

the HUMAN LIFE REVIEW



WINTER/SPRING 2011

Featured in this issue:

William Murchison • Paul B. Linton • Brian Caulfield
James Hitchcock • Christopher White • David Quinn
Nicholas Dunn • Wesley J. Smith • Donald DeMarco
Christopher & Joan Bell • Thomas M. Clark

FROM THE ARCHIVES: J. P. McFadden on:
What the Difference Is (1979)

Also in this issue:

Paul Greenberg • Anne Conlon • William McGurn • Seth
Lipsky • Helen Alvaré, Greg Pfundstein, Matthew Schmitz &
Ryan T. Anderson • Carol Crossed • Maggie Gallagher
Robert P. George • Lord Nicholas Windsor • Michael J. New

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. . . writing on the 10th anniversary of the *Review*, founding editor J.P. McFadden recounted his concern at the outset about finding “the ‘good copy’ we needed.” That didn’t last long, however, as editors “were soon inundated with a huge catch of good stuff. Our problem,” he continued, “was (and remains) to choose the best.” Twenty-six years later, that problem happily remains as we continue to be “inundated with good stuff,” much of it now arriving via email from all over the cyber world. Case in point: “The Problem with *Perry*” (page 97), an invaluable analysis of the federal district court decision that tabled (at least for now) California citizens’ vote (in Proposition 8) to prohibit same-sex marriage in their state. The article’s author, Thomas M. Clark, is a corporate lawyer currently working in Tokyo—it’s a pleasure to welcome him to our pages.

Two other newcomers in this issue embody the energetic commitment twenty-somethings are bringing to the pro-life movement. Nicholas Dunn, who will soon graduate from The King’s College here in New York City, wrote “Abortion, Ijtihad & the Rise of Progressive Islam” (page 53) while interning this year at the Catholic Family and Human Rights Institute (C-Fam). Christopher White (“Report on the March for Life,” page 44) graduated from King’s a couple of years ago and is now the International Director of Operations for the World Youth Alliance.

Christopher and Joan Andrews Bell, also making their first appearance here, are long-time pro-life stalwarts: He started (along with Fr. Benedict Groeschel) and runs the Good Counsel Homes for pregnant women. His wife Joan, a legend in the movement, has been arrested scores of times for anti-abortion protesting and, in 1986, was sentenced to five years in jail by a judge who declared her “nonrepentant” because she refused to promise, as Nat Hentoff later related in a column about her case, “to stop trying to obstruct the lawful—and indeed constitutional—practice of abortion.” (Mr. Hentoff’s “The Prisoner Who Cannot Be Broken” was reprinted in the Fall 1988 *Review*.) The Bells were good friends of Dr. Bernard Nathanson, next to Norma McCorvey (AKA “Jane Roe”) perhaps the country’s most famous pro-life convert. Indeed, as you will read in the heartfelt reminiscence that appears here (page 83), Nathanson delivered the Bells’ daughter Mary, and asked Joan to be his godmother when he was accepted into the Catholic Church.

Dr. Nathanson’s death in February moved many pro-lifers to reflect on his journey from pro-abortion crusader—he was a founder of NARAL—to pro-life crusader—he made the movie *The Silent Scream*. We thank our friends at Public Discourse (www.thepublicdiscourse.com) for permission to reprint one such reflection, Robert P. George’s “Bernard Nathanson: A Life Transformed by Truth” (page 151). Readers will also learn more about Bernard Nathanson—and specifically his important book, *Aborting America*—in “What the Difference Is,” the 1979 article by J.P. McFadden featured in *From the Archives*.

ANNE CONLON
MANAGING EDITOR



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INTRODUCTION

Total abolition of abortion is of course not possible. I know one isn't supposed to put it this way, but it's the best way to explain it: abortion is a sin, and will disappear at the same time, and not before, we do away with sin itself. Or evil, if you prefer. But the worst thing about sin is not its existence, but its denial. It is one thing to admit that abortion will always be with us, quite another to make it the official policy of our nation, with the support of our laws, the use of our money—to promote and encourage it with all the powers of state and society, at ruinous costs to both.

The above is taken from “What the Difference Is” (in *From the Archives*, p. 89); it was written by my late father, founding editor J.P. McFadden, in 1979, almost seven years after the *Roe v. Wade* decision. “It seems clear that the Court intended a final solution to the problems involved” in abortion cases. However, that hadn’t happened; in fact, he noted, the “public perception is that anti-abortion sentiment is growing dramatically.” The sheer radical nature of the *Roe* decision—abortion-on-demand through all nine months of pregnancy, and the power of the states to interfere severely restricted—worked against the Court’s intention, as did the nature of the act of abortion itself. *Why* didn’t abortion become accepted? J.P. quotes Malcolm Muggeridge, who said it was because abortion “raises questions of the very destiny and purpose of life itself.” J.P. also noted the growing, “historically-implausible” alliance between Catholics and Evangelicals (the latter being then “far and away the largest and most vigorous American religious community”)—which, he thought, might just be the alliance that “overturns a new morality plausible only in a ‘post-Christian’ society.”

Now, over thirty years later, it is remarkable to think how much of what J.P. wrote has been affirmed—a growing anti-abortion movement, even stronger unity among Catholics and Evangelicals. However, I don’t think even he envisioned what an agonizingly slow climb it would be, how many times the movement would appear to have lost its foothold and tumbled way down, seemingly to certain, crushing defeat. One cannot deny that, in lives lost and moral sense coarsened, the last three decades have seen tragedy on a massive scale. And yet: Abortion remains an issue that rankles, one which refuses to act like “settled law,” thank God. And, as senior editor William Murchison writes in our lead article: “The Fight Continues.”

Just when things seemed the worst, points out Murchison, when the consequences of America’s electing Barack Obama to the presidency seemed to result in damage to the pro-life cause “so extensive that recuperation could take decades,” came the November 2010 elections, and a heartening “Republican resurgence” on both state and national levels. By late winter of 2011, things were looking *very* different: on the national level, in the movement to defund Planned Parenthood (an ingenious way of “addressing simultaneously the nation’s two deficits—financial and moral”) and at the grassroots, in the culture itself. In an echo of McFadden, Murchison remembers what it was like when *Roe* was decided: In 1973, “there was a general expectation

that resistance to the ruling would rage for a while, then die away.” He continues:

The Court itself seemed to render such a judgment: People would do thus-and-so because the justices commanded them to do thus-and-so, and that would be the end of a sentiment that we find, instead, in 2011, to be large, vital, crackling, and resurgent, if not yet in a position to command the landscape.

Yes, the fight continues, and in this hefty double issue we visit multiple aspects of the ongoing struggles. Murchison outlines many promising instances of pro-life “legislative gumption” on the state level; there are always, however, conflicting opinions among the ranks as to the wisdom of tactics. Our next article, “The Problem of Pain (Legislation),” is attorney Paul Benjamin Linton’s analysis of legislation drafted by attorneys for the National Right to Life Committee—and passed in Nebraska—which would prohibit virtually all abortions after the 20th week of pregnancy, due to the pain suffered by the unborn child. Similar legislation is being considered in several other states, with impressive endorsements. Linton explains why he thinks such pain bills are a bad idea, and may even be dangerous should a case challenging such legislation make its way to the Supreme Court.

Bringing down the abortion rate is an urgent struggle here in New York City, where *forty-one percent* of pregnancies end in abortion! This shocking statistic was publicized at a January 6th press conference with New York’s Archbishop Timothy Dolan—the launch of an awareness campaign funded by the pro-life Chiaroscuro Foundation (for more on the press conference, see *Appendices C* and *D*; and also, go to the website, www.NYC41Percent.com). A few days later, as Brian Caulfield reports in our next article, a rally was held in upper Manhattan featuring pro-life leader Alveda King, niece of Martin Luther King, Jr., to emphasize an even worse statistic: in the African-American community, nearly *60 percent* of pregnancies end in abortion. King’s rally, says Caulfield, is part of a “revolutionary” movement largely ignored by the major media (used to parroting Planned Parenthood talking points) until something too large to be ignored occurs—like a controversial billboard that appeared in February in Manhattan. The billboard had a photo of a young African-American girl with the caption: “The Most Dangerous Place for an African American is in the Womb.” A press outcry ensued and the billboard was taken down only three days into a planned three-week run. This is just one skirmish in a burgeoning movement that, Caulfield reports, follows the “path blazed” by Dr. Mildred Jefferson, the first African-American woman to graduate from Harvard Medical School and an early president of the National Right to Life Committee. (Dr. Jefferson was also an early friend of this journal). She died on October 20, 2010, at age 84. May she rest in peace.

Why aren’t Catholic Democrats solidly pro-life? That’s the question Professor James Hitchcock revisits in “Catholic Liberals and Abortion: Chapter Two” (the first chapter appeared in our Winter 2003 issue). Hitchcock focuses largely on evidence provided by the *National Catholic Reporter*, the “principal organ of

American liberal Catholicism.” After Obama’s election, “a variety of Catholic liberals hailed the coming of a new dawn, in which all people would be drawn together in a great healing”—but that “healing” included accusing the Catholic bishops of political opportunism for making the defense of unborn life a priority, and disparaging the pro-life movement as noisy, made up of “hysterical extremists.” By 2010 “the liberal culture showed definitively that it cannot sustain a pro-life position”—as most “pro-life Democratic congressmen collapsed under party pressure” to support Obamacare. The lack of liberal Catholic support for pro-life activists is a harsh truth, especially for the thousands of men, women and children who brave the icy January winds to join the March for Life in Washington DC every year, exercising their American rights as citizens to protest an immoral law (an action which, if it is aimed at other social injustices, is praised by the Catholic left). This 38th anniversary March was the first one for our next author, Christopher White, a young man from South Carolina (who is the international director of operations at the World Youth Alliance). In his graceful essay (his first for our journal) White relays his impressions of the March, and also reports on the 12th annual Cardinal John O’Connor Conference, which he attended the day before.

We go next to two international stories. The first, by Irish journalist David Quinn, is on the state of abortion in his country, in the news again because of a ruling by the European Court of Human Rights in Strasbourg. Ireland continues to be, thanks to a 1983 pro-life amendment to its constitution, a nation that protects the life of the unborn. But a recent ruling by the ECHR, stating that Ireland had “breached a woman’s right to privacy” by not granting her an abortion, gave pro-abortion advocates there a “shot in the arm.” As Quinn explains, the ECHR has “become extremely controversial in recent years, because it has become very activist, and its activism is mostly in one direction”—away from the sanctity of life, as well as in favor of freedom “*from* religion, not freedom of religion.” Quinn is followed by Nicholas Dunn, another young newcomer to the *Review*, who has adapted an informative research paper on “Abortion, Ijtihad and the Rise of Progressive Islam.” Ijtihad is the Islamic principle of determining the “best and most reasonable solution to a current problem by examining the Qur’anic text” in cultural and historical context. Dunn demonstrates how liberalizing trends in Islam, due in large part to pressure by UN population programs, are contributing to a “diversity of interpretations and beliefs” about family planning and abortion.

The two articles which follow examine contemporary worldviews on the very meaning of human life. First, contributor Wesley Smith writes about the field of bioethics—originally founded as a great humanitarian movement—being usurped by those who do *not* believe in the intrinsic dignity of the human being, and the “threat to universal human rights” this poses. Some who think this way snidely claim that the “only true cogent bases for embracing inherent human moral worth are religious,” but Smith disagrees: “Human exceptionalism does not require belief in a transcendent God, or indeed spiritual allusions of any kind if we understand that

what matters morally is not the capacities of the individual . . . but our intrinsic natures as human beings—which are innate.” Professor (of philosophy) Donald De Marco, takes on, next, those who believe the emergence of life was the result of some “chance combination of gasses,” or “the Big Bang theory.” His article notes some delightful examples of scientific experiments meant to “prove” theories of randomness, including a well-funded one in which monkeys were given computer keyboards to peck away at for a month: “The monkeys produced 5 pages consisting largely of the letter S,” their “behavior was erratic, bashing the keyboard and doing other things that are too indelicate to mention.” But then DeMarco brings out big guns: Great minds from Aristotle to Cicero (can one really believe that “literature could be produced by pure chance”?) to Thomas Aquinas to contemporary biochemist and intelligent-design proponent Michael Behe, all to demonstrate the weaknesses in the random gas theory, as well as Darwinian evolution (regarded today in many circles as “settled dogma,” but full of *unsettled* contradictions).

The winter of 2011 brought the death of Dr. Bernard Nathanson (on Feb. 21)—once a leading abortionist and abortion proponent—a founder of what was the National Association for the Repeal of Abortion Laws (NARAL). And yet many in the pro-life movement were in mourning, because Nathanson had been converted to the pro-life cause, also journeying from Jewish atheist to Roman Catholic Christian. His “long road to Damascus,” a remarkable “modern-day St. Paul story,” is told for us here by pro-life champions Joan Andrews Bell and Chris Bell, who journeyed with him—Joan was his godmother, and he delivered their own firstborn, Mary. In “What the Difference Is,” next, J.P. McFadden also speaks of Nathanson, who at that time had recently published *Aborting America*; my father’s comments, to be sure, must be seen in the light of what he knew *then*—Nathanson was not yet on the side of life (nor, as you will be reminded in this powerful, prophetic essay, was J.P. one for glossing over difficult truths).

Our final article is an engagingly written and persuasive legal analysis of last August’s *Perry v. Schwarzenegger*, a case which, “if affirmed on appeal, would alter the institution of marriage at its core.” Attorney Thomas M. Clark writes that Chief Judge Vaughn Walker countermanded the popular will, proclaimed in Proposition 8—which this ruling invalidated—by trying “very hard to cast his unprecedented creation of a federal constitutional right to same-sex marriage” as part of social progress. But any “thoughtful review” of *Perry* as a constitutional decision must reject its reasoning. “Walker realized he has to engage in some clever sleight-of-hand to overcome the fact that same-sex marriage has not only never been recognized as a fundamental right under the U.S. Constitution, but indeed never even *existed* in the United States until 2004.” Proposition 8 was not meant, Clark writes, as “unprovoked hostility to homosexuals,” but as a response to the judicial imposition of same-sex marriage. In some ways we end this issue’s articles section where we began it, with an activist legal decision meant to “settle” a question that will remain painfully, emphatically unsettled.

INTRODUCTION

* * * * *

We lead our appendices with two columns by *Arkansas Democrat-Gazette* editorial-page editor Paul Greenberg, who will receive the Human Life Foundation’s Great Defender of Life award this October 27th (see ad on page 24). His subject here is the existence of “death panels” included in Obamacare, which are euphemistically called end-of-life counseling regulations. *Appendix B* is adapted from *catholic eye*, a monthly newsletter edited by our managing editor Anne Conlon; Conlon’s “Philadelphia Story” reports on the twisted and grotesque actions of abortionist (and murderer) Dr. Kermit Gosnell, and the even more twisted “spin” given the story by pro-abortion journalists. Two of our appendices speak specifically of the Chiaroscuro Foundation’s press conference: “Rising Above *Roe v. Wade*,” (*Appendix D*) by *Wall Street Journal* Main Street columnist William McGurn (our Great Defender of Life 2010), and “Where is the Mayor?” (*Appendix E*) by founding editor of the *New York Sun* Seth Lipsky. The press conference was “high-profile”—bringing together interfaith leaders from the orthodox Jewish, Catholic, and Protestant churches, and representatives of the black and Hispanic communities, to reveal that New York City’s abortion rate is twice the national average—and yet, McGurn writes, it “elicited nary a peep” from Mayor Michael Bloomberg (who, Lipsky quips, “can turn the city inside-out over the making of a French fry in the wrong fat”).

Appendix E corrects the “Lazy Slander of the Pro-life Cause,” the “frequently repeated canard” that “pro-lifers don’t really care about life”—the truth is that of course “pro-lifers have taken the lead in offering vital services to mothers and infants in need.” In “Frosty Reception” (*Appendix F*) Carol Crossed shares a story from her recent travels, a vignette demonstrating the upside down logic of American law when it comes to killing the vulnerable. Columnist Maggie Gallagher’s “Is Abortion Good for Girls?,” written the week of the 38th anniversary of *Roe*, is next in *Appendix G*, followed by a superb profile of Dr. Bernard Nathanson by Professor Robert P. George of Princeton. *Appendix I* is reprinted from *First Things*: “Caesar’s Thumb” is an essay written by Lord Nicholas Windsor, a member of the British Royal Family, and a prominent, eloquent voice for life on the international scene. Our final appendix is Michael New’s RIP for Ellen McCormack, who made history in 1976 by running for the Democratic nomination for president on a pro-life platform. She died on March 27th.

As always, we thank Nick Downs for lifting our spirits with his brilliant cartoons.

MARIA McFADDEN
EDITOR

The Fight Continues

William Murchison

As Barack Obama observed dryly to congressional leaders of both parties as he put together the agenda for his administration and the new, monotonously Democratic Congress: “Elections have consequences.” He added, with precision and economy: “I won.”

Well, he did win, by golly. And elections, as he sought to impress on his hearers, do have consequences—large and small ones; not always the ones desired by those seeking to impose or resist them. Anyway, consequences. By the late winter of 2011, these were beginning to play out in ways unforeseeable at the time of Obama’s ascent to the presidency, when it might have been deduced that damage to the pro-life cause was so extensive that recuperation could take decades.

The new president seemed conventionally, if not passionately, attached to the pro-choice agenda. He wanted the uncompromising supporters of abortion rights who had voted for him to know he had heard them. At the same time, he had larger fish to fry, such as passage of a stimulus bill, and the invention and imposition of a system of national health care. Life issues, as was predictable, arose in that latter context: Shall federal funds be used to pay for abortions? The president promised it wouldn’t happen. But it did, with no audible murmur from him. The Heritage Foundation called the health-care bill’s abortion provision “a historical departure from the federal policy on taxpayer-funded abortion that has prevailed for more than three decades.”

It wasn’t the only bouquet he threw the pro-choice cause in terms of federal funding. Barely had Obama been sworn into office before he revoked the so-called Mexico City policy that denied U.S. government funds for family planning to groups performing abortions in foreign countries. Ronald Reagan had instituted the policy in 1984; Bill Clinton canceled it in 1993; George W. Bush restored it. “Government,” Obama declared at the time he overturned the ban, “should not intrude on our most private family matters.”

Otherwise, though, an increasingly exhausted administration found little to do and say about mothers and their obligations, or lack thereof, to unborn babies. The consequences of the 2008 election, from a pro-life standpoint, were not agreeable. They were not, at the same time, larger than might have been expected from a president backed by the united might of left-wing feminism.

Not so the consequences from the election that came next. That would be for

William Murchison writes from Dallas for Creators Syndicate and is a senior editor of the *Human Life Review*. His latest book is *Mortal Follies: Episcopalians and the Crisis of Mainline Christianity* (Encounter Books).

two reasons. First, the sheer dimensions of the Republican resurgence both at the state and the national level. Second, the resultant release of frustrations bottled and stoppered for two years as pro-life lawmakers—and their constituents—noted the withdrawal of innate sympathy from a cause previous presidents either had embraced (Ronald Reagan, George W. Bush) or generally abstained from antagonizing (George H. W. Bush, Bill Clinton).

It was clear, the day after the 2010 election, that some readjustment of the balance sheet was in prospect: possibly some major readjustment.

The political climate of the first few months was in many ways—not all—propitious for pro-life re-engagement. Money was the nation's top topic as legislatures and the Congress convened. How would budgets be balanced and jobs created? And would it be taking too much of a chance, politically speaking, to risk turning off the “economic conservatives” by noisily trumpeting the concerns of the “socially conservative” brothers and sisters? Isn't pro-life just kind of, you know, icky in some conservatives' eyes? Doesn't it contradict the objectives of limited government when you tell even conservative people they “must” do something, such as conserve and protect an unborn life?

By March, conservatives still were trying out the new dance steps indicated by the tempos of the new moment. But some interesting things were happening in the absence of a Ronald Reagan type capable of bringing together, with a smile and a gracious speech, the varied perspectives of what we may as well call “the Right.”

I would speak first of the national level, then of happenings at the grassroots.

Indeed the federal deficit and the laggard economy are huge problems. How are they to be negotiated in the context of measures to protect unborn life? Which—to put it another way—should have the ascendancy?

To put it still another way: Is it necessary to assign one or the other ascendancy? Maybe not. Anyway, in the springtime, that was the puzzle which many Republican wheel horses were working out, not without some early indicators of a useful way forward.

The name of Indiana Gov. Mitch Daniels, a potential candidate for president as I write, is most closely identified with the puzzle. Daniels, a self-identified pro-lifer (yes, I know Sen. Harry Reid claims, or has claimed, the same distinction) gave an interview in June 2010 to *The Weekly Standard's* Andrew Ferguson. In the course of the interview Daniels called for “a truce on the so-called social issues. We're going to just have to agree to get along for a little while.” This in order that the economy might be healed and the disaster of the deficit addressed firmly. He got bad notices in some socially conservative circles. To certain ears he had sounded like a wimp. Or—which was probably worse—a Republican in Name Only, the species known as RINO.

Daniels sought to apply liniment to his bruises. “A truce is not a surrender,” he counseled. He was certainly for undoing the Mexico City ban. The perpetually formidable Phyllis Schlafly held her fire. She saw a way out. In her syndicated column, she averred, “The truth is that social and fiscal issues are locked in a political and financial embrace that cannot be pried apart. . . . In order to reduce government size and power, and restore the limited government sought by fiscal conservatives, they simply must address the social issues.”

In December 2010 Daniels unbosomed himself to LifeNews.com. He was for pushing the pro-life cause as long as it wasn’t the only cause, a roadblock to control of the budget. “If it threatened to crowd out or stop business in a way that meant we couldn’t leap forward for our school kids and all the other issues, then I’d have a problem with it.”

At the Conservative Political Action Conference in February 2011, Daniels sought to depict the challenge realistically. He wasn’t saying, don’t do the social conservatism thing. He was saying, look, “We face an enemy, lethal to liberty, and even more implacable than those America has defeated before”—the enemy known as fiscal irresponsibility or look-at-us-we’re-trillions-in-debt. “Should the best way [to solution] be blocked, while the enemy draws nearer, then someone will need to find the second best way. Or the third.” It was what you could call a moment of high political seriousness. Ears pricked up. Applause flooded the hall. Daniels walked away from CPAC irresolute about actually running for president but redeemed in many eyes from the accusation of wimpiness as to the cause of moral order in society.

House Republicans already had found a persuasive way of addressing simultaneously the nation’s two deficits—financial and moral. Let an incensed *New York Times* editorial tell the story: “The budget bill pushed through the House last Saturday [Feb. 19] included the defunding of Planned Parenthood and myriad other cuts detrimental to women. . . . An amendment offered by Representative Mike Pence, Republican of Indiana, would bar any financing of Planned Parenthood. . . . The House resolution would slash support for international family planning and reproductive health care. And it would reimpose the odious global ‘gag’ rule, which forbids giving federal money to any group that even talks about abortions.” And so on and so on.

In March, National Review Online ran a helpful and enlightening column by two conservative activists clearly respectful of each other but rarely photographed in harness beneath the same yoke. Grover Norquist, president of Americans for Tax Reform, and Marjorie Dannenfelser, president of the Susan B. Anthony List, which endorses pro-life women for political office, focused on the House vote to defund Planned Parenthood. What a great idea! they agreed—a veritable win-win. We need to cut spending. “Planned Parenthood must be at the head of the cut list.”

Made stronger by government funding, Planned Parenthood pays its president \$337,000 a year. Between 2002 and 2007, it brought in \$388 million more than it spent on various projects. Stop the spending, and the things the spending pays for stop also. Pretty neat. Everybody's happy except PP's clients and, of course, the *Times*, which is pretty morose anyway these days, but that's another story. In such an approach to collaboration, there's really no cynicism of the genre generally on display in Washington, D.C. Linking diverse organizations in a unified cause is the essence of politics as practiced by everybody in the world, so why not by—for as long as feasible—the right-to-life cause?

As always in these undertakings, some precision in movement is essential: not too much for one ally, not too little either. And no throwing anyone under the bus! Ever! The alliances being forged in Washington may seem a trifle wispy when viewed from the outside, but the alignment of social conservatives—including right-to-life folk—with hard-headed economic bean counters offers arresting possibilities. A lot will depend on leaders and followers alike, working together, listening together, respecting each other. A *Wall Street Journal*/NBC News poll in early March suggested some challenges lie ahead. Two thirds of Republican primary voters, the poll said, are “more likely” to judge candidates by their economic va-va-voom than by their stances on social policy. The game has just begun.

Meanwhile, back at the creek forks (as it was usual to say when America was largely rural), the pro-life cause is asserting itself in ways not feasible after the 2008 vote count and the Obama inauguration. State governors and legislatures seem to know what they want. What they want, many of them, is to place more discouragements in the path of women seeking abortion.

“Newly energized by their success in November’s midterm elections,” the *New York Times* reported, “conservative legislators in dozens of states are mounting aggressive campaigns to limit abortions.” The head of Ohio Right to Life called the legislative climate “the best . . . for passing pro-life laws in years.” Judicial review of state laws, as we know from harsh experience, often yields disappointment to state lawmakers seeking loopholes in *Roe v. Wade*. The thing to note, nevertheless, is the upsurge in loophole-enlargement that followed the 2010 elections. It represents hope; it represents resolution and indefatigability. None of these attributes was necessarily to be expected in the Age of Obama.

The new Republican speaker of the House, John Boehner, seconded the motion. “There has never been a cultural change so quickly,” he observed in February, applying himself to the deficit challenge. He could as readily, perhaps, have been talking about the social issues. The trend cannot have suffered arrest from the gruesome news, in Philadelphia, concerning a doctor, Kermit Gosnell, charged with killing seven newly delivered immigrant and minority babies at his filthy

abortion mill (one of those places *Roe v. Wade* was going to put out of business, except . . .). As the district attorney summarized the matter, Gosnell “induced labor, forced the live birth of viable babies in the sixth, seventh, eighth month of pregnancy and then killed those babies by cutting into the back of the neck with scissors and severing their spinal cords.” Not quite the medical poster boy, Dr. Gosnell, for whom pro-choice organizations may be presently seeking.

Herewith a few instances of legislative gumption, accompanied by acknowledgments of the inconclusive nature of this reporting. At the time of writing, in other words, none of this matter had been translated from ideal into law.

Pro-life forces in the Texas Legislature renewed in January their long-stalled quest for a law requiring availability of a sonogram to a woman seeking an abortion. By March, both houses had passed similar versions of the bill, the House’s being tighter (sonogram viewing would be mandatory) than the Senate’s. Gov. Rick Perry, at the start of the session, bumped sonogram legislation up the ladder by declaring it an emergency item.

Twenty-eight Iowa lawmakers got up a bill to protect life “from the moment of conception”—and take that, Supreme Court! Another bill sought to stop Dr. LeRoy Carhart, possibly the country’s best-known abortion doctor, from moving his practice to Iowa from Nebraska because of a new Nebraska law barring abortions after six months.

The legislatures of Oklahoma, Indiana, and South Carolina entertained proposals to ban private insurance coverage for abortion.

Washington, Minnesota, West Virginia, and New Jersey lawmakers looked at bills to restrict the public funding of abortion.

Legislators in Michigan moved to ban partial-birth abortion.

Parental-consent bills multiplied across the country.

South Dakota created a national ruckus thanks to one lawmaker’s bill to classify as justifiable homicide the killing of someone—excluding abortion doctors, the lawmaker subsequently explained—who fatally attacked an unborn child. Later, the author pulled down the bill. He had made at least one point without trying: The stewardship of life is a matter infinitely more fraught than Justice Harry Blackmun and his six colleagues, in *Roe v. Wade*, could have imagined it to be.

As these and numerous other pro-life bills were shaping up at the state level, the 38th anniversary of *Roe v. Wade*—January 22, 2011—came to pass. The figure “38” is worth careful notice, and not on account of any kinship to a domino game. Who observes 38-year anniversaries apart from husbands and wives? In 1973, when a 7-2 majority on the U. S. Supreme Court nullified the anti-abortion enactments of the several states, there was general expectation that resistance to the ruling would rage for a while, then die away. We had somehow, as a nation, accustomed ourselves to the upheavals of the ’60s. Here was one more such. We

would get over it. We would calm down and get on with life. So to speak. The United States assimilated *Brown v. Board of Education*—which overturned school-segregation laws in the South and Border states—within a couple of decades, if not less in the larger, commercially oriented cities. Segregation in 1954 had seemed part of the Southern décor—like the conviction that unborn life, being life, deserved protection. The conviction by now ought to have vanished, assuming it to have been as arbitrarily founded as segregation.

The Court itself seemed to render such a judgment: People would do thus-and-so because the justices commanded them to do thus-and-so, and that would be the end of a sentiment that we find, instead, in 2011, to be large, vital, crackling, and resurgent, if not yet in a position to command the landscape. A kind of stand-off has ensued. That is more, certainly, than anyone on either side of the question might have anticipated 38 years ago.

The coming of 2011 finds the two, competing convictions about unborn life—pro and whatever—strong enough to keep their antagonism going for some time. The putatively “transformative” presidency of Barack Obama, from which so much was expected, has brought the country nowhere near acceptance of the *Roe* regime.

What would it take to get rid of the *Roe* regime once and for all? (I leave NARAL Pro-Choice America to figure out the reverse of the question: What would it take to impose that regime?) A few more elections like that of 2010 would help, of course. A law on the statute books lends legitimacy to the principle it seems to embody. We say, oh, that’s the law. OK.

A larger, more lasting kind of legitimacy proceeds from the law of the culture itself, written nowhere except the heart and the mind and the conscience. What the culture dictates, legislatures and Congresses put into effect. The root of the reason for Obama’s failure to “transform” sentiment on abortion is the public’s still-impressive resistance to the idea that unborn life is a negotiable commodity, like asparagus. Some like it, some don’t—that kind of thing.

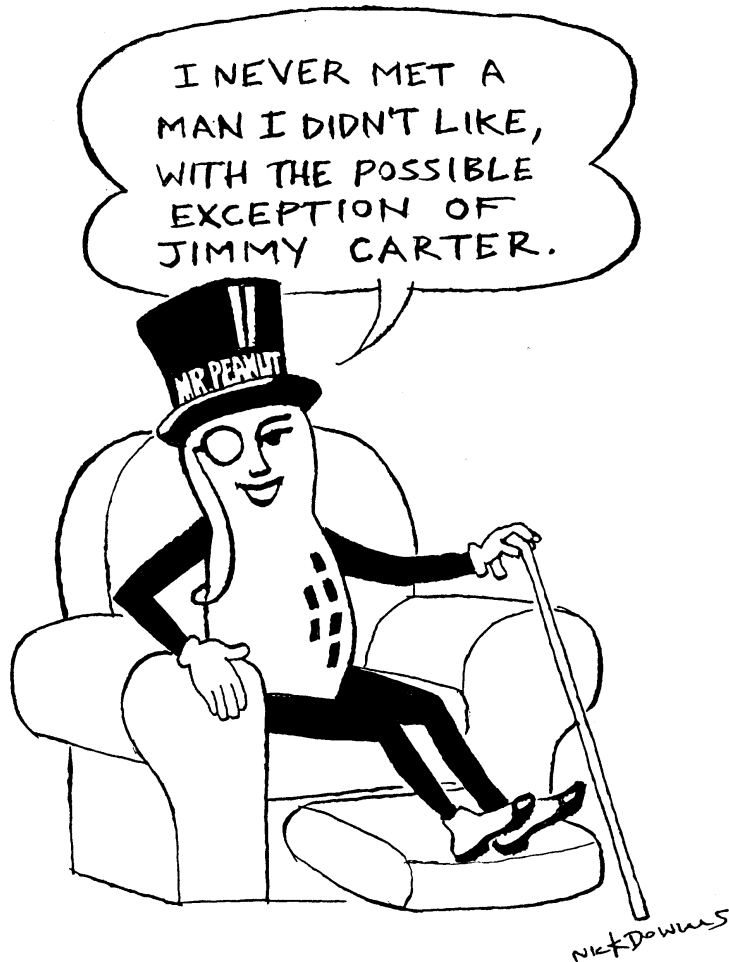
Obama, as seems his custom, overrated his power to charm audiences, here and abroad, into compliance with that which he assumed to be best for one and all. On abortion, a large number needed no presidential persuasion; another large number—hard to quantify because of nuances on such matters as rape, incest, government intrusiveness, etc.—showed themselves unalterably set against persuasion of the sort being practiced on them. They said no. They still say it.

What of the others, then? It is possibly a commonplace by now—one would hope so—that the transformation of opinion on life questions depends less on elections than on the transformation of the culture through the steady, consistent teaching of ideas no ballot box can hold. The building of a culture of life, as Pope John Paul II would have it, is the ticket—a culture resting on the strong foundation of faith in the purposes and designs of a sovereign God. Getting there takes time,

effort, and willingness to stay in the game no matter how rough the going.

In the meantime, laws, bills, committee hearings, rallies, polls, telephone banks, get-out-the-vote campaigns, contributions to candidates, the whole political shmeer—none of it can be called available for apathy, refined disdain, or the turning of well-tailored backs.

Elections, as the man said, do have consequences. And this time “we” won.



The Problem of Pain (Legislation)

Paul Benjamin Linton, Esq.

On April 13, 2010, the Nebraska Legislature passed the “Pain-Capable Unborn Child Protection Act,” LB 1103, which Gov. Dave Heineman signed into law the same day. The Act, which was drafted by attorneys for the National Right to Life Committee (NRLC), prohibits virtually all abortions during and after the twentieth week of gestation. The twentieth week of gestation was selected because that is the stage of pregnancy when, according to the Act’s findings of fact, the unborn child has all of the anatomical and neurological structures in place to experience pain.

The Act was aimed at the practice of Leroy Carhart, a physician who has performed late-term abortions in Nebraska for many years. In earlier litigation, Dr. Carhart successfully challenged Nebraska’s attempt to ban partial-birth abortions, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (*Carhart I*), and unsuccessfully challenged the federal Partial-Birth Abortion Ban Act, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (*Carhart II*). Much to the surprise of the drafters of the “Pain-Capable Unborn Child Protection Act,” its sponsors, and many others, Dr. Carhart did not challenge the Act, even though it would clearly appear to violate the Supreme Court’s determination in *Roe v. Wade*, 410 U.S. 113 (1973), as reaffirmed in relevant part in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), that viability, and not any earlier stage in pregnancy, marks the constitutional frontier which no state may cross in prohibiting abortion. Rather than challenge the Act, Dr. Carhart moved his late-term abortion practice to Maryland, where there is little or no chance of the legislature enacting a similar bill. (Dr. Carhart also announced that he will be performing abortions, at an earlier stage of pregnancy, in Indiana and Iowa.)

