to a clinic separated by a 24-hour waiting period.) They also say the 13 percent drop in abortions from 2008 to 2011 is probably not due to a further decline in abortion providers, because their numbers are almost unchanged. Instead, they attribute the decline to wider use of contraception, and especially to increased use of “LARCs” (long-acting reversible contraceptives) like the IUD and hormonal implants. These, say Guttmacher, are less prone than other contraceptives to “user error.”

There is good reason to question each of these judgments. Before turning to pro-life laws and the decline in abortion providers, let’s explore the “wider use of contraceptives” theory.

It is worth noting at the outset that the LARCs welcomed by Guttmacher suppress fertility for three to ten years and can be removed only with the help of a doctor, regardless of whether the woman changes her mind. Rather than saying

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that they have less “user error,” it would be more accurate to say they are less subject to user “freedom of choice.” But to Guttmacher, it seems, any choice to consider having a baby is “error.”

The “reproductive rights” movement’s turn away from “choice” and toward semi-permanent sterilization of women merits a discussion of its own. But there are good reasons to doubt that the abortion decline is largely due to contraception of any kind.

First, numerous studies suggest that contraceptive programs don’t substantially reduce unintended pregnancies or abortions. “Reproductive rights” advocates are aware of these findings. That is why, in their frustration, they are increasingly pushing semi-permanent methods that are less subject to what some call “user motivation.” A few years ago, Princeton researchers who advocate wider use of “emergency contraception” (EC) analyzed twenty-three different studies of programs to boost use of EC. All but one study showed increased use of the drugs. “However,” they said, “no study found an effect on pregnancy or abortion rates.”

Second, it has long been known that women using contraception may reduce the likelihood of pregnancy, but the likelihood increases that any pregnancy that does occur will be ended by abortion. Statisticians call this an increase in the “abortion ratio,” the number of abortions per hundred pregnancies (excluding miscarriages). It is easy to understand why the abortion ratio may increase in such situations. If I’ve already acted to make sure the sexual act does not lead to procreation, and then the instrument for achieving that goal failed, I may see myself as having a right to fix that problem. The Supreme Court said as much in its *Planned Parenthood v. Casey* decision of 1992: Many Americans have organized their lives in reliance on “the availability of abortion in the event that contraception should fail.”

Thus, if wider or more consistent use of contraception were the chief reason for the abortion decline, we would see a reduction in total pregnancies (that is, a reduction in the sum total of abortions plus births), but not as much of a reduction in abortions. Births would decline more than abortions do. Yet between 2008 and 2011, the opposite happened: Births declined by only 9 percent, while abortions declined by about one-and-a-half times as much (13 percent). Not only the abortion rate, but also the abortion ratio, has dropped to its lowest level in at least two decades. Four out of five women who do become pregnant are letting their babies live. That can’t be due to contraception.

Third, the decline in abortions since 2000 has been led by a sharp decline among teens aged 15 to 17, somewhat offset by higher rates among women in their 20s and 30s. An earlier Guttmacher study noted that in 2008, the likelihood of abortion among these teens had dropped to being a little over half the likelihood for all women of reproductive age. And during much of this same period, family planning advocates were lamenting a decline in adolescents’ use of “reproductive health services” such as family planning.

Fourth, Guttmacher speculates that people may have used contraception more consistently between 2008 and 2011 because the pressures of a sluggish economy

made them less willing to procreate. Yet in their earlier study of 2008 abortion data, cited above, the same Guttmacher researchers suggested the opposite: The sluggish economy under Bush was constraining access to contraception and leading people to have more abortions, stalling the steady decline in abortion rates from 2000 to 2005. Are we to believe that a Bush recession produces abortions while an Obama recession produces contraception? This theory seems a bit desperate. Generally abortion rates are higher, not lower, among women in poverty.

Finally, what about the shift in methods of contraception, from more easily reversible measures to LARCs such as the IUD? There is indeed a study claiming that among those using contraception, the percentage using LARCs increased from 2.4 percent in 2002 to 8.5 percent in 2009. This single-digit change is even less significant than it looks, as it was accompanied by a 2 percent decrease in surgical sterilization, the most effective method of all. And this was not a change from “unprotected” sex to use of contraception, but a marginal change in effectiveness rates among those already using some method. (Here I will pass over the “reproductive health” industry’s penchant for encouraging women to replace condom use with methods that expose them to a higher risk of AIDS and other sexually transmitted diseases, another topic deserving its own discussion.) To say this trend is responsible for the lion’s share of a 13 percent abortion decline nationwide seems implausible, especially when we look at differences by state, discussed below. To say it’s responsible for the decline in the abortion ratio would be ridiculous.

Are there other ways to explain the abortion decline?

Let’s look at the supply side, the number of abortion providers. Guttmacher says there is only a small decline here: In 2011 there were 4 percent fewer providers overall (counting hospitals, clinics, and physicians’ offices), and only 1 percent fewer clinics doing abortions. So how can this be responsible for a 13 percent reduction in abortions? It is at this point that Guttmacher’s “spin” overwhelms its reporting.