On the heels of Dr. Carhart’s refusal to challenge the Act, a number of other states, encouraged by NRLC and its affiliates, are considering similar legislation. Americans United for Life has also gotten into the act with their “Women’s Health Defense Act,” which, like NRLC’s model legislation based on the Nebraska Act, prohibits abortion during and after the twentieth week of gestation. The purpose of this article is to suggest why pro-life legislators, lawyers, lobbyists, and activists may wish to think twice before pursuing such legislation.

It is undisputed that, at twenty weeks’ gestation, the overwhelming majority of

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unborn children are not viable, i.e., capable of sustained survival outside of the womb, with or without medical assistance. Viability usually occurs somewhat later in pregnancy, at the twenty-third or twenty-fourth week, although a few unborn children may attain viability earlier and others still later, depending upon their body weight, size, and lung development. Statistics on the numbers of abortions performed during the second half of pregnancy (during or after the twentieth week of gestation) reveal, not surprisingly, that far more abortions are performed toward the beginning of this period than later. That, in turn, means that most of the abortions that would be affected by the Nebraska Act (or similar legislation) would be performed on unborn children who are not viable. Would such a prohibition be constitutional? The answer to this question would seem to be a resounding “No.”

In *Roe v. Wade*, the Supreme Court held that the state’s “important and legitimate interest in potential life” does not become “compelling,” and, therefore, sufficiently weighty to justify an abortion prohibition, until “viability.” 410 U.S. at 163. “This is so,” the Court explained, “because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.” *Id.* Thus, “if the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.” *Id.* at 163-64. The Court restated this holding in summarizing its opinion: “For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Id.* at 164-65.

There is no doubt that, under *Roe*, the Pain-Capable Unborn Child Protection Act is unconstitutional, at least with respect to its application to pre-viability abortions (whether its post-viability applications are constitutional presents a different question, which is briefly discussed later in this article). Moreover, *Roe*’s holding, that the states may not prohibit abortion before viability, with or without exceptions, was reaffirmed by the Supreme Court 19 years later in *Planned Parenthood v. Casey* (1992). In the Joint Opinion authored by Justices O’Connor, Kennedy and Souter, the Court held that “before viability, the State’s interests are not strong enough to support a prohibition of abortion . . .” 505 U.S. at 846. *See also, id.*, at 860 (“viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on non-therapeutic abortions”) (emphasis added); 872 (“the woman has a right to choose to terminate or continue her pregnancy before viability”). In summarizing its holdings, the Joint Opinion stated: “Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.” *Id.* at 879. The holding in

Roe, that the states may not prohibit abortion before viability, which was reaffirmed in *Casey*, would not appear to leave any room for a ban on abortion before viability. Both *Roe*'s viability holding and *Casey*'s reaffirmation of that holding were supported by a majority of the Court in each case. So, what (or who) has changed?

Supporters of Nebraska's legislation and the model bill based upon it (and the same goes for advocates of AUL's Women's Health Defense Act) pin their hopes on Justice Kennedy, who, along with Chief Justice Roberts and Associate Justices Scalia, Thomas, and Alito, supposedly would make up a majority on the Court to uphold the Act. Indeed, Matt Boever, legal counsel to Sen. Mike Flood, the principal sponsor of the Nebraska "pain" bill, candidly admitted that "LB 1103, if upheld, would require Justice Kennedy and the Court to overrule the precedent in *Casey* that there is a constitutional right to choose an abortion before viability." Assuming that both the Chief Justice and Justice Alito would be "on board" for such a decision (which, in the author's opinion, is not at all certain), proponents of the Act would still need to garner Justice Kennedy's vote because, as they recognize, Justices Ginsburg, Breyer, Sotomayor, and Kagan would most likely vote to strike down the Act.

It is remarkable that they would believe they could attract Justice Kennedy's vote, in light of the fact that he was one of three authors of the Joint Opinion in *Casey* reaffirming the viability holding of *Roe*. Based upon Justice Kennedy's passionate dissent in the first partial-birth-abortion-ban case, *Carhart I*, and his majority opinion for the Court upholding the federal Partial-Birth Abortion Ban Act seven years later in *Carhart II*, supporters of the "pain" bill (or similar "model" legislation banning abortion at twenty weeks) believe that he would recognize a state interest in the unborn child's ability to experience pain that would sustain the constitutionality of the Act. But this belief is naïve and dangerous.

In both his dissent in *Carhart I* and his majority opinion in *Carhart II*, Justice Kennedy expressed the view that the states have legitimate interests in regulating the practice of abortion that go beyond their recognized interests in protecting maternal health and preserving the life of the unborn child. In *Carhart I*, Justice Kennedy rejected Dr. Carhart's interpretation of Supreme Court precedent that "the only two interests the State may advance through regulation of abortion are . . . the health of the woman who is considering the procedure and . . . the life of the fetus she carries." *Carhart I*, 530 U.S. at 960 (Kennedy, J., dissenting). He identified three additional state interests, concern for the life of the unborn and "for the partially born," "preserving the integrity of the medical profession" and "erecting a barrier to infanticide." *Id.* at 961 (summarizing the State's argument).

With respect to the first two interests, Justice Kennedy said that the "States . . . have an interest in forbidding medical procedures which, in the State's reasonable

determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus.” *Id.* “A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others.” *Id.* at 962.

With respect to the third interest, Justice Kennedy stated that “Nebraska was entitled to find the existence of a consequential moral difference between the procedures [conventional dilation and evacuation (or D&E), in which the unborn child is dismembered in the course of the abortion procedure, and dilation and extraction (or D&X), in which the child is killed after it has been partially delivered, intact].” *Id.* “D&X’s stronger resemblance to infanticide means [that] Nebraska could conclude [that] the procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect.” *Id.* at 963. Writing for the Court in *Carhart II*, Justice Kennedy reiterated these themes. *See Carhart II*, 550 U.S. at 156-60 (law was aimed at preventing the devaluation of human life, maintaining the ethics of the medical profession and establishing a bright line between abortion and infanticide).

Supporters of the Pain-Capable Unborn Child Protection Act point to the foregoing statements of Justice Kennedy as evidence that he would, first, recognize the unborn child’s ability to experience pain as a legitimate basis for state regulation of abortion and, second, uphold a prohibition of abortion, even one that applied before viability, that was based on that interest. For purposes of this article, the author assumes (without necessarily agreeing with) the first proposition. Does the second proposition follow? Decidedly not.

As an initial observation, it must be emphasized that neither the first nor the second partial-birth-abortion-ban case concerned an *abortion* prohibition. Rather, both involved an abortion *procedure* ban that, in Justice Kennedy’s view, left other procedures unaffected. In both his dissent in *Carhart I*, 530 U.S. at 972-79, and his majority opinion in *Carhart II*, 550 U.S. at 150-56, Justice Kennedy went to great pains to explain why the statutes in question did *not* affect the legality of the most commonly used second-trimester abortion technique (conventional D&E), acknowledging that the statutes would be unconstitutional if they effectively prohibited conventional D&Es. That the prohibition of partial-birth abortion was not an *abortion* ban, but an abortion *procedure* ban, was critical to his analysis. Thus, in the second paragraph of his dissent in *Carhart I*, Justice Kennedy stated: “The Court’s decision today . . . invalidat[es] a statute advancing critical state interests, *even though the law denies no woman the right to choose an*

abortion and places no undue burden upon the right.” 530 U.S. at 957 (emphasis added). Later in his dissent, he stated that “as an ethical and moral matter D&X is distinct from D&E and is a more serious concern for medical ethics and the morality of the larger society the medical profession must serve.” *Id.* at 963. Immediately following this sentence, however, Justice Kennedy added: “*Nebraska must obey the legal regime which has declared the right of the woman to have an abortion before viability.*” *Id.* at 963-64 (emphasis added).

In *Carhart II*, the Court “assumed” the continuing validity of “the principles set forth in the joint opinion” in *Casey*. *Carhart II*, 550 U.S. at 146 (the Court “assumed” the validity of those principles only because two justices who joined the majority opinion in *Carhart II*—Justices Scalia and Thomas—had dissented from the reaffirmation of *Roe* in *Casey*, not because Justice Kennedy, who authored the majority opinion in *Carhart II*, had second thoughts about the Joint Opinion he co-authored in *Casey*). The first “principle” of *Casey*, Justice Kennedy stated, is that, “before viability, a State ‘may not prohibit any woman from making the ultimate decision to terminate her pregnancy.’” *Id.* (quoting *Casey*, 505 U.S. at 879). The second “principle” is that a state “may not impose upon this right an undue burden, which exists if a regulation’s ‘purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.’” *Id.* (quoting *Casey*, 505 U.S. at 878). And the third “principle” is that the State may adopt “‘regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn . . . , if they are not a substantial obstacle to the woman’s exercise of the right to choose.’” *Id.* (quoting *Casey*, 505 U.S. at 877). Justice Kennedy concluded his summary of *Casey* by noting that, in *Casey*, the Court “struck a balance. *The balance was essential to its holding.*” *Id.* (emphasis added).

In light of the foregoing statements of Justice Kennedy in *Carhart I* and *Carhart II*, it is clear that he continues to adhere to the Joint Opinion in *Casey*. Indeed, in *Carhart II*, he recognized that the federal Partial-Birth Abortion Ban Act “would be unconstitutional ‘if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.’” 550 U.S. at 156 (quoting *Casey*, 505 U.S. at 878). Thus, even if one assumes that the state has a legitimate interest in *regulating* abortion at a stage of pregnancy when the unborn child is capable of experiencing pain, that interest is not strong enough to sustain a statute *prohibiting* abortion before viability.

Two other considerations militate against the conclusion that the states may prohibit abortion whenever the unborn child is able to experience pain. First, as a matter of simple logic, the state’s interest in preserving the life (or, to use *Roe*’s lexicon, “potential” life) of the unborn child is obviously weightier than any

asserted interest in avoiding pain. But, under *Roe*, as reaffirmed in part in *Casey*, the state's interest in preserving the life of the unborn child is not strong enough to support a prohibition of abortion before viability. So, on what basis could a *lesser* interest sustain a prohibition of abortion before viability?

Second, if the state has an interest in preventing pain to the unborn child during an abortion procedure, a ban on all abortions at the stage of pregnancy when the child is capable of experiencing pain is obviously overkill. The state's interest could be achieved by a far less draconian measure, simply requiring pain alleviation. But that is precisely the direction that neither NRLC's Pain-Capable Unborn Child Protection Act nor AUL's Women's Health Defense Act takes.

Supporters of these bills fail to come to grips with these unequivocal statements of Justice Kennedy, which leave no doubt that he would not vote to uphold a "pain" bill that prohibited abortions before viability. There is, however, a further problem with the "pain" bill, and that is based on Justice Kennedy's view, expressed in both *Carhart I*, 530 U.S. at 964-72, and *Carhart II*, 550 U.S. at 161-67, that the states may legislate in the area of abortion on the basis of something short of unanimous medical opinion.

In *Carhart I*, taking issue with the majority's reliance on Dr. Carhart's opinion that, at least in some cases, the D&X ("partial-birth") method of abortion was the safest for the woman, Justice Kennedy responded that "the question here is whether there was substantial and objective medical evidence to demonstrate [that] the State had considerable support for its conclusion that the ban created a substantial risk to no woman's health." 530 U.S. at 969. Stated more simply, "the State is entitled to make judgments where high medical authority is in disagreement." *Id.* at 969-70. In *Carhart II*, Justice Kennedy, noting that the Court "has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty," concluded that the Partial-Birth Abortion Ban Act "is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives." 550 U.S. at 163, 166-67.

It was apparently in reliance upon such statements that Nebraska's Pain-Capable Unborn Child Protection Act includes legislative findings that "at least by twenty weeks after fertilization there is substantial evidence that an unborn child has the physical structures to experience pain," and that "there is substantial evidence that, by twenty weeks after fertilization, unborn children seek to evade certain stimuli in a manner which in an infant or an adult would be interpreted as a response to pain." LB 1103, §§ 3(1), (2). In light of these (and other) findings, Nebraska asserted a "compelling state interest" in "protecting the lives of unborn children from the stage at which substantial medical evidence indicates

that they are capable of feeling pain.” *Id.*, § 3(5).

If “substantial medical evidence” that an unborn child is capable of experiencing pain *during or after* the twentieth week of gestation is sufficient to support the constitutionality of the Pain-Capable Unborn Child Protection Act, then it necessarily follows that an Act prohibiting abortion *before* the twentieth week also would be constitutional if it was supported by “substantial medical evidence” that the unborn child was capable of experiencing pain. In one of its legislative findings not quoted above, the Nebraska Legislature noted that “even before twenty weeks after fertilization, unborn children have been observed to exhibit hormonal stress responses to painful stimuli. Such responses were reduced when pain medication was administered directly to such unborn children.” LB 1103, § 3(4). Some physicians believe that the unborn child is capable of experiencing pain at a much earlier stage of pregnancy than the twentieth week of gestation. Indeed, the “model” act based on the Nebraska legislation is quite explicit on this point. In its proposed “legislative findings,” the model act finds that “pain receptors (nociceptors) are present through the unborn child’s entire body no later than 16 weeks after fertilization and nerves link these receptors to the brain’s thalamus and subcortical plate by no later than 20 weeks,” that “by 8 weeks after fertilization, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example by recoiling,” and that “in the unborn child, application of such painful stimuli is associated with significant stress hormones known as the stress response.” NRLC Pain-Capable Unborn Child Protection Act Model, §§ 3(1), (2), (3).

Under the rationale used to support the constitutionality of the Nebraska Act, if there is, in Justice Kennedy’s words, “substantial and objective medical evidence” that the unborn child is capable of experiencing pain before the twentieth week (sixteen weeks or even eight weeks, as suggested in NRLC’s model act), then a ban on all abortions at that stage of gestation also would be constitutional. The Court cannot uphold the Nebraska Act (or model legislation based upon that Act) without opening the door to other “pain” legislation that would prohibit abortion at much earlier stages of gestation. Entirely apart from the constitutional considerations already mentioned, it is highly implausible that either the Court or Justice Kennedy would accept the unborn child’s ability to experience pain as a substitute for (or in addition to) viability as the (or a) criterion for determining the states’ authority to prohibit abortion when that ability may be present much earlier in pregnancy than the twentieth week of gestation.

Those who believe that Justice Kennedy would be a possible vote to uphold an abortion ban that reached pre-viability, as well as post-viability, abortions necessarily have to ignore or “explain away” Justice Kennedy’s unequivocal writings on the subject—in *Casey*, *Carhart I* and *Carhart II*—that the States may *not* prohibit abortion before viability. But there is other evidence that Justice Kennedy

would not back down from what he co-authored in *Casey*. For example, in *Leavitt v. Jane L.*, 520 U.S. 1274 (1997), the Supreme Court refused to review a decision of the United States Court of Appeals for the Tenth Circuit, *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), declaring unconstitutional a statutory provision banning abortion after the twentieth week of gestational age (as measured from the date of conception). Even though the ban applied at a slightly later stage of pregnancy than the Pain-Capable Unborn Child Protection Act, and permitted abortions for a broader range of reasons (life-of-the-mother, “grave danger” to the pregnant woman’s “medical health,” and fetal anomaly), neither Justice Kennedy nor any other justice dissented from the denial of review. Again, in both *Ada v. Guam Society of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992), and *Voinovich v. Women’s Medical Professional Corp.*, 523 U.S. 1037 (1998), Justice Kennedy did not dissent from the Supreme Court’s refusal to review the constitutionality of the post-viability applications of an abortion ban (*Ada*) or a post-viability ban itself (*Voinovich*), which may suggest that he is even less open to reviewing an abortion ban that applies before viability.

In light of the foregoing analysis, it is (or should be) apparent that there is no realistic possibility that Justice Kennedy would vote to uphold an abortion prohibition that reached pre-viability, as well as post-viability, abortions, regardless of the reasons asserted in support of such a prohibition. To believe otherwise is, in the author’s opinion, naïve. It is also dangerous. If a case challenging an act like the Nebraska Pain-Capable Unborn Child Protection Act (or the Women’s Health Defense Act) actually reached the Supreme Court, a majority of the Court would most likely use the case to reaffirm *Roe v. Wade*, as modified by *Casey*. It is certainly not in the interest of the pro-life movement to precipitate litigation that could result in yet another decision of the Supreme Court further entrenching *Roe* in our constitutional jurisprudence.

In view of the foregoing, it may be asked: Why did Dr. Carhart not challenge the Pain-Capable Unborn Child Protection Act? In the author’s opinion, the reason has nothing to do with the Act’s constitutionality with respect to its application to pre-viability abortions and everything to do with its application to post-viability abortions. With the exception of its decision in *Carhart I*, the Supreme Court has showed an increasing unwillingness to declare abortion statutes unconstitutional “on their face,” i.e., in all of their applications, and has preferred a more limited approach in which facial challenges are disfavored, “as applied” challenges are favored, and the relief granted in any case where a statute has unconstitutional applications will be limited to remedying those violations. See, e.g., *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996) (*per curiam*) (vacating decision of court of appeals affirming injunction against enforcement of

state constitutional amendment regarding abortion and remanding the cause for entry of an order enjoining enforcement of the amendment “only to the extent that the amendment imposes obligations inconsistent with federal law”); *Leavitt v. Jane L.*, 518 U.S. 137 (1996) (*per curiam*) (summarily reversing judgment of the court of appeals that provisions of an abortion prohibition were not severable and remanding for a consideration of severability); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006) (vacating judgment of the court of appeals striking down state parental-notice statute and remanding the cause to determine whether the unconstitutional applications of the law were severable from the constitutional applications); *Carhart II*, 550 U.S. at 167-68 (holding that the facial challenges to the federal Partial-Birth Abortion Ban Act should not have been entertained by the district courts). Given this trend in the case law, Dr. Carhart may have feared that, in challenging the Act, he could have “won the battle and lost the war”—i.e., the Court probably would have struck down the Act as it applied to pre-viability abortions, but upheld it as applied to post-viability abortions. This would be ironic, given NRLC’s official policy opposing post-viability bans.

Abortion advocates are shrewd. They may have made a hard calculation that the benefits of having the Act struck down insofar as it prohibits pre-viability abortions was not worth the risk of having it upheld as it applies to post-viability abortions. The Act, *recast as a post-viability ban only*, would then have become the national “template” for post-viability prohibitions across the country, thereby replacing the generally weak and ineffective post-viability statutes that are now on the books in most states. If, in fact, that was Dr. Carhart’s reasoning for not challenging the Nebraska Act, that suggests that enacting similar statutes in other states may not trigger the “test case” that supporters of the “pain” bill are seeking. At some point, however, if enough states enact statutes based on the Nebraska Act, *some* abortion provider will bring suit. But as this article has demonstrated, such a suit poses risks not just for the pro-choice side, but also for the pro-life side. The pre-viability applications of the law would not be upheld and the “central” holding of *Roe*, that the states may not prohibit abortion before viability, could once again be affirmed by the Supreme Court. That significant downside could be entirely avoided by abandoning the approach taken by the Pain-Capable Unborn Child Protection Act and the Women’s Health Defense Act, and taking a different and more cautious approach: simply enacting a carefully drafted post-viability ban that could pass constitutional muster.

In addition to the constitutional concerns raised by NLRC’s and AUL’s models, it may be asked whether it is good public policy to ban abortions on the basis of the unborn child’s ability to experience pain. The unstated (and certainly unintended) message that such a policy communicates is that it *is* acceptable to kill

unborn children when they are not thought to be capable of experiencing pain (or perhaps, when their pain can be prevented). That is not a message the pro-life movement wants to send. The constitutional and public-policy concerns posed by these particular “pain” bills should give thoughtful pro-life legislators, lawyers, lobbyists, and activists pause before they decide to support such legislation in other states.



Nick Downes

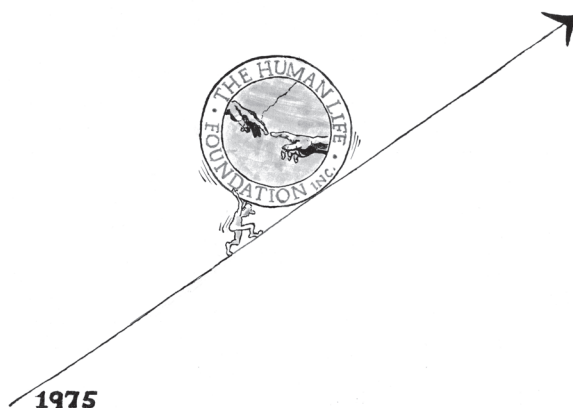
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Civil Rights Revisited:

The Growing African American Pro-Life Movement

Brian Caulfield

The rally speakers decried the targeting of African Americans and the degrading treatment of women and children by powerful cultural forces. They spoke of non-violent resistance, community education, and the need to expose the well-financed agenda to marginalize the black population, especially in the inner-city areas.

No, this was not a rally in the 1960s led by the great civil-rights leader Dr. Martin Luther King Jr. Rather, the rally was staged earlier this year in upper Manhattan by King's niece, Dr. Alveda King, who joined an interfaith, interracial coalition of pro-lifers to shine a spotlight on the abortion industry's marketing and presence in black and minority neighborhoods.

The January 10 event was historic in that it brought black pro-life leaders from across the country to the media capital of New York and showed with public statistics that abortion is decimating the black community and destroying black families. Supporting the event was Archbishop Timothy Dolan, head of the Catholic Archdiocese of New York, who a few days earlier had spoken at a press conference highlighting the abortion numbers in New York City. He was joined by Brooklyn Bishop Nicholas DiMarzio, New York rabbis, and ministers from African American churches.

Using the newly released New York City Vital Statistics report, those who spoke at the press conference and the rally stressed that 41 percent of pregnancies in New York City end in abortion, with the percentage among black mothers standing about 20 points higher. In fact, more black babies are aborted than born each year. In 2009, black mothers in the city aborted 59.8 percent of their pregnancies—a rate of 1,500 abortions per 1,000 live births. In 2008 African Americans and Hispanics had a combined total of 79 percent of all abortions in New York City. That year, for every 1,000 live births, white women had 512 abortions, Hispanics 867, and blacks 1,260. On a national level, although black Americans make up 12.4 percent of the U.S. population, black women account for 30 percent of abortions.

The numbers are sobering, and the rally speakers tied them to Planned Parenthood, which is the nation's largest abortion business, and has the majority of its facilities in minority neighborhoods.

As Dr. King and other speakers pointed out, the targeting of African Americans

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and other minorities is in keeping with the published principles of Margaret Sanger, founder of Planned Parenthood, who initiated what she called the “Negro Project.” She wrote that “colored people are like human weeds and are to be exterminated.” Detailing her strategy, Sanger added, “We should hire three or four colored ministers, preferably with social-service backgrounds, and with engaging personalities. The most successful educational approach to the Negro is through a religious appeal. We don’t want the word to go out that we want to exterminate the Negro population and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members.”

These shocking statements have been well-documented by pro-lifers, but will not appear in the literature of Planned Parenthood today, which tries to distance itself from its history while still holding up the founder for praise.

Yet black ministers were out in force at the January rally to declare that they would not be complicit in the decimation of their own race. The event was hosted by Pastor Bill Devlin of the Manhattan Bible Church on W. 205th Street and 9th Avenue in Manhattan. The opening prayer was offered by Pastor Michael Faulkner of the New Horizon Church in Harlem. Showing that the pro-life ethic cuts across racial lines, they shared the podium with a white minister who has been in the abortion fight for decades—Rev. Patrick Mahoney, director of the Christian Defense Coalition.

Another speaker was Dr. Gerard Nadal, who holds a doctorate in molecular microbiology and placed the abortion statistics in perspective. Commenting on the rally in his blog, he said, “Welcome to the New Civil Rights movement. Dr. King admonished the audience of mostly blacks and Hispanics not to take away the wrong message, not to leave distrusting whites, but to take note of the solidarity of the blacks, Hispanics, and Caucasians gathered together.”

The rally also highlighted a bill in the New York City Council that would place onerous restrictions on pro-life crisis-pregnancy centers, requiring them to advertise that they do not perform or refer for abortions, and to take other measures designed to disrupt their outreach to pregnant women. Chris Slattery, the operator of twelve such New York centers under the Expectant Mother Care umbrella, was another rally speaker.

Billboard Politics

The abortion statistics in the black community gained headlines a few weeks after the rally when a billboard was posted at a prominent Manhattan intersection in February, Black History Month, declaring, “The Most Dangerous Place for an African American is in the Womb.” A similar billboard campaign was staged around the same time in Los Angeles, with the message that black children are an “Endangered Species.”

Political activist Rev. Al Sharpton and some members of the City Council rallied to have the New York billboard removed, saying that the message was divisive and insulting to black people. The billboard company agreed to take it down a few days later, well before the three-week contract was up. Of course, the point of the billboard was not to demean African Americans or make black women feel inferior or guilty; quite the opposite. The purpose was to empower African American women, call attention to the devastating effects of abortion on the black community, and start a discussion about the targeting tactics of abortion clinics.

In his online blog, Archbishop Dolan addressed the issue head-on: “Why has the billboard suddenly been taken down? What was it that moved many of our elected officials to condemn this ad and call for the gag order? Are they claiming that free speech is a right enjoyed only by those who favor abortion or their pet causes? Do they believe that unpleasant and disturbing truths should not be spoken? Or are they afraid that when people are finally confronted with the reality of the horror of abortion, and with the toll that it is taking in our city, particularly in our African-American community, that they will be moved to defend innocent, unborn, human life.”

Not surprisingly, the billboard was misinterpreted and misrepresented in the media, though it definitely achieved its goal of gaining attention. Indicative of the media’s mixed reaction, the *Daily News* ran an editorial stating, “A racially offensive anti-abortion sign might have done some good if it curbs unwanted pregnancy.” The focus of the editorial was not on the tragedy of abortion and its effect on the black community, but on the need for more contraception and responsible latex sex. It seems no matter how pro-lifers frame an issue, major media commentary always comes back to Planned Parenthood talking points.

The revolutionary nature of the new black pro-life movement has been generally passed over by the mainstream media, but that does not mean that the message has not been heard within the black communities. Rev. Sharpton, a self-proclaimed “pro-choice” advocate, may seek to change the subject from abortion to race relations, but black pro-lifers would rather talk about abortion facts and figures, and what they have seen and experienced.

Family Ties

The most recognizable name in the new black pro-life movement, of course, is Alveda King, niece of Martin Luther King and daughter of his brother, Rev. A. D. King, who was also a civil-rights activist. She serves as director of the African American Outreach for Priests for Life and Gospel of Life Ministries, the organizations headed by Father Frank Pavone.

As she outlines in her online biography she was jailed during the open-housing movement in the 1970s, and her family home in Birmingham, Ala., was bombed

by racists, as was her father's church office in Louisville, Ky. She sees the pro-life movement as a continuation of the civil-rights struggle.

Ms. King has suffered from the abortion culture as well, undergoing two abortions when she was younger; and she now takes part in the Silent No More ministry, in which women who have had abortions tell their stories of pain and loss, as they seek spiritual, emotional, and physical healing.

Last summer she was a speaker at Glenn Beck's Restoring Honor Rally in Washington, D.C., held on the anniversary of Martin Luther King's 1963 "I Have a Dream" speech. Outlining the societal ills that have continued or begun since her uncle gave that speech, she said, "We are still suffering from the great evil divide of racism. Our children are suffering in failing school systems. Our sons and daughters are being incarcerated at astronomical rates. Sickness, disease and poverty of the spirit, soul and body are plaguing our communities. The procreative foundation of marriage is being threatened, and the wombs of our mothers have become places where the blood of our children is shed in a 'womb war' that threatens the fabric of our society. And the economy reflects the depth of our nation's moral poverty." Hope lies in restoring the values of America and abolishing racial divides and privileges, she concluded. "We will know [that day comes] when prayer is once again welcome in the public squares of America. We will know when our children are no longer in mortal peril on our streets and in our classrooms, and in the wombs of our mothers. We will know when righteousness rolls down like waters, and justice like a mighty stream."

One of her projects is to reclaim her uncle's legacy for the pro-life movement by showing that his statements, religious beliefs, and advocacy for the oppressed indicate that Martin Luther King was against abortion. Although Planned Parenthood gave him an award in the 1960s, Ms. King insists that he would not support legalized abortion today, since he would see the harmful effects of the 1973 *Roe v. Wade* decision.

"Planned Parenthood, stop implying that my uncle, Dr. Martin Luther King Jr, would support abortion if he was alive today," Ms. King writes. "Uncle Martin, were he alive today, would be on the side of the young, the weak, the infirm, and the poor in spirit. The award you claim that he accepted was not accepted by him but by his wife, Coretta, and the speech she read was not written by my uncle. We know that you only gave him the award in an attempt to reach the black community through their religious leaders as is verified by the words of your founder, Margaret Sanger."

Black Pro-Life Union

Ms. King is part of a larger movement that is symbolized by the formation of the National Black Pro-life Union, based in the nation's capital. The group is led by

Day Gardner, a former beauty queen who was, in 1976, the first black woman to reach the semifinals in the Miss America pageant. In describing the effect of abortion on the African American community, she does not shy from using the word genocide.

She writes, “For too long, our black leaders have walked with blinders on—we have ignored the screams and tears of our children being ripped from the womb. We have been guilty of looking the other way while our children were targeted for death. But we are coming together and we realize abortion will not go away until we bring this travesty out into the light and act to protect the very lives being disregarded. The hateful agenda of Planned Parenthood must be stopped, and we as a society must not sit by and allow children to be killed.”

The Pro-life Union’s website lists 15 black pro-life groups and numerous black ministers and pastors who are advisers and speakers. The union also highlights the irony that the first black U.S. president is the strongest supporter of abortion ever to hold the office.

Obama is famous for saying in a televised interview during the 2008 campaign that determining when human life begins is “above my pay grade.” He also remarked at a campaign rally that if his daughters made a mistake he wouldn’t want them “punished with a baby.” As an Illinois legislator, he defended partial-birth abortion.

Taking the president to task, Texas pastor Stephen Broden writes on the National Black Pro-life Union website that Obama talks about reducing abortions, yet his actions have repeatedly supported the abortion industry. He rescinded the Mexico City policy barring federal funding of international groups that provide abortion, funneled millions of stimulus dollars to abortion champions such as Planned Parenthood, and lifted the Bush-era research ban on newly produced embryonic stem cells. When the president met with representatives from “pro-choice” and pro-life groups, Broden writes, pro-life blacks were left out of the discussion.

Obama’s stated goal of reducing abortion “is a curiosity in light of this administration’s action that promoted the continuation of prenatal murder through supporting the abortion industry both here and abroad,” noted Broden. “I see your actions better than I hear your verbiage.”

The Movement’s Jefferson

Of course, the growing black pro-life movement follows the path blazed from the beginning by the late Dr. Mildred Jefferson, the first African American woman to graduate from Harvard Medical School. After a distinguished medical career and serving as an early president of the National Right to Life Committee, she died in October 2010 at the age of 84.

Even the *New York Times* recognized the significance of her stand in an obituary,

which highlighted the significance of her medical training in her opposition to abortion. The paper quoted from her 1981 testimony before Congress, where she said that the *Roe v. Wade* decision “gave my profession an almost unlimited license to kill. . . . With the obstetrician and mother becoming the worst enemy of the child and the pediatrician becoming the assassin for the family, the state must be enabled to protect the life of the child, born and unborn.”

Dr. Jefferson was there at the beginning of the pro-life movement, a rare African American leader in a movement that could otherwise be dismissed by critics as white and well-off. As the black pro-life groups gather today, they knowingly or not pay tribute to Dr. Jefferson, whose outspoken and direct tactics were not always popular even among fellow pro-lifers. Her fearless spirit and trust in the truth should certainly guide their efforts as they labor to shine a spotlight on the devastating effects of abortion on their community.

Indeed, black pro-lifers are not as constrained in their words as their white counterparts sometimes seem to be, with the latter adopting a more moderate tone to avoid being pegged as extremists. The words of black pro-lifers often sound like cries from the heart, from a community wounded and witnessing to the horrors that it has experienced at the hands of the abortion industry that was supposed to help it.

“Genocide . . . Assassin . . . Killing . . . Prenatal murder . . . Endangered Species.” This is the strong language black leaders use. Yet the mainstream media have largely ignored their voices—except in a rare obituary. They are aware, no doubt, that the testimony of African Americans would undermine the widespread notion, supported even in the Oval Office today, that abortion is good for black people.

As they move forward and grow as a movement, the words of Dr. Jefferson can provide wise guidance to the growing black pro-life movement: “I am at once a physician, a citizen, and a woman, and I am not willing to stand aside and allow this concept of expendable human lives to turn this great land of ours into just another exclusive reservation where only the perfect, the privileged, and the planned have the right to live.”

Catholic Liberals and Abortion: Chapter Two

James Hitchcock

It has often been pointed out that, had the abortion issue been foreseen in 1960, it would have been assumed that the Republicans—predominantly white Anglo-Saxon Protestants with a tinge of eugenics in their background—would have been the pro-abortion party, while Catholic Democrats would have been solidly pro-life.

That the reverse happened is a complex story still not fully understood. The obvious fact is that secular liberals, especially feminists, demanded that abortion be recognized as a fundamental “right” and most leading Catholic Democrats—Edward Kennedy, Father Robert Drinan, Mario Cuomo, Patrick Leahy, Joseph Biden, Nancy Pelosi—acquiesced enthusiastically.

Catholics were expected to remain loyal Democrats but were not to have a distinctive agenda of their own, and over the years liberal Catholics have given the party repeated assurances that they will not hold it accountable for its stand on abortion, an issue that soon ceased posing any kind of moral dilemma and became merely an unwarranted impediment to the liberal program.

For almost three decades, liberal Catholics embraced the late Cardinal Joseph Bernardin’s concept of the “seamless garment of life issues”—allegedly a broadening of moral concerns without minimizing the seriousness of abortion. But pro-life skeptics pointed out that the only concrete constituency for this “consistent ethic of life” was a dwindling number of anti-abortion Democrats who stood, often heroically, against the pressure of their party.

In 2010, the liberal culture showed definitively that it cannot sustain a pro-life position. The slim thread was finally snapped, as most pro-life Democratic congressmen collapsed under party pressure and supported President Barack Obama’s very dubious comprehensive health plan¹ and in the process Catholic liberals showed themselves at best indifferent to the abortion issue.

The *National Catholic Reporter* is the principal organ of American liberal Catholicism, and its formal acceptance of the Catholic teaching on abortion has always been an uneasy one. For example, on the thirtieth anniversary of *Roe v. Wade* in 2003, the paper’s coverage of the issue included no spokesman for any major pro-life group, no theologian expounding the Church’s teaching, and no bishop reaffirming it, but did pay attention to Frances Kissling, the fanatically pro-abortion director

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of a paper organization called Catholics for a Free Choice.²

Sounding a theme that the NCR would repeat endlessly, its publisher (later editor), Thomas W. Roberts, warned pro-lifers, in an ostensibly friendly fashion, that they were wasting their energies and ought to turn to other things. He characterized both sides in the abortion debate as “screaming maniacs” and charged that the American bishops had allowed themselves “to be sucked into . . . this national screaming match.”