The study admits that the blanket term “clinics” covers two different kinds of facility: multi-purpose clinics that chiefly provide family planning or broader health services (30 percent of providers, responsible for 31 percent of the abortions); and specialized “abortion clinics” (19 percent of providers, but responsible for a whopping 63 percent of the abortions). In most cases, each abortion clinic performs between one thousand and five thousand (yes, that’s five thousand) abortions a year. Closing even one such clinic could have a significant impact.

Did the number of dedicated abortion clinics decline, and if so by what percentage? This figure cannot be found in Guttmacher’s tables. But one table reports there were 329 such clinics in 2011; and the study’s text mentions that “in 2008 there were 49 more abortion clinics.” We can do the math ourselves. If there were forty-nine more in 2008, there were forty-nine fewer in 2011, so the number of abortion clinics dropped from 378 to 329, which is a decline of . . . 13%. If anything, the significance of this figure—which is identical to the percentage drop in abortions themselves—is underscored by Guttmacher’s apparent effort to hide it.

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In turn, what led so many abortion clinics to close? Guttmacher provides part of the answer. It laments the “disruption of services” produced by a law in Louisiana that made it easier to close such clinics (contributing to a 19 percent decline in the state’s abortion rate), and the 24-hour waiting period enacted by Missouri in 2009 (helping to give it a 17 percent decline from 2008 to 2010). More generally, it complains about “burdensome” laws regulating abortion clinics, many of which have been passed since 2011 and so can be expected to play a greater role in future abortion numbers.

Guttmacher’s spin doctors call these “TRAP” laws (“targeted regulation of abortion providers”), even when they only bring abortion clinics into line with standards already governing other clinics doing ambulatory surgery. For years, the abortion industry has been dragging these laws into court, claiming they place an “undue burden” on women’s access to abortion and will make clinics close entirely. Taking into account that these claims may be exaggerated or overheated to win a legal victory, does Guttmacher now want to claim that its allies have been lying in court? If not, it seems pro-life laws really do have an impact on the abortion “supply.”

Also suggestive are differences by state. Guttmacher mentions six states where the decline in abortion rates from 2008 to 2011 was much sharper than the national average of 13 percent. There’s one fluke here: Delaware. The state had a 28 percent decline, but it previously had the very highest abortion rate in the nation, and still has a much higher rate than average. The other five already had low abortion rates, and these sharply declined further: Kansas (a 35 percent decline), South Dakota (30 percent), the above-cited Missouri (21 percent), Utah (21 percent) and Oklahoma (20 percent).

In 2010, the year before the abortion decline was measured, all these states ranked in the top half of the country for having laws protecting life, according to the annual scorecard by Americans United for Life. Oklahoma was second in the country, and South Dakota was sixth. Utah comes in just under the wire at twenty-fifth, but AUL says that is because it does not have laws against cloning, embryo research or assisted suicide. In general, these are socially “conservative” states on matters of family and sexuality. They are hardly the states most likely to be pushing LARCs on their population; in fact, some of them have worked to reduce or eliminate funding for Planned Parenthood. Rather, their pro-life laws help reduce the abortion rate and abortion ratio, as other research has shown.

The states where the abortion rate increased from 2008 to 2011, or decreased much less than the national average, are Alaska, Maryland, Montana, New Hampshire, West Virginia, and Wyoming. All of these were ranked by AUL as being in the bottom half of the country in terms of pro-life laws. Maryland has a “Freedom of Choice Act” establishing a statewide “right” to abortion that is more extreme than Roe; Montana’s supreme court has found a similar expansive right in the state constitution and has legalized abortions performed by non-physicians; Alaska’s similar state supreme court ruling has forced the state to fund abortions and

invalidated conscience protection for hospitals that do not wish to perform abortions. The states showing little or no decline in abortions were among the states with the most pro-abortion legal policies.

To be sure, the abortion decline is probably based on more than particular pro-life laws as such. After all, the governors and legislators making those laws were elected by the state's voters, who wanted pro-life lawmakers. The laws are made possible by a culture and public attitude against abortion, which can also influence women's attitudes and behavior directly. Sentiment against abortion, and acceptance of the "pro-life" label, has been growing nationwide (especially among young people), though surely more in some states than others. The national debate in the late 1990s on the grisly partial-birth abortion technique, the revelations about criminally dangerous abortionists like Kermit Gosnell, and the greater visibility of the unborn child due to advances like 4-D ultrasound have no doubt all played a role.

And that sentiment can be found in the medical profession itself, a trend that may scare the abortion industry most of all. The pro-abortion American College of Obstetricians and Gynecologists could not have been happy a few years ago, when its own journal reported that only 14 percent of ob/gyns ever perform abortions. Those who do perform them have long complained that their morale is low, that their medical colleagues look down on them, and that when they retire there may be no one willing to replace them. Some abortion practitioners have even publicly admitted that abortion is an act of violence, hoping that their candor will free them to persuade their colleagues that it is necessary violence.

Maybe this is all pretty simple after all: If you want fewer abortions, oppose abortion; if you want lots of abortions, promote abortion. And maybe more Americans are learning what abortion is: a violent act against life, a grief for women, a corruption of medicine, and an embarrassment to a civilized society. Education to further advance that understanding should be accompanied by positive steps to help women at risk of abortion, and to help health-care professionals and policymakers address these women's real needs.

In short, pro-life Americans should rejoice at the good news, and redouble their efforts to help pregnant women and their unborn children. Notwithstanding the spin doctors of the abortion industry, we are seeing some light at the end of that long dark tunnel.

APPENDIX B

[Anne Hendershott is Professor of Sociology and Director of the Veritas Center at Franciscan University in Steubenville, Ohio. She is the author of Status Envy: The Politics of Catholic Higher Education; The Politics of Abortion; and The Politics of Deviance (Encounter Books). She is also the co-author of Renewal: How a New Generation of Priests and Bishops Is Revitalizing the Catholic Church (2013). The following essay first appeared on Crisismagazine.com and is reprinted with permission.]

What's Behind the UN Attack on the Church?

Anne Hendershott

United Nations Against Vatican

As faithful Catholics continue to contend with last week's incendiary United Nations report attacking the Church for her teachings on contraception, abortion, and homosexuality, it may be time to look closely at the real agenda at the United Nations.

For more than two decades, the UN has dedicated itself to attempting to diminish the influence of the Church on life issues. We need to begin to understand why.

In an October 2013 Crisis article entitled "Kicking the Church out of the UN," Austin Ruse, the president of Catholic Family and Human Rights Institute (C-FAM), suggests that the reason for the hostility directed at the Church is because the Church has obstructed the goals of the population control zealots at the UN. "Starting at the Cairo Conference in 1994, the Church has been able to block an international right to abortion ... the Holy See has consistently handed the Catholics for Choice, the Norwegians, the United Nations Population Fund and all the other uglies at the UN defeat after defeat."

It is likely that last week's UN Committee on the Rights of the Child report was payback. Despite its non-voting status at the United Nations, the Holy See has stood as the major barrier to the UN goal of universal access to abortion and contraception for young girls and women throughout the world. While the Church was unable to convince all countries—including the United States—of the evils of abortion, the Vatican, as a sovereign state, continues to play an important role at the negotiating table in areas in which the Church has a stake in helping to ensure the right to life and the dignity of the person.

The UN has attempted to end that influence. In 1999, decrying the Vatican's role in encouraging the United Nations to block funding for abortion services, Frances Kissling, then-president of Catholics for Choice—a group that claims to speak for pro-abortion Catholics, yet has no actual membership—began a campaign to remove the Vatican from the UN. A strong media presence and a letterhead funded by the abortion industry and pro-abortion organizations like the Ford and Rockefeller Foundations, Operation See Change, as Kissling called her campaign against the Vatican, attempted to persuade the United Nations to revoke the Vatican's status as a permanent observer.

Although Kissling's See Change Campaign was supported by the abortion

industry and was successful in focusing international public attention on the unique standing of the Vatican at the UN, opposition to the Catholics for Choice initiative was also strong. Then-Senators Rick Santorum (R-PA) and Bob Smith (R-NH), and Representative Chris Smith (R-NJ) introduced congressional resolutions critical of the See Change Campaign and lauding the role of the Vatican at the UN. In the end, not a single member state signed on to support the Catholics for Choice campaign.

Still, the efforts to expel the Vatican continue today. Austin Ruse's C-FAM recently announced that Catholics for Choice has re-launched its See Change Campaign demanding that the Vatican's observer status be reduced to that of a non-governmental organization—barring Church officials from negotiations. And, as Ruse, who has a front row seat for the UN negotiations, writes: “a nasty Norwegian diplomat at the UN” who “frequently badmouths the Holy See” has suggested that it is time that the Holy See be expelled.

It is not a coincidence that Kirsten Sandberg, Chairman of the UN Committee on the Rights of the Child that issued the attack on the Vatican last week, is from Norway. Demanding that the Church amend Canon Law to accommodate the changing culture, Sandberg's committee “urges that the Holy See review its position on abortion which places obvious risks on the life and health of pregnant girls, and to amend Canon 1398 relating to abortion with a view to identifying circumstances under which access to abortion services can be permitted.”

Sandberg's committee demands that the Church “assess the serious implications of its position on adolescents' enjoyment of the highest standard of health and overcome all the barriers and taboos surrounding adolescent sexuality that hinder their access to sexual and reproductive information.” Further, Sandberg's UN Committee moves beyond denigrating the Church for her teachings on abortion and contraception to demand that the Church “overcome the taboos” surrounding adolescent sexuality—including homosexual behavior—by changing Church teachings on homosexual relations to conform to the prevailing culture espoused by the UN.

Recent Events Highlight UN's Progressive Culture

Although Sandberg's Committee on the Rights of the Child report has gotten the most publicity because it is the first to directly attack the Church in this way, the truth is that the report is just the latest in a long series of UN reports designed to make abortion an international right, and increase world-wide support for same-sex behavior. A report issued last month by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) entitled “Teaching and Learning: Achieving Quality for All,” is described by C-FAM in a report released last week as suggesting that the purpose of educating children is not simply to increase literacy, but also to teach them “where and how to have an abortion” and to be more accepting of same-sex behavior.