Liberal Catholics were alarmed and discouraged by the results of the 2004 election, when “Catholic social teaching was getting short-changed,” and they began to organize to elect a Democrat in 2008. (Significantly, such organizations were candidly described as a “counterforce” to the pro-life movement.)³

The Jesuit Thomas Reese, who is the secular media’s favorite commentator on Catholic matters, was consulted by the Democratic Party on how to attract Catholic votes.⁴ Reese dismisses abortion as an unimportant issue and the pro-life movement as “a small group of people for whom there is only one issue, and they will make noise.”⁵

In 2008, the election of Barack Obama was thus a moral imperative for many Catholic liberals, embraced with extreme passion. A full-page advertisement in the NCR identified Obama with the words of Jesus in the Sermon on the Mount,⁶ a tactic which, if Republicans had used it, would have been denounced as blasphemy and idolatry. The Democratic platform, which spoke vaguely about reducing the number of abortions, was endorsed as “courageous” and “historic.”⁷

The liberal Catholics’ role in the campaign was not to persuade Obama to moderate his stand on abortion (there is little evidence that they even tried to do so) but to persuade Catholics that abortion is simply not important.

The liberal “solution” to the plague of abortions was merely the further expansion of the welfare state, which in 2008 included “access to affordable family planning and comprehensive age-appropriate sex education,”⁸ policies that in fact promised to make access to abortion even easier, although the head of Democrats for Life predicted that the policies of the Obama administration would reduce the number of abortions by 95 percent over a ten-year period.⁹

Liberals had no concrete plan to oppose legal abortion. One commentator insisted that “the pro-life movement needs to abandon the effort to overturn *Roe*” and proposed a “solution” whereby the bishops would ask pro-abortion politicians to volunteer at a crisis-pregnancy center, then to reconsider their stance.¹⁰

There is scant empirical evidence that an increase in welfare programs actually does reduce the number of abortions, a claim that was formulated for a partisan group by a former employee of Planned Parenthood.¹¹ The claim that poverty alone motivates abortions is obviously erroneous, since many women of middle- or upper-class status avail themselves of the service, and it is fundamental to the

abortion cause that the practice be permitted for any reason whatsoever.

Douglas W. Kmiec, former dean of the law school at Catholic University of America and an official in the Reagan administration, rejoiced in 2008 that Obama wanted America “to feel good about itself,” a desire that Kmiec said was a part of a “Catholic sensitivity.”¹²

In his endorsement, Kmiec’s sole reference to abortion was to acknowledge that “Catholics do have to navigate some difficult ethical waters to contemplate voting blue” and that Obama needed to show “greater concern” for marriage and family issues. (The word “navigate” suggested that Kmiec no longer considered abortion a moral issue, merely an obstacle to be avoided.)

Kmiec’s espousal of Obama caused him to denigrate pro-lifers, repeating the claim of their enemies that they are unconcerned with life beyond the womb and accusing them of thinking that they have done their duty merely by voting for hypocritical political candidates.

As Kmiec well knew, religious groups were providing most of the support for needy pregnant women long before abortion even became legal. But when asked by a pro-abortion group whether Obama would continue to allow public funding of “crisis-pregnancy centers” operated by pro-lifers, his representatives quickly responded, “No.”¹³

Kmiec insisted that “the proper question for Catholics to ask is not ‘Can I vote for him [Obama]?’ but ‘Why shouldn’t I vote for the candidate who feels more passionately and speaks more credibly about economic fairness for the average family, who will be a true steward of the environment, and who will treat the immigrant family with respect?’”

During the 2008 campaign, two organizations called Catholics in Alliance for the Common Good and Catholics United existed for no other purpose than to encourage Catholics to vote for Obama, an act that was said to be dictated by “Catholic doctrine.”¹⁴ Although Catholics United boasted that “we refuse to water down our faith in service of partisan politics,” two of its staff members were closely involved in partisan politics—James Salt had been an actual employee of the Democratic Party and another staff member, Chris Korzen, had close ties to various liberal lobbying groups.¹⁵ (Catholics in Alliance for the Common Good was funded by the militantly pro-abortion billionaire philanthropist George Soros.¹⁶)

While repeatedly castigating the bishops for their alleged partisanship, the publisher of the NCR asked, “Can a Catholic Vote for McCain?” and clearly implied that the answer was no,¹⁷ while a Jesuit passed on to NCR readers every bit of information (or gossip) against McCain that could be culled from the liberal media¹⁸ and a former NCR editor demanded that the bishops condemn the Republican vice-presidential candidate, Sarah Palin, for having been rebaptized as a Pentecostal!¹⁹

The night before the election, the editor of the NCR received a phone call from his brother in Australia: “Tom, the whole world is holding its breath, waiting to see if America is going to rejoin the family of nations.”²⁰ (Given the moral character of many of the members of that “family,” the comment was an unintended backhanded stab at Obama.)

After Obama’s election, a variety of Catholic liberals hailed the coming of a new dawn, in which all people would be drawn together in a great healing,²¹ although it was clear that such unity required accepting Obama’s position on abortion and other things. Reese rejoiced that “progressive Catholics” were cooperating with the new administration,²² and the NCR published a front-page photograph of its publisher seated next to Obama at a White House conference,²³ the kind of picture that, had it appeared in a Catholic paper during a Republican administration, would have been taken as proof that the Church had been co-opted by partisan interests.

Catholics who met with Obama’s staff to discuss policy included unofficial lobbying groups but also some with official status: the Leadership Conference of Women Religious and the Conference of Major Superiors of Men.²⁴

The Jesuit theologian John Langan urged the bishops to “restore civility” to the abortion debate and “show respect for those with whom they disagree.” His injunction was described by the NCR as “carefully nuanced,” but Langan in fact dismissed pro-lifers as “a noisy movement” whose members use “scurrilous and vicious language,” and he warned of “selfish and dishonest political interests.”²⁵ While acknowledging the degree of the Democrats’ commitment to abortion, Langan too had no suggestion except “supporting a social and economic agenda that aims to reduce the number of abortions.”

Langan’s speech was remarkable in its candid partisanship, even to the point of calling for support of the president “in time of war,” a request that would have provoked liberal outrage if invoked on behalf of the two presidents Bush. The wars in Iraq and Afghanistan have often been condemned by liberals as immoral, but Reese justified Obama’s continuation of the war in Afghanistan as based on a “realistic idealism” consistent with Catholic morality.²⁶

Stephen Schneck, another admirer of Obama, said, “I know the pro-life crowd won’t like this, but in fact the administration has been very attentive to issues that may concern Catholic voters” and was paying much attention to “progressive pro-life organizations,”²⁷ a term that seemed to mean precisely those groups that assured the administration that abortion is not important.

Catholic liberals hoped that “the president will announce an agenda that is redolent of Catholic social teaching,”²⁸ an odd expectation, since nothing in his history suggests that at any stage of his education Obama learned anything about such teaching.

The NCR looked into its clouded crystal ball and pronounced flatly that “with the election of Barack Obama, the final nails were being hammered into the conservative movement he [William F. Buckley Jr.] had fathered. Bereft of ideas, facing a demographic tidal wave . . . its base reduced to an aging core of white Protestant Southerners.”²⁹ The editor urged all right-thinking people to support the president, because he offered “the prospect of political realignment that will make Americans amenable to a progressive agenda for generations to come.”³⁰

Liberal Catholics treated the Obama health plan as a moral absolute.³¹ But the plan was so complex that even many of its supporters did not fully understand it. Bishops, relying on competent advice, saw numerous loopholes through which abortion could be funded, but their objections were dismissed as mistaken or even dishonest, and the assurances of Obama and his supporters were taken at face value, despite his history of fanatic support for abortion “rights.”³²

The Catholic Health Association’s endorsement of the plan scarcely alleviated all misgivings, because in many ways the Catholic health network appears to be in the same situation as Catholic higher education—some of its institutions are no longer even formally Catholic, some of those that are are nonetheless governed by boards many of whose members are not Catholic, some of their administrators and staff are out of sympathy with the very idea of “Catholic” health care, and those who do accept the idea have widely varying notions of what it means. Just as only a small minority of Catholic universities treat abortion as a moral evil, it is likely that, if the government does eventually try to force abortion on Catholic hospitals, most will acquiesce, however reluctantly, and some will even welcome it.

Those who claimed that the Obama health plan does not support abortion ignored the obvious: If, in fact, it does not (a very large assumption), this is due precisely to the vigilance of bishops and others, who demonstrated that such support would have serious political consequences. Liberals also ridiculed pro-lifers for fearing that Obama would introduce the Freedom of Choice Act, ignoring the fact that once again it was pro-life vigilance that made it politically impossible for him to do so. (Ironically, the Democratic defeat in 2010 makes it possible to continue treating Obama as a “moderate” on abortion, since for the remainder of his term his hands will be tied on that issue.)

On the eve of the 2010 election, foreseeing the Democratic defeat, NCR editor Tom Fox seemed to despair, lamenting “the divisiveness, bitterness, and shallowness of current politics” and wondering if the citizens were even capable of dealing with their various problems, including “the erosion of our democracy.” Obama and the Democrats had been punished for their statesmanlike efforts on behalf of the common good, Fox lamented.³³

An NCR reader charged that the bishops’ stand on abortion “has not furthered the common good or even a greater respect for life among Catholics or society in

general. This new Congress may polarize the electorate and Catholics even further,³⁴ a complaint that implied that the health of the country requires unanimity of support for the Obama administration.

The bishops' gravest error, according to liberal Catholics, is an alliance with the Republican Party, most of whose members reject various elements of the "seamless garment." But neither the bishops nor other pro-life leaders offer blanket defenses of the Republicans. On the contrary, they are more than willing to oppose Republicans who are not pro-life, and on most issues (immigration, welfare) the bishops' positions are closer to those of the Democrats.

In accusing the bishops of "politicizing" the abortion issue, liberals overlook the obvious fact that the Republican Party merited Catholic support by espousing the pro-life cause despite significant opposition within its own ranks, whereas the Democrats demand undeviating Catholic loyalty and are intensely frustrated that one "single issue" blocks a comfortable marriage of church and party.

Liberals tend not to discuss, except in passing, the rigid pro-abortion Democratic stance. In commemorating the *Roe* decision, the NCR did urge that "the Democratic Party must become open—really open—to those who do not favor abortion rights. . . . The national party is dogmatically pro-choice, a captive of single-issue interest groups." But little energy has been expended to persuade the party to follow that course. To the contrary, Roberts in 2003 urged the bishops to show greater respect for, and cooperation with, pro-abortion politicians.

The NCR offers ostensibly friendly advice to the pro-life movement even as it publishes respectful articles about people who are pro-abortion. Much more is involved here than disagreements over political strategy: The moral character of abortion is itself in question.

For the most part, Catholic liberals are not moral relativists. They treat the issues of war, capital punishment, the welfare state, and racial equality as as absolute as anything can be, not subject to doubt or compromise. Even their rejection of Catholic sexual morality is itself a reverse absolute—the morality of homosexuality is not an open question, nor are contraception, divorce, or sex outside marriage.

Thus when liberals take a stance of caution, ambivalence, and nuanced complexity towards abortion, they are in effect acknowledging the issue's relative lack of moral weight.

Father Charles Curran, who for years has been the principal liberal Catholic moral theologian in America, attempted to relativize the abortion issue for the Democrats' benefit during the 2010 election, arguing that in principle abortion is no different from issues like capital punishment and immigration and cannot be treated as an absolute. The bishops' stand against abortion is a prudential judgment that might be wrong, he claimed.³⁵

Liberal Catholics repeatedly identify "prophets" in the Catholic community—

those who protest war, capital punishment, and other things. But the title is never awarded to pro-lifers, whose passions are treated as signs of psychological unbalance. Langan would be unlikely to apply his injunctions against “extremism” to his anti-war fellow Jesuit Daniel Berrigan, for example, although Catholic anti-war protesters use very “uncivil” rhetoric and have repeatedly broken the law.

For years there have been organized protests against Republican presidents appearing on Catholic campuses, on the grounds that the wars in Iraq and Afghanistan are immoral, and the approved liberal attitude has always been that such protests demonstrate an acute sense of justice. But when pro-lifers mounted protests against Obama’s appearance at the University of Notre Dame in 2010, liberal Catholics condemned them as rude and embarrassing to the Church.

Father Theodore Hesburgh, former president of Notre Dame, has participated in a liturgy of “reconciliation” with former students who were suspended from the university in 1969 for blocking recruiters from Dow Chemical Company. But that spirit of reconciliation does not extend to those who demonstrated against Obama’s appearance at the university, some of whom Notre Dame arranged to have arrested and prosecuted to the fullest extent.³⁶

For decades, the NCR has passionately called for a “prophetic” Church that reminds people of injustices they might prefer to ignore. But on abortion, the paper gloats that “people do not like the specter of a hierarch dictating public policy positions to the congressmen they elected,” a boast that could apply equally to the public’s failure to oppose capital punishment, its desire to restrict immigration, and any number of other liberal causes. The Jesuit theologian David Hollenbach cites polls claiming that only 44 percent of Catholics consider the abortion issue important.³⁷ But the percentage who agree with the bishops on other issues is often even smaller, and the raw public-opinion numbers ought in any case to be irrelevant to a “prophetic” church.

Liberals miss the crucial point of the bishops’ decision to give priority to the abortion issue: the fact that the bishops are among the few leaders who trouble the nation’s conscience over the issue, whereas behind every liberal cause there are numerous secular lobbying groups that do not need religious support.

Langan and other liberals’ avuncular advice to the pro-life movement is misguided, since the reality is that the movement has been modestly and consistently successful in galvanizing effective political action, and the percentage of Americans who are morally troubled by abortion continues to increase. American history shows that only aggressive movements—independence from Britain, abolitionism, women’s rights, Prohibition, civil rights—achieve success. Virtually by definition, no consensus ever exists on great issues—independence in 1775, slavery in 1860, women’s suffrage in 1900, war in 1917 and 1941, civil rights in 1954.

Hollenbach accuses the pro-life movement of having “hijacked other critical issues,”³⁸ but it is not clear that liberal religious groups have much influence at all, since for the most part they merely encourage liberal politicians to support programs they would support in any case. There is little reason to believe that liberal Catholic groups had much to do with Obama’s election in 2008—polls showed Catholics, like most voters, tending towards John McCain until the financial crisis broke in September of that year.

If in fact there was a liberal Catholic “conscience constituency” in 2008, it collapsed almost completely two years later, while the pro-life movement continued to gain ground. (Preposterously, the lobbying group Network, which is run primarily by nuns, in 2010 claimed to “speak for” 50 million Americans, including 59,000 nuns, a claim taken at face value by the pro-abortion media.³⁹)

Opponents of abortion are constantly required by Catholic liberals to “broaden” their moral outlook, a demand that is never made of opponents of capital punishment, for example, or advocates of open immigration, which are treated as legitimate in their own terms.⁴⁰ Catholic liberals rebuke pro-lifers for being morally insensitive on other issues but never rebuke their secular allies for being insensitive to the rights of the unborn. To the contrary, when Catholic liberals speak of “broadening” the moral witness, it often means eliminating abortion from the equation entirely.

For years, critics have complained that the bishops’ official Campaign for Human Development gives money to groups that are pro-abortion. Each time, the complaints are first denounced as false and outrageous and later reluctantly acknowledged to be true, with new procedures introduced to prevent repetition.⁴¹ It is inconceivable that CHD would ever be so careless as to give money to groups implicated in racism, for example, and its laxity on abortion is merely further evidence of how lightly liberals take the issue.

Network, which sponsored the advertisement identifying Obama with the words of Jesus in the Sermon on the Mount, in its 30 years of existence has never been able to identify abortion as a moral issue.

At their meeting in Dallas in 2010, the Leadership Conference of Women Religious—comprising the officers of most of the women’s religious orders in the United States—marched as a group to protest the state of Texas’s retention of the death penalty.⁴² But it is almost inconceivable that these nuns would ever demonstrate outside an abortion clinic.

Catholic liberals have uncritically accepted much of the pro-abortion propaganda, as shown in their apparent assumption that the pro-life movement is merely a creature of the bishops. Ironic in view of their call for the bishops to “get out of politics,” the liberals’ real demand is for the bishops to muzzle the pro-life movement, apparently not realizing that the movement’s energy is largely spontaneous

and would continue even if the bishops attempted to dampen it.

Liberal Catholics often use the terminology of the pro-abortion movement: “pro-choice” rather than “pro-abortion”; the emotionally loaded “back-alley abortions”; and “criminalization of abortion,” which is intended to conjure up images of harassed young women being hustled off to jail.⁴³

In reality Catholic liberals are at best deeply ambivalent about the morality of abortion, and many of them question not merely the tactics of the pro-life movement but the moral teaching itself.

Defending Obama’s appearance at Notre Dame, a professor at another Catholic college told students that “*Roe v. Wade* does not mandate abortion but merely protects a woman’s choice,” a defense the professor “resented” even having to make, since in doing so he seemed to be affirming the legitimacy of the abortion “litmus test.” But he was also proud of the fact that he had vigorously protested the appearance of the “dishonest” George W. Bush on his campus, because, unlike Obama’s, Bush’s appearance raised legitimate moral issues.⁴⁴ (The *Dred Scott* decision forced no one to own slaves; it merely protected the rights of slave-owners.)

Notre Dame Sister Kathleen Deignan, who is affiliated with an environmentalist group called GreenFaith, goes so far as to insist that being pro-life means that “we have to restrain our reproductive life. . . . The situation calls for the church to ask married couples, ‘Can you restrain your urge to reproduce?’”⁴⁵

The liberal Catholic group Call to Action is officially “neutral” on abortion, an odd silence for people who consider it imperative for Catholics to be moral witnesses. But its executive director, Jim FitzGerald, was formerly employed by Planned Parenthood, of which he baldly claims, “No organization . . . has done more to prevent abortion.” According to FitzGerald, “What’s missing in our church is the freedom to talk about issues like abortion or gay marriage or stem cell research.” (It is unlikely that, when he worked for Planned Parenthood, FitzGerald demanded that the organization allow its members greater “freedom” on the life issues.)

A former CTA board member, Bob McClory, an ex-priest who writes regularly for the NCR, says that FitzGerald’s position is not problematical for most members, and another board member claims that FitzGerald “respects life as much as any of us.”⁴⁶ (The assertion may be quite true as applied to CTA members, albeit not in the sense the speaker intended.)

A member of Obama’s National Catholic Advisory Board used the ecumenical character of the pro-life movement against it, suggesting that the bishops’ opposition to abortion is not really Catholic at all but stems from American Catholicism’s having been affected by Puritanism.⁴⁷

Writing in the NCR, the ex-priest James Carroll reduced abortion to the bishops’

“strident obsession with abortion, a last-ditch effort to control the intimate sexual decisions of lay people.”⁴⁸

During the 2010 election Curran in effect attempted to cut the ground from under the entire pro-life effort by endorsing one of the favorite arguments of pro-abortionists—that the question of when human life begins is merely “speculative.”⁴⁹ The NCR devoted four pages to his essay and praised him highly for his theological acumen.

While several readers disputed Curran, others took advantage of the opportunity to declare that the fetus is not human. One reader, noting that many human eggs abort naturally, proposed sarcastically that “The final step must be for the bishops to declare God the ‘the No. 1 abortionist’ and to forever exclude him from the one, holy Catholic church.”⁵⁰

During the 2008 elections, an Ursuline nun, Sister Marian Bohlen, demanded that the Church lose its tax exemption because of the bishops’ “interference in politics.” She boasted of being “pro-life in all aspects of life” but simultaneously boasted of being “pro-choice” on abortion, thereby explicitly excluding abortion as a life issue.⁵¹

The root of the problem is that ultimately Catholic liberals simply cannot sustain any position that is not also held by secular liberals and are embarrassed if they find themselves in disagreement with those liberals. The Catholic politicians’ weary disclaimer, “Personally I am opposed to abortion but . . .” has long been incredible—few of them have made even the smallest effort to persuade the public that abortion is morally wrong. To the contrary, Kennedy, Cuomo, Pelosi—even the Jesuit Drinan—were taught by their party that their moral educations were seriously deficient and needed correction.

The theological basis for this longing to belong to the community of the enlightened is the belief that truth is discovered only in the unfolding of history, which requires being continually on the alert for new “progressive” movements and aligning with them. (“The world sets the agenda for the Church.”) Liberals regard their triumph as inevitable, since their moral vision is self-evidently true.

Persuaded that throughout history the Catholic Church has usually been an enemy of progress, Catholic liberals cannot believe that on the abortion issue the Church has stood on the moral high ground for almost 40 years, while enlightened liberals fell into serious error.

Liberal Catholics’ “solution” to the plague of abortions through the expansion of the welfare state, their assumption that poverty alone motivates abortions, their insistence that the protection of the unborn must await the emergence of popular consensus, and their dismay at pro-life militancy all stem from their discomfort at seeing abortion as a moral issue at all. (The journalist Michael Sean Winters makes the bizarre claim that the pro-life bishops are guilty of the heresy of Pelagianism—

excessive reliance on natural human virtue—and “the very American, and very un-Catholic, habit of reducing religion to ethics.”⁵² Presumably the various liberal “social justice” programs do not involve ethics.)

The bishops are accused of narrow partisan loyalties, the pro-life movement as a whole is denounced as made up of hysterical extremists, and Republican support for the pro-life cause is dismissed as sheer political opportunism, all of which is a virtual confession that the liberals themselves do not see abortion as a moral issue, that they cannot conceive that anyone would oppose it except for partisan gain.

Although the bishops are accused of mixing religion and politics, the abortion issue requires liberal Catholics themselves to erase the distinction, inviting them to look to their political leaders for religious and moral leadership, a role perhaps first played by Mario Cuomo. When Pelosi was the newly elected Democratic majority leader of the House of Representatives, the NCR published a lengthy interview with her in which she was presented as a person of extraordinary spiritual and moral sensitivity, calling herself a “conservative Catholic” but expressing strong support for a married clergy and for women priests, as well as for abortion—altogether someone who understood her faith much better than the benighted bishops.

The pro-abortion politician Kathleen Kennedy Townsend—heiress to the Massachusetts political dynasty—declared that Obama’s election had religious significance, because in choosing him over their bishops “Catholics are saying ‘We are going to take our church back.’”⁵³ (The electoral results in 2010 presumably meant that they were once again surrendering it, that those who had exercised wise judgment in not listening to their bishops had inexplicably sunk back into folly.)

The welfare state is in reality the primary religion for many liberals, their confidence in it literally an act of faith that is impervious to critical examination. Thus they denounced, as moral insensitivity, the bishops’ carefully stated reservations about the Obama health plan and condemned, as a kind of sacrilege, the fundamental question—raised by some bishops—whether it is the proper role of government to provide for all its citizens’ needs.⁵⁴

Whatever Catholic liberals’ personal view of abortion, they have invested so heavily in the Democratic Party that failing to support it would be the ultimate apostasy, far worse than giving up the religion of one’s birth or one’s baptism.

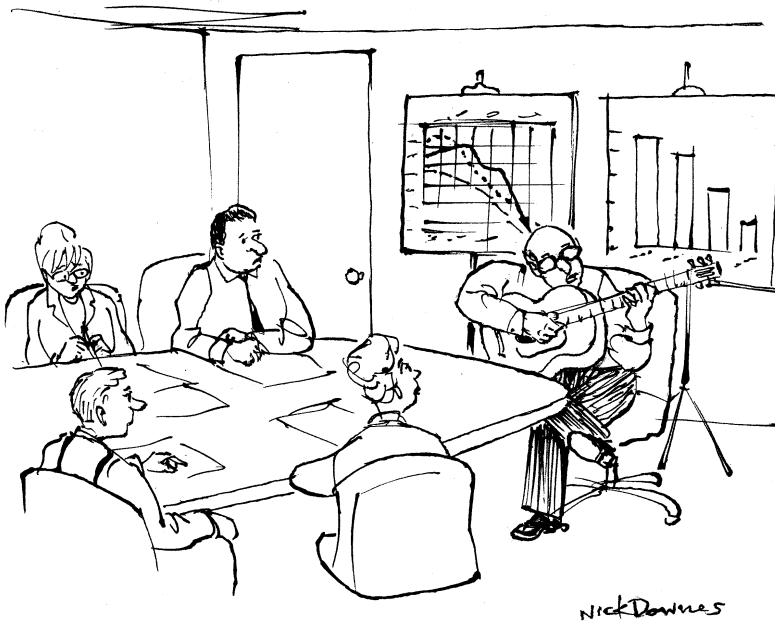
NOTES

1. W. James Antle III, “Stupak Stands Down,” *Catholic World Report*, May 2010, 33-4, and Paul Kengor, “The Fig Leaf That Fell Off,” *CWR*, January 2011, 38-9.
2. See Hitchcock, “Catholic Liberals and Abortion,” *HLR*, Winter 2003.
3. Roberts, “New Groups Add Broader Catholic Views to Politics,” *National Catholic Reporter*, Aug. 8, 2008, 12.

4. Roberts, "New Groups," 12.
5. Jerry Filteau, "Georgetown Jesuit Urges Bishops to Restore Civility in Pro-Life Efforts," NCR, May 15, 2009, 1, 10.
6. "Imagine a President," NCR, June 27, 2008, 15.
7. "Democrats' New Abortion Policy Hailed as 'Common Ground,'" NCR, Aug. 22, 2008, 3.
8. "Democrats' Platform Wording on Abortion Wins Both Praise, Criticism," *Boston Pilot*, Aug. 22, 2008, 4.
9. Reported by Roberts, NCR, Oct. 31, 2008, 7.
10. Michael Sean Winters, "Time to Rethink Antiabortion Strategy," NCR, Jan. 8, 2010, 3a.
11. Douglas Johnson, "Efforts to Sell Obama," *National Right to Life News*, October 2008, 19.
12. "Reaganites for Obama?," *Slate* (on-line), Feb. 13, 2008; "Endorsing Obama," *Slate* (on-line), March 23, 2008.
13. Johnson, "Efforts to Sell Obama," 19.
14. Anne Hendershott, "The Big Con Continues," *Catholic World Report*, Nov. 2010, 20-2.
15. www.catholics-united.org, Sept. 2008.
16. Catholic League for Religious and Civil Rights website, Dec. 31, 2010; Open Society Foundations website, 2009.
17. Joseph Feuerherd, NCR, Oct. 31, 2008, 28.
18. Raymond Schroth, S.J., "Is This the Best We Can Do?," NCR, Oct. 31, 2008, 19.
19. Tom Blackburn, NCR (letter), Oct. 17, 2008, 19.
20. Tom Fox, "Election Hope—Now Hard Work," NCR, Nov. 14, 2008, 2.
21. "Views on Culture Wars Key to Whether Obama Brings Hope or Division," NCR, Nov. 14, 2008, 6-8.
22. Filteau, "Georgetown Jesuit," 10.
23. July 10, 2009.
24. Dennis Coday, "Catholics Meet Obama Team to Discuss Policy," NCR, Dec. 26, 2008, 9.
25. Filteau, "Georgetown Jesuit," 1, 10.
26. "A Realistic Idealist at Oslo," NCR, Jan. 8, 2010, 25.
27. Filteau, "Politically Progressive Catholics Find Home in Obama Administration," NCR, June 26, 2009, 5.
28. Winters, "The Next Big Issue for Obama," NCR, Jan. 22, 2010, 5-6.
29. Winters, "What Would Buckley Do?," NCR, Sept. 4, 2009, 15-6.
30. Feuerherd, "Bear with Obama," NCR, Jan. 22, 2010, 28.
31. For example, "Health Care Bill Must Pass," NCR, Jan. 8, 2010, 30.
32. For example, Filteau, "Fact-Checked: US Bishops on Health Care Reform," NCR, Apr. 30, 2010, 7.
33. "America's Eroded Democracy," NCR, Nov. 2, 2010, 2; "Less Here than Meets the Eye," *Ibid.*, 26.
34. David E. Pasinski (letter), NCR, Dec. 10, 2010, 25.
35. "US Catholic Bishops and Abortion Legislation," NCR, Nov. 26, 2010, 1-4a.
36. Chares E. Rice, "An Academic 'Ruling Class,'" *The Irish Rover*, Oct. 3, 2010.
37. Quoted by Michael Humphrey, "'Faithful Citizenship' in an Election Year," NCR, June 27, 2008, 11.
38. Quoted by Humphrey, "'Faithful Citizenship,'" 11.
39. Paul Kengor, "The '59,000' Nuns for Obamacare," CWR, May 2010, 35-6.
40. See for example Humphrey, "'Faithful Citizenship,'" 11.
41. To trace the pattern of indignant denial, followed by half-hearted admission, see for example, Filteau, "Poverty Program Defended against 'Outrageous' Attacks," NCR, Nov. 27, 2009, 7; Winters, "An Indecent, Unchristian Witch Hunt," NCR, Mar. 5, 2010, 19; Russell Shaw, "Group Cries Foul over USCCB's Coalition Memberships," *Our Sunday Visitor*, Mar. 7, 2010, 4; Filteau, "10 Dioceses Quit Bishops' Antipoverty Campaign," NCR, July 9, 2010, 1, 12; (Anon.) "Attacks Serve a Separate Agenda," NCR, July 9, 2010, 28; Winters, "Catholic Identity Demands Justice for Poor," NCR, Nov. 12, 2010, 20; Winters, "Critics Renew Attacks on Bishops' Campaign," NCR, Nov. 26, 2010, 5.
42. NCR, Sept. 3, 2010, 1.
43. See for example Winters, "Time to Rethink Antiabortion Strategy," NCR, Jan. 8, 2010, 3a.
44. Dennis D. McDaniel, "From Campus to Bookshelf: Assessing a President," NCR, Sept. 4, 2009, 15, 18.
45. Quoted by Patricia Lefevre, "GreenFaith Fellows Work for the World's Future," NCR, Apr. 17, 2009, 7a.
46. Heidi Schlumpf, "A New Leader at the Table," NCR, Aug. 7, 2009, 7.

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47. Nicholas Cafardi, "Obama's Vatican 'Problem' Is an Opportunity," NCR, Feb. 6, 2009, 19.
48. "Celibacy the Central Pillar of the Culture of Power," NCR, June 11, 2010, 3.
49. "US Catholic Bishops," 3a.
50. Aaron Milavec, "God's Abortions" (letter), NCR, June 26, 2009, 25.
51. "Communion Wars" (letter), NCR, June 27, 2008, 27.
52. "Time to Rethink," 3a.
53. Fox and Mike Sweitzer-Beckman, "Call to Action Aims 'to Take Our Church Back,'" NCR, Nov. 28, 2008, 14.
54. See for example, Winters, "In Reform Debate Pro-Lifers Undermine Their Cause," NCR, Sept. 18, 2009, 5-6.



"This is a little something I call, 'receivership blues.'"

Report on the March for Life

Christopher White

On January 6, 2011, just two weeks prior to this year's March for Life weekend in Washington, D.C., the Chiaroscuro Foundation hosted a press conference to highlight New York City's "unconscionably high abortion ratio." At this press conference, a mix of civic and religious leaders from the New York City area came together to launch a call for action—a plea for government officials and citizens alike to recognize the problem of high abortion rates in New York City and to begin addressing them. New York City's abortion data released in the 2009 Summary of Vital Statistics revealed that in 2009, NYC had an abortion ratio of 41 percent. This number is based on the Guttmacher Institute's abortion ratio, which measures "abortions per 100 pregnancies ending in abortion or live birth." This means that almost half of viable pregnancies in NYC end in abortion. (The national abortion ratio is 23 percent.)

With these fresh statistics in mind, I began my journey to Washington, D.C., as a first-time attendee to the March for Life. As a native South Carolinian who landed in New York almost six years ago, I've taken pride in calling the city my home. These new abortion statistics, however, should be enough to give anyone pause, regardless of their political or religious affiliations. Cities—particularly New York City—are supposedly places of energy, culture, the best entertainment, opportunity, and most of all, *life*. With 87,273 abortions in 2009 alone, I could no longer say that my home, New York City, was a place of life or opportunity.

On January 23, the eve of the March for Life, Georgetown University's Right to Life student association hosted the 12th annual Cardinal O'Connor Conference. This year's conference began with a panel discussion moderated by Fr. Joseph Koterski (Fordham University Philosophy Department) and featuring Mother Agnes Mary Donovan (Superior General of the Sisters of Life), Bishop William Lori (Bridgeport), Archbishop Edwin O'Brien (Baltimore), and Helen Alvaré (George Mason University School of Law). Each of these panelists had the occasion to work with and for Cardinal O'Connor, and it was obvious that his work and life guides theirs today. Cardinal O'Connor once remarked that "It is my very sincere prayer that if I live for a week, if I live for twenty years, my last breath will be in support of the sacredness of every human life." Based on the commentary provided by this panel, it was clear that the Cardinal had indeed cemented such a legacy for himself. As the panelists shared personal stories and

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reflections, I was quickly drawn into the life of this great man.

John Cardinal O'Connor was born on January 15, 1920, into a blue-collar family in Philadelphia. At age 16, he entered Saint Charles Borromeo Seminary and was ordained a priest nine years later on December 15, 1945. After working as a diocesan priest for seven years, he accepted the appeal of the archbishop of New York, Cardinal Spellman, for more chaplains in the U.S. Armed Forces. He then spent over 25 years in the U.S. Navy until being appointed Bishop of Scranton in 1983. Less than a year later he was appointed Archbishop of New York, a post he held until his death in 2000. Archbishop O'Brien observed that O'Connor was "always a priest and always present." Cardinal O'Connor made countless late-night visits to local New York hospitals to care for the sick and dying. Often he was spotted providing care to the patients by cleaning their sores and changing their bedpans.

On Monday, January 24, the 38th annual March for Life took place to mark the tragic and terrible 38 years since the decision of *Roe v. Wade*. The National Mall was full with thousands of members of youth groups, university students, clergy, and average citizens. Among the more than 400,000 marchers this year were 53 members of the U.S. Congress. Despite the fact that this event ranks among the largest annual gatherings in the nation's capital each year, it was hardly covered by local or national media outlets.