The UNESCO report decries that “in many parts of the world, people remain

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intransigent in their attitudes toward homosexuality.” The truth is that many countries struggle with these new UN requirements to teach tolerance of homosexuality in their school curriculum while sodomy and homosexuality continue to be outlawed in their countries.

But, laws against abortion and homosexuality have not stopped UNESCO from promoting their pro-abortion and pro-same sex policies in the past. In 2012, Maria Casado, director of UNESCO’s presence at the University of Barcelona, Spain called for a national registry of doctors who refuse to perform abortions. According to LifeSiteNews, Casado expressed opposition to restrictions to abortion in Spanish law and called for a more stringent definition of conscientious objection for doctors—claiming that her goal is to “respect rights in a democratic society, women’s rights as well as doctor’s rights.... When conscientious objection is transformed into a collective stance for ideological reasons, it turns into civil disobedience,” naming the Catholic Church as responsible insofar as it promotes conscientious objection to abortion.

And, while one of the goals of UNESCO and the Committee on the Rights of the Child has been population control through abortion and contraception, there is no other entity at the United Nations that has worked as ruthlessly for population control as the United Nations Population Fund (UNFPA). Exposed by Steven Mosher, president of the Population Research Institute, as being a direct participant in China’s coercive one-child policy, UNFPA is an international development agency that “promotes the right of every woman, man and child to enjoy a life of health and equal opportunity.” Three core areas of UNFPA’s work focus on reproductive health, gender equality, and population and development strategies. The main focus is on increasing access to contraception and abortion by working directly with governments throughout the world.

Population control supporters Bill and Melinda Gates have assisted the efforts of UNFPA through the Gates Foundation. Recipients of the prestigious UNFPA Population Fund award in 2010, Bill and Melinda Gates have donated more than one billion dollars to family planning groups—including the UNFPA; International Planned Parenthood Federation; CARE International—an organization that works with the UN to lobby for legalized abortion in several African nations; Save the Children—a major promoter of the population control agenda; and the World Health Organization—an organization that forcibly sterilized thousands of women in the 1990s under the pretence of providing tetanus vaccination services in Nicaragua, Mexico and the Philippines.

Sharing the same ideology as the UN, Bill and Melinda Gates view population control as the key to the future. For Bill Gates, “there is no such thing as a healthy, high population growth country. If you’re healthy you’re low-population growth.... As the world grows from 6 billion to 9 billion, all of that population growth is in urban slums.”

At an international women’s health conference called “Women Deliver” last May in Kuala Lumpur, Melinda Gates promised to expand access to family planning

and promised to raise \$4 billion to supply contraceptives, particularly Depo-Provera, to 120 million more women. Co-sponsored by the UNFPA, UNWomen, UNAIDS, the Bill and Melinda Gates Foundation, and others including the World Bank and the World Health Organization, the “Women Deliver” conference included a presentation by the late-term abortionist LeRoy Carhart who was there to instruct others on how best to expand abortion services. Participants also heard presentations from Princeton University’s most famous abortion proponent and euthanasia advocate, Professor Peter Singer.

It is likely that the United Nations will continue its commitment to expanding access to abortion and contraception, and removing the taboos that surround homosexuality throughout the world. The Catholic Church is one of the few remaining barriers to this expansion. There will be continued attacks and the Church needs to prepare for them as the United Nations will continue to attempt to diminish the authority of the Church by resurrecting old clergy abuse cases and inflating statistics on past misdeeds by priests.

Pot Calls Kettle Black

Continuing a defensive stance has not been effective. The Catholic laity should demand that the United Nations look to its own failures to protect children. Even Neil MacFarquhar, a reporter for the New York Times, had to admit in an article published in 2011 that the United Nations needs to “focus serious attention on addressing sexual crimes” by those involved in the peacekeeping missions globally: “But the question that diplomats, advocates and even some officials ask is why the efforts still lag in terms of investigating accusations and, making sure those who send troops and contractors abroad hold them accountable.”

In his Times article, MacFarquhar described a 2011 case in which “hundreds of Haitians protested in support of a teenage boy who said he was sexually assaulted by peacekeepers from Uruguay on a United Nations base, eliciting a furious rebuke from Haiti’s president and an apology from Uruguay.”

The Times article charges that human rights experts and some member states fault the United Nations for leaving too much of the job of enforcing its zero tolerance policy to others. Worse, MacFarquhar charges that “[i]ndividual cases and any disciplinary action are rarely made public.” The Times also points out that the United Nations has been recalcitrant in responding as “senior officials defend the numbers as improving and argue that publicly shaming member states would make finding peacekeeping troops more difficult. Going into a blame and shame approach is counterproductive because this requires a mind-set change, said Susanna Malcorra, head of the logistics end of (UN) peacekeeping.”

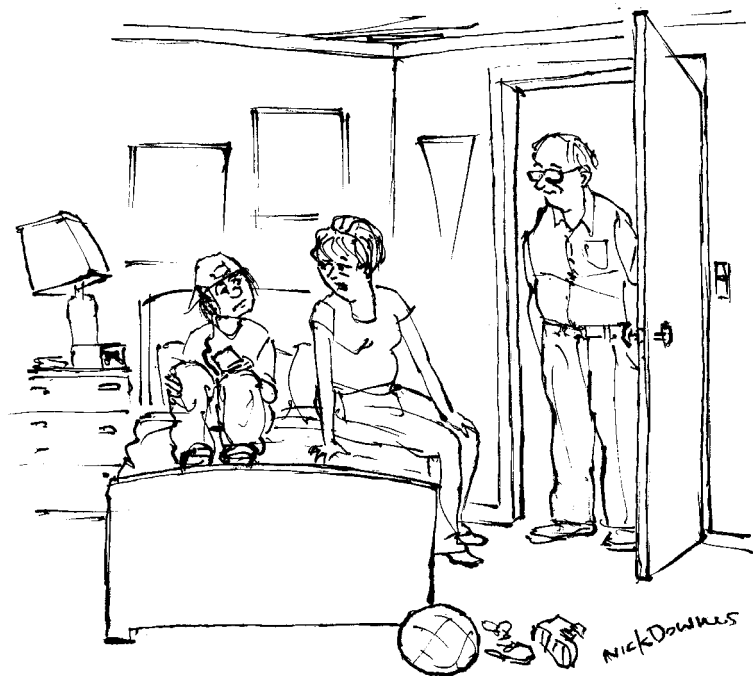
Of course, as the most recent report issued by the UN Committee on the Rights of the Child shows, the UN has no problem in attempting to “shame” the Catholic Church by dredging up unsubstantiated allegations of priestly pedophilia. In contrast, the sexual abuse by UN peacekeepers continues. A report published last September in the United Nations’ own News Center described serious misconduct by

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its UN peacekeeping troops—including sexual abuse—in Mali.

More than a decade ago, the Christian Science Monitor suggested that “Whenever the UN has established operations in recent years, various violations of women seem to follow.” It seems that these violations also include sexual abuse involving young men and girls. The Christian Science Monitor concludes that these violations have included a prostitution ring in Bosnia involving peacekeepers, UN staff members in West African withholding aid such as bags of flour from refugees in exchange for sexual favors, Jordanian peacekeepers in East Timor accused of rape, peacekeepers in Somalia accused of sexual abuses, and Moroccan and Uruguayan peacekeepers in Congo accused of luring youth into their camps with offers of food for sex.

Perhaps it is now time for the Church—including the laity—to stand up to the bullying by the various committees of the United Nations—including the Committee on the Rights of the Child. It is time to expose the real agenda of the United Nations—most notably the UNFPA—to expand the lucrative contraceptive and abortion industry throughout the world, and remind others that the true protector of children remains the Catholic Church.



“It’s just that your father and I have decided to live apart. From you, that is.”

APPENDIX C

[*Charles J. Chaput, O.F.M. Cap., has led the Philadelphia archdiocese since September, 2011. What follows is the text of Archbishop Chaput's homily for the National Prayer Vigil for Life Closing Mass on Jan. 22. Unable to attend the Mass because of a snowstorm, it was delivered on his behalf by Msgr. Walter Rossi, rector of the National Shrine.*]

National Prayer Vigil for Life Homily

Charles J. Chaput, O.F.M. Cap.

Today is the 41st anniversary of *Roe v. Wade*, which effectively legalized abortion on demand. It's a time to look back and look ahead. The abortion struggle of the past four decades teaches a very useful lesson. Evil talks a lot about "tolerance" when it's weak. When evil is strong, real tolerance gets pushed out the door. And the reason is simple. Evil cannot bear the counter-witness of truth. It will not co-exist peacefully with goodness, because evil insists on being seen as right, and worshiped as being right. Therefore, the good must be made to seem hateful and wrong.

The very existence of people who refuse to accept evil and who seek to act virtuously burns the conscience of those who don't. And so, quite logically, people who march and lobby and speak out to defend the unborn child will be—and are—reviled by leaders and media and abortion activists that turn the right to kill an unborn child into a shrine to personal choice.

Seventy years ago, abortion was a crime against humanity. Four decades ago, abortion supporters talked about the "tragedy" of abortion and the need to make it safe and rare. Not anymore. Now abortion is not just a right, but a right that claims positive dignity, the license to demonize its opponents and the precedence to interfere with constitutional guarantees of freedom of speech, assembly and religion. We no longer tolerate abortion. We venerate it as a totem.

People sometimes ask me if we can be optimistic, as believers, about the future of our country. My answer is always the same. Optimism and pessimism are equally dangerous for Christians because both God and the devil are full of surprises. But the virtue of hope is another matter. The Church tells us we must live in hope, and hope is a very different creature from optimism. The great French Catholic writer Georges Bernanos defined hope as "despair overcome." Hope is the conviction that the sovereignty, the beauty and the glory of God remain despite all of our weaknesses and all of our failures. Hope is the grace to trust that God is who he claims to be, and that in serving him, we do something fertile and precious for the renewal of the world.

Our lives matter to the degree that we give them away to serve God and to help other people. Our lives matter not because of who we are. They matter because of who God is. His mercy, his justice, his love—these are the things that move the galaxies and reach into the womb to touch the unborn child with the grandeur of being human. And we become more human ourselves by seeing the humanity in the poor, the weak and the unborn child and then fighting for it.