As we marched up Constitution Avenue toward the Supreme Court, I turned around to take in the scene behind me. As far as I could see, hundreds of thousands were marching, raising banners, praying, chanting, and simply, hoping—all united for the cause of life. In front of the Supreme Court, where the March ended, I couldn't help but marvel at the force of the rulings that come from within its marble walls. For a moment it seemed overwhelming and somewhat defeating. Compared to the more than 50 million lives we've lost since the decision of *Roe v. Wade*, what effect or influence did our presence have? Could we really make a difference? I then recalled the words of encouragement of the same man, John Cardinal O'Connor, whom I had begun the weekend with: "If all the marches, all the prayers, the speeches, the encyclicals, the entire effort of each of you saved but one human life, would not the Lord of Life say to each one of us and to each individual who has ever made the effort on behalf of human life: 'Well done, my good and faithful servant. Receive the kingdom the Lord has prepared for you from all of eternity. For you not only fed me and clothed me, confirmed and consoled, and visited me in prison. You saved my life.'" At the conference the day before, Mother Agnes reminded us that the field of mission of John Cardinal O'Connor was not simply humanity, but *a* human person. With that same mission in mind, I resolved that yes—we do indeed make a difference. By marching for the cause of life, we serve as a witness to life—the greatest gift that can be given

and yet one that can be so easily taken away.

On March 1, 2011, the Chiaroscuro Foundation released the results of a survey of New Yorkers on the recently released abortion statistics. The survey results found that “two-thirds of New Yorkers (64%)—including 57% of pro-choice women—think too many abortions are taking in place in New York City every year, and more than half of city residents surveyed (51%) would support a 24-hour waiting period before abortion procedures can take place.” Another recent poll found that six in ten young people believe abortion to be morally wrong. These numbers should give us hope, and encouragement for action—but also remind us of the great work yet to be done.

In the same data, we learn that 81 percent of New Yorkers are unaware of these abortion-ratio numbers. Between 2000 and 2009, more than 900,000 pregnancies in New York City ended in abortion—this is nearly one-eighth of the entire city population of New York. Despite what we have been led to believe, abortion may be legal, but it’s not safe or rare. It’s not safe for the mothers who have breast cancer later in life from abortions, it’s not safe for those who suffer mentally or emotionally from their abortions, and it’s not safe for the families who lose a potential brother or sister or daughter or son.

During his tenure as Archbishop of New York, John Cardinal O’Connor made a commitment to all pregnant women in New York who consider abortion as an option. His personal vow was to provide whatever support they need, be it financial, medical, emotional, or spiritual. This commitment must be renewed by all of us today who try to follow in his footsteps. Like Cardinal O’Connor, we must take measures to help women experiencing unplanned pregnancies, we must support the family and promote it as the fundamental unit of our society and as a place for children to be loved and nurtured. We must improve sexual education so that it no longer promotes a harmful social agenda, but rather educates young people on their biology and encourages them to make wise and future-minded decisions. For the more than 400,000 people that chose to march in D.C. this year, this is the great cause that drives us to our nation’s capital and this is the mission that must be shared with our families and our communities.

Ireland Continues the Good Fight

David Quinn

Recently the issue of abortion in Ireland found itself back in the headlines, both in Ireland itself and internationally. The cause of this was a ruling by the European Court of Human Rights in Strasbourg.

The court ruled that Ireland had breached a woman's right to privacy because she was not able to determine whether she was permitted to have an abortion in Ireland. The woman was suffering from a rare form of cancer from which she eventually recovered. Under Irish law, a woman can have an abortion if her life is judged to be at risk, but there are no medical guidelines in place for judging *when* a pregnant woman with a life-threatening condition may have an abortion.

Because of the absence of such guidelines, the court deemed that this woman's rights, and specifically her right to "respect for her private life," had been violated.

As most readers of this publication will know, direct abortion is not available in Ireland, thanks mainly to the 1983 pro-life amendment to our Constitution. At the last count, 4,422 Irish women travel to Britain each year to have an abortion; a couple of hundred more travel to other countries, such as Holland or Spain.

We are often accused of hypocrisy because of this. We're told we "export" the problem, and that it would be more honest, plus less traumatic for the women, to let them have the abortions in Ireland. In fact, the absence of abortion in Ireland has a real practical effect: It saves lives. Ireland's abortion rate is about one third of the British rate. If abortion were available at home, there can be little doubt that more Irish women would choose it and more unborn lives would end as a result.

And despite the accusations of hypocrisy, there has been little real attempt to legalize abortion in Ireland since the X-Case of 1992, which caused an international furor. Readers may recall that this involved a 14-year-old victim of statutory rape who had become pregnant and was deemed to be "suicidal" as a result. She was refused permission to travel to England for an abortion (the police found out about her intention because the parents wanted to bring a DNA sample from the aborted fetus back to Ireland to make it easier to convict her assailant). The case found its way to the Supreme Court, which decided that Irish women had a right to travel overseas to have an abortion, to receive information about abortion, and to have an abortion in Ireland when the woman's life was in danger because of a pregnancy, including by threat of suicide.

However, no government since then has introduced legislation to give meaning

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to the last part of the X-Case ruling. There was an attempt in 2002 to rescind the last part of the decision through a constitutional referendum, but this was narrowly defeated thanks in part to a split in the pro-life ranks.

Since then, abortion has barely surfaced as an issue in Ireland. One reason is that most politicians and most of the public are tired of it as an issue after repeated battles. In addition, our politicians have had their minds focused on other social issues. For example, we have just legalised civil partnerships for same-sex couples, which are just about marriage except for the name. In the last decade, Ireland has been taking giant steps towards destroying the special status of marriage in law and in society, and the fight-back has been inadequate partly because the Catholic Church has been so enormously weakened by the sex-abuse scandals, even though they peaked in the 1970s. (Full disclosure: I head up a pro-marriage organization called the Iona Institute, which I founded with the help of others in 2006. It has at least helped to create a debate around the issue.)

The most active pro-life topic in Ireland over the last few years has been the issue of embryo research. The way is now paved for embryo research—including embryo stem-cell research—to take place in Ireland. This is because of a recent Supreme Court ruling that the protection the Constitution gives to the “unborn” extends only to embryos in the womb rather than outside the womb. Therefore, embryos produced for experimental purposes, or which are “left over” after IVF, etc., are not protected by the Constitution. Crucially, however, this ruling does not prevent our legislators from introducing a law that would afford such protection, and pro-life groups have been focusing their energies on winning a political commitment to such legislation.

This is where things would have stood were it not for the ruling by the European Court of Human Rights (ECHR) delivered just before Christmas.

A word about that court is in order. The first thing to understand is that it is not an institution of the European Union, as is commonly thought. If it were, then we would have a lot more to worry about, because rulings by the EU’s court, the European Court of Justice, are binding in Irish law, whereas rulings by the ECHR are not.

Instead the ECHR is a body—the most important body—of the Council of Europe.

The Council of Europe was established after World War II to encourage cooperation between the countries of Europe so as to prevent further outbreaks of war. In addition to the court, there is also a parliamentary assembly consisting of representatives from the various national parliaments. The Council is different from the EU in that it is much less powerful and has more members. The EU currently has 27 member-states, whereas the Council of Europe has 47 member-states.

The most important document of the Council is the European Convention on

Human Rights, which the court interprets. This was primarily designed to help prevent the gross human-rights violations that took place in World War II from occurring again. Its framers never dreamt that cases involving the “right” to an abortion would be heard by it. The court has become extremely controversial in recent years, because it has become very activist, and its activism is mostly in one direction. For example, the court has heard a number of cases involving the teaching of religion in schools, and each of these has tended to restrict its teaching. When asked to adjudicate on the right to religious freedom, it is more likely to find in favor of freedom *from* religion than in favor of freedom *of* religion. It sees it more as a negative right than a positive one.

Last year, a particular decision of the court caused more controversy than probably any other decision in its history. Called *Lautsi v. Italy*, it involved a mother (Lautsi) who objected to the fact that her son had to be in the presence of crucifixes when in school each day. She believed this violated her son’s freedom of religion; the court agreed. The implications were far-reaching. While decisions of the ECHR are not binding in Irish law, other member-states of the Council have incorporated the European Convention on Human Rights, and decisions of the ECHR, into their law. This meant that the finding against Italy was binding on all such countries. The ruling caused an uproar in Italy. Even the moderate left-wing parties objected to it.

State schools in Italy display the crucifix as a mark of Italian identity, not necessarily religious identity. Italian national identity is a very hot topic in Italy because of growing immigration, especially from Muslim countries, and a growing backlash against the excesses of multiculturalism, which force native cultures to recognize every culture but their own.

The Italians refused point-blank to adhere to the ruling. Other countries objected equally loudly. In little Malta, for example, Catholic leaders called on Maltese to put more crosses on display than ever in protest. Italy, along with 19 other states, has appealed the decision, and at the time of writing, the decision is still awaited.

Nonetheless, the court has to tread carefully. It knows it overreached with *Lautsi* and caused a backlash it didn’t anticipate. If it upholds its decision, it knows it will mainly be ignored—and its authority thereby undermined. But if it goes against its earlier judgment, it will also undermine its authority and furthermore upset the logic of other of its rulings that curbed the teaching or promulgation of religion in school. Perhaps its *Lautsi* overreach is one reason it recently found that there is no right to same-sex “marriage” in the Convention, and furthermore that this does not amount to discrimination. Perhaps it is also why the decision regarding Ireland’s abortion law was not as expansive as it might have been, and

did not realize the worst fears of pro-life activists across Europe.

The recent case involved three women known as A, B and C. A was unmarried, unemployed, and poor; she had four children already, all in foster care, and didn't want another child. B, the second applicant, was also unmarried; when she travelled to England for an abortion, she believed she had an ectopic pregnancy, which turned out not to be the case. The third applicant, C, was in remission from cancer and became pregnant. She feared that the pregnancy would cause a relapse of her cancer, and that therefore her life was at risk; she claimed she could not find clear medical and legal advice as to whether she could have an abortion in Ireland.

All three applicants said their rights had been violated under Articles 3, 8, 13 and 14 of the Convention, which, in order, prohibit "inhuman and/or degrading treatment," uphold privacy, allow for effective remedy and outlaw discrimination. The third applicant also relied on Article 2, dealing with the right to life.

Here is the interesting part of the judgment, one that was barely covered in the media at all: A and B lost their case on all grounds, while C lost under articles 2, 3, 13 and 14 and won only on Article 8.

In addition, the court said that the finding that C's right to privacy had been violated was not to be interpreted as creating a general right to abortion. In other words, it was not a *Roe v. Wade* type of ruling. In fact, the only reason the court found in favour of C at all in regard to Article 8 is that Irish law does include a right to an abortion where a pregnant woman's life is in danger. If this did not exist in Irish law, then there would have been no ruling in favour of C.

European pro-life groups more or less welcomed the decision. They would have preferred that all three cases be thrown out on all grounds, but they were extremely relieved that the court had not found that there was a right to an abortion in the Convention. They were also relieved that the right to privacy was not defined in such a way as to include a right to an abortion per se, as distinct from a right to know under Irish law whether not an abortion can be performed under given circumstances.

What the court said was that member-states were entitled to a wide "margin of appreciation" in respect of their abortion laws. It said: "As there was no European consensus on the scientific and legal definition of the beginning of life and as the right of the fetus and mother were inextricably linked, a State's margin of appreciation concerning the question of when life began implied a similar margin of appreciation as regards the balancing of the conflicting interests of the fetus and the mother."

Of course, this seems to leave open the possibility that if in the future there is a European consensus that life begins at some point after conception, the court may narrow the margin of appreciation (that is, the latitude) currently enjoyed by

members of the Council of Europe. However, we are where we are, and where we are is that there is currently no right to abortion in the European Convention on Human Rights.

The Irish and international media highlighted the part of the court's ruling that suited them, as did pro-abortion groups. They homed in on the finding that C's rights had been violated under Article 8 of the Convention.

The Irish Times reported: "Irish abortion laws breach human rights, court rules."

RTE, the national broadcaster, led with "Human rights violated by abortion ban." CNN said: "Court condemns Irish ban on abortion." You had to read the fine print to discover that Ireland is only very narrowly in breach of the Convention. Both the media and the pro-abortion groups wanted to convey the impression that international law requires Ireland to permit abortion and that a very august body had found us wanting.

Initially the impression was given that the decision was binding. (I quickly tweeted that it wasn't. This was picked up by the *Guardian* in Britain, which asked for the opinion of a legal expert. The legal expert agreed with me.)

The impression was also conveyed that because of Ireland's ban on abortion, Irish women's lives are in danger. Nothing could be further from the truth. In fact, Ireland is the safest place in the world for women to have children. Only one to two in 100,000 women per annum die because of pregnancy-related complications. This is according to the World Health Organization. Some might argue that this is because pregnant Irish women travel to England for "life-saving" abortions. But if the British abortion regime were the answer, then we would expect Britain to be even safer than Ireland for pregnant women, but this is far from the case. In Britain, roughly eight in every 100,000 women die due to pregnancy-related complications. Some people believe this is precisely because British doctors have little experience dealing with life-threatening pregnancies. For example, if a pregnant Irish woman is experiencing blood clots, doctors will go to great lengths—almost always successful—to save both her and her child. In Britain, however, it is far more likely that an abortion would be recommended and performed so as to make the doctor's job less complicated. But if the mother insists on not having an abortion, British doctors will have much less experience than Irish doctors in saving both mother and child in such circumstances. Paradoxically, therefore, easy access to abortion in Britain appears to be putting more women's lives at risk than Ireland's very restrictive approach.

Needless to say, Ireland's very enviable record in this regard is never trumpeted by the Irish or the international media. Therefore the impression is conveyed that Irish law really does endanger pregnant women when the opposite is the case. To counter this, the Pro-Life Campaign is running a nationwide poster campaign to tell the

public the truth. It would be much better, however, if the media got the message out, because many people still regard the media as being objective in these matters, whereas the Pro-Life Campaign would obviously be seen as partisan.

In any case, the ECHR decision has been a shot in the arm for pro-abortion forces in Ireland. The Labour party has promised to legislate for the X-Case, and to go further than this by also allowing abortion where a woman's health is "at risk." In practice, this would mean replicating British abortion law, which is de facto abortion-on-demand. It would also necessitate another abortion referendum in order to widen the X-case ruling.

However, when Labour was last in power, in the mid-1990s, it tried, and failed, to legislate for the X-case because—for various reasons—the ruling is extremely difficult to legislate for in practice.

Fine Gael, the main opposition party at the time of the ECHR ruling, said it had no plans to introduce X-Case-type legislation but would ask an all-party parliamentary committee to look at the issue and report back. Fianna Fail, the outgoing government party, also said it had no plans to legislate for the X-Case.

The media confidently announced that the ECHR ruling had made abortion an election issue. A general-election took place in Ireland on February 25, leading to a Fine Gael/Labour government. However, the ECHR decision has receded into the background because, by far and away, the dominant issue in Ireland right now is the dire state of the economy. Unfortunately, this won't stop the Labour party from attempting to introduce abortion to Ireland and the very fact that people are so distracted may actually aid them. Much will depend on Fine Gael's willingness to stand up to them. (For the record, Fine Gael was once a Christian Democratic party.) Fortunately the Irish pro-life movement, in particular the Pro-Life Campaign, did manage to make the right to life an issue on many doorsteps during the election campaign and therefore both Fine Gael and Fianna Fail issued strong, pro-life statements towards the end of the election.

Quite a number of Irish politicians are still pro-life by conviction, but in practice—with some exceptions—they tend to be less committed to their cause than the pro-abortion politicians, especially as they know the media are typically against them.

This makes it absolutely vital that the pro-life movement in Ireland continue to actively cultivate grass-roots support as the best way to counter the influence of the pro-abortion lobby, which doesn't need grass-roots support because it has most of the media on its side. Fortunately, the Irish pro-life movement remains strong and, for this reason—the ECHR ruling notwithstanding—pro-choice groups will still have a battle on their hands trying to make abortion available in Ireland.

Abortion, *Ijtihad*, and the Rise of Progressive Islam

Nicholas Dunn

Diverse interpretations of the Qur'an and *hadith*—the sacred scriptures of Islam—have led to a variety of positions among Islamic theologians and scholars regarding the morality of abortion, contraception, and family planning. Though general Muslim consensus accepts that abortion is murder and consequently prohibited, there is considerable debate about when ensoulment occurs. Abortions performed before the fetus is “infused with life”¹ are not considered killing, and are therefore permissible. Contraception and family planning are predominantly permitted, though a minority of Muslims see it as a lack of trust in God, or believe it to be a Western conspiracy to prevent the growth of Islam. Iranian president Mahmoud Ahmadinejad recently declared that family planning is “in the realm of the secular world,”² echoing the sentiment of the late Ayatollah Khomeini,³ who strongly encouraged procreation and hoped to create “soldiers for Islam.”⁴

The demography of the Muslim world⁵ is ever-changing. Some countries, such as Iran, are experiencing a substantial population decline, while others, such as Yemen, maintain very high fertility rates. In Iran, state policies are responsible for a rapid fertility decrease, from seven children per woman in 1950 to less than two today.⁶ Experts view religion as an important factor in determining societal norms related to fertility.⁷ At the same time, Islam is frequently cited as the fastest growing religion, and many stress the imminence of “Eurabia”—a potential Europe where, due to immigration and high birth rates, the Muslim population is the majority. Yet, of the ten countries with the largest drop in fertility rates since 1980, eight are Islamic nations.⁸ Contraceptive use is higher than ever in the Muslim world, and the number of abortions is on the rise.⁹ What explains the divergence in fertility and abortion norms in the Muslim World?

This paper contends that at least part of the answer lies in liberalizing trends within Islam. The paper examines the trends in legal and social policies relating to abortion and family planning in countries that are predominantly Muslim. It begins by reviewing Islam's theological teachings on the morality of these issues, and then considers how varying interpretations and legal schools have influenced legal and social policies across the Muslim world. This paper demonstrates that, while the laws in many Muslim countries remain far stricter than in other parts of the world, such as Western Europe and North America, a more progressive understanding

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of Islam is gaining popularity in certain regions and has resulted in the liberalization of the legal status of abortion and family-planning programs in a number of countries. Many Muslim countries have succumbed to pressure to adopt the population-control agenda that is promoted by U.N. agencies, particularly the United Nations Population Fund (UNFPA), and pro-abortion NGOs.

Islamic Teachings on Abortion

Islam values the traditional family and encourages procreation. Marriage and children are seen as a gift from God; the Qur'an depicts children as "the decoration of life"¹⁰ (18:46). In contrast to Judeo-Christian traditions, Islam does not teach that procreation is the final end of marriage. Islamic teachings on marriage determine that an individual has the right to sexual pleasure within marriage that is independent of his or her choice to have children. For guidance in all areas of life, Muslims look to the Qur'an, the central text and holy book of Islam. However, despite its many specific instructions, the Qur'an does not directly address every possible moral situation that a Muslim may face, including abortion. Furthermore, since there is no central authority figure (such as the Catholic pope) to make definitive statements, there is an assortment of beliefs.¹¹

On the occasion that the Qur'an is unclear, or does not speak on a particular matter, Muslims will consult the sayings and example of the Prophet Muhammad (*hadith*). Still, even the *hadith* may be subject to varying interpretations, in which case Muslims turn to the principle of *ijtihad*: the ability to determine the best and most reasonable solution to a current problem by examining a Qur'anic text in light of the cultural and historical context, complemented by a thorough understanding of Qur'anic principles and the *hadith*. There is a great deal of flexibility and adaptability in Islamic law. As the contemporary jurist and philosopher Azizah Y. al-Hibri remarked, "Islam was revealed for all people and for all times."¹²

Though the pronouncements (*fatawa*) of a religious leader, or *ulama*, carry much weight, personal conscience and individual interpretation are highly regarded principles in Islamic theology and Muslim life. Whereas traditionally *ijtihad* was reserved for scholars called *mujtahids*, today the average Muslim finds it necessary to practice personal *ijtihad* in daily life. Consequently, this has allowed for a diversity of interpretations and beliefs, especially on the issue of abortion. There are two passages in the Qur'an that describe the embryonic-development process:

We created you from dust, then from a drop of fluid, then a clinging form, then a lump of flesh, both shaped and unshaped: We mean to make Our power clear to you. Whatever We choose We cause to remain in the womb for an appointed time, then We bring you forth as infants and then you grow and reach maturity (22:5).

We first created man from an essence of clay then placed him, a drop of semen [*nutfah*], in a secure enclosure. The drop of semen We made a clot of blood [*'alaqah*] and the clot a lump of flesh [*mudghah*]. This We fashioned into bones [*'idham*], then

clothed the bones with flesh [*lahim*], thus bringing forth another creation. Blessed be God, the noblest of creators (23:12-14).

From these lines, scholars have understood that the fetus undergoes a series of transformations, beginning as a simple organism and eventually becoming a human being. The *nutfah* begins at conception and lasts for 40 days, until implantation. There are five periods of 40 days, and it is after the fourth (the *mudghah* phase) that the soul (*ruh*) enters the body. At that point the Qur'an regards the fetus as "another creation."

The general consensus is that abortion is prohibited once ensoulment has occurred—that is, the moment when the soul is united with the developing fetus, thus making it a human being (*insān*).¹³ There is considerable debate, though, over precisely when ensoulment takes place. Some theological schools posit that the fetus is ensouled at the moment of conception, while others suggest 40, 80, or 120 days after conception. Thus, abortion is either prohibited at all times, or permitted up to 40, 80, or even 120 days after conception, depending on the dominant legal school (*madh'hab*) in the given area.

The major schools, which have both religious and jurisprudential dimensions,¹⁴ form their position on abortion from their interpretation of the *hadith*. The explanation (of the *hadith*) most often quoted regarding fetal development comes from Abd Allah ibn Mas'ud, a close companion of Muhammad:

The Prophet of God told us—and he is the one who speaks the truth and evokes belief—Each of you is gathered in his mother's womb for forty days; then [he is] a clot of blood [*'alaqa*] for the same period; then he is a clump of flesh [*mudgha*] for the same period. Then God sends an angel who is commanded regarding four things: his livelihood, his span of life, and that he be blessed or cursed [in the afterlife]. Then [the angel] breathes the spirit into him.¹⁵

That ensoulment takes place 120 days after conception (three periods of 40 days) is accepted by both the Hanafi and the Zaydi schools, as well as some members of the Shafi'i School. Thus, abortion is permitted before 120 days (or, before the end of the fourth month), but strictly prohibited after. Other Shafi'i jurists allow abortion only up to 80 days, and the Hanbali School allows abortion up to 40 days. According to the Maliki School, the Imami Shi'is, and the Ibadi¹⁶ Muslims, abortion is prohibited (*haram*) at any point in the pregnancy, for it is the killing of a potential person. Virtually all scholars make an exception when the health or life of the mother is endangered. Since the mother is the source of life for the fetus, her life takes precedence. In this case, abortion is regarded as a lesser evil, following a general principle in *shari'a* law of choosing the least damaging option (or "the lesser of two evils"), even though it may be undesirable.¹⁷

Because the Qur'an is even less clear on family planning than on abortion, there is an even greater diversity of opinion on its permissibility. Historically, Muslim

scholars have said that contraception is permissible if the wife consents.¹⁸ In classical Islamic law, eight of the nine legal schools permit contraception. Ibn Hazm, a medieval theologian and jurist, adopted an extremely restrictive position on contraception, arguing that it is a form of hidden infanticide. The Qur'an's prohibition of parents killing their children for "fear of poverty" (17:31) has prompted some to extend this teaching to family-planning methods. Muslim opponents of family planning believe it denotes a lack of trust in the providence of God, citing the Qur'an's reminder that God provides for all his creatures: "There is not a creature on earth whose provision is not guaranteed by God" (11:6). Yet others note that the Prophet Muhammad permitted the practice of *al-'azl* (*coitus interruptus*, or withdrawal), and, by analogy, mechanical contraceptive methods, for example condoms and diaphragms, should also be permitted. All five legal schools permit *al-'azl*, four of them insisting that the wife's consent must be given.

How Theology Becomes Law: The Legal Status of Abortion in the Muslim World

Next, we examine the status of abortion in countries that are predominantly Muslim. Leila Hessini, senior policy adviser for Ipas,¹⁹ notes that 13 of the 20 countries in the Middle East and North Africa (MENA) have "very restrictive" abortion laws, allowing abortion only if the woman's life is threatened.²⁰ It is important to note that, even with a liberalizing trend, the laws in the Muslim world are relatively strict compared with much of Western Europe and the United States. Still, Hessini notes that "reform efforts, *including progressive interpretations of Islam*,"²¹ have resulted in a liberalization of abortion laws in the MENA region.

When examining the laws, it is important to note the differences in the composition of the government. Some countries are Islamic states, while others are secular states. The two Muslim countries with the most liberal abortion laws are Tunisia and Turkey. In both Turkey and Tunisia, the dominant legal school is the Hanafi School, which, as already noted, allows abortion up to 120 days after conception. In 1965, Tunisia became the first MENA country to liberalize its abortion law. Spousal consent is not required, and women do not have to be married to obtain an abortion. Abortions may be sought during the first trimester, and, in the event of fetal abnormalities or a threat to the mother's life, after 12 weeks. Turkey is the only predominantly Muslim country that is also fully secular,²² and liberalized its abortion laws in 1983 with the Population Policy Law No. 2827, which authorizes abortion on request up to ten weeks of pregnancy and up to 24 weeks for medical indications.²³

The remaining Muslim countries that permit abortion without restriction as to reason are Albania and the former Soviet republics Azerbaijan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. Abortion was made legal in the Soviet Union in 1920, and it has remained legal in these five post-Soviet Central Asian

states. Seven countries permit abortion in the first four months in the case of fetal deformity: Benin, Burkina Faso, Chad, Guinea, Iran, Kuwait, and Qatar. Iran is the most recent to allow this, having passed the Therapeutic Abortion Act in 2005. While abortion has always been permitted to save the mother's life, this type of legislation broadens the reasons to include fetal viability and economic or social hardships. Some speculate that the number of fetuses that are falsely diagnosed with "fatal" conditions may increase.

A 2008 report from the International Planned Parenthood Foundation (IPPF) suggests that despite both legal and religious restrictions against abortion in most of the Muslim world, both social values and economic situations have changed, resulting in an increase in the number of abortions that take place in the MENA region. Mohammed Graiggaa, executive director of the Moroccan Association for Family Planning, agrees: "There's definitely an increase compared to 10 to 15 years ago. . . . Abortion is much less of a taboo. It's much more visible. Doctors talk about it. Women talk about it. The moral values of people have changed."²⁴ While it is impossible to know just how many abortions take place, because illegal abortion is not typically documented, the UNFPA reports that one in ten pregnancies in the 21 predominantly Muslim countries of the region ends in abortion.²⁵

Abdel Moati Bayoumi, a professor at Al-Azhar University in Cairo, sees the increased practice of abortion and its acceptability²⁶ in the Muslim world as a sign of "how much people are drifting away from the teachings of Islam."²⁷ In many cases, religious leaders have also issued *fatwas* (non-binding religious edicts), making allowances for abortions under certain circumstances. A prominent Shi'ite cleric in Iran recently issued a *fatwa* permitting abortion in the first trimester if the woman's health is endangered or if the fetus is deformed. Iran's Supreme Leader, Ali Khamenei, has also issued a *fatwa* that permits abortion in the first ten weeks if the fetus tests positive for thalassemia, a genetic blood disorder.²⁸ In Saudi Arabia, where a similar *fatwa* was issued, a study revealed that nearly half of those asked, who had initially rejected the permissibility of abortion, changed their mind when informed of the *fatwa*.²⁹

Still, *fatwas* are not bona fide legal policy and generate much controversy. In 2004, when the Grand Sheikh of Al-Azhar University in Cairo supported a *fatwa* that permitted abortion in the case of rape, the mufti of Egypt, Ali Gomaa, chastised him, saying his decision violated the Qur'an's command that "forbids killing innocent souls."³⁰ Nonetheless, some of the liberalization in attitude can be attributed to a more progressive understanding of Islam, one that sees *ijtihad* (the equivalent of the Catholic concept of conscience) as a way to reconcile religion with cultural preference and personal desire.

In 2005, Pakistan's Ministry of Population Welfare, with support from the UNFPA, sponsored the International Ulama Conference on Population and

Development. The conference, which took place in Islamabad in 2005, explored the role of family-planning and reproductive-health programs within Islam. Pakistan's prime minister emphasized the importance of *ijtihad* in Islam, especially when dealing with these issues. Chaudhry Shahbaz Husain, the federal minister for population welfare, echoed this sentiment, asserting that, while classical Islam does not prohibit family planning or population control, even if it did, through the development of *ijtihad*, scholars should look for newer theories of jurisprudence in order to justify birth control and family regulation in civil society.³¹

Ms. Hong Ping, of the Chinese chapter of IPPF, presented a paper at the Ulama Conference entitled "Promotion of Reproductive Health Through Religious Leaders Among the Muslim Population." Ping explained that there existed "misunderstanding and misperception" among Muslims, regarding the permissibility of reproductive-health services, such as "abortion is life-killing." IPPF's initiative, which Ping speaks of, is just one example of how pro-abortion groups have targeted religious leaders to promote their population-control agenda. Ping encouraged leaders to use "relevant statements" in the Qur'an and *hadith* to explain that "reproductive health was necessary and feasible," thus "integrating the doctrines from the Qur'an and *hadith* with reproductive health and family planning."³²

While traditionally abortion even before 120 days was still discouraged (*makruh*), many Muslims have moved towards what the renowned Pakistani scholar Fazlur Rahman calls a "general acceptance of abortion within 120 days of pregnancy"³³—that is, abortion without restriction as to reason, to use the legal terminology.

Population and Development: UNFPA

To understand how U.N. agencies and non-governmental organizations (NGOs) have played a role in popularizing abortion and family planning in Muslim countries, one should begin in Cairo in 1994, at the U.N.'s International Conference on Population and Development (ICPD). Leading up to the conference, many Muslim communities expressed suspicion towards the U.N. initiatives for family planning and population control. Religious leaders in Saudi Arabia condemned the conference as a "ferocious assault on Islamic society,"³⁴ forbidding Muslims from attending. Saudi Arabia, the Sudan, Iraq, and Lebanon did not send delegates to the conference, with the hope of disassociating themselves from endorsing abortion, and Islamic fundamentalists called it the "conference of licentiousness."³⁵

Yet in recent years, the flexible nature of Islamic law has made Islamic countries vulnerable to progressive readings, as well as intervention from outside sources. Pro-abortion NGOs, such as the IPPF, the International Women's Health Coalition, and the International Reproductive Rights Research Action Group, put pressure on policymakers to liberalize their abortion laws, promising a decrease in maternal mortality and an improvement in the status of women. Thoraya Ahmed

Obaid of Saudi Arabia, a former executive director of the UNFPA who describes herself as a product of Islam interpreted as a religion of moderation, is a strong advocate for women's access to reproductive-health services. And, while the UNFPA says that it takes a "neutral stance" on abortion, it works closely with NGOs that promote and advocate for abortion.³⁶

One of the strategies used by the UNFPA and likeminded advocates is to take advantage of U.N. language that is euphemistic and often leads to confusion. Population-control advocates talk about the earth's "carrying capacity," and family-planning activists promote "fertility regulation." Abortion advocates intentionally use the vague and misleading term "sexual and reproductive health services," causing conservative countries to qualify their support for "reproductive health" by noting that it does not include abortion.

A push for legal abortion also comes under the banner of improving women's health, and the maternal mortality rate by reducing the incidence of unsafe abortions.^{37,38} Indicators demonstrating the social status of women reveal that women enjoy fewer public privileges in Muslim countries compared with those in North and South America, Western and Eastern Europe, and East Asia. Unfortunately, those who call for gender equality and the empowerment of women go much further than educational and economic opportunities, and often extend empowerment to include a woman's "right" to abortion. Even though research shows that access to safe and legal abortion does not lower the maternal mortality ratio,⁴⁰ this has not stopped many from claiming a new "right" to maternal health under the Millennium Development Goals and calling for an end to unsafe, defined as illegal, abortion.

For example, in the case of Turkey, Hessini notes that three interrelated strategies were successfully used to bring about a reform of Turkish abortion laws:

- 1) Research on the undesired consequences of unsafe abortion, its link to maternal mortality and a high rate of unwanted pregnancy;
- 2) The introduction of simpler and safer methods for treating post-abortion complications such as manual vacuum aspiration (MVA); and
- 3) A cohort of trained providers of MVA.⁴⁰

Unsafe abortion was acknowledged as a major public-health concern in Turkey in the late 1970s. But, according to some World Health Organization staff, any abortion that is performed in a country where abortion is illegal is considered "unsafe."⁴¹ In countries where abortion is illegal, a large number of maternal deaths will be attributed to "unsafe" abortions, and, at the U.N., the countries will be pressured to legalize abortion.

Summary

As the Muslim delegations began to present their views at the ICPD in Cairo, it became clear that there was a greater degree of latitude in the Muslim religious

position on abortion than originally represented by the media, which linked the Muslim position with that of the Holy See's total condemnation. Though Islam, on the whole, forbids abortion, Muslim scholars reject a full prohibition of abortion, taking a more nuanced approach that acknowledges the intricacies of the issue. Along with attention to national policies, a crucial part of understanding abortion in the Muslim world is comprehending the diversity of beliefs and practices among Muslims, as well as the variety of ways in which the relationship between the religious and the legal plays out. While it is evident that Islam plays a major role in informing legal and social policy in the Muslim world, a lack of clarity and consensus on Islam's position on abortion has made many Muslim nations vulnerable to outside intervention and subsequent liberalization.

NOTES

1. Donna Lee Bowen, "Abortion, Islam, and the 1994 Cairo Population Conference." *International Journal of Middle East Studies*, Vol. 29, No. 2 (May 1997), 163.
2. Associated Press, "Iran's Leader Introduces Plan to Encourage Population Growth by Paying Families," 27 July 2010, <http://www.nytimes.com/2010/07/28/world/middleeast/28iran.html>.
3. Khomeini led the 1979 Iranian Revolution, which overthrew the Shah of Iran, Mohammad Reza Pahlavi. He subsequently became the Supreme Leader of Iran until his death in 1989. Khomeini had the Shah's family-planning clinics demolished, and instituted pro-natalist policy that led to an annual population growth rate of 3 percent.
4. Isobel Coleman, *Paradise Beneath Her Feet: How Women Are Transforming the Middle East* (New York: Random House, 2010), 92.
5. In this paper, the phrase "Muslim world" refers to countries with a population that is over 1 million with a Muslim majority. While India has the second-largest amount of Muslims (after Indonesia), they comprise only 12 percent of India's total population. Therefore, I do not consider India's laws and policies in this paper, since Muslims have a minor influence on Indian policies. Predominantly Muslim countries are found mostly in the Middle East and Northern Africa (referred to as the MENA region), but are also in Sub-Saharan Africa, Central and Southeast Asia, and Europe. Further, some countries are Islamic states, while others have secular governments. Due to these factors, one can easily conclude that the Muslim world is anything but homogeneous—and therefore generalizations are difficult to make.
6. United Nations, *World Population Prospects: The 2008 Revision*, 280-281.
7. See Eric Kaufmann, *Will the Religious Inherit the Earth: Demography and Politics in the Twenty-First Century* (London: Profile Books, 2010).
8. These are: Algeria, Iran, Jordan, Kuwait, Libya, Maldives, Oman, Syrian Arab Republic, and Tunisia. (Source: *World Population Prospects: 2008 Revision*, United Nations Population Division, <http://esa.un.org/unpp/index.asp>).
9. Borzou Daragahi, "Abortions on the rise in Mideast," *Los Angeles Times*, 29 June 2008.
10. Other translations: "ornament" or "adornment."
11. Bowen, 163.
12. Al-Hibri made this remark in an address entitled "Family Planning and Islamic Jurisprudence," delivered on 19 May 1993 before the Panel on Religious and Ethical Perspectives on Population Issues, convened by the NGO Steering Committee at PrepCom II of the International Conference on Population and Development (ICPD) at the United Nations.
13. The Qur'an is clear about the sanctity of life, saying: "Whosoever has spared the life of a soul, it is as though he has spared the life of all people. Whosoever has killed a soul, it is as though he has murdered all of mankind" (5:32).
14. The schools of Islamic jurisprudence (called *madh'hab*) represent different interpretations of Islam. All consider the Qur'an and *hadith* to be sacred texts and the primary source of consultation. There are four major Sunni legal schools: Hanafi, Shafi'i, Maliki, and Hanbali. The Zaydi

- school is the predominant Shi'a school.
15. Donna Lee Bowen, "Reproduction: Abortion and Islam (Overview)," *Encyclopedia of Women and Islamic Cultures*, ed. Suad Joseph (Leiden and Boston: Brill), Volume 3: 313-15, 313.
 16. Ibadī is the dominant form of Islam in Oman, where abortion is legal only to save the life of the mother.
 17. Bowen, "Abortion, Islam, and the 1994 Cairo Population Conference," 164-165.
 18. While any form of temporary sterilization is generally permitted, tubal ligation and vasectomy are more controversial because of their permanent effect. Iran, Turkey, and Tunisia allow both tubal ligation and vasectomy, but Jordan and Egypt forbid both.
 19. Ipas, an abortion-advocacy organization, is a manufacturer and distributor of manual vacuum aspiration (MVA) instruments.
 20. Leila Hessini, "Abortion and Islam: Policies and Practice in the Middle East and North Africa," *Reproductive Health Matters* (May 2007, 15(29):75-84), 75.
 21. Hessini, 75.
 22. Turkey is a representative democracy.
 23. Hessini, 79.
 24. Borzou Daragahi, "Abortions on the rise in Mideast."
 25. United Nations Population Fund (UNFPA), *The Gap Exists Between Hopes and Realities* (New York: UNFPA), <http://www.unfpa.org/intercenter/hopes/gap.html>.
 26. The IPPF report notes that 53 percent of Egyptians and 55 percent of Iranians disagree with their government's ban on abortion.
 27. Borzou Daragahi, "Abortions on the rise in Mideast."
 28. Sa'diyya Shaikh, "Family planning, contraception and abortion in Islam: Understanding Hilafah: Moral Agency, Justice and Compassion," in *Sacred Choices: The Case for Contraception and Abortion in World Religions*, ed. Daniel Maguire (Oxford: Oxford University Press, 2003), 122.
 29. Hessini, 81.
 30. BBC—Religions—Islam: Abortion, http://www.bbc.co.uk/religion/religions/islam/islamethics/abortion_1.shtml.
 31. Farooq Hassan, "Muslim Ulama & Implementing Restrictive Family and Population Policies," IslamOnline.net, 18 May 2005, http://www.islamonline.net/servlet/Satellite?c=Article_C&cid=1158658475746&pagename=Zone-English-Living_Shariah%2FLSELayout.
 32. Ibid.
 33. Fazlur Rahman, *Health and Medicine in the Islamic Tradition* (New York: Crossroad Publishing Company, 1987), 118.
 34. Shaikh, 105.
 35. Alan Cowell, "Vatican Says Gore Is Misrepresenting Population Talks," *New York Times*, 1 September 1994, A1.
 36. Between 1990 and 1994, UNFPA gave \$57 million to China to fund their "one-child policy." As a result, the United States, under the Bush administration, withheld funding from the UNFPA. UNFPA has also funded the IPPF, one of the leading abortion-advocacy groups in the world, and the Center for Reproductive Rights (CRR), a New York-based pro-abortion law firm. In 2006, UNFPA lobbied the Nicaraguan government to reconsider its ban on abortion.
 37. The final report from the ICPD in Cairo stated: "In no case should abortion be promoted as a method of family planning." But, "in circumstances where abortion is legal, such abortion should be safe."
 38. The term "safe motherhood," coined by Fred Sai, M.D., a Ghanaian physician, is another term used to advocate for abortion-on-demand. Sai founded Family Care International (FCI), an abortion-advocacy group that is responsible for the Women Deliver Conference—itsself claiming to be focused on maternal health, but overtly dedicated to "reproductive rights" and the pro-abortion agenda. Sai served as the chairman for the Main Committee of the ICPD in Cairo in 1994, and was the former president of the IPPF. One of the top priorities of the Safe Motherhood Initiative (SMI) is to "Prevent Unwanted Pregnancy and Address Unsafe Abortion." But SMI goes further than Cairo's "where legal, safe," calling for the legalization of abortion: "What can be done? Reform laws and policies to support women's reproductive health and improve access to family planning, health and *abortion-related services*" (italics mine).
 39. A recent study done by the British medical journal *The Lancet*, in conjunction with the University of Washington's Institute for Health Metrics and Evaluation (IHME), refutes the claim, made by

those who promote abortion in maternal-health policy, that 500,000 maternal deaths occur annually. [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(10\)60518-1/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(10)60518-1/fulltext).

40. Hessini, 79.

41. See Donna Harrison, "Removing the Roadblocks from Achieving MDG 5 by Improving the Data on Maternal Mortality," *International Organizations Research Group Briefing Paper No. 5*, C-FAM, May 2009), http://www.c-fam.org/docLib/20090514_Removing_the_Roadblocksfinal.pdf.



The Bioethics Threat to Universal Human Rights

Wesley J. Smith

Bioethics is much larger than the sum of its parts. The discipline isn't "only" about how patients are treated in hospitals or the arcane details of public health policy. Rather, because many leading bioethicists reject intrinsic human dignity and seek to remake medical ethics and public policy to reflect that nihilistic worldview, the bioethics movement (as I call it) threatens to subvert human freedom. Indeed, if we reject human exceptionalism in bioethics—and the danger here is acute—the principle of *universal* human rights could buckle.

Bioethicists don't see themselves as undermining freedom, of course. Many believe they champion liberty by focusing intently on patient autonomy as the fundamental underpinning of bioethical analysis. Moreover, they note, bioethical advocacy helped bring an end to the bad old days of medical paternalism under which dying patients were often "hooked up to machines against their will," when they wanted to die naturally, at home, surrounded by family.

The Belief in Human Dignity Led to Better End-of-Life Care

Bioethics—along with the hospice movement—did indeed spark a revolution in the humane care of dying people. But the decades that have since passed have obscured *why* that great humanitarian reform was achieved: The most prominent leaders of these efforts were inspired by a robust Christian faith and a strong adherence to the sanctity/equality of human life.

The late English physician Dame Cecily Saunders, whose dedication to dying patients drove her over several decades to create the modern hospice movement, is a perfect example. In a 1998 interview for a book I was writing, she described how her work as a hospital social worker led to an epiphany: "I realized that we needed not only better pain control but better overall care. People needed the space to be themselves. I coined the term 'total pain,' from my understanding that dying people have physical, spiritual, psychological, and social pain that must be treated. I have been working on that ever since."¹

This insight—and her great calling to reform end-of-life care—arose directly from her deep Anglican faith, as I recounted in my book *Culture of Death* (citations omitted):

Saunders' epiphany was not "rational," but spiritual, coming from a deep empathy inspired by her religious faith. Her work was a "personal calling, underpinned by a

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powerful religious commitment,” wrote David Clark, an English medical school professor of palliative care and Saunders’ biographer, to whom she has entrusted the organization of her archives. So strong was Saunders’ faith in what she perceived as her divine call: “I have thought for a number of years that God was calling me to try to found a home for patients dying of cancer,” she wrote to a correspondent. Saunders’ initial idea was for St. Christopher’s hospice to be a “sequestered religious community solely concerned with caring for the dying.” But the idea soon expanded from a strictly religious vision into a broader secular application, in Clark’s words, “a full-blown medical project acting in the world.”²

Similarly, the bioethics pioneer, the Christian theologian Paul Ramsey, was the first leader in the then-nascent movement to focus on methods by which dying patients could be treated more humanely within the medical system. He called it treating “the patient as a person,” and indeed wrote a book by that title, arguing that patients should be allowed to refuse unwanted life-extending treatment even if it resulted in their deaths.

Ramsey was not motivated by a belief that a dying or profoundly disabled patient is somehow less valuable than those who are healthy and able-bodied—a prominent view in contemporary bioethics. (As we shall see, the problem today is that many in bioethics want to treat some patients as “non persons.”) To the contrary, in *The Patient as a Person*, he clearly foresaw the nexus between upholding the sanctity of human life on one hand, and preserving human freedom on the other (my emphasis):

Just as man is a *sacredness in the social and political order*, so he is a *sacredness in the natural and biological order*. He is a sacredness in bodily life. He is a person who within the ambience of the flesh claims our care. He is an embodied soul or ensouled body. He is therefore a sacredness in illness and in his dying. . . . *Only a being who is a sacredness in the social order can withstand complete dominion by “society” for the sake of engineering civilization’s goals—withstand in the sense that the engineering of civilizational goals cannot be accomplished without denying the sacredness of the human being*. So also in the use of medical or scientific technics.³

Ramsey considered this point to be so fundamental, he even thought that the term “dignity of human life” was a mere “sliver of the shield in comparison with the awesome respect required of men in all their dealings with men if man has “a touch of sanctity in this his fetal, mortal, bodily, living and dying life.”⁴

Contemporary Bioethical Advocacy for Human Dignity

The belief in the equality/sanctity of human life in bioethics, as we shall see, has waned since those early days. But thankfully, it has not yet been eradicated. For example, Leon Kass—who headed the President’s Council on Bioethics under President George W. Bush—explained the importance of human dignity in the context of bioethics while serving on the Council. Note how he correctly tied that principle to the promotion of liberty:

[W]e Americans . . . care a great deal about human dignity, even if the term comes not easily to our lips. In times past, our successful battles against slavery, sweatshops, and segregation, although fought in the name of civil rights, were at bottom campaigns for human dignity—for treating human beings as they deserve to be treated, *solely because of their humanity*. . . . Today, human dignity is of paramount importance especially in matters bioethical. As we come more and more immersed in a world of biotechnology, we increasingly sense that we neglect human dignity at our peril, especially in light of gathering powers to intervene in human bodies and minds in ways that will affect our very humanity, like threatening things, that everyone, whatever their view of human dignity, holds dear. Truth to tell, it is beneath our human dignity to be indifferent to it.⁵

Similarly, in their 2008 book, *Embryo: A Defense of Human Life*, Princeton University professor of jurisprudence Robert P. George and University of South Carolina philosophy professor Christopher Tollefsen argue for a “natural rights” understanding of the intrinsic value of human life that supports a “universal personhood”—a dramatically different concept from the usual meaning of personhood in contemporary bioethical discourse. They write:

For . . . if we are persons, then as bodily beings we have human dignity. And that dignity is served or disrespected by our attitude, and the attitudes of others, toward the basic human goods, including the good of human life. So our dignity is violated when the basic goods are deliberately damaged or destroyed in our person, as when someone intentionally takes another human being’s life. That action, as an assault on human life, is an assault on human dignity no matter the victim’s age or size or stage of development. We become subjects of human dignity, in other words, from the point at which we begin to exist as human beings, and we are, for the same reasons, the subjects of absolute human rights from precisely that point as well.⁶

Alas, the equality/sanctity of life understandings of Saunders, Ramsey, Kass, and George/Tollefsen represent a distinct minority view in contemporary bioethics, having been generally supplanted by the so-called “quality of life ethic”—that presumes to invidiously declare differing moral values for human life based on measurements of individual capacities or abilities.⁷

Attacking Human Dignity in Bioethics

The idea that human life should be accorded relative value isn’t new in bioethics. Indeed, its genesis can be traced back to the very beginning of the field as a modern discourse. For example, in 1973, the late utilitarian philosopher Joseph Fletcher—whom bioethics historian Albert R. Jonsen once called the “patriarch of bioethics”⁸—opined in the first edition of the *Hastings Center Report* that “criteria for humanhood” should be adopted within bioethics to measure the moral worth of individual human beings in order to determine how they should be treated in medicine, by science, and within society.⁹

In his essay, Fletcher callously dismissed medical “reverence for life,” sniffing

that “nobody in his right mind regards life as sacrosanct.” What matters, he wrote, was not membership in the human race, but one’s capacities and capabilities. “What is critical is personal status, not merely human status.”

Toward that end, and to show that “we mean business,” he proposed a list of “criteria or indicators,” by which bioethicists could judge the existence of what he called “humanhood,” in order to eugenically (my term) divide “truly human beings” (in Fletcher’s parlance) from those who were merely “subpersonal.”¹⁰ These criteria or indicators¹¹ included “minimum intelligence,” “self awareness,” “self control,” a “sense of futurity,” “memory,” and the ability to communicate, writing bluntly with regard to the latter, “disconnection from others, if it is irreparable, is dehumanization.”¹²

The Fletcher School (if you will) predominates in today’s bioethical discourse—either explicitly, or sometimes, based on practical effect. This anti-human-exceptionalism meme is most commonly expressed around a distorted concept of personhood, in which that status is not viewed as intrinsic, but rather, *must be earned* by possessing minimal capacities, such as being self aware or able to value one’s own life. In this view of personhood theory, some humans—all unborn life, infants, and people with serious cognitive disabilities or diseases such as late-stage Alzheimer’s—are human non-persons, and hence, possess lesser value than other humans (and, perhaps, than some animals).

The implications of personhood theory to the most vulnerable among us could not be more pronounced. For example, writing in the *Kennedy Institute of Ethics Journal*, the influential United Kingdom bioethicist John Harris wrote that non-persons are not wronged if they are killed, because nothing is taken from them “that they can value.”¹³ Similarly, in the same edition of the KIEJ, the American bioethicist Tom L. Beauchamp suggested that human non-persons might one day be used instrumentally, based on their purported lower moral worth:

. . . because many humans *lack* properties of personhood or are less than full persons, they are thereby rendered equal or inferior in moral standing to some nonhumans. If this conclusion is defensible, we will need to rethink our traditional view that these unlucky humans cannot be treated in ways we treat relevantly similar nonhumans. For example, they might be aggressively used as human research subjects or sources of organs.¹⁴

The anti-universal-human-rights implications of these views, which are commonly expressed in bioethics discourse, are obvious—but often go unremarked upon directly. That is why a recent article entitled “Undignified Bioethics,” published in the journal *Bioethics*, was so notable.¹⁵ Rather than ignore the clear adverse liberty import of viewing human life in a relativistic fashion, English bioethicist Alasdair Cochrane (who, ironically, works out of the Centre for the Study of Human Rights) acknowledged the explicit human-rights implications of denying

human dignity in bioethics—but embraced such policies anyway.

Cochrane first discusses dignity as a way of behaving, which is immaterial to moral value. Then he gets to the heart of the matter (my emphasis):

The second important conception of dignity that we need to consider does not see dignity as a form of behaviour, but as a property. Under this conception, the possession of dignity by humans signifies that they have an inherent moral worth. In other words, because human beings possess dignity we cannot do what we like to them, but instead have direct moral obligations towards them. Indeed, this understanding of dignity is also usually considered to serve as the grounding for human rights. As Article 1 of the Universal Declaration of Human Rights states: ‘All human beings are born free and equal in dignity and rights.’¹⁶

Exactly right. Cochrane vividly—and succinctly—highlighted the liberty stakes at risk in embracing a human-*un*exceptionalist bioethics. If humans do not have intrinsic equal moral value, the philosophical bases of all human-rights documents, e.g., the U.S. Declaration of Independence (“We hold these truths to be self evident, that all men are created equal . . .”) are rendered impotent. Making matters worse, we open the door to exploiting human beings as mere natural resources, a point that Cochrane acknowledges:

This conception of dignity as inherent moral worth certainly seems coherent enough as an idea. Indeed, we can also see why this conception of dignity is employed in certain debates around bioethics. For if all individual human beings possess dignity, then they should not be viewed simply as resources that we can treat however we please. To take an example then, it may be that we could achieve rapid and significant progress in medical science if we were to conduct wide-ranging medical experiments on groups of human beings. However, because human beings have dignity, so it is argued, this means that they possess a particular quality that grounds certain moral obligations and rights.¹⁷

Again, right on. It is the principle that undergirds crucial protections of the vulnerable such as the Nuremberg Code’s ethical ruling governing human-subject research. Bluntly put, without robust support for human exceptionalism in medicine, health policy, and bioethics generally—across the gamut of human differences, distinctions, and capacities—the door opens to tyranny.

But even though Cochrane *sees*, he doesn’t care. He writes:

When we start looking at particular characteristics that might ground dignity—language-use, moral action, sociality, sentience, self-consciousness, and so on—we soon see that none of these qualities are in fact possessed by each and every human. We are therefore left wondering why all human beings actually do possess dignity.¹⁸

Thus, like Fletcher, Singer, Harris, and others before him, Cochrane argues that we should look to each individual to determine moral worth rather than accepting intrinsic human dignity.

Cochrane supports his thesis by arguing that the only truly cogent bases for

embracing inherent human moral worth are religious, such as the belief that we are made in the image and likeness of God.¹⁹ Ironically, some Christians further Cochrane's cause by agreeing with the false premise that only a metaphysical understanding of human nature justifies intrinsic human dignity. That is dangerous in a society in which even devout believers accept that public policy should rest on secular foundations, because it surrenders the field to the human unexceptionalists. It is also completely unnecessary. Human dignity can be well defended from secular bases. Indeed, in order to protect universal human rights, we must earnestly engage that intellectual challenge.

Defending Human Dignity in the Secular Public Square

Happily, human exceptionalism does not require belief in a transcendent God, or indeed, spiritual allusions of any kind if we understand that what matters morally is not the capacities of the individual—which, after all, are transitory—but our intrinsic natures as human beings—which are innate. *We, and only we*, in the known physical universe, are hard-wired—whether through creation, intelligent design, or random evolution—to be moral beings.

Consider: Animals certainly have exceptional capabilities, e.g., the bat's sonar or the gorilla's strength. But these are mere physical distinctions that have no more significant moral implications than my having less value than someone with 20/20 vision because I wear glasses. In contrast, humans are exceptional in ways that separate us *morally*—rather than physically—from fauna, e.g., rationality, creativity, abstract thinking, moral agency and accountability—the list is long—which *arise from our natures* and are *possessed by all of us* unless interfered with by immaturity, illness, or disability. As the philosopher Hans Jonas put it so well, “something like an ‘ought to’ can issue only from man and is alien to everything outside him.”²⁰

Because *our essential human natures do not change* if we are injured or too young to fully express them, none of us should be denied equality. The philosopher Carl Cohen put it this way:

It is not individual persons who qualify (or are disqualified) from the possession of rights because of the presence or absence in them of some special capacity, thus resulting in the award of rights to some, but not to others. Rights are universally human; they arise in the *human moral world*, in a moral *sphere*. In the human world moral judgments are pervasive; it is the fact that all humans including infants and the senile are members of that moral community—not the fact that as individuals they have or do not have certain special capacities, or merits—that makes humans bearers of rights.²¹

Moreover, refusing to segregate ourselves into different moral castes is philosophically essential to maintaining universal human rights. As the noted philosopher

Mortimer J. Adler wrote, if we ever came to believe that all humans do not possess equal moral status, the intellectual foundation of liberty would collapse:

Those who now oppose injurious discrimination on the moral ground that all human beings, being equal in their humanity, should be treated equally in all those respects that concern their common humanity, would have no solid basis in fact to support their normative principle. A social and political ideal that has operated with revolutionary force in human history could be validly dismissed as a hollow illusion that should become defunct.²²

Adler then explained why knocking humans off the pedestal of exceptionalism could lead to tyranny:

On the psychological plane, we would have only a scale of degrees in which superior human beings might be separated from inferior men by a wider gap than separated the latter from non-human animals. Why, then, should not groups of superior men be able to justify their enslavement, exploitation, or even genocide of inferior human groups, on factual and moral grounds akin to those that we now rely on to justify our treatment of the animals we harness as beasts of burden, that we butcher for food and clothing, or that we destroy as disease-bearing pests or as dangerous predators?²³

That isn't an overstatement. In bioethics, we are already seeing advocacy for just such courses.

The Potential Bioethical Oppression

In the West, oppression would not look like history's previous great evils, such as American slavery or the Holocaust. Rather, it would most likely be imposed, in the name of reducing suffering, around issues and activities that come under the general heading of bioethics. For proof, we need merely look at the following *partial list* of current bioethical policies or proposals that (would) exploit, harvest, and kill the most weak and vulnerable among us:

1) **Infanticide:** Peter Singer and other bioethicists have long argued that because infants lack personal capacities, they should be allowed to be killed to benefit themselves (stop suffering), family (to ease emotional or financial burdens), or society (reducing health care costs).²⁴ This isn't just theoretical. Dutch doctors now openly euthanize infants born with disabling or terminal conditions under what is known as the "Groningen Protocol" (named after the Groningen University Medical Center, where many infanticides have taken place).²⁵ Repeated studies in *The Lancet* indicate that 8 percent of all infants who die in the Netherlands are euthanized.²⁶

2) **Human Cloning/Fetal Farming:** Discarding human exceptionalism in bioethics enables the pursuit of human cloning and the growing of cloned fetuses in artificial uteri for use in organ harvesting or medical experiments, even paying women to gestate fetuses into late term before aborting so the remains could be

usable. Such a crass course has already been seriously proposed by bioethicist Jacob M. Appel: “Someday, if we are fortunate, scientific research may make possible farms of artificial ‘wombs’ breeding fetuses for their organs. . . . That day remains far off. However the prospect of fetal-adult organ transplantation is a more realistic near term possibility. A market in such organs might benefit both society and the women who choose to take advantage of it.”²⁷

3) Redefining Death for Organ Harvesting: Some of the most notable and respected bioethicists and organ-transplant professionals have openly advocated changing the “dead donor rule” to include people with persistent unconsciousness, so that the organs of patients diagnosed to be in a persistent vegetative state could be harvested. Even though this would amount to killing for organs, such proposals are commonly made in the world’s most prestigious medical and bioethical journals. For example, several physicians writing “for the International Forum for Transplant Ethics,” opined: “If the legal definition of death were to be changed to include comprehensive irreversible loss of higher brain function, it would be possible to take the life of the patient (or more accurately to stop the heart, since the patient would be defined as dead) by a ‘lethal’ injection, and then remove the organs . . . subject to the usual criteria for consent.”²⁸ Others have urged that such people be used in medical experimentation. Thus several Belgian bioethicists argued that permanently unconscious patients should be considered mere “living cadavers,” as a consequence of which they could be used ethically in xenotransplantation experiments in which their own kidneys would be replaced by those from pigs.²⁹

4) Euthanasia/Organ Harvesting: Belgium has begun tying euthanasia of seriously disabled patients with organ procurement, which was documented in an international medical journal: “This case of two separate requests, first euthanasia and second, organ donation after death, demonstrates that organ harvesting after euthanasia may be considered and accepted from ethical, legal and practical viewpoints in countries where euthanasia is legally accepted. This possibility may increase the number of transplantable organs and may also provide some comfort to the donor and his (her) family, considering that the termination of the patient’s life may somehow help other human beings in need of organ transplantation.”³⁰

Babies can’t choose to be killed. Ending the lives of the cognitively disabled for their organs would amount to a profound human-rights violation. Treating the unborn as so many tissue lines—which is a distinct issue from the usual abortion-rights-liberty claim of women controlling their own bodies—would send an insidious message that human life has no moral value based on being human whatsoever.

And that is just the beginning of the threat. As science advances and we assume the power to literally remake genomes, the possibilities for intentionally creating

Brave New World-type oppressed castes could leave the realm of science fiction. Indeed, in his last book, Joseph Fletcher advocated engineering a part-ape chimeric “parahuman” to “do dangerous or demeaning jobs.”³¹ More recently, from the other direction, Princeton biologist Lee Silver foresaw the establishment of a two-tiered caste-based system made up of genetically enhanced and superior post-humans, whom he calls the “Gen Rich,” and the unmodified human “Naturals,” who would be forced into menial pursuits. He writes: “Now, Natural children are only taught the basic skills they need to perform the kinds of tasks they’ll encounter in the jobs available to members of their class.”³² And here you thought that “untouchables” were supposed to be a relic of the past.

Conclusion: A Human Dignified Bioethics Is Essential to Maintaining Human Freedom

This is why bioethics *matters*. Bioethical discourse and policies grapple with the essential question of human meaning. Such debates aren’t merely philosophical, but—given that bioethical policies have the potential to impact every living and future human being on the planet—have very practical, real-world consequence. The stakes could not be higher. Cochrane sees this potential too, writing: “Obviously, given controversies over abortion, stem cell research, genetic interventions, animal experimentation, euthanasia and so on, bioethics does need to engage in debates over which entities possess moral worth and why.”³³

One last important point: We often hear that politics is the art of compromise. But that only works when there is general agreement about values and ends, but debatable differences over means. That is not where we find ourselves in bioethical controversies, where the disagreements are fundamental and will determine the core governing values of society.

We cannot fashion a principled compromise around the existence of human dignity—it either exists or it doesn’t. But while that precludes debate in the usual sense of the term, we can, nay, *must*, hold up these diametrically conflicting world views to intense public scrutiny. And we must make people understand that the contest over a “dignified” or “undignified” bioethics is too important to leave to academics and public intellectuals. All must be engaged, for the bioethics we choose to follow will determine whether our society stands for human equality and the guarantee of truly universal human rights.

NOTES

1. Cecily Saunders, Interview with Author, December 8, 1998.
2. Wesley J. Smith, *Culture of Death: The Assault on Medical Ethics in America* (San Francisco, Encounter Books, 2000), p. 24.
3. Paul Ramsey, *The Patient as Person: Explorations in Medical Ethics*, 2nd ed. (New Haven, Yale University Press, 2002), p. xlvi. (First edition published by Yale University Press, 1970.)
4. Id.

5. Leon R. Kass, "Defending Human Dignity," Ch. *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (Washington D.C., President's Council on Bioethics, 2008), p. 298.
6. Robert P. George and Christopher Tollefsen, *Embryo: A Defense of Human Life* (New York, Doubleday, 2008.), p. 108.
7. See for example, Peter Singer, *Rethinking Life and Death: The Collapse of Our Traditional Ethics* (New York, St. Martin's Press, 1994), p. 118.
8. "O Brave New World: Rationality in Reproduction," by Albert R. Jonsen, David C. Thomasma, and Thomasine Kushner, eds., *Birth to Death: Science and Bioethics*, p. 50.
9. Joseph Fletcher, *Humanhood: Essays in Biomedical Ethics* (Prometheus Books, Buffalo, N.Y., 1979), p. 85.
10. Id., p. 11.
11. Id., pp. 12-16.
12. Id., pp. 16-17.
13. John Harris, "The Concept of the Person and the Value of Life," *Kennedy Institute of Ethics Journal* (Baltimore, Johns Hopkins University Press), Vol. 9, No. 4, December 1999, p. 307.
14. Thomas L. Beauchamp, "The Failure of Theories of Personhood," *Kennedy Institute of Ethics Journal*, supra, p. 320.
15. Alasdair Cochrane, "Undignified Bioethics," *Bioethics*, 2009, Vol. 4, Issue 5, pp. 234-241.
16. Id., p. 236.
17. Id.
18. Id.
19. Id., pp. 236-237.
20. Hans Jonas, *The Phenomenon of Life: Toward a Philosophical Biology* (Evanston, Northwestern University Press, 1966), p. 283.
21. Carl Cohen, "Do Animals Have Rights?" *Ethics and Behavior*, Vol. 7, No. 2, 1997, p. 95-97.
22. Mortimer J. Adler, *The Difference of Man and the Difference it Makes* (New York, Fordham University Press, 1993), p. 264.
23. Id., p. 265.
24. See for example, Wesley J. Smith, "Infanticide Must be Combated—Carefully," *Human Life Review*, Fall 2010.
25. Eduard Verhagen, M.D., J.D., and Pieter J. J. Sauer, M.D., Ph.D., "The Groningen Protocol—Euthanasia in Severely Ill Newborns," *New England Journal of Medicine*, 352:959-962, March 10, 2005.
26. For example, see Agnes van der Heide et al., "Medical End-of Life Decisions Made for Neonates and Infants in the Netherlands," *Lancet*, Vol. 350, 1997, pp. 251-55.
27. Jacob M. Appel, "Are We Ready for a Market in Fetal Organs?" *Huffington Post*, March 17, 2009, http://www.huffingtonpost.com/jacob-m-appel/are-we-ready-for-a-market_b_175900.html.
28. See, for example, "Should Organs from Patients in Permanent Vegetative State Be Used for Transplantation," R. Hufferberg, et al., *Lancet*, Vol. 350, November 1, 1997, p. 1321.
29. An Ravelingien, et al, "Proceeding with Clinical Trials of Animal to Human Organ Transplantation: A Way Out of the Dilemma," *Journal of Medical Ethics*, February 2004; 30(1): 92–98.
30. Oliver Detry, et al., "Organ Donation After Physician-Assisted Suicide," *Transplant International*, 21 (2008) p. 915.
31. Joseph Fletcher, *The Ethics of Genetic Control: Ending Reproduction Roulette* (Buffalo, Prometheus Books, 1988), p. 172.
32. Lee M. Silver, *Remaking Eden: Cloning and Beyond in a Brave New World* (New York, Avon Books, 1997), p. 6.
33. Cochrane, "Undignified Bioethics," supra., p. 237.

The Role of Chance in the Emergence of Life

Donald DeMarco

Peter Singer, who holds the Ira W. De Camp Chair of Bioethics at Princeton University's Center for the Study of Human Values, makes the following dogmatic comment in his book, *Practical Ethics*: "Life began, as the best available theories tell us, in a chance combination of gasses; it then evolved through random mutation and natural selection. All this just happened; it did not happen to any overall purpose." This comment in no way represents "the best theories," but it does represent a view that has persisted from the time of the ancient Greek atomists (Leucippus and Democritus) who believed that the chance collisions and combinations of atoms over untold eons brought everything into existence—even human thought.

In the modern world, the French biologist and Nobel Prize winner, Jacques Monod, makes a similar assertion in *Chance and Necessity: An Essay on the Natural Philosophy of Modern Biology* (Vintage, 1971):

The ancient covenant is in pieces; man knows at last that he is alone in the universe's unfeeling immensity, out of which he emerged only by chance. His destiny is nowhere spelled out, nor is his duty. The kingdom above or the darkness below; it is for him to choose.

Was Goethe so wrong when he penned the song of the archangels at the beginning of the greatest poem of the German language, *Faust*?

The sun makes music as of old
Amid the rival spheres of heaven
On its predestined circle rolled
With thunder speed; the angels even
Draw strength from gazing at its glance,
Though none its meaning fathom may:
The world's unwithered countenance
Is bright as on the earliest day.

Goethe's poetic expression, as this essay will demonstrate, is not inconsistent with the "best theories" that scientists have proposed. In fact, it seems to be entirely harmonious with current scientific knowledge that provides a powerful and convincing refutation of the theories of chance that have been postulated from the early atomists through the likes of Monod and Singer.

In 1927, a Catholic priest and astronomer by the name of Georges Lemaître

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was the first to hypothesize that the universe began when a “primeval atom” of infinite density exploded. Some of his contemporaries ridiculed him, arguing that this theory was nothing more than a transparent ploy to make the Book of Genesis look scientifically credible. Can science provide any evidence that is consistent with the command, “Let there be light”?

Lemaître was well aware of the controversial nature of his theory and offered a testable prediction, namely, the observation of receding galaxies. If the distance between galaxies is increasing, Lemaître postulated, then everything must have been closer together in the past, and perhaps all together in the beginning. Fellow scientists scoffed at this idea as well. But in 1929 Edwin Hubble presented to the world evidence that galaxies were indeed rushing away from each other. From that time to the present, most scientists, on the basis of comprehensive and accurate explanations gleaned from empirical observations, have become convinced that some sort of Big Bang scenario must have occurred. It is now estimated that approximately 13.3 to 13.9 billion years have elapsed since the initial mega-explosion occurred. Lemaître has been vindicated.

The Hubble Space Telescope, named after the prestigious astronomer, has confirmed the existence of some 50 billion galaxies. This figure is truly astonishing and has suggested to some that the universe may be so large as to be infinite. No one knows what lies beyond the furthest galaxies. Some of these galaxies could be more than 12 billion light years away. And since light travels at 186,000 miles per second, it travels 6 trillion miles per year. Thus, the furthest known galaxies may be 12 billion times 6 trillion miles away or 72,000,000,000,000,000,000,000 miles (72 sextillion).

Gregg Easterbrook makes some even more astounding points in his fascinating book, *Beside Still Waters: Searching for Meaning in a World of Doubt* (William Morrow, 1998). If the Big Bang had been slightly less violent, the expansion of the universe would have been less rapid, and it would soon have collapsed back on itself. Conversely, if the initial detonation had been slightly more violent, the universe might have dispersed into a cosmic soup too thin for the aggregation of stars. There was little margin for error. The ratio of matter and energy to the volume of space at the moment of the Big Bang had to be, scientists tell us, within about one quadrillionth of one percent of the ideal. In addition, space, at the time of the Big Bang, had to be astonishingly flat for the universe to develop. If it had not been, the universe would have come to an end in a small fraction of a second, or would have expanded so rapidly that the universe would have been too cold for stars to form and life to evolve. Despite the overwhelming odds against the universe forming as it did, it nonetheless did happen. George Will has commented on this unlikely occurrence by stating that “what *is* is staggeringly implausible, and that is theologically suggestive”

(*Newsweek*, November 9, 1998, p. 88).

The origin and maintenance of the universe, according to the Big Bang theory, is so utterly improbable that its only plausible explanation is that a superior being must have had a hand in its inception and development. Allan Sandage, one of the world's leading astronomers, has stated that the Big Bang can be understood only as a "miracle." This statement implies that its ultimate explanation lies outside the framework of science. Charles Townes, a Nobel Prize-winning physicist and co-inventor of the laser, has argued that recent discoveries in physics "seem to reflect intelligence at work."