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Over the past 41 years, the prolife movement has been written off as dying too many times to count. Yet here we are, again and again, disappointing our critics and refusing to die. And why is that? It's because the Word of God and the works of God do not pass away. No court decision, no law and no political lobby can ever change the truth about when human life begins and the sanctity that God attaches to each and every human life.

The truth about the dignity of the human person is burned into our hearts by the fire of God's love. And we can only deal with the heat of that love in two ways. We can turn our hearts to stone. Or we can make our hearts and our witness a source of light for the world. Those of you here today have already made your choice. It's a wonderful irony that despite the cold and snow of January, there's no such thing as winter in this great church. This is God's house. In this place, there's only the warmth of God's presence and God's people. In this place, there's no room for fear or confusion or despair, because God never abandons his people, and God's love always wins.

We are each of us created and chosen by God for a purpose, just as David was chosen; which is why the words of the Psalmist speak to every one of us here today:

Oh God, I will sing a new song to you;
With a ten-stringed lyre I will chant your praise,
You who give victory to kings,
And deliver David, your servant from the sword.

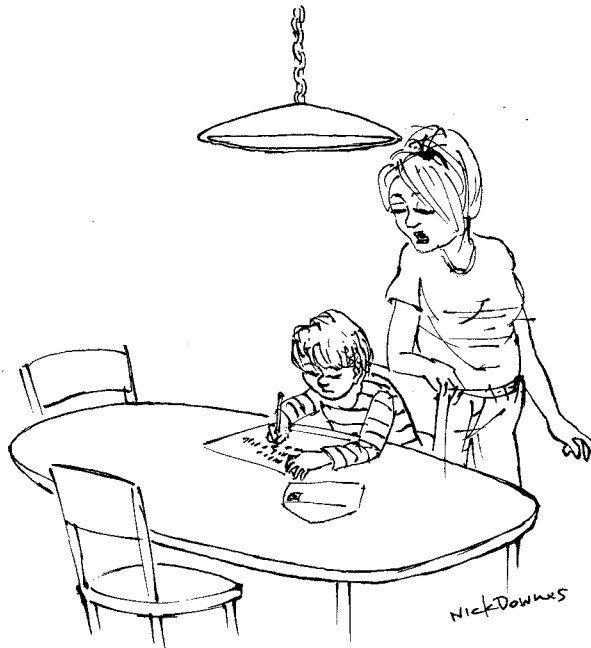
The Psalmist wrote those words not in some magic time of peace and bliss, but in the midst of the Jewish people's struggle to survive and stay faithful to God's covenant surrounded by enemies and divided internally among themselves. That's the kind of moment we find ourselves in today. All of us are here because we love our country and want it to embody in law and in practice the highest ideals of its founding. But nations are born and thrive, and then decline and die. And so will ours. Even a good Caesar is still only Caesar. Only Jesus Christ is Lord, and only God endures. Our job is to work as hard as we can, as joyfully as we can, for as long as we can to encourage a reverence for human life in our country and to protect the sanctity of the human person, beginning with the unborn child.

We also have one other duty: to live in hope; to trust that God sees the weakness of the vain and powerful; and the strength of the pure and weak. The reading from Samuel today reminds us that David cut down the warrior Goliath with a sling and a smooth, simple stone from the wadi. And what I see here before me today are not "five smooth stones from the wadi" but hundreds and hundreds of them. Our job is to slay the sin of abortion and to win back the women and men who are captive to the culture of violence it creates. In the long run, right makes might, not the other way around. In the long run, life is stronger than death, and your courage, your endurance, your compassion even for those who revile you, serves the God of life.

The Gospel today tells us that Jesus has power over illness and deformity. But

even more radically, it reminds us that Jesus is the Lord of the sabbath itself—the one day set aside every week to honor the Author of all creation. The sabbath is for man, as Jesus says elsewhere in the Gospel, not man for the sabbath. In like manner, the state and its courts and its laws were made for man, not man for the state. The human person is the subject of life and the subject of history; immortal and infinitely precious in the eyes of God; not an accident of chemistry, not a bit player, and not a soulless object to be affirmed or disposed of at the whim of the powerful or selfish.

If Jesus is the lord of the sabbath, he is also the lord of history. And sooner or later, despite the weaknesses of his friends and the strengths of his enemies, his will will be done—whether the Pharisees and Herodians of our day approve of it or not.



“Santa doesn’t like to be threatened, dear.”

APPENDIX D

[Anna Franzonello is staff counsel at Americans United for Life. This article was first published on December 12, 2013, on National Review Online (www.nationalreview.com). © 2013 by National Review, Inc. Reprinted by permission.]

Planned Parenthood Spends Millions to “Refresh” its Brand, but It’s Still the Same Taxpayer-Funded Big Abortion Business

Anna Franzonello

Taken with a hearty grain of salt, remembering that Planned Parenthood is the source of the data it released, here are five things that can be gleaned from its most recent annual report, released Wednesday.

1. Abortion remains a central component of Planned Parenthood’s business.

From October 1, 2011, to September 30, 2012 (Planned Parenthood’s “service” year), Planned Parenthood affiliates performed 327,166 abortions—that averages almost 900 abortions each and every day. In terms of time, money, and unduplicated patients, abortion is substantially more important to Planned Parenthood than the “3 percent of services” line it routinely tries to sell. Relying on Planned Parenthood’s estimate that its clinics “saw approximately three million patients,” abortion was the “service” Planned Parenthood provided for roughly 11 percent of its patients (assuming that there were not many repeat abortion customers).

Even that 11 percent figure doesn’t fully reflect the abortion-centric nature of Planned Parenthood today. A former Planned Parenthood affiliate that operated five clinics in upstate New York announced in late 2012 that it dropped its affiliation with the national chain over Planned Parenthood’s mandate that all affiliates perform abortions by January 2013. An opportunity to further expand its abortion business made the Planned Parenthood report’s “10 history-making moments” list. Boasting that it’s “on offense in the states,” the group celebrates a new California law that lowered the standard of care to allow non-physicians to perform abortions. Planned Parenthood gloats that it will “press forward” with such a “proactive legislative agenda around the country.”

2. After bullying the Susan G. Komen Foundation into lowering its grant standards and receiving “an outpouring of public donations,” Planned Parenthood’s “breast health services” continued to plummet.

The Planned Parenthood report chose “fighting against breast cancer” as another top-ten moment of the year, and asserts that “an outpouring of public donations helps Planned Parenthood significantly expand our breast health training, outreach, and medical programs.”

But the numbers tell a different story.

Planned Parenthood provided nearly 90,000 fewer “Breast exams/Breast care”

services than the year before—and nearly 200,000 fewer than two years ago. In fact, Planned Parenthood’s services decreased for every sub-category it lists under “Cancer Screening and Prevention.”

The substantial decrease in breast-health services is particularly noteworthy because it continued despite the Komen Foundation succumbing to pressure to reverse its decision and continue grants to Planned Parenthood. Planned Parenthood president Cecile Richards told the media that her organization used the controversy to its advantage and “raised more money than we would have lost.”

3. Life-ending drugs and devices are a growing portion of Planned Parenthood’s “contraception” services.

Planned Parenthood’s figures show an uptick in what it categorizes as “contraception” services. Notably, the majority of that growth came from its increased distribution of Plan B and ella. And Planned Parenthood’s nearly 1.6 million morning-after pill and week-after pill “services” are not necessarily coming at the request of women: The group pushes women and girls to “get [the drug] before you need it,” as its website states, “just in case.”

Allegations by former employees also cast serious doubts on the honesty or accuracy of Planned Parenthood’s reporting on its contraception services.

In a whistleblower lawsuit, Sue Thayer alleges that to enhance revenues her former employer, Planned Parenthood of the Heartland, effectively mailed thousands of unrequested birth-control pills to women. “C-Mail” was designed to overbill the government: Ms. Thayer’s lawsuit alleges that the Planned Parenthood program “created a medically unnecessary surplus” of approximately four extra months’ worth of pills for each client each year. And when the Postal Service returned the birth-control pills to Planned Parenthood because a patient moved or a wrong address, Ms. Thayer states in her complaint that Planned Parenthood “instructed its staff” to re-use these pills and send them to future patients—double-billing government programs for the same birth-control pills.

4. Taxpayers continue to heavily subsidize the nation’s largest abortion chain.

Planned Parenthood affiliates reported its government “grants and reimbursements” in the most recent year totaled \$540.6 million. That means Planned Parenthood is taking nearly \$1.5 million a day from taxpayers. Meanwhile, the abortion chain posted a profit, essentially: It had \$58 million “excess” of revenue over its expenses this year.

5. The abortion chain is spending millions to “refresh” the Planned Parenthood “brand.”

Under its top-ten moment titled “Pop Culture Influence,” Planned Parenthood gushes over an NBC show “depict[ing] the first abortion on a major network entertainment program in years.” The report goes on to note that “Planned Parenthood has also worked with major television programs and media outlets

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such as Girls and Cosmopolitan to promote our brand.” A look at its financial page shows that Planned Parenthood spent \$3.2 million specifically to revamp its brand.

Other non-defined categories of expenses that did not exist in Planned Parenthood’s previous reports: \$31.3 million to “Build Advocacy Capacity,” \$1.5 million to “Renew Leadership,” and nearly \$73 million to “Increase Access.”

Of course, as predicted, Planned Parenthood’s annual report makes no mention of several significant events that occurred during the “service” year the document covers.

Understandably, its claim to be “the most effective advocate” for “access to safe and legal abortion” doesn’t strike the chord Planned Parenthood probably hopes if you know that Tonya Reaves, a 24-year-old mother with a young son, bled to death after her uterus was lacerated during an abortion at a Planned Parenthood clinic on Chicago’s Michigan Avenue. Nor does it sound genuine when you consider that two nurses left Planned Parenthood in Delaware not because of a change of heart on abortion but because of the abortion clinic’s deplorable safety conditions, what they called including “meat-market style, assembly-line abortions.” It especially falls flat when you learn that these serious health hazards were reported to Planned Parenthood officials but were never addressed. Heck of a year, Planned Parenthood.