A good companion to Easterbrook's work is Stephen M. Barr's *Modern Physics and Ancient Faith* (Notre Dame, 2003). "Why is the universe so big?" he asks. The scale of the cosmos is indeed mind-boggling. It takes 1.5 billion years for life to evolve, he informs us. In that time, the universe has been ever-expanding at a colossal rate. In terms of space, life comes at an enormous price. Man himself, however, Professor Barr states, is just the "right size," which is to say that he is the geometric mean between the size of Planet Earth and the size of an atom.

It has been famously asserted that a half-dozen monkeys provided with typewriters would, given enough time, reproduce all the books in the British Museum. This statement, commonly but wrongly attributed to Thomas Henry Huxley, implodes on itself because of an inner contradiction. On the one hand, it claims that an extraordinarily high degree of order can be the product of pure chance. On the other hand, it assumes that an extraordinarily high degree of order already exists, namely the monkeys and the typewriters. The former are highly complex organisms that are presumed to be indefatigable and unswervingly dedicated to their mission. The latter are presumed to function endlessly without ever needing repair, while producing a transfinite number of typed pages.

That literature could be produced by pure chance was refuted long ago by Cicero. In his *De natura deorum* (*On the Nature of the Gods*), the great orator wrote:

He who believes this [that the world arose through the random combination of atoms] may as well believe that if a great quantity of the one-and-twenty letters composed either of gold or any other matter, were thrown upon the ground, they would fall into such order as legibly to form the *Annals* of Ennius. I doubt whether fortune could make a single verse of them.

Scientists, nonetheless, do not dismiss such statements so easily. *The New Yorker* (Aug. 4, 2004) reported about a computer program that simulated the random keyboard pecking of the equivalent of 42,162,500,000 billion, billion monkey-years. The single most intelligible result was the appearance of "VALENTINE.CeasetoIdor:eFLPOFRjWK78aXzVOwm)-';8.t". The first 19

letters of this sequence can be found in *The Two Gentlemen of Verona* (though not exactly in the way that Shakespeare wrote them, given upper- and lower-case inconsistencies; moreover, since the Bard did not use a typewriter, the chance of replicating his handwriting would be even more remote). Cicero may not have known exactly how prescient he was.

The Arts Council in Great Britain provided the University of Plymouth with a £2,000 grant to see what would happen if six real monkeys pecked away at a computer keyboard for a month. The monkeys produced five pages consisting largely of the letter S. Their behavior was erratic, bashing the keyboard and doing other things that are too indelicate to mention.

Playwright Tom Stoppard has remarked that “the idea of God is slightly more plausible than the alternative proposition that, given enough time, some green slime could write Shakespeare’s sonnets.” Psychiatrist Karl Stern is more decisive. In *The Flight From Woman* he finds it delusional to believe that “random occurrences of large clusters of molecules” led to the formation of life and that, “through processes of natural selection, a being finally occurred which is capable of choosing justice over injustice, of writing poetry like that of Dante, composing music like that of Mozart and making drawings like those of Leonardo.” This echoes the distinguished conductor Georg Solti’s remark: “Mozart makes you believe in God—much more than going to church—because it cannot be by chance that such a phenomenon arrives into this world.”

The monkey image does not begin to explain how order came about, but rather presupposes it. It represents a good illustration of the logical fallacy known as “begging the question,” where the conclusion one is trying to prove is simply assumed (e.g., “Terrorism is bad because it can lead to other acts of terrorism”).

The prevailing myth, nonetheless, lingers that swirling clouds of gas and dust gradually formed galaxies, stars, and planetary systems; atoms combined into larger and larger molecules; simpler organisms evolved into more complex ones; sensation and thought finally appeared through some kind of natural selection. The scientific evidence, however, moves in the opposite direction, not from chaos to order, but from profound principles of order that operated from the very beginning. According to Stephen M. Barr:

The slime from which life arose was made of atoms that had all the structure and intricacy and potentiality that chemists devote their lives to studying. Those laws of chemistry are themselves the consequence of the beautifully elaborate laws of electromagnetism and quantum mechanics, which in turn come from the even more profound structures studied in “quantum field theory.”

The very intelligibility of the word “chance,” it should be pointed out, depends on a previous grasp of the notion of order. This is a point Aristotle made when he defined chance as the “intersection of two lines of causality.” For example, two

friends meet by chance at a grocery store. This chance occurrence presupposes that each one came to the store with a particular intention in mind: one to buy milk, let's say, the other to purchase butter. They meet at the check-out. Their meeting is a chance occurrence. But the "chance" aspect was not primary. What was primary, or prior to the chance meeting, was order and purpose, the two friends coming to the store for clear and precise reasons.

Order precedes chance. The intrinsic order of an atom precedes one atom's combining with other atoms. Chance proceeds from order. The question, "What are the chances that life could have evolved from chaos?" is not so much a question as a contradiction. Order, however subtle and small, existed at the outset. The great mathematician and physicist Hermann Weyl has put it this way:

Many people think that modern science is far removed from God. I find, on the contrary, that . . . in our knowledge of physical nature we have penetrated so far that we can obtain a vision of the flawless harmony which is in conformity with sublime reason" (*Mind and Nature: Selected Writings on Philosophy, Mathematics and Physics*, Princeton, 2009).

Astrophysicist Sir James Jeans has remarked that "the universe begins to look more like a great thought than a great machine." Jeans's remark is not inconsistent with one made by St. John the Evangelist: "*In principio erat Verbum, et Verbum erat apud Deum, et Deus erat Verbum.*" Order precedes chance, thought precedes matter, and God the Creator precedes creation.

It should also be stressed that it is also true that from order can come more order, even more complex order. The term evolution is used to describe one level of order that, in time, produces a higher level of order.

The materialists, beginning with the atomists of antiquity, gave undue prominence to chance in the development of the universe and its contents. When we look more specifically into the origin of life and its development, we find that the Darwinists have assigned a similar excessive importance to the role of chance. Both philosophies adhere to the untenable principle that highly complex order, including life forms, can arise from chance. Despite its flaws, Darwinian evolution has come to be regarded today in many circles as a settled dogma. Philosopher Daniel Dennett has gone so far as to declare that parents should be prevented from misinforming their children about its "truth" (*Darwin's Dangerous Idea*, Simon & Schuster, 1995).

The truth of the matter is that Darwinian concepts of evolution, in all their myriad varieties, are far too hazy to be viewed as "settled." Nonetheless, it is often presented as if it were Gospel. A high-school-biology textbook, for example, informs students that:

Of course, there has never been any kind of plan to [evolution] because evolution

works without either plan or purpose . . . It is important to keep this concept in mind: *Evolution is random and undirected* (Miller and Levine, *Biology*, 1995).

Science, in order to make such a broad and sweeping statement, must step out of its own domain: Sheer materialism as a philosophy is not an object of science. There is no “scientific” evidence for such an assertion. Nonetheless, such assertions continue to be made. The National Association of Biology Teachers has adopted the following unscientific definition of evolution:

The diversity of life on earth is the outcome of evolution: an unsupervised, impersonal, unpredictable, and natural process of temporal descent with genetic modification.

Charles Darwin’s classic work appeared in 1859, and its full title is worth noting: *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life*. The abbreviated title, *On the Origin of Species*, is preferred, for obvious political reasons.

Darwin, in the mid-19th century, knew as much about molecular biology as Aristotle did about paleontology. Aristotle may be forgiven for postulating the eternality of the species. He did not know enough about natural history to think otherwise. So too, Darwin can be forgiven for not knowing about the astonishing complexity of DNA and the multiplicity of intricate biochemical functions that are at the operational core of all living things. In fairness to Darwin, it may be said that were he alive today and working as a scientist, he would not be a Darwinian. In *The Origin of Species*, he indicates that he was keenly aware of his theory’s precarious nature:

If it could be demonstrated that any complex organ existed which could not possibly be formed by numerous, successive, slight modifications, my theory would absolutely break down.

Here is Darwin’s Achilles Heel. Darwin’s theory has been shown to be reasonable when applied to finch beaks, horse hoofs, and moth coloration. Changes in these areas follow his one-thing-at-a-time series of slight modifications. But does it apply to biological situations where many operations must be present simultaneously in order for the organism to survive, and where the elimination of any one of these operations would be the end of the line for that organism?

Biochemist Michael Behe has done a superlative job in showing that Darwin’s theory is at a loss in dealing with “irreducible complexity.” This brace of words refers to a biological situation which, if reduced by one element, would not lead back to an organism that needed to evolve one more step, but to one that could not function at all (*Darwin’s Black Box*, The Free Press, 1996). Darwin’s theory cannot explain the existence of a biological complexity that did not evolve by a succession of slight modifications. The evolutionary clock cannot be turned back one step at a time.

Behe offers many examples of “irreducible complexity.” One of them centers on the immune system, which has four necessary and essential operations: diversity, recognition, destruction, and tolerance. It could not have the first three and not the fourth. The body must be tolerant of itself, that is, the immune system (in the human there are 100 billion immunological receptors) must be able to distinguish the “self” from the “non-self” and be tolerant of the former.

A minimal condition for any immune system to work properly is for all four operations to work in synchrony. The immune system is one of staggering complexity, one for which Darwinian evolution has no explanation whatsoever. It must possess immunoregulatory macromolecules that are able to recognize (*recognition*) the self as distinct from the non-self; be tolerant (*toleration*) of the self; be properly and specifically diversified (*diversity*) to destroy (*destruction*) foreign substances.

With regard to “chance,” Behe turns to the complexity of blood-clotting cascades in animals with roughly 10,000 genes. The proper functioning of blood-clotting requires just the right combination of 30,000 gene pieces with the four “domains” of Tissue Plasminogen Activator (TPA). He calculates that the mathematical probability of getting all of these factors properly shuffled together is approximately one in 10^{17} . In slightly more imaginable terms, we may consider the following: If a million people played the lottery each year, it would take an average of about 1,000,000,000,000 years (one trillion) before *anyone* ever won. Yet, despite the odds, blood-clotting, in the vast majority of cases, works very nicely. Blood-clotting, of course, is just one function among numerous other functions that are required for the maintenance of life in a particular organism. This world of biochemical complexity is one that Charles Darwin knew absolutely nothing about.

Unlike the world of physics, life does not begin with a Big Bang. Life is a delicate affair. Nobody thinks that the humble amoeba evolved on the heels of an explosion. In fact, the delicacy of living operations provides an additional refutation of Darwinian as well as Neo-Darwinian evolution.

In Tracy I. Storer’s *General Zoology*, the author states, very matter-of-factly, that “in some moths the odor of a female may attract a male for a mile or more.” G. K. Chesterton exclaimed in his *Orthodoxy* that “one elephant having a trunk was odd. But all elephants having a trunk looked like a plot.” Chesterton surely would have suspected that there was at least a plot involved in the otherwise unexplainable phenomenon of one moth sending a delicate waft of perfume into the air that remains detectable and still attractive to a mate who is a mile or more away. What are the chances that the male can sense this smell and remain insensitive to all other scents that fill the atmosphere? It is like dialing a number at random and somehow getting the one person in the world you want. Life is indeed delicate, which is why

it must be honored, cherished, and protected. How delicate? Consider another example from the world of zoology:

The female butterfly carries a store of perfume weighing only 1/10,000 of a milligram, and she squirts minute fractions of it into the air. These scent molecules can be detected by a male seven miles away.

Here is a synchrony of factors that need to be in place at the same time in order for their purpose to be realized: 1) the production and storage of perfume in the body of the female butterfly; 2) an organ that enables the butterfly to squirt the perfume so as to release it into the air; 3) the instinct on the part of the female to know when to release the perfume; 4) the structure of the perfume molecules that allows them to remain in the air and be dispersed over a radius of seven miles; 5) the ability of the male to detect the perfume specifically; 6) the fact that the male finds the perfume attractive; 7) the ability of the male to track the perfume to its point of origin; 8) the fact that the female will accept the male once he arrives; 9) the mating; 10) the progeny that are thereby produced.

This decade of factors must be present at the same time. One element in the ten cannot evolve from a previous state. If there is not a squirting organ in the female, the game is over at that point. If the male finds the perfume unattractive, he has no interest in mating. If any of these ten factors is removed, the concatenation of factors leading to the production of offspring is broken.

Nonetheless, this butterfly illustration is even more phantasmagorical if we consider the exquisite delicacy of the perfume. One milligram = .033 ounces. 1/10,000 mg = .000033 oz. Let us imagine that someone could collect this butterfly perfume (there is a Japanese perfume known as Hanai Mori Butterfly Perfume) and sell it for the extravagant amount of \$100,000 per ounce. For the minuscule price of one third of a cent (\$.033) one would obtain enough perfume for the normal supply of 100,000 female butterflies. Now, if we added 7 miles, the distance the perfume can travel and still be detected, to each of these butterflies, the total distance would be 700,000 miles, or the equivalent of traveling to the moon and back (250,000 x 2) plus eight times around the globe (approximately 25,000 x 8).

This situation is made even more mind-numbing when one considers that the female squirts only a minuscule fraction of her perfume. Darwinists may owe an apology to these virtuosic lepidoptera. And how does one begin to explain that Monarch butterflies hatched in Canada come into the world with flight reservations to Mexico?

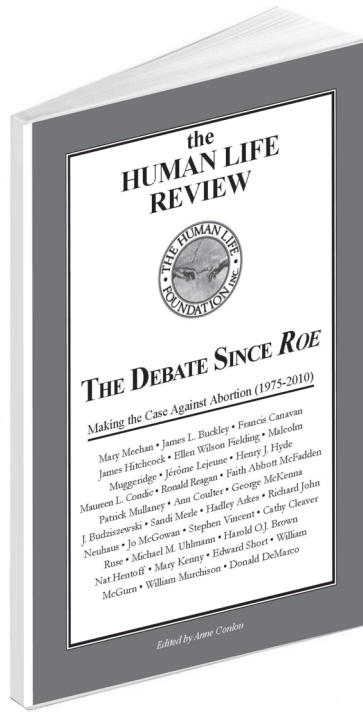
“Intelligent design” is a redundant expression. If there is a “design,” there must be intelligence behind it. And what is “design” other than the arrangement of elements for a purpose? It is difficult to believe that there is no purpose to the release into the air of the female butterfly’s perfume.

The words pertinent to this issue of St. Thomas Aquinas, though written some seven centuries ago, retain their appeal to common sense, as well as offering a clear example of simple and timeless wisdom:

We see that things which lack knowledge, such as natural bodies, act for an end, and this is evident from their acting always, or nearly always, in the same way, so as to obtain the best result. Hence it is plain that they achieve their end, not fortuitously, but designedly (*Summa Theologica*, I, Q. 2, a. 3).



"Guess he should've opted for the gold watch, eh, Ms. Krause?"



**“Good writing can win battles;
great writing, whole wars.”**

—J.P. McFadden

This is a book for anyone who has sat around the kitchen table (or the dorm room) defending the sanctity of human life while wishing he or she had greater command of the facts and arguments. Culled from the *Human Life Review*'s unique 35-year-record of anti-abortion advocacy, *The Debate Since Roe* features essays by doctors and lawyers, politicians and political scientists, philosophers and clerics, journalists, and, to quote the *Review*'s late founding editor J.P. McFadden again, those who bring “a layman's view of the meaning of it all.” A perfect gift for students, pastors, family members and friends. To order a copy (\$14.95 includes shipping), please use the enclosed business reply envelope or call us at (212) 685-5210. Bulk pricing is available for orders of over 10 copies. You may also order copies at our website: www.humanlifereview.com.

Dr. Bernard Nathanson, R.I.P.

Christopher and Joan Bell

The crypt was dark, as if only filled with candle light, that early morning in December. The very young girl didn't really understand why she was there, or how poetically appropriate her presence was to the occasion. Her mother was to be the godmother of this doctor about to be baptized. This doctor had delivered our own daughter, Mary, just four years earlier. Shortly after her birth, this doctor had witnessed her baptism at the hands of the same prelate, Cardinal John O'Connor, in this very place under the main altar at St. Patrick's Cathedral.

When we first discovered Joan had conceived, we also discovered how hard it was to find a pro-life OB-GYN who would not prescribe birth control or encourage unnecessary (which nearly all are) pre-natal tests. We called and visited several local doctors, all of whom saw Joan's age, 43, as requiring her to have an amnio and numerous, spurious blood tests. Some didn't want to hear that we just didn't want that.

Joan didn't want to impose upon someone we knew and admired. Yet, we really had no choice, as we couldn't find anyone in the New York–New Jersey area who was as unconditionally pro-life as was Bernard Nathanson. At this time, he was more than a great physician, he was a pro-life friend, a fellow warrior.

What a long road to Damascus for Bernard N. Nathanson, M.D. His conversion was a modern-day St. Paul story, and this, when he would receive baptism, confirmation, and his first Holy Communion, was perhaps his finest hour to date. He had, some 16 years before, renounced abortion and assiduously applied his God-given talents, using the best technology and videography of the day to bring the horror of a child's death—before birth, darkly in the womb—into the light of day, and by so doing dispel the evil he personally, and at a time passionately, promoted. You could imagine Albert Einstein trying to put the Atomic Bomb atoms back into Pandora's Box.

Born in New York to a Jewish family, Bernard was sent by his father to Hebrew school; his father would then denounce everything he learned. This Bernard painfully revealed in his 1996 autobiography, *The Hand of God*.

He was bright. He followed in his father's medical footsteps and went on to become an OB-GYN, receiving his medical degree from McGill University Medical College in Montreal, Canada. He spent a few years as a doctor in the U.S. Air

Joan (Andrews) Bell has been actively involved in all aspects of pro-life work since 1973. **Christopher Bell** began the Good Counsel Homes for pregnant mothers in need in 1985. They were married in 1991, and their daughter was delivered by Dr. Nathanson eleven months later. They continue in a variety of pro-life works, but are mostly raising their (now seven) children.

Force and then came back to New York to build a notable medical practice and, at one time, work at the same hospital as his father. Having so much and then seeking to do the worst. Along the road to being a doctor he had a girlfriend abort their child. This might have been one of many reasons that led him further into this dark path. Bernard Nathanson used his medical education and experience, his persuasive articulation and personal charisma, along with a photogenic face, to bring about the “need for women to have legal abortions.”

During the late 1960s, Bernard collaborated with leaders in the so-called feminist movement and became one of the founders of the National Association for the Repeal of Abortion Laws (now called NARAL Pro-Choice America). He deftly used the press and broadcast media of the day to leverage fabricated statistics brandishing the “horrors of back-alley abortions.” He attacked the Catholic Church, saying the Bishops were imposing their religious dogma on this nation and making poor women suffer. The bishops were an easy enemy and, he later explained to the Archbishop of New York and a roomful of priests, “you would not fight back. If you had, it would have been more difficult for me and my friends then.”

Further, Bernard and his collaborators claimed that poor women were having too many children they didn’t want, and those children were all adding to the welfare rolls. Conservative and liberal politicians alike were easily duped into believing this was a problem and that abortion would solve it.

All this allowed him to win over a progressively declining public morality and a ravenously, raucously decadent body politic in New York State, which then passed legislation legalizing abortion. This then created a situation that continues to this day: that New York City is the abortion capital of America. What happened here would soon spread wildly throughout the entire land.

Bernard entered with even greater ingenuity into what he would later call “the satanic cult of abortion.” Before the Supreme Court’s 1973 decision in *Roe v. Wade*, when all abortion restrictions were lifted, he created the first ambulatory surgery center, the Center for Reproductive Sexual Health (CRASH), which killed children at a more alarming rate than ever previously imagined. As the director of CRASH, he said he oversaw 60,000 abortions, personally instructed medical students to commit some 15,000 more, and personally committed 5,000 himself. In one of those abortions he personally took the life of a child he conceived with another girlfriend. In *The Hand of God*, Bernard admitted how inhuman was his reaction: “I swear to you, I had no feelings aside from the sense of accomplishment, the pride of expertise.”

Many emphasize that Bernard’s view of the baby in the womb through the development of quality ultrasound technology was the turning point. In 1974, he wrote about his doubt in the *New England Journal of Medicine*: “I am deeply troubled by my own increasing certainty that I had in fact presided over 60,000

deaths. . . . There is no longer serious doubt in my mind that human life exists within the womb from the very onset of pregnancy.” Yet he contradictorily concluded in this article: “We must work together to create a moral climate rich enough to provide for abortion, but sensitive enough to life to accommodate a profound sense of loss.”

In Joan’s discussions with him, he clearly gave her the impression that it was the developing ingenuity of the field of perinatology, the study of the unborn and its personality, that brought him face to face with the humanity, the individuality, the uniqueness of the pre-born child. This, beyond doubt, brought him to the Truth. He was not a believer in God, he’d say, but he humanly and scientifically knew that from conception till birth a human being existed. Unequivocally, then, he no longer could deny that abortion is the murder of that individual human being. “Even as an atheist I knew that it was just wrong,” he said.

Joan first met Bernard at a pro-life meeting in Delaware in 1980. He later visited Joan in a Florida prison where she was incarcerated, with a five-year sentence, for a peaceful, prayerful attempt to stop abortion. She said about him, “His intellect was incredibly diverse and profound. What an amazingly sharp mind with deep ethical insights he had.”

Richard Traynor, an attorney from New Jersey who accompanied Bernard on his visit with Joan, later said, “He brought a large stack of books and he questioned her on a wide range of subjects including philosophy, history, medical and theological.”

She added recently, “I was deeply honored by his presence in my life. He was a great doctor as well. I loved him and his goodness very much. He had a very great attraction to goodness and truth. I could feel his love for the pre-born children, including each child he had aborted and each child threatened by abortion today. It was a profound experience being in his presence and seeing the love and contrition in his eyes. I believe he came to totally accept God’s forgiveness. It was clearly real to him. His conversion is like St. Paul’s.”

Christopher first met Bernard at a New Jersey Right to Life banquet where they sat together on the dais. Bernard was fasting, as he often did, before speaking. He launched a boycott of McDonald’s hamburger restaurants at that banquet after explaining that the McDonald’s charitable foundation was funding horrific experimentation on live babies taken from the womb.

Once, in 1989, Christopher, Joan, Bernard, and hundreds of other pro-lifers were in front of Planned Parenthood in New York City peacefully trying to stop abortions. Christopher saw how pensive Bernard was and asked, “May I ask you a question?” Bernard responded, “Anything except about my spiritual life.” He was obviously contemplating the journey of his soul. He’d later explain that it was

the love he saw in the pro-lifers he met that helped him believe in God. Christopher Slattery, founder of EMC Frontline Pregnancy Centers, was there too. Slattery had a high-paying job as an ad salesman working for an international magazine, which he left to do full-time pro-life ministry. He's been sued and personally suffered much for his attempts to turn abortion-bound women toward life.

Bernard met and developed a life-changing relationship with Fr. C. J. McCloskey, a priest of the Prelature of Opus Dei. Fr. McCloskey offered the intellectual stimulus for Bernard to find his way to accepting Baptism in the Catholic Church. Joan was his godmother. John Downing, a lifelong Catholic and an attorney friend of many years, was his godfather. Christopher Slattery was his Confirmation sponsor. In the crypt of St. Patrick's Cathedral on the feast of the Immaculate Conception—in that year, 1996, it was December 9. Cardinal O'Connor, an exceptionally powerful pro-life leader among Catholics and in the nation generally, spoke of how appropriate it was that Bernard enter the Church on this feast of the conception of the new Eve.

Now, here he was in the dark of the Church ready to accept the Great Light of Christ into his life, into his soul, seeking the mercy and forgiveness he knew he needed and desperately wanted. Christ on that Cross lived and died for him that day.

Surrounding Bernard were concelebrants Fr. McCloskey; Msgr. William Smith, a supremely orthodox professor of moral theology at St. Joseph's Seminary in New York; Fr. Richard Neuhaus, a former Lutheran pastor also received into the Church by Cardinal O'Connor, and editor of the ecumenical intellectual journal *First Things*; and Fr. Paul Marx, founder of Human Life International.

Also witnessing this profound moment was Chuck Colson, known as the founder of Prison Fellowship Ministries after his involvement with the Watergate scandal of the 1970s and his subsequent imprisonment. As an evangelical Christian, Colson reflected:

This week I saw fresh and powerful evidence that the Savior born 2000 years ago in a stable continues to transform the world. Last Monday I was invited to witness a baptism . . . [of] none other than Bernard Nathanson, at one time one of the abortion industry's greatest leaders. . . . I watched as Nathanson walked to the altar. What a moment. Just like the first century—a Jewish convert coming forward in the catacombs to meet Christ. And his sponsor was Joan Andrews. Ironies abound. Joan is one of the pro-life movement's most outspoken warriors, a woman who spent five years in prison for her pro-life activities. It was a sight that burned into my consciousness, because just above Cardinal O'Connor was a cross. . . . I looked at the cross and realized again that what the gospel teaches is true: In Christ is the victory. He has overcome the world, and the gates of hell cannot prevail against His church. . . . And this is the way the abortion war will be won, through Jesus Christ changing hearts, one by one. No amount of political force, no government, no laws, no army of Planned Parenthood workers can ever stop that. It is the one thing that is absolutely invincible. . . . That simple baptism, held without fanfare in the basement of a great cathedral, is a

reminder that a holy Baby, born in a stable 20 centuries ago, defies the wisdom of man. He cannot be defeated.

Fr. McCloskey would write:

Bernard himself was overwhelmed. “It was a very difficult moment. I was in a real whirlpool of emotion. And then there was this healing, cooling water on me, and soft voices, and an inexpressible sense of peace. I had found a safe place. . . . For so many years I was agitated, nervous, intense. My emotional metabolism was way up. Now I’ve achieved a sense of peace.”

Cardinal O’Connor often had a light quip for such a serious moment: “There, now you’re as Catholic as I am!”

Jean Head, longtime leader of Manhattan Right to Life, was another witness and as the group walked over to an Irish pub for brunch, she said, “One time I gave him a Miraculous Medal and he simply took it.” On Bernard’s prayer card he quoted from St. Paul’s letter to the Ephesians: “God, who is rich in mercy.”

Bernard was married in a Catholic ceremony to Christine Reisner, who was constantly with him and devotedly caring for him through his long illness to the final moments of his death. She is the daughter of Dr. Edward H. Reisner Jr., a hematologist who was a longtime colleague of Bernard’s at St. Luke’s Hospital. Bernard is also survived by his son, Joseph, whose mother, Adelle Roban, was married to Bernard for 30 years and she was always pro-life. In fact, she once ran for the U.S. Senate on the Right to Life Party line.

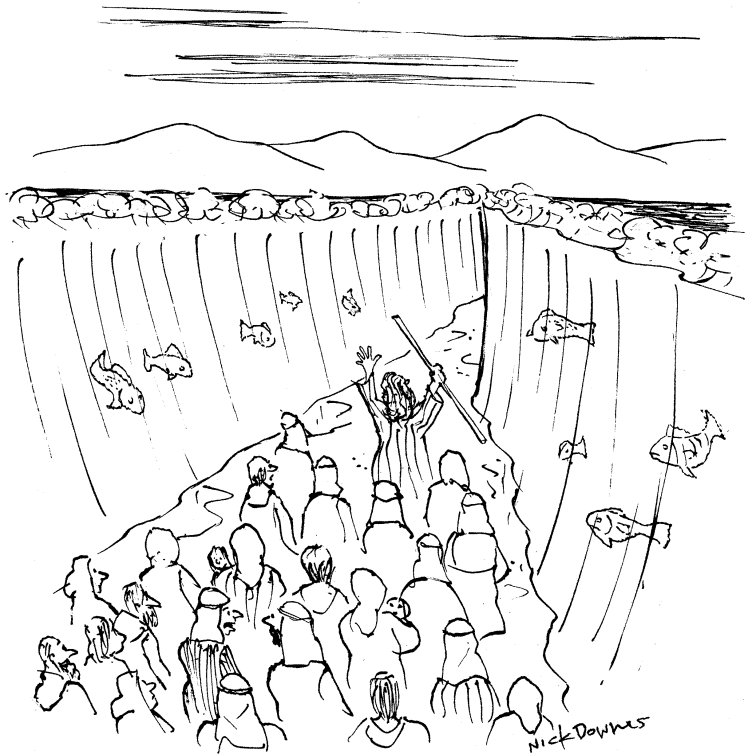
Soon after Bernard stopped doing abortions, he wrote his first book, *Aborting America*, in which he described the deception used to bring down abortion laws. That was followed in 1984 by *The Abortion Papers*, co-authored with Adelle. That year he also produced *The Silent Scream*, a 28-minute, first-ever ultrasound video of an abortion, in which Bernard clinically described every detail. When that failed to lessen the abortion holocaust, he then produced *Eclipse of Reason*, a late-term-abortion documentary, hoping to awaken a tepid public to what he often called “the most atrocious holocaust in the history of the United States.”

He formed a non-profit using his and his wife’s first names, Bernadell, to distribute that video, which became another international pro-life educational tool. Also, through Bernadell a newsletter was publishing scientific information on the current and coming threats to the pro-life movement—forecasting abortion pills, more fetal experimentation, and cloning.

He lectured widely and published numerous scholarly articles. He retired from his medical practice and went on to earn a master’s degree in bioethics from Vanderbilt University in Nashville, Tennessee, in order to have further knowledge and standing when refuting the continuous and growing medical and biological threats to human life.

CHRISTOPHER & JOAN BELL

He died Feb. 21 at the age of 84. His funeral Mass was held where he had officially begun his Catholic journey, St. Patrick's Cathedral, and was presided over by the current Archbishop, Timothy M. Dolan. His family was joined by many friends, including the little girl he delivered and saw baptized, who grew to see him baptized and now sent home to God. We pray our beloved Bernard rests in peace.



"Ordinarily, I hate magic tricks."

From the Archives:

What the Difference Is (1979)

J. P. McFadden

It will soon be seven full years since the United States Supreme Court handed down its decisions in the Abortion Cases. It seems clear that the Court intended a final solution to the problems involved: The seven-man majority mandated the most “liberal” abortion laws in the Western world, striking down existing laws in all 50 states. In effect, abortion-on-demand, throughout the full nine months of pregnancy, was made legal for any woman who could find a doctor willing to approve the operation. The power of the several states to interfere in any way was severely restricted. Indeed, in the first three months—when the majority of abortions take place—any restrictions whatever were proscribed. And the lower courts have seemed to vie with each other in imposing the most rigorous (the layman would say pro-abortion) interpretation of the mandate; in the main, the High Court has sustained such extreme rulings.

In all this, the Court acted in far more radical fashion than anyone had anticipated. True, in the late 1960’s there was agitation for “reform,” and pro-abortion activists had succeeded in loosening the laws in a handful of states. But nowhere had they won a victory comparable to that presented them on January 22, 1973. In fact, the most publicized instance—New York’s 1970 law (narrowly passed after bitter debate) that permitted abortion up to 24 weeks—seemed to indicate that the force of “reform” was spent, and the trend already moving in the other direction, for in 1972, only a few months before the Court’s *fiat*, the New York legislature repealed the “reform” (only then-Governor Nelson Rockefeller’s veto preserved it until the Court mooted the question). Today, there is even stronger support for this view, e.g., the scholarly survey of opinion studies by Professor Judith Blake and printed in a *pro*-abortion publication in 1977.¹ Blake concluded: “None of our time series on public views regarding abortion indicates that the Supreme Court decisions had an important positive effect on opinion. The longest series—from 1968 through 1977 on elective abortion—shows a leveling off of opinion [favorable to abortion] after 1970 and only a modest increase in approval by 1974 that remained unchanged by 1977. This increase can hardly be said to constitute a sharp rise in a long-term upward trend in approval antedating the Court’s decisions.” Nor is there any more recent evidence of such a trend. On the contrary, the general public perception is that anti-abortion

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sentiment is growing dramatically.

Why, then, did the Court go so far? To what demand was it responding? What prompted it to do precisely what the late Dr. Alan Guttmacher, then probably the nation's leading pro-abortion spokesman, warned against as late as 1967 when he wrote: "I believe that social progress is better made by evolution than by revolution. Today, complete abortion license would do great violence to the beliefs and sentiments of most Americans. Therefore I doubt that the U. S. is as yet ready to legalize abortion on demand, and I am therefore reluctant to advocate it in the face of all the bitter dissension such a proposal would create."²

Some would say that the Court has simply got used to acting in this way; that, since 1954 at least, the majority of the Mr. Justices have been impatient with the evolutionary social progress advocated even by such partisans as Dr. Guttmacher, and have been legislating a new social order. (Not a few have said exactly that kind of thing in this journal.) If this is true, it would also seem to be true that, up to the abortion decisions, the Court was not only imposing new social policies but also doing so successfully. Americans have granted the Court *moral* suasion. The argument is no longer: Is the Court properly interpreting the Constitution and the law?—not even the Justices themselves seem to bother much about that nowadays. Rather it has become: Is the Court "right"? Despite strong opposition to desegregation, reapportionment, and busing—to cite the most obvious examples—the Court maintained and/or achieved a consensus, certainly among "opinion makers," that it was doing *good*. (For practical purposes today, such a consensus is reflected in, and largely enforced by, the *media*, e.g., Walter Cronkite always approves, and he knows.) Why hasn't this happened with abortion?

Four years ago (1975 in the London *Sunday Times*) Malcolm Muggeridge gave us his opinion.³ He was of course writing for a British audience; abortion law there was "liberalized" in 1968, so at that time the United Kingdom had had the same seven years' experience with abortion-on-demand that we have now. "Generally," wrote Muggeridge, "when some drastic readjustment of accepted moral values, such as is involved by legalized abortion, is under consideration, once the decisive legislative step is taken the consequent change in *mores* soon comes to be more or less accepted, and controversy dies down. This happened, for instance, with the legalization of homosexual practices of consenting adults.

"Why, then, has it not happened with the legalization of abortion? Surely because the abortion issue raises questions of the very destiny and purpose of life itself; of whether our human society is to be seen in Christian terms as a family with a loving father who is God, or as a factory-farm whose primary consideration must be the physical well-being of the livestock and the material well-being of the collectivity.

"This explains why individuals with no very emphatic conscious feelings about

abortion one way or the other react very strongly to particular aspects of it. Thus, nurses who are not anti-abortion zealots cannot bring themselves to participate in abortion operations, though perfectly prepared to take their part in what are ostensibly more gruesome medical experiences.”

One need not share Muggeridge’s Christian viewpoint to agree that he’s got it right. Abortion *is* different. The Court’s *fiat* has *not* brought about that change in mores indispensable to making the new legislation take hold. As noted, the trend is now clearly going in the opposite direction. If we continue to follow the English parallel, the second seven years will be even leaner ones for the pro-abortionists: there, in the face of still-growing opposition (as many as 100,000 anti-abortion demonstrators have turned out in London—proportionally, some five times as many as have yet assembled in Washington), Parliament has been forced to reconsider the original “liberalization” several times, has already “tightened” the present law, and could move further toward at least partial repeal of abortion-on-demand. (Of course, Parliament can overrule itself; here, it is not so simple for the Congress—or the people—to overrule the Supreme Court.)

And if you do share Muggeridge’s viewpoint, you see why the pro-abortionists have, from the start, made every possible effort to label all opposition as religiously-inspired, and thus “unconstitutional,” in direct violation of the reigning Secularist rendering of the First Amendment as freedom *from* religion. They rightly sensed that, if they could not make that point stick, they would fail to overcome the opposition of the majority, which still derives its moral opinions from Christian roots. It is worth noting that, for the pro-abortionists, it was no doubt the correct strategy—the only chance they had to at least neutralize the majority and smother *organized* opposition which, once inflamed, would predictably burn out of control. Their failure may well have resulted from a *tactical* mistake: making the main thrust anti-Catholicism. The hope of isolating the best-organized minority from the rest of the natural opposition no doubt had the devil’s own allure about it. And, a decade or so earlier, it might have succeeded. The “old” Catholic Church could have been counted on to organize monolithic opposition on so clear-cut a moral issue; it might well have been strident enough to scare off allies—thus dooming any broad-based antiabortion effort. But by the 70’s, “Vatican II” (more accurately, how it was perceived, by Catholics and non-Catholics alike) had not only sapped any such Catholic capability but also had enormously lessened traditional Protestant fears of Rome, even—especially among those who had felt them most, i.e., those now generally called Evangelicals. Thus, while Catholics were no longer able to fill the bogeyman role, the Evangelicals—far and away the largest and most vigorous American religious community today—had become capable of playing precisely the part the pro-abortionists feared. Ironically, it may well be this historically

implausible religious alliance that overturns a new morality that is plausible only in a “post-Christian” society.

This is, admittedly, a rather impressionistic sketch (it could be greatly elaborated upon, as it has been in this journal for the past five years). But the central point is this: on abortion, the Court is *not* perceived as having done “good,” as was the case with desegregation. Then, its opponents suffered guilt feelings (even if their rights were being violated, it seemed ignoble to defend them). Now, the bad conscience is all on the other side, and not helped by the language the Court’s majority used in the Abortion Cases: going Solomon one better, it callously divided the living unborn into three “trimesters”; breezily deciding that since no one could really agree what rights the baby should have, it should have *none*, and so on, leaving its supporters to defend unrestricted killing of the innocent in the name of nothing more than a newly-discovered constitutional “right to privacy” for presumptively *non*-innocent consenting adults. (If the pro-abortionists had stuck to their original pleas for abortion in the “hard cases”—innocent victims of rape, incest, etc.—they might have succeeded in slowly eroding anti-abortion laws much as divorce laws have been trivialized; but the Court was impatient, and the Fabian option has undoubtedly been lost.)

On the other hand, anti-abortionists are constantly buoyed by the rewarding feeling that they are fighting the quintessential good fight, motivated not by any selfish concerns whatever but rather a *pure* desire to protect the helpless and the innocent. Thus the amazing effectiveness of the “right to life lobby” in Washington and elsewhere: it has dawned (albeit slowly) on politicians that these people are perfectly willing—even anxious—to spend the rest of their lives fighting on this “single issue,” that their numbers are growing (probably into the millions already), and that there is nothing comparable on the other side. More, while they can expect to pacify most pro-abortionists with a vote for, say, ERA, there is only one way to prevent the anti-abortionists from making their political lives a nightmare: they must vote against abortion ever and always.

This imbalance of forces could grow much greater. The antiabortionists love to invoke the slavery analogy, for obvious reasons.⁴ And certainly the analogy would seem to hold on the main point: not since slavery has so intractable a *moral* issue been plunged into the political maelstrom. But the comparison tends to *underrate* the potential strength of the “new abolitionists.” They are not encumbered by any particular regional, economic, or even political baggage. Nor do the pro-abortionists enjoy anything like the enormous strengths that the Slave Interest once marshalled—all the political, cultural, traditional, even economic (e.g., a shrinking, aging population already bids to stamp “no solution” on the nation’s *current* dilemmas) factors would seem to be running *against* them. And all this without

even mentioning religion *per se* (surely there can be no long-range compatibility between any viable Christianity and a Slaughter of the Innocents?). To be sure, the pro-abortion party *can* claim some powerful allies, for instance the Establishment, and the *Zeitgeist*. There is certainly no doubt that the American Establishment contributed the *sine qua non* for legalized abortion-on-demand; handy symbols are the brothers Rockefeller, their Foundation, and their legion of minions in academia, the media, the Main Line Protestant churches, and so on. Such people financed, propagandized, and made “respectable” what had been a heinous crime. And of course the “times” (not to mention the *Times*) were with them. As M. J. Sobran never ceases to remind us, Secularism is the Established Religion in America today, courtesy of the same folks who brought us the Abortion Cases—in which *pagan* “values” were specifically invoked!

The Abortion Interest has another “strength” too: it has been legally established at a time when the nation is harried and distracted as never before by a multitude of other vexed problems. All this at a time, as our President reminds us, that Americans seem to have lost their once-famous confidence that they could solve any problem. Add this factor to the difficulty that, unless the Court decides to reverse itself (highly unlikely), the only way to disestablish abortion is the very difficult amendment process, and you probably have the Interest's greatest strength. At a moment in our history when nothing seems to get *done*, holding the legal and political high ground is an enormous advantage.

But then it is a strictly *defensive* advantage, and wars are rarely won by defense alone. Thus time may well be with the anti-abortionists. Consider this point: by now, at *least* 10 million American women must have had abortions (the actual number could well be twice that, or more). A great fear of anti-abortionists was that this would work *against* them; that each aborted woman would thereafter have a powerful personal reason to support legalized abortion. There is little evidence that this is happening. Only a handful of women have publicly flaunted having had abortions; the vast majority are silent. They do not join the “activist” Women’s Lib or other pro-abortion groups: indeed, while there are quite a few such organizations—often well organized and financed—they are notoriously short of the foot-soldiers such women were expected to provide, another fact that has not escaped the watchful notice of the politicians. Here again, the trend seems to be *against* the Abortion Interest, e.g., relatively large numbers of once-aborted women are showing up in the ranks of the “right-to-lifers,” where they do speak out publicly—their confessions of the “terrible mistake” have become a regular feature of anti-abortion meetings.

If this picture has any truth it, one would expect to see cracks beginning to show in abortion's defenses. As it happens, there is a recent and highly visible one. A “founding father” (by his own estimate, and it is very hard to dispute him on the

evidence) of the “abortion rights” movement has now publicly repudiated the movement, his own part in it—again, by his own count, he has been personally responsible for 75,000 abortion deaths!—and the Supreme Court decisions that made it all possible. True, he is just one man. But his act is loaded with symbolism.

He is Dr. Bernard Nathanson. He was a co-founder of the National Association for the Repeal of Abortion Laws in the 60s. NARAL was the most visible and effective symbol of the early “reform” movement; it inspired much of the agitation, and helped win the most important victories, e.g., the New York high-water mark mentioned above. (It still exists today as the National Abortion Rights Action League.) Nathanson ran the nation’s largest abortion clinic; he also performed many himself in his private practice (some 1,500, he estimates, of his total body count). Probably no one else is better qualified to tell the inside story of the pro-abortion movement. Nathanson does his best to spill it all, and seems to enjoy doing so. His erstwhile NARAL friends must find the whole thing painful.

Now if things were going well for the abortionists—going as they used to, when *only* pro-abortion stuff got published or publicized by the media—this book would have been buried in a 500-copy edition by some Vanity Press. Not today: the book (titled *Aborting America*) was published by the nation’s *premier* publisher, Doubleday & Co. And Nathanson had the “help” of a *Time* magazine editor in writing it. In short, for the first time, an *anti-abortion expose* has been treated as something that will sell—like, say, a Watergate memoir, or the latest sex novel—because the publisher judges that there is a big enough audience for it. Verily, there is symbolism in that!

I am not reviewing the book here (I have reviewed it elsewhere; you will find that review reprinted in the appendices of this issue). But perhaps I should note that Nathanson has by no means become a “right-to-lifer” nor is he, even now, totally against abortion. He thinks the Court should “revise” its present position, and that a great deal can and should be done to limit and control the carnage. Some of his notions are silly, some shallow. He remains substantially unrepentant about those seventy-five thousand “Alphas” (God help him, he still can’t call them unborn babies or even “fetuses,” so he has invented his own antiseptic terminology). But a great deal of what he says is important as expert-witness testimony against legalized abortion. Certainly anyone involved on either side of the controversy should probably read the thing, and the uninitiated will learn plenty from doing so—probably a lot more than many want to know (it requires a strong stomach for the vivid blood-and-gore scenes). The point is, the book is more important than its contents.

Nathanson has dealt a symbolic wound to an already-retreating force, all the more damaging because he *knows*, he was one of *them* (still *is*, really). If it is a fact that the anti-abortion forces are growing—and that seems visibly true—and if

Judith Blake is right, i.e., that the *general* opinion has already swung away from approving abortion, then the pro-abortionists must at least hold their own. They have lost Nathanson, and they are likely to lose a great many of those who read his book, which would not be available if they were not also losing their grip on the media. It is a downward spiral.

Yet the *Zeitgeist* remains with the pro-abortionists. Abortion on demand is not an American phenomenon. The whole Western world has now succumbed to the craze, just a single generation after it tried the Nazis for crimes that *included* abortion. (More to the point, how do we distinguish genocide by race from genocide by *class* of humans?) In the Communist world, of course, abortion is turned on and off like a spigot, according to the political calculations of the “leaders.” Thus in poor Hungary, which has long had more abortions than births, it is utilized as an escape-valve for a demoralized people. (The Russians themselves have *miscalculated*: they are now a minority in their own empire.) The Japanese seem to abort with the same avidity they bring to taking pictures. *Can* such a massive horror be stopped once unleashed, short of the decline and fall of the civilization which permits it?

Perhaps not. As Nathanson writes (in his own defense), the “errors of history are not recoverable, the lives cannot be retrieved.” It will require a massive effort to reverse so strong a tide, for abortion is both symbol and cause of decay, the death-wish of a society that has forgotten its past and fears its future. Without doubt, a society that does not recoil from the willful destruction of its own future generations is doomed. But millions of Americans *are* recoiling from the abortion horror. Whatever other parallels there may be between slavery and abortion, surely one is that not since the Abolitionists has this nation seen anything like the anti-abortionists. If their numbers continue to grow at the current rate, they alone could tip the balance: as students of such “causes” know, if 10-20% of the total population becomes fully committed to a certain political or social objective, it usually achieves it (although rarely on the terms it demanded, or to the extent it hoped for—slavery lingered on, some would say lingers still, long after it was “ended”).

Total abolition of abortion is of course not possible. I know one isn’t supposed to put it this way, but it’s the best way to explain it: abortion is a sin, and will disappear at the same time, and not before, we do away with sin itself. Or evil, if you prefer. But the worst thing about sin is not its existence, but its *denial*. It is one thing to admit that abortion will always be with us, quite another to make it the official *policy* of our nation, with the support of our laws, the use of our money—to promote and encourage it with all the powers of state and society, at ruinous cost to both.

And yet, as Professor John T. Noonan has made clear, the abortionists are unwilling to compromise their abortion “liberty” in any way whatever.⁵ They demand total

acceptance, and total support, from our society. It is not conceivable (if they will forgive me the word) that they can maintain such a public franchise for their “private right.” It *is* conceivable that anti-abortionists can win majority support for their solution: to recriminalize virtually all abortions. The greater the polarization becomes, the harder it is to imagine what kind of compromise will heal a wound so festered.

But of course that is what the American political system is all about. Our basic presumption is that we all agree on the common good, and can compromise the “points of difference.” Surely the most frightening aspect of the slavery-abortion analogy is that the system broke down completely on slavery. I am not predicting an abortion civil war, just reemphasizing the point that compromise on the issue will be hard to achieve. Solomon in his wisdom suggested that each party get half the baby, but that was not the solution to the problem—the solution came from the mother who chose life. The shrill intransigence of the abortionists may force the majority of Americans to do likewise.

NOTES

1. Judith Blake is a professor at the School of Public Health of the University of California (Los Angeles); her study of opinion on abortion first appeared in the March and June (Vol. 3, Nos. 1 and 2) issues of *Population and Development Review*, published by the Population Council, Inc. The entire study was reprinted in the *Human Life Review*, Vol. IV, No. 1, Winter 1978.
2. See *The Case for Legalized Abortion Now*, published by Diablo (sic) Press (Berkeley, California, 1967), pp. 12-13.
3. Mr. Muggerridge’s article, “What the Abortion Argument Is About,” also appeared in the *Human Life Review*, Vol. I, No.3, Summer 1975.
4. See the extensive treatment of slavery-abortion analogies by Prof. Patrick Derr in the *Human Life Review*, Vol. V, No.3, Summer 1979.
5. See especially Prof. Noonan’s book *A Private Choice: Abortion in America in the Seventies*, published earlier this year by the Macmillan Co.’s Free Press (New York, N. Y.); two chapters of the book were reprinted in the *Human Life Review*, Vol. V, No.3, Summer 1979.

The Problems of *Perry*:

Exposing the Flaws of Its Assault on Traditional Marriage

Thomas M. Clark

February 2011 is being cast by partisans on both sides of the same-sex marriage debate as a potential tipping point in the struggle to define the future of marriage in America. During the course of a week, President Obama instructed the Department of Justice to cease defending the federal Defense of Marriage Act (“DOMA”)¹ in court, the Maryland Senate approved a bill that, if passed and signed by the Governor, will make Maryland the sixth state to embrace same-sex marriage, and the Governor of Hawaii signed into law a bill creating civil unions (though not marriage) for same-sex couples. There is no question that these actions are all important developments, particularly the President’s decision to refuse to defend an Act of Congress designed to protect, at least for federal and inter-state comity purposes, the traditional definition of marriage as between one man and one woman. Yet despite the alarm of defenders of traditional marriage, and the bravura of same-sex marriage proponents, around these recent events, they are not likely to decide the ultimate fate of marriage in the Nation. That distinction belongs to the key case, decided by a federal district court in August 2010 and now working its way through the appellate courts. That case almost surely will end up in the U.S. Supreme Court, which will decide in one sweeping decision whether the marriage laws in all fifty states must accommodate same-sex couples. That case, if affirmed on appeal, would alter the institution of marriage in the United States at its core. That case is *Perry v. Schwarzenegger*.²

Chief Judge Vaughn Walker of the United States District Court for the Northern District of California must be complimented for the political adroitness of his lengthy and cleverly structured opinion in *Perry*, which last August invalidated California’s Proposition 8. As commonly reported by a largely sympathetic press, he marshalled a wealth of social-science testimony purporting to undercut the stated rationales for Proposition 8’s limitation of marriage to a man and a woman. He, perhaps superfluously, but probably correctly, noted the economic benefit for California and its cities from recognizing same-sex marriage—of no little consequence given California’s fiscal condition. With keen sensitivity to coalition building, he tried very hard to cast his unprecedented creation of a federal constitutional right to same-sex marriage as simply part and parcel of the broader line of

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social progress that has included gender equality and, most pointedly, racial equality, perhaps hoping to make inroads with the substantial majority of African-Americans who supported Proposition 8.

Yet Judge Walker feels no need to wait until those constituencies are won over, no need for the kind of democratic exercise transpiring in Maryland and elsewhere, indeed no need at all to ground his clarion assertion—that “the time has passed” for our tradition-bound notion of marriage as between a man and a woman—in the reality of what the people have willed or said. Rather, by judicial fiat he countermands the very exercise of popular will that shows how wrongheaded his assertion is. Any thoughtful review³ of *Perry* as a constitutional decision must reject its reasoning and conclusion. A brief analysis shows not only the jurisprudential flaws in Walker’s opinion, but also reveals a deeper, more far-reaching agenda: to remake to his tastes not merely the legal, but the very social and cultural framework of marriage and child-rearing in America, in a way that justifies most if not all of the fears of the proponents of Proposition 8.

I. Laying the Foundation

Walker realizes he has to engage in some clever sleight-of-hand to overcome the fact that same-sex marriage has not only never been recognized as a fundamental right under the U.S. Constitution, but indeed had never *even existed* in the United States until 2004. When it came, moreover, it was not by legislative or popular action, but by the judicial fiat, first of the Massachusetts Supreme Judicial Court in a narrow 4-3 ruling in *Goodridge v. Department of Public Health*,⁴ and then by a handful of other state high courts,⁵ “finding” such a right in their state constitutions. While the *Goodridge* majority may have convinced a few similarly liberal activist state judges to follow their lead, it was even more successful in convincing over a dozen states in the immediately ensuing election to specifically enshrine one-man-one-woman marriage into their state constitutions. Indeed, Proposition 8 itself is exactly such an initiative, undertaken not as some unprovoked hostility to homosexuals, but rather as a direct response to the California Supreme Court’s 2008 attempt⁶ to judicially impose same-sex marriage. As of the end of 2009, same-sex marriage had been rejected by the people *every single one* of the 31 times it has been put to a popular referendum. Thirty states enshrine one-man-one-woman marriage in their state constitutions, another 15 in statutory law. Only five states allow same-sex marriage and three of those (Massachusetts, Connecticut, and Iowa) only because of activist judicial compulsion.⁷ The two states that legislatively enacted same-sex marriage without judicial compulsion, Vermont and New Hampshire, would seem to make northern New England the heartland of sentiment for gay marriage in the nation—yet, when the legislature of neighboring Maine passed a bill allowing same-sex marriage in 2009, the measure

was swiftly annulled by popular referendum. Furthermore, in the 2010 elections, the New Hampshire legislative majority that had recently enacted same-sex marriage was dramatically repudiated by the voters, with pro-traditional-marriage Republicans not only capturing both legislative houses, but also securing veto-proof two-thirds majorities in both houses, setting the stage for a likely repeal effort. The 2010 elections also saw all three Iowa Supreme Court judges who had voted in favor of imposing same-sex marriage through the state constitution, and who stood for re-election, defeated and replaced by the voters. Of course, at the federal level, as noted, Congress has enshrined one-man-one-woman marriage for federal statutory purposes in the Defense of Marriage Act, and the unlikelihood of repeal anytime soon has caused same-sex-marriage advocates, abetted now by the Obama Administration, to concede the democratic contest and turn to a judicial strategy for annulling this Act.⁸ Suffice it to say that all of this is hardly a good start for showing that same-sex marriage is “rooted in our nation’s history, legal traditions, and practices,” as the Supreme Court says must be true of rights that are to be deemed “fundamental.”

Walker is up to the task, though. It is marriage itself, he stresses, not same-sex marriage, that is the fundamental right—and indeed it is. All we have to do is recognize, as Walker will help us do, that contrary to what every state legislature, or the Framers of the Fourteenth Amendment, or anyone else for that matter may have thought for the last couple of centuries, the identity of the two marriage partners as a man and a woman has never been a core requirement of marriage or part of its core meaning. Indeed, Walker says the evidence “did not show any historical purpose for excluding same-sex couples from marriage.” Rather, that exclusion was at best an accident of other, usually shameful concepts of gender roles in society. The not-so-subtle message: You can’t be against gay marriage unless you also want to keep women in the home and make them totally subservient to their husbands. Moreover, these shameful gender concepts long went alongside the shameful racial stereotypes embedded in the anti-miscegenation statutes famously invalidated in *Loving v. Virginia*.⁹ Opening marriage to same-sex partners, in Walker’s view, will no more change the fundamental nature of marriage than did *Loving*. (Implication: If you’re against gay marriage, you might also want to send us back to the dark ages of race-based prohibitions on marriage. Again, a not-too-subtle call for African-Americans, who voted over 75 percent in favor of Proposition 8, to get back in line with the progressive agenda.)

Walker is careful to consider not only political audiences, but judicial audiences as well. Though applying the “strict scrutiny” normally reserved for laws that burden “fundamental rights” or discrimination against “suspect classes,” Walker spends much of the opinion emphasizing that Proposition 8 cannot even meet the more deferential “rational basis” test. So, lest any appellate judges or justices have qualms

about declaring same-sex marriage a new fundamental right, Walker makes clear they need not do so to invalidate Proposition 8. It fails even the rational-basis test, because Walker finds no possible valid state interest could be even rationally related to the limitation of marriage to a man and a woman. How wrong, how indeed irrational, have all fifty states been for the past couple of centuries, and how irrational do forty-five of them continue to be to this day! Not to mention how irrational was Congress in passing DOMA a decade ago. Needless to say, how irrational were a majority of California's voters in passing Proposition 8, just a few years ago.

Finally, there is that very important audience of one: Justice Kennedy. Clearly targeting Justice Kennedy, Walker repeatedly cites *Lawrence v. Texas*,¹⁰ the 2003 Supreme Court opinion in which Kennedy struck down a Texas anti-sodomy statute, finding that moral disapproval of homosexuality alone could not provide a legitimate state interest, even under a rational-basis review, to justify such a statute. Walker then deftly positions Proposition 8 as a measure just like the Texas anti-sodomy statute: one that serves no articulable state interest, other than disapproval of homosexuality. Showing no shortage of chutzpah, Walker even cites as support Justice Scalia's dissent in *Lawrence*, which noted that if "moral disapproval" can no longer sustain a "rational basis" for state legislation, then it is hard to see how denying marriage to same-sex couples could be sustained: "surely not," notes Scalia, based on "the encouragement of procreation, since the sterile and the elderly are allowed to marry."¹¹ Picking up Scalia's point, Walker marshals findings of fact that states have not historically required evidence of ability and willingness to procreate in order to receive a marriage license. Of course, Scalia's point was that the holding of *Lawrence* itself was wrong, and that Kennedy's repeated dictum that its logic would not go so far as to recognize same-sex marriage was naïve or disingenuous. Walker seems to be almost tweaking Justice Kennedy by saying, in effect, that Scalia was right, in that the logic of *Lawrence* leads ineluctably to the constitutional right of same-sex marriage; *now, Justice Kennedy, just do what Scalia said you would do*. It is a nice question whether such tweaking will turn out to be an effective strategy for getting Kennedy's vote when the appeal is all but certainly heard by the Supreme Court. People, especially Supreme Court justices, do not usually like to be proven wrong, let alone proven naïve or disingenuous.

Perry's fate in the Supreme Court aside, there is no denying that Judge Walker's opinion probably did as much as could reasonably be hoped for in trying to create a new and unprecedented constitutional right, not only against the weight of tradition, but even more to the point, against the weight of recent and repeated popular rejections of same-sex marriage. Its many mischaracterizations and selective uses of information are for the most part subtle, interwoven with a largely irrelevant and hopelessly skewed but nonetheless intimidatingly voluminous trial record. Its key

legal conclusions are framed in references that, if flawed, at least superficially resonate with other values rightly held dear, such as gender and racial equality. But for all of this cleverness, the opinion remains a flawed and dangerous departure from sound constitutional jurisprudence. Walker also does little to hide his contempt for the majoritarian values, particularly religiously grounded values, which he faults for being the main barrier to full acceptance and affirmation of homosexuality. A brief analysis will reveal both the jurisprudential and logical flaws of the opinion and the dangers its approach holds for the future. Let us start by exposing a flawed analogy that is central to both the legal and the broader political arguments for same-sex marriage.

II. The Misappropriation of *Loving*

Though *Loving* is cited only a few times, it is actually central to Walker's project of assuring us that same-sex marriage is nothing new; for if the "long-standing" limitation of marriage to people of the same race can be swept aside without redefining marriage, then there is at least hope that people can see same-sex marriage as an extension of that same principle. Not incidentally, the comparison of Proposition 8 to anti-miscegenation laws has been a prominent part not only of the legal challenge but also of the broader public argument of gay-marriage advocates. This argument, culminating in Walker's conflation of the limitation of marriage to a man and a woman with invidious pre-*Loving* racial discrimination, however, is a complete misreading both of *Loving* and of the historic role of race in marriage.

The long-held Judeo-Christian view of marriage, which admittedly has had as a central element the notion of one man and one woman, has never considered an interracial marriage invalid, canonically or in civil law. The early Christian Church freely blessed marriages between free Roman citizens and slaves, though banned by Roman law at the time. At least from the time of the ascendancy of Christianity until the 19th century, there is little evidence of a racial requirement for the civil or canonical validity of a marriage—these requirements seem to have appeared on the scene rather late. Needless to say, racial discrimination and animus would have discouraged many such marriages; however, examples abound of mixed marriages, especially after the Age of Exploration. Marriages between European settlers and Native Americans were blessed, as far as records show, by the Catholic Church and most Protestant denominations. Indeed, even the anti-miscegenation statute at issue in *Loving* had exemptions for marriages between whites and the "descendants of Pocahontas," an admission by the drafters of this invidious statute that their cruel and, in historic terms, *novel* restriction would have criminalized the Old Dominion's own founding fathers. Contrary to Walker, it can be seen that anti-miscegenation laws had little to do with the "long-standing" understanding of marriage, and came to the fore largely in the 19th century as a complement to

notions of white supremacy and the expansion of the slavery system in the United States. Later they were adopted in the 20th century as part of the Nuremberg Laws by the Nazi regime in Germany, and later still by the apartheid regime in South Africa. Yet as all these examples show, they were late-stage manifestations of racial-supremacy policies, wholly divorced from, and indeed inimical to, the understanding of marriage in the Western natural-law tradition. The reason for the *lack* of any racial component in the natural-law definition of marriage is as obvious as the reason *for* its limitation to a man and a woman: Race is *irrelevant* to the natural fact that a man and a woman are sexually complementary and, in the normal course, any normally functioning man and woman of the species *homo sapiens* are capable of reproducing with each other without regard to race.

It is of course true, as Judge Walker's opinion notes, that Supreme Court case law on marriage, especially after *Griswold v. Connecticut*¹² wherein the Court invalidated a ban on artificial contraception as applied to married couples, acknowledges many aspects of the marriage relationship deserving protection as a fundamental right beyond the mere right to procreate. Marriage is also about a commitment to mutual support and intimacy. One must accept that these commitments may and do exist in relationships other than traditional marriage: not only among same-sex couples, but even among other groups of related persons mutually committed to each other for support and friendship, whether the relationship be sexual in nature or not. All of these may well deserve some level of protection by law. It can hardly be irrational, however, for a popular majority to say some special and especially solicitous framework is appropriate for those relationships that by their natural form, a man and a woman, are inclined to procreation and the upbringing of biologically related offspring. And certainly it *is* irrational to compare such a distinction to the wholly unwarranted racial distinctions invalidated in *Loving*. In short, it is simply facetious to argue that in overturning bans on interracial marriage, *Loving* was touching anything nearly so central to the historic definition of what a marriage is as is the one-man-one woman requirement. A brief review shows why, constitutionally as well as logically, *Loving* hardly supports the case against Proposition 8.

Loving was through and through a case about the specific invidiousness of race-based classifications in light of the obvious historical purpose of the post-Civil War Amendments to eradicate white supremacy and guarantee equality for blacks. On one level, *Loving* is easily distinguishable from the gay-marriage issue on the ground that it was based specifically on the core purpose of the Equal Protection clause to prohibit any race-based discrimination. Classifications based on race, as the anti-miscegenation statutes were, were historically subjected to the strictest levels of scrutiny. One could simply find *Loving* distinguishable on that ground alone and stop there. There is simply no basis for extending such a strict

standard of review to areas outside racial classification, or status-based analogues like national origin, illegitimacy, etc.

More needs to be said, though, for *Loving* is a particularly odd place to look for support for the notion that marriage is to be radically delinked from any reference to heterosexual procreation. If *Loving* was about anything beyond the near *per se* invalidity of race-based classifications in criminal laws, it revolved precisely around, and assumed the primary power of, marriage as the main vehicle for propagation. The *Loving* Court went to great length to point out that, in addition to the racial classifications, the Virginia statute had the invidious purpose of preserving white racial integrity. Marriage as a union of man and woman for the purpose of procreation, far from being an irrelevancy to the *Loving* Court, was an assumption too obvious to need stating—and indeed was what rendered the ban on interracial marriage particularly invidious. Such a ban enshrines a pernicious view that the races are and forever should be separate, and that any admixture of non-white blood *through interracial procreation* would “mongrelize” the white race. As such, the statutes were rightly seen as a bulwark of the whole institution of white supremacy that it was the core purpose of the Fourteenth Amendment to eradicate. As Chief Justice Warren wrote: “Restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”¹³ Yet the tremendous moment of non-discriminatory marriage rights, and indeed the criticality of marriage in the analysis, flows most precisely from its connection to procreation and propagation of the races.

That it is dubious to find in *Loving* support for a notion of marriage stripped of its traditional one-man-one-woman understanding is shown yet again when Chief Justice Warren moves beyond Equal Protection to consider briefly the Lovings’ Due Process challenge to the statute. In short order, Warren notes that marriage is a “basic civil right of man, fundamental to *our very existence and survival*,” citing to *Skinner v. Oklahoma*.¹⁴ Warren’s invocation of *Skinner*, where the Supreme Court invalidated a law authorizing sterilization of certain convicted criminals, and linking it to our “existence and survival” as a species, makes the point clear: Marriage, to the *Loving* court, held its central role for reasons closely intertwined with its historic purpose of securing heterosexual bonds for purposes including procreation.

Needless to say, the Supreme Court’s jurisprudence has gone far since *Loving*, notably under *Roe v. Wade*¹⁵ and its progeny, to expand its notion of fundamental rights relating to marriage and relationships (or, in the view of many, to tragically restrict fundamental rights, like the right to life, for the most defenseless). These cases will likely be relevant to greater or lesser extents in evaluating *Perry* on appeal. The point here, however, is that race-based classifications stand in nothing like the same position to the core meaning of marriage as do the male and

female identity of the marriage partners. Nor does homosexual conduct stand in anywhere near the same protected focus as race does under the Fourteenth Amendment. Judge Walker would have us believe that the main lesson *Loving* holds for us today is not its clarion call to reject racial classification and the invidious doctrines of racial supremacy that the Civil War was fought to eliminate, but rather that it was about a purely private right to form a marriage with whomever you want, a right that, as we shall see further on, once granted, will not be denied ever more bizarre forms of union. To suggest parity between Proposition 8 and anti-miscegenation laws cheapens the unique status of *Loving* in breaking down the legal and biological underpinnings of white supremacy and eradicating the legacy of slavery in the United States. That this is intuitively understood by many African-Americans perhaps explains their sceptical reaction to the anti-Proposition 8 propaganda.

III. The Gender Equality Argument—Conflating Equality and Obliteration

In parallel to his attempt to conscript *Loving* and the progress of racial equality as arguments for same-sex marriage, Judge Walker wishes to posit the vast redefinition of marriage he envisions as merely a logical next step to the progressive recognition of marriage as a union of equals, rather than as a male-dominated institution, including such developments as the elimination of coverture. Again, this is brilliant politics, as it makes any defense of traditional marriage at least presumptively seem like a defense of patriarchy. In Walker's view, the exclusion of same-sex couples "exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage." As if to remove any possible doubt about where things stand, Walker reminds us that "that time has passed."

On its face, Walker's argument from gender equality is more intuitively convincing than the argument from racial equality, since, unlike race, gender is indeed very closely connected to, indeed is at the core of, the question of whether a same-sex union can be seen as a marriage. As with much of the rest of his analysis, though, Walker conflates a commendable advance in the recognition of the equality of the genders, and the march toward understanding marriage as a union of equals, with the very different and more radical notion that all distinction between the genders is to be obliterated.

It may be conclusory to just assert that men and women have distinct and complementary marital roles and attributes, starting with their role in parenting. Yet it is no less conclusory than Walker's assertion that "gender no longer forms an essential part of marriage." Obviously in the view of the vast majority of Americans who have directly, through referendum or through their representatives, enacted statutes to limit marriage to a man and a woman, there is very much a sense that gender is somehow, in some way, relevant to what a marriage "is." Nor is this commonly felt view irrational in the least. To start with one obvious way: Only an

opposite-sex couple have the ability to conceive and raise their biological offspring. Immediately, unique consequences begin to flow from that very obvious natural fact: a whole host of marital rights and obligations, considerations of support obligations that include this new life the couple brings into being, the state's interest in encouraging stability in this relationship. It is true that a same-sex couple might adopt children, or (in the case of lesbians) use technological means for one of the partners to conceive, but the very fact that such intervention is necessary means that the law can deal with those issues as part of the process of adoption or as a requirement ancillary to regulation of artificial conception. Not so with an opposite-sex couple, where such potential flows from the natural relationship itself. A same-sex partner cannot, absent technological interventions that leave little chance for "surprise," leave the other partner pregnant, giving rise to a host of state interests around mutual support, the parental rights of biological parents, protection of the new life involved, etc.¹⁶ Without more, it is clear that the state has many important reasons for which to treat a marriage of a man and woman differently than other relationships. Walker's statement that "today, gender is not relevant to the state in determining spouses' obligations to each other and to their dependents" is breathtaking, either in its wilful blindness, or in its wishful thinking.

It should be obvious that this distinction between genders, and consequent difference in the ramifications of same-sex and opposite-sex unions, need imply no inequality among the genders. The regrettable past invoked by Judge Walker, including the doctrine of coverture, by which a woman's assets and legal identity were "subsumed" under her husband's upon marriage, indeed "is passed" and rightly so. But the correction of this past inequality means assuring equal legal standing and protections for the rights of men and women in marriage, not the legal pretense that all aspects of masculine and feminine nature are to be obliterated or ignored.

IV. The Irrational Claim of "No Rational Basis"

Walker is keen to show that Proposition 8 does not have even a rational relation to a legitimate state interest, to increase the chances that its result, at least, will be upheld regardless of the standard of review an appellate court decides to apply. While there are several interests advanced by Proposition 8 proponents and rebutted by opponents, suffice it to say a central argument is over whether Proposition 8 furthers a valid interest in strengthening "traditional marriage." Here, Walker is callous in his summary dismissal of proponents' arguments.

Proponents submitted briefs and testimony that Proposition 8 would at least arguably serve the purposes of (1) promoting stability and responsibility in naturally procreative relationships, (2) promoting enduring and stable family structures for the responsible raising and care of children by their biological parents, (3) increasing the probability that natural procreation will occur within stable, enduring,

and supporting family structures, (4) promoting the natural and mutually beneficial bonds between parents and their biological children, (5) increasing the probability that each child will be raised by both of his or her biological parents, (6) increasing the probability that each child will be raised by both a father and a mother, and (7) increasing the probability that each child will have a legally recognized father and mother.¹⁷

It is hard to imagine any of these reasons not being well understood by most Americans, and most people, as among the rationales for marriage between one man and one woman. Yet Walker rejects all of these as legitimate rationales since “evidence supports two points which together show Proposition 8 does not advance any of the identified interests: (1) same-sex parents and opposite-sex parents are of equal quality and (2) Proposition 8 does not make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents.”

Let us take these one at a time and understand the breadth, and audacity, of Walker’s “findings.”