APPENDIX E

[Mark Tooley is president of the Institute on Religion and Democracy in Washington, D.C. and author of Methodism and Politics in the Twentieth Century. The following column appeared in The American Spectator (<http://spectator.org>) on Jan. 26, 2014, and is reprinted with the magazine's permission.]

Confusedly Pro-Life

Mark Tooley

This last week's March for Life recalling 41 years of judicially imposed abortion on demand aroused some confused religious commentary about the meaning of pro-life. Most of Christianity has traditionally opposed abortion as uniquely pernicious because it destroys a completely innocent and vulnerable life, in most cases only for convenience. Yet some try to stretch "pro-life" to include their own political preferences in ways that dilute focused opposition to abortion.

One example is Evangelical Left activist Shane Claiborne, a well-intentioned neo-Anabaptist enthusiast popular in some church circles. He recently and admirably urged being "Pro-life from the womb to the tomb." And he asserted: "The early Christians consistently lament the culture of death and speak out—against abortion, capital punishment, killing in the military ... and gladiatorial games," which, excepting gladiators, he thought "profoundly relevant to the world we live in where death is so prevalent."

Claiborne of course is a pacifist who opposes all violence, including military action and capital punishment. Whether the Early Church agreed is debatable. But historic Christianity has affirmed both the death penalty and warfare in some cases. Never has orthodox Christianity likened aborting an unborn child to a judicially adjudicated execution of a murderer or to the waging by legitimate authority of a just military action. Even serious Christian ethicists who share opposition to capital punishment would grant its deep moral distinctions from abortion. Defenders of capital punishment and of just war would argue that their positions are in fact pro-life because they punish or inhibit the wanton destroyers of innocent life.

Several days ago an Evangelical blogger, reviewing a new book on religion and capital punishment, commented that the "death penalty resembles abortion" as the "more thought and examination it receives (especially where the gory details are concerned), the less palatable it seems." In a common mistake, he surmised that pro-capital punishment arguments rest on Mosaic law, which dictated death for numerous offenses. He asked mockingly: "Do we really want the execution of false prophets?" Traditional Christianity has long understood that the civil punishments of the old Hebrew theocracy are no longer binding. But the divine command to Noah, prior to Mosaic law, that "he who sheds innocent blood so shall his blood be shed" has typically been understood to have universal application.

One of the great interpreters of Christian teaching about capital punishment was the late Catholic theologian Cardinal Avery Dulles. He cited this command to Noah, St. Paul's assignment of the "sword" to the civil state, theologians like Augustine

APPENDIX E

and Aquinas, and natural law's understanding of retributive justice to explain why Roman Catholicism has always and still does affirm capital punishment as intrinsic doctrine. Dulles also explained that Pope John Paul II expressed hope that modern wealthy societies would choose incarceration over capital punishment when possible.

In the 1970s and 1980s the late Cardinal Joseph Bernardin of Chicago advocated a "seamless garment" including opposition to abortion, capital punishment, nuclear weapons, and economic injustice. While more artfully designed than most such proposals, critics still faulted his implication that Catholic teaching was as unequivocal on the other issues as it was on abortion. Before becoming Pope Benedict XVI, Cardinal Ratzinger insisted that "not all moral issues have the same moral weight as abortion and euthanasia." He explained: "There may be a legitimate diversity of opinion even among Catholics about waging war and applying the death penalty, but not however with regard to abortion and euthanasia."

Such careful moral distinctions rooted in centuries of Christian ethical discourse are often absent in popular religion. A recent poll of Evangelicals showed that young people, probably unaware of a hierarchy of teachings, were far less likely to support capital punishment. "This parallels a growing trend in the pro-life conversation among Christians to include torture and the death penalty as well as abortion," the pollster explained. "For many younger Christians, the death penalty is not a political dividing point but a human rights issue." No doubt. "Rights" emotively interpreted have displaced ethics, theology and careful moral reasoning in much of modern American Christianity.

The elasticizing of "pro-life" was also demonstrated at the March for Life by Evangelical environmentalists, one of whose leaders there emphasized "that the unborn should be protected from toxins and pollution that they are in no way responsible for." His group targets the impact of toxins on pregnant women and babies. A critic of this approach told the *Christian Post* that stretching "pro-life" weakens the cause of specifically defending the unborn. He also distinguished "an intentional threat to life," such as abortion and euthanasia, versus "unintentional threats to health," such as pollution.

Over extending "pro-life" to entail a long laundry list of political goals that includes abolishing capital punishment, opposing the military, denouncing "enhanced interrogation," eliminating nuclear weapons, demanding more environmental regulation, expanding the Welfare State, perpetuating Obamacare, and raising the minimum wage is ultimately to neutralize the term and the movement. Likely some on the Left are fine with that goal. But defending the unborn, one million of whom are legally destroyed annually in America, is sufficiently important to merit its own proprietary terminology and unique movement exclusively focused on the mission at hand.

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Address all orders to this address:

The Human Life Foundation, Inc.

353 Lexington Avenue

Suite 802

New York, New York 10016

Phone: 212-685-5210

humanlifereview@verizon.net



www.humanlifereview.com