(i) Rationality of ends: the preference for biological (opposite-sex) parents

Not only is Walker saying that there is no difference between same-sex parents and opposite-sex biological parents, he is saying that there is no conceivable reason to even prefer a “mother and father” over same-sex “parents” that would render any of proponents’ reasons rationally related to a valid objective. This conclusion is itself irrational. We can all agree that there may well be many same-sex couples who would be very good parents. Likewise, we may all agree that indeed today there are many, many adoptive, non-biological parents who are excellent parents. Does this mean that society must adopt a policy that removes *any* incentive for, or any slight additional preferences for and encouragements of, stable, biologically based family units? It surely should not, merely because one believes that there are many good same-sex or adoptive parents. It is amply rational, not to say intuitively obvious, that other things being equal, where a child is born to parents who have invested biologically in the child, whose act of begetting that child is in praxis with the couple’s own mutual love and commitment, they will see in the child both a reflection of themselves, and of their loving relationship with each other, all of which will tend to deepen their love for the child and commitment to raising him well. Moreover, experience is that children themselves want to know about their natural parents—where they came from—to the extent that many upon finding they have been adopted want to know about their natural parents, often causing confusion and questions of why they were “given away.” None of this is to deny the tragic reality of abusive and neglectful parents, or the great blessing that non-biological parents can be for many children in specific situations. But it is rational to say, and society should have the right to say, that, on average, looking

at the whole population, it is a good thing if children are, as a general rule, raised by their biological father and mother, living in a stable, legally recognized and supported relationship, and that should be the “default position” absent special circumstances. Indeed, as discussed in Section VII, *infra*, to hold otherwise is to launch us on the path to Brave New World. Since biological, and *ergo* one-man-one-woman, parenting is the preferred norm, some slight preferences given to encourage and favor such marriages should be upheld.

Now, the normal application of “rational basis” review would be in complete accord with this approach. Under rational-basis review, it is sufficient if the legislation has a plausible relationship to some valid goal, and is reasonably tailored to achieve the end. The fact that there are cases of good adoptive parents does not require the state to avoid *any* measures to promote biological parenting. Likewise, if marriage rights go to some heterosexual couples who are incapable of procreation, that is, *contra* Justice Scalia’s dissenting *dictum* in *Lawrence*, no constitutional problem, since under rational-basis review only a “reasonable,” and not a “perfect,” fit between the means and the goal is required.¹⁸ The fact that the vast majority of heterosexual couples have the chance to naturally bear their biological offspring, while *exactly zero percent* of homosexual couples do, is more than sufficient to justify differential treatment under rational-basis review.

Walker, to be sure, says that Proposition 8 should have to face strict-scrutiny, not rational-basis, review. However, to hedge his bets, especially given Justice Kennedy’s clear refusal to apply strict scrutiny in *Lawrence* and reliance instead on the rational-basis test, Walker’s clear intellectual hurdle, and goal, is to show that Proposition 8 flunks even rational-basis review. Since, as explained above, rational-basis review should be satisfied so long as there is a plausible relationship between the law’s requirements and a valid goal like stable child rearing, Walker *must* find that there is *absolutely no, even generalized advantage* to children in being raised by their biological (and thus, of necessity, opposite-sex) parents. Tactically, one can understand why he must draw this conclusion—without it, Proposition 8 easily passes any honest rational-basis review. Still, one should wonder *what authority* a federal judge would invoke to reach the breathtaking conclusion that not only is there no, even generalized desirability, other things being equal, for children to be raised by their biological parents, but in fact even to posit that this is irrational, in constitutional terms.

To overturn over two centuries of American state marriage law, millennia of social custom, and, most relevantly, the fresh verdict of the people of California that limiting marriage to one man and one woman serves a valid interest in supporting stable families and child rearing, one might expect this authority would be an express constitutional provision, or at least a long, established line of case law. Failing this, he might point to a prevailing consensus among other states showing

that no or few other states had reached the conclusion that such a limitation could be rationally grounded.

Of course, there is no constitutional provision or long line of case law. Even if, in the desperate search for straws to clutch at, one wanted to count *Lawrence* as implicit support, the opinions of both Justice Kennedy and Justice O'Connor (concurring in the judgment) make clear they wish to stop short of endorsing such a right to same-sex marriage; hence, together with the three dissenters in *Lawrence*, one can say that the radical notion that it is irrational to favor opposite-sex couples for marriage recognition has never to this day commanded a majority of the Supreme Court. Similarly, there is no lopsided consensus among the states making California an anomaly. Indeed, *the reverse is true*: Forty-five states require marriage to be between a man and a woman, many having reaffirmed long-standing statutory law by recently adopted state-constitutional provisions to this effect. Three of the five states that now recognize same-sex marriage do so only because of state court constitutional interpretations that suffer from the same infirmities as *Perry* itself.

So what awesome authority does Walker invoke to overturn these long-held and recently reaffirmed judgments of the people? What authority is so weighty that the views of both long tradition and current democratic processes must be cast aside? The answer, it appears, is Professor Michael Lamb.

Lamb is a developmental psychologist at Cambridge University in England. When Judge Walker sweepingly rejects all of Proposition 8's purported rationales with the assertion that "same-sex and opposite-sex parents are of equal quality," he rests this assertion magisterially on paragraphs 69-73 of the opinion's findings of fact. A look to these paragraphs finds that they all rely on statements by Lamb: "Children raised by gay and lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful, and well-adjusted"¹⁹; "children do not need to be raised by a male parent and a female parent to be well-adjusted, and having both a male parent and a female parent does not increase the likelihood that a child will be well-adjusted."²⁰ This may seem surprising to many of us who raise children and know intuitively the distinct and complementary roles played by mothers and fathers; however, we need not worry, because Lamb assures us that "the research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology."²¹

That might be reassuring, except for the fact that, as recently as the 1980s, Lamb was publishing research that showed the exact opposite. Indeed, an earlier Lamb study concluded that "the data suggest that the differences between maternal and paternal behavior in their biological gender or sex roles" are more critical to healthy child development even than the degree of the parents' involvement or paternal desire for involvement in infant care.

When pressed during cross-examination for an explanation of his change in

position, Lamb said nonchalantly that his previous findings “have not been held up in subsequent research.” Lawyers for Proposition 8 may be forgiven for wondering whether any of the change in Lamb’s research from the 1980s to today might be due in part to the ascendance of pro-homosexual political influence, particularly in academia. Asked if scientists, universities, and journals were vulnerable to political pressure, Lamb, perhaps at his most candid, replied, “No one is hermetically sealed from politics.”²²

None of this, of course, is to ridicule Professor Lamb. Assuredly academic views and the results of research change and evolve over time, and charity demands we assume Lamb was just saying what he believed at each time. This is most definitely, though, to take to task Judge Walker, for invoking a handful of academics, who admit that the research is constantly evolving, to trump the decisions of the democratic process. It is one thing to tell a popular majority that their will must be thwarted because it runs contrary to an express constitutional provision, or imperils the “scheme of ordered liberty” by infringing rights “deeply rooted in our nation’s history and tradition.” It is quite another thing to tell that popular majority its will must be thwarted, indeed that its whole expression is “irrational,” because it goes against a gaggle of academic theorists, or at any rate against what they say today before their views “evolve” again.

Proposition 8 has what is, for constitutional purposes at least, a sufficiently rational end. While it leaves intact numerous protections for same-sex couples through domestic-partnership laws, rights to adoption, inheritance, etc., it desires to give some special, largely symbolic, but still important status to a family unit that is in general likely to procreate and raise their own biological offspring. It wants to send a message that while other family structures are valuable and protected, a nuclear, biologically grounded family unit plays a special role, and is preferred as the norm for family units. Special rules of recognition and a unique legal framework are justified, among other reasons, by the spontaneous opportunities for procreation that inhere in the heterosexual form. Some level of special privileges for marriage are justified by the desire to incentivize procreation to take place in that form, especially where adequate, if not completely equal, alternatives such as domestic partnership are available for others.

(ii) Rationality of means: Does Proposition 8 advance traditional marriage?

It was reported that, early in the trial, Judge Walker asked counsel for Proposition 8 what harm it did to opposite-sex couples if marriage rights were allowed to same-sex couples. It’s the wrong question, at least under rational-basis review. If the government provides a tax credit to those who install energy-efficient equipment in their homes because it wants to incentivize energy efficiency, it does not avail homeowners who have not installed such equipment to demand the same

credit, saying, “It’s not fair, we want the credit too, and in any event, how does giving it to us too harm those who did install the equipment?” It may be true that a given homeowner who installed the equipment is no worse off just because someone else gets the credit too. It may also be the case that the homeowner who has not installed the equipment does other things that are socially beneficial, and are worthy of subsidy or support through other programs. Both of these facts, however, are irrelevant, and in no way undercut the government’s right to incentivize a particular activity, at this time, that it believes meets a particular social need or confers a social benefit. The law looks not only at the specific effect on a given party, but also at what may likely come about on a dynamic and going-forward basis over the broader society because of the incentives put in place. It is clear that Judge Walker harbored a preconceived notion about the effect of same-sex marriage-recognition on traditional marriage from the beginning of the trial, and this showed itself throughout in a deliberately crabbed reading and callous rejection of proponents’ arguments on this aspect.

As an initial matter, we see that Walker’s rejection of proponents’ arguments involves his assertion that the measure “does not make it more likely that *opposite-sex* couples will marry and raise offspring biologically.” The supportive citations for his conclusion are to paragraphs 43, 46, and 51 of the findings of fact. All of the cited findings relate to testimony by various “experts” that sexual orientation and identity are immutable and that it is not a realistic option for gays and lesbians to marry a person of the opposite sex. This raises a serious question as to whether Judge Walker misunderstood the depth of proponents’ rationales. Perhaps it is true that if proponents were solely claiming that Proposition 8 would cajole homosexuals to marry members of the opposite sex and have children, that claim would be counter-indicated by the cited testimony. But that is not, or at least not all of, what proponents are arguing.

Yet further evidence of Walker’s misunderstanding of this point appears in his rejection of the third purported interest advanced by Proposition 8, that of promoting opposite-sex parenting over same-sex parenting. Walker writes:

To the extent California has an interest in encouraging sexual activity to occur within marriage (a debatable proposition in light of *Lawrence*, 539 US at 571) the evidence shows Proposition 8 to be detrimental to that interest. Because of Proposition 8, same-sex couples are not permitted to engage in sexual activity within marriage. . . . *To the extent proponents seek to encourage a norm that sexual activity occur within marriage to ensure that reproduction occur within stable households, Proposition 8 discourages that norm because it requires some sexual activity and child-bearing and child-rearing to occur outside marriage.*²³

This passage is almost risible in its mischaracterization not only of proponents’ arguments, but also of the natural facts of reproduction. Obviously, proponents

have no interest to see that *same-sex* sexual activity occur within marriage “to ensure that reproduction occurs in stable households.” As should be obvious to everyone except Judge Walker, unlike heterosexual sexual activity, same-sex sexual activity has *absolutely no connection with or bearing on reproduction*. It may be true that, quite independently of proponents’ clearly expressed (and, as seen above, rational) purpose of promoting stable, biological (*ergo* opposite-sex) parenting, there is also an interest in seeing that *any* child rearing, even that flowing from adoption and technological means of conception, happens in a sufficiently stable environment. To this end, requiring such adoptions to be limited to married couples *and* domestic partners (including same-sex partners), may well be rational and desirable. But that is not the interest at issue in this passage of the opinion—the specific interest is in promoting biological (opposite-sex) parenting and seeing that it takes place in an especially stable framework. That rational goal is obviously *not* undercut *at all* by forcing homosexual (*ergo* non-reproductive) sexual activity to take place outside of marriage.

Given the unique and central role that opposite-sex couples play in biological reproduction and parenting, it is the long-term consequence for the institution of marriage *for heterosexuals* that is a main concern of proponents. Although he seems confused about this point in passages like that cited above, Walker elsewhere acknowledges this concern, and belittles it. Did proponents present no argumentation on the impact of weakening opposite-sex marriage as such?

Not exactly. Proponents presented expert testimony, including from David Blankenhorn, author of *Fatherless America* and *The Future of Marriage*, editor of four books on family structure and marriage, and editor or author of several publications on the subject. Specifically, Blankenhorn discussed the phenomenon of deinstitutionalization, whereby the stable patterns and rules surrounding an institution like marriage slowly change and erode the institution. It was Blankenhorn’s testimony that allowing same-sex marriage would undermine respect for the unique status of traditional marriage, and this could lead to further deinstitutionalization, including an increase in out-of-wedlock births, divorce, etc. Unlike the ready acceptance accorded the views of Michael Lamb and other plaintiff experts, Judge Walker minutely dissected Blankenhorn, spending over ten pages of his opinion critiquing his credentials, suitability as an expert witness, and actual testimony. He pointedly dismissed Blankenhorn’s opinion that same-sex marriage may be both a cause and a symptom of deinstitutionalization as “tautological.” A more objective and neutral (i.e. judicial) approach might have recognized that there is such a thing as a vicious cycle, wherein ideas such as same-sex marriage, together with other trends, could undermine respect for the unique role of traditional marriage as the exclusive framework for procreative intimacy and child-rearing, leading to an erosion of marriage’s unique legal status and practical benefits, which in turn

encourages both an abandonment of marriage by those weakly committed to it, and to further social initiatives to progressively weaken its hold. Walker did refer to data from Massachusetts that showed “marriage and divorce” rates did not change significantly in Massachusetts in the four years after same-sex marriage was made legal compared with the four years before legalization,²⁴ but did not explain why it would be irrational for California voters to assume either that four years was not sufficient time for such a social impact to be fully manifested, or that demographic or other factors would make the Massachusetts data less than dispositive for California.

A popular majority might rationally determine that there is a risk certain social consequences would follow if marriage and biological reproduction were so definitively decoupled, as they surely would be, by a policy that says marriage, even at the most generalized society-wide level, has nothing to do with natural reproduction. Many, marginally committed to the institution of marriage, might see less of a point in ensuring that natural reproduction took place in marriage, since, after all, under the “new paradigm,” not only need not marriage and reproduction go hand in hand, but it is irrational even to structure marriage as if they should. With such a commitment to marriage goes also a commitment to biological two-parent child raising. This new paradigm, a rational public might think, would be more fuel thrown on the fire that is the current crisis of family-structure breakdown and out-of-wedlock births.

To be sure, these negative consequences would not befall every heterosexual couple. Those committed to traditional marriage, most of all the religiously grounded whom Walker sees as the source of nothing but discrimination and every obstacle to progress, will not be affected by whatever the state says about civil marriage. Indeed, this is precisely the point that underscores the valid, secular focus of proponents’ concerns. Strongly religious people have no need to have the civil law exclusively recognize their forms of marriages, as long as their marriages are recognized. They will find any so-called marriage recognized in civil law only as meaningful as comports with their moral sense; they will not have their own attachment to traditional marriage undercut one iota, nor their sense that sexual activity or procreation outside of such traditional marriage is immoral. Rather, it is those without a strong religious sense, for whom the imprimatur of the state sends, by default, a stronger message, or at least for whom its according of privileges and responsibilities guides behaviour to a greater degree, whose conduct will be affected by such fundamental shifts in the definition of marriage. Far from being undertaken with the interests of the religious in mind, it is most precisely for the valid secular goal of promoting the benefits of stable, biological two-parent family structures *among the not so religious* that Proposition 8 is amply rational.

How much of this Blankenhorn effectively brought out is unclear. We do know

that Walker was not impressed at all, among other things finding Blankenhorn's lack of a graduate degree in sociology, psychology, or anthropology a strong indictment. One is tempted to wonder whether, given the political partisanship of many such academic faculties, such a lack is necessarily fatal, or not even desirable. Nonetheless, it may well be conceded that Blankenhorn's testimony was not sufficiently grounded in original, empirical research, and even that he was ambiguous and contradictory at points, without conceding that a democratic majority should have to pass "peer review" with academic elites in order to have a legislative finding deemed rational. Indeed, as Lamb's self-contradiction with his earlier research shows, views around such complex subjects are highly nuanced, and are constantly evolving. The question is: Who gets to decide important social policy questions while these debates go on? The majority who passed Proposition 8 might be forgiven for thinking that in a democracy, the majority does, and need not secure an academic approval before enacting a social and political determination into law.

V. *Perry* as Judicial Usurpation

While Judge Walker must be given credit for *Perry*'s rhetorical flair and emotive invocation of the progress of racial and gender equality, it cannot be saved from the fact that it substitutes Walker's own *ipse dixit* that the time for gender roles in marriage "has passed" for the stubborn reality that out of the fifty states, same-sex marriage has *never* been approved by a legislature free of judicial compulsion in forty-eight states,²⁵ and as of late has been rejected at every opportunity it has had to be considered in a popular referendum.

What basis is there to assert that the federal Constitution requires that the received and universal definition of marriage must be so radically altered? It is an alteration, to many a defacement, that as we have seen goes far deeper than any change worked by *Loving* or the abolition of coverture.

When the *Loving* Court invalidated anti-miscegenation statutes, it could point not only to the core purpose of the Civil War Amendments, but also to the fact that, as of the time of the decision, only 14 states retained such statutes, and many were not enforced. Even *Roe*, though unconvincing on this point, could invoke a fig leaf that it was responding to social trends rather than imposing them, by referring to some legislative efforts during the late 1960s and early 1970s to liberalize abortion law. By contrast, Walker must face the fact that not only do forty-five states prohibit same-sex marriage (and forty-eight would, but for other *Perry*-like judicial decisions), but that the recent trend is to reconfirm the traditional understanding of marriage and to react *against* the kind of change *Perry* is trying to impose.

From Maine to California, *the people* have *never* accepted same-sex marriage. Judge Walker dismissed Blankenhorn's analysis as tautological for suggesting

same-sex marriage is both a cause and an effect of deinstitutionalization; but how much more truly tautological is Walker himself for invoking a hoped-for but so far non-existent “passing” of society’s attachment to traditional marriage as a basis for destroying it by judicial fiat?

In sum, *Perry* can rightly be described as judicial usurpation because it substitutes for the expressed will of the people not a valid constitutional provision, not a right “implicit in the scheme of ordered liberty,” not even recognition of a larger, discernible national consensus, but rather the unsupported and demonstrably false belief of Judge Walker that for our society “the time has passed” for any rational significance to marriage being an institution between one man and one woman.

Since it is in the nature of unwarranted usurpations of power that they are not naturally self-limiting or self-correcting, it is important to understand the dangerous path on which *Perry*’s assumptions and logic set us.

VI. The Legal and Social Implications of *Perry*

Judge Walker intends that marriage be radically redefined to obliterate the heretofore constant understanding of it as a relationship between one man and one woman, and instead to be open to same-sex unions. Yet, ironically, he is careful to observe other historic characteristics that he seems content to let stand. Most notably, he recites without hint of controversy that “marriage requires two parties to give their free consent to form a relationship, which then forms the foundation of a household.” But surely the limitation of marriage to “two parties” is no less a retained historical characteristic, and no less an “arbitrary” one, than the limitation to opposite sexes. Indeed, Judge Walker’s voluminous findings of fact on the history of marriage in the United States oddly omit any reference to the real controversies over polygamy. A search of the entire opinion reveals only two uses of the word “polygamy,” one in a quote by proponents’ witness Blankenhorn, and one by Proposition 8 proponent and defendant-intervenor Hak-Shing William Tam, the latter pointing out historical connections between same-sex marriage and polygamy. Yet Walker serenely passes over this as if utterly irrelevant to the implications of the decision at hand, which, on a bit of reflection, one can see it is not.

Perry fundamentally faults Proposition 8 with “enacting a private moral view,” and concludes it is not constitutionally legitimate for moral disapproval alone to deny rights to gay men and lesbians. But what must he say then of the Supreme Court’s 1878 decision in *Reynolds v. United States*,²⁶ which in the course of upholding a criminal conviction for bigamy in the Utah Territory against constitutional challenge, felt it appropriate to observe that “polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African peoples.”²⁷ This would seem to be, at its core, a “moral disapproval”—

and a rather white, Eurocentric one—of polygamy, one that would have to fall as surely as Proposition 8. Indeed, it takes little imagination to envision the ringing language in some *Perry*esque decision a few years hence, comparing Justice Whyte’s comments on “odious polygamy” in *Reynolds* to Chief Justice Burger’s concurring language in *Bowers v. Hardwick*,²⁸ the 1986 case upholding a Georgia anti-sodomy law that was overruled in *Lawrence*, that sodomy was always condemned in Judeo-Christian civilization and that laws against it had “ancient roots.”²⁹ Under the logic of *Perry*, with its findings of fact about the historic discrimination against homosexuals, how could polygamists not prevail? The historical discrimination, including physical violence and murder, against pre-reform Mormons is well documented. Doubtless today an open polygamist would be subjected to the same social disapproval and discrimination as would homosexuals, and surely more. If being a historically targeted minority is indeed an additional reason to subject discriminatory measures against a group to heightened scrutiny, as Walker says, how could anti-polygamy statutes not be subject to a searching review?

Continuing to borrow from *Perry*’s template, polygamists surely could find included among Michael Lamb’s colleagues a bevy of Cambridge anthropologists who could offer expert testimony on the social and practical advantages of polygamous child raising. After all, if it takes a village to raise a child, why not marry one? Perhaps Lee Badgett, an economist who testified for Proposition 8 opponents about the economic harms it inflicted on California, could be called by polygamists to testify on the economic benefits of polygamy. Especially given the current climate wherein two income earners in a household are increasingly the norm, Badgett could elaborate on the household efficiencies of multiple parents to share work and child-raising duties. Rather than tedious debates about whether two mothers are “equal in quality” to a mother and a father, why not play it safe and have two mothers *and* a father? This, polygamists would say, would be not only arguably equal in quality to the traditional two-parent household, but also mathematically provable to be even *greater* in quantity. Putting all of these findings together with the obvious burdening of their fundamental right to marry whom they want, how could aspiring polygamists not prevail on a constitutional challenge to anti-polygamy statutes? We can begin to see the path that *Perry* has put us on.

Let us stay for a moment (which is all it will be, if *Perry* is affirmed) with the construct of a two-party relationship. If, as *Perry* finds, marriage fundamentally only requires “two parties to give their free consent to form a relationship,” what possible reason could Judge Walker give to uphold restrictions against incest, at least among family members of the age of consent? The oft-cited rationale, for those keen to avoid suspicion of harboring a “moral” objection, is that incest can lead to genetic diseases. But surely this is no longer persuasive, given *Perry*’s complete divorce of marriage from procreation. It is illegitimate, *Perry* would say,

to assume marriage is in contemplation of procreation, so objections to the genetic risks of incest would be irrelevant. Again, without much imagination needed, one can envision the long findings of fact of some *Perryesque* decision a few years hence detailing the venerable history of religious, and specifically Christian, condemnation of incest, all leading to the conclusion that laws against incest and incestuous marriage are grounded only on a “moral view” and therefore not valid under rational-basis review.

One is rightly sceptical of “slippery slope” arguments because they often prove too much. Yet, in the area of constitutional decision-making, the slippery slopes have usually been realized. Whether it is the right to contraception in *Griswold* leading to the right to abortion in *Roe*, leading to the almost complete constitutional protection of abortion on demand under *Roe*’s progeny, or the right to sodomy in *Lawrence* leading to the instant claim for same-sex marriage, leading to the next assertion of an unfettered right to marry one’s daughter or three of her friends, the slippery slope is not a mere rhetorical flourish. It should not surprise us that slippery slopes actually materialize in these cases since courts in constitutional decision-making, unlike legislatures or popular initiatives, have to at least try to be consistent in the application of legal doctrines once they are enunciated. Therefore Justice Scalia, sagely dismissing Justice Kennedy’s disclaimer in *Lawrence*, wrote, “this case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.”³⁰

Now, to be sure, it is the contention and hope of Proposition 8 proponents that Justice Scalia was prematurely pessimistic in saying that *Lawrence* leads ineluctably to the affirmation of same-sex marriage. They contend, and the foregoing analysis would support their contention, that even if “moral disapproval” alone cannot support discrimination against same-sex marriage, there are entirely rational interests in favoring opposite-sex biological parenting as a norm that would support that discrimination. Notwithstanding Scalia’s concern that “even the sterile and the elderly are allowed to marry,” it should not be fatal under rational-basis analysis that the scheme allows some sterile opposite-sex couples to marry, since this categorical permission tracks the stated interest in procreation an overwhelming-enough proportion of the time to be amply rational, if not perfect. Having said all of this, however, if the principle were established that same-sex marriage cannot be constitutionally denied based only on “moral disapproval,” and *furthermore* that favoring of some general norm of biological opposite-sex parenting is not a valid grounds for denying same-sex marriage, then there would really be no basis for restrictions on any other kind of relationship being recognized by marriage. Nor, for that matter, could a state constitutionally prohibit incest, bigamy, prostitution, or many other “morals” offenses. If “consent” is really

the key determinant, one begins to question how even forms of violent sexual or other physical practices might be restricted, or how illicit drug use can be banned, since an adult, informed consent to be harmed would trump any moral disapproval of such practices.

Interestingly, while Walker's opinion makes a few references to the "intimate relationship" protected by marriage, his operative legal definition of what is constitutionally protected seems to be the right to come together to form a household for mutual support, and indeed, citing *Lawrence*, rebuffs the notion that marriage is "simply about the right to have sexual intercourse." Yet, taking Walker at his word, it is hard to see how on this reading the privileges of marriage could be denied to other groups seeking to form a household for mutual support. Such groupings might be elderly siblings dependent on each other for support, a grown child with an elderly parent, or, for that matter, a group of three or more relations, or even just good friends, bound together by shared values and a commitment to care for each other through life. Could these groups persuasively be denied the benefits of marriage while same-sex homosexual couples enjoy them? Under what possible rationale—that the homosexual couples engage in homosexual sexual intimacy whereas the elderly siblings do not? Basing a distinction on this ground, beyond being deeply offensive to those who might have thought that a lifetime relationship of caring and support would be more critical a requirement than the practice of non-reproductive sex acts, would contradict Walker's assurances that the expanded notion of marriage he is creating is not "simply about the right to have sexual intercourse."

These entirely plausible examples serve to illustrate that, at least if "principle and logic" have anything to do with judicial decisions, *Perry* is putting us on a very slippery and direct slope to the end of marriage as we know it, *exactly* the danger articulated by the proponents of Proposition 8.

One has a sense that some opponents of same-sex marriage, if they thought *Perry* would be upheld and the gates had to open to same-sex marriage, might almost prefer to see it further extended to these other broad types of arrangements. The rationale might be something like the following. If expanded this broadly, marriage, or more to the point *civil marriage*, would cease to have any connotation of sexual relations; elderly siblings, multi-generational groupings, others whose relationships are clearly non-sexual, would be eligible as well. Better to have that, a mere protection of "association," than a marriage scheme implying, however vaguely, sexual relations, that accepted same-sex couples and hence condoned homosexual activity. An expanded "civil association" would imply no endorsement of homosexuality *per se*, and would in effect cease to be considered "marriage." Instead, this new institution would be "the thing people sign up for when they form a mutual-support structure, without any assumption of sexual intimacy,

and they need certain inheritance, tax, insurance, or other benefits.” “Real marriage,” these people might say, would shed its dependence on the state for its social legitimacy and status, and return to being recognized in the traditional way through religious or other social-customary solemnizing. The openness of this “real marriage” to same-sex couples would be entirely controlled as a private and social matter by the relevant religious or social communities that solemnize it. The status and social dignity of marriage, delinked from recognition as such by law, would turn more on the size and prominence of the religious and social communities that recognized and honored particular types of marriage. Some smaller religious and social groups would almost surely recognize same-sex marriage, and to the extent status within that group is what matters most to its adherents, that would have to be sufficient. If it turned out that in such a scheme the great majority of Americans belong to religious or social communities that do not recognize same-sex unions as valid marriages within their world view, and consequently same-sex couples faced the denial of equal social “status” with opposite-sex couples in the broader society that *Perry* found constitutionally troubling, it would now only flow from the world views of these religious and social groups and their adherents, and hence, presumably, be totally beyond any legal or constitutional redress.

This whole line of thinking, of course, would be strikingly at odds with the arguments advanced by proponents of Proposition 8, who urge precisely that *the state’s* conferring of secular benefits on one-man-one-woman marriage serves the important function of incentivizing and strengthening those unions and the biological two-parent child raising they engender. Still, many such proponents, if forced to choose between one system that enshrines as a matter of policy that heterosexual, biologically based marriage and parenting have no marginal value whatsoever, and deserve not the slightest preference, over same-sex marriage, and another system that removed the state from the language of marriage entirely and left it to be defined socially by the prevailing opinions of religious and social groups, might well conclude that the latter system would be the lesser of two evils.

Just as interestingly, one senses, despite the undeniably more neutral and “secular” character of the latter system, that neither the partisans for same-sex marriage nor Judge Walker want such a new form of “real marriage” delinked from state recognition. Walker is at pains in his opinion to talk not in terms of destroying marriage, but of recognizing its “sacred” character, insisting only that this “sacredness” applies absolutely equally to homosexual and heterosexual unions.³¹ His findings of fact are replete with testimony of plaintiffs about how domestic partnership was inadequate for them because it could not confer the “social acceptance” and lacked the “status” of marriage.³² It is an interesting complaint, in light of the fact that elsewhere the opinion concedes, as it must, that California has given just about every tangible, legal benefit of marriage to domestic partnership,

for which same-sex couples are eligible.

At a practical level, one can be amazed at Judge Walker's obtuseness in not seeing that a good part of the "status" and "social acceptance" of marriage, among a majority of our people, come from its historic meaning and significance as a union of a man and a woman, the sanctuary of loving procreation of the next generation, necessary, as Chief Justice Warren recalled, "to our very existence and survival." How could one think that one could change that and have marriage still be, and be seen to be, the same thing? Walker's obtuseness in thinking that something so fundamental about marriage could be changed without any effect on the very symbolic power of marriage that homosexuals so covet would be matched only by his arrogance in thinking, if he indeed thinks, that a judicial fiat could make it so.

Beyond the practical matter of how feasible this project would be, however, the intended aim—to secure not just legal equality but social acceptance and affirmation of same-sex relationships as fully co-equal with traditional marriage—reveals that there is a far broader agenda at work here than mere equal rights to *state* recognition. As the foregoing analysis shows, state recognition alone cannot guarantee full equality. Ultimately social acceptance will turn not on the fact that homosexuals can legally get a marriage license, any more than acceptance for polygamists would if *Perry* were to take that next, logical step.

Above, Judge Walker is taken to task for arrogance in thinking his decision in *Perry* can change this social situation, but, as noted throughout, Judge Walker is a very intelligent man who understands how these things are done. He *would be* very arrogant and obtuse if he thought this decision, even if affirmed and applied to the entire Nation, would bring about social acceptance of same-sex marriage on its own. He almost surely does not think this. However, he knows that, like the many decisions he cites as precedent, this decision is but a step on a journey.

VII. Brave New World: Religion and Nature as Ultimate Objects of *Perry*'s Attack

The inability of civil-marriage "equality" to confer social status and acceptance flows from the fact that most Americans continue to believe that certain moral consequences flow from whether we live our lives according to norms of the common good given by a certain philosophical world view, or according to norms that impede that common good. If these world views did not exist, or if they had no power, there would be few norms against which to measure the morality of action, and hence little basis other than sheer "taste" on which to base any moral criticism; and, in this case, any honest reflection would have to conclude that the criticism was not properly even a moral criticism, but rather an arbitrary preference. Without world views, then, there would be no basis on which to morally object to homosexuality, and hence to deny the acceptance that might as a *prima facie* matter flow from its being accepted by the positive law of the state. There

would also be no basis to morally object to bigamy, incest, bestiality, or, for that matter, racism, economic exploitation, or various other things that empirically “happen” in the world but are routinely criticized. In this situation, while a majority of Americans might still object to homosexuality on purely “taste” grounds—not finding it personally appealing—they would, if they were honest, have little more basis to deny status and dignity to same-sex marriage than to deny it to those who like chocolate ice cream rather than strawberry.

In parts, the *Perry* opinion appears to proceed as if we live in such a world without world views, as it spends significant time in the findings of fact establishing that sexual orientation is not a morally chosen path but rather simply an orientation that is given genetically, and over which there is little choice.³³ This finding (putting aside the reliability of self-reported experiences of choice) would be a powerful argument *if* there were no world views, since then, the finding that an orientation is no different than a taste in ice cream would render it *ergo* not subject to moral criticism. It is likely the source of a good-faith confusion and surprise on the part of same-sex-marriage proponents, then, when a showing of the unchosen nature of sexual orientation does not lead more readily to the collapse of all moral objections to homosexuality and same-sex marriage. Why don't these people see that I didn't choose this orientation, and just accept me for what I am?

The reason such objections do not collapse, of course, is that there *are* world views, systems which inform a moral framework in which actions are not (always) value-free expressions of taste but (sometimes) represent morally significant choices. World views support a basis for identifying and prioritizing moral aspects of a “good” society, such as just levels of economic support, racial equality, or promotion of biological family unity, notwithstanding unchosen “tastes” that may object to some or all of these values. While a person may have unchosen genetic tendencies, for example, to prefer people of his own race, that fact will not stop a developed world view from articulating a vision of the common good that limits, to a degree, that person's ability to act on his preferences. World views, in short, while acknowledging the unchosen and random aspects of taste, deny them the power to thwart any moral consensus around a normative public order.³⁴

World views come from a variety of sources in our pluralistic society. In the world view of secular materialism, notions of the common good are highly generalized, avoiding specific substantive content of good and bad as much as possible, and indeed finding a maximum of choice a good in itself. In the secular-materialist world view, the substantive content of norms, or lack thereof, may approach that found in the complete absence of world views, since materialism generally seeks to avoid the identification of overarching meaning or purposes in the natural world. Identification of such “meaning” would implicitly suggest there is significance in metaphysical concepts like “purpose” that are, inherently, not material,

obviously contradicting a rigorously materialist world view.

While it is beyond the scope of this analysis to consider the feasibility of a truly, completely materialist world view, divorced of any concept of purpose (and whether, if there were such a world view, it could support any moral norms at all, including ones that we likely would all agree are fundamental), suffice it to say that as relevant here, the more a world view begins to infer and detail metaphysical purpose in the natural order, the more likely it is that such a world view will move beyond the unchosen fact of “taste” or orientation from which no moral norms are articulable to the inference of more and more detailed moral norms against which the way we live our lives —i.e. our actions—is to be judged.

A detailed reading of *Perry* shows that Judge Walker completely understands this, and knows that his longer-term goal of attacking all social disapproval of homosexuality will not be achieved simply by showing that orientation is not chosen. It is true, as noted above, that in parts *Perry* appeals to the unchosen nature of sexual orientation as if that should win the day. That is because it is still worth filling the record with references to this unchosen nature of sexual orientation, as this assists a second short-term objective. To deal with the contingency that a reviewing court might not find that Proposition 8 fails a rational-basis analysis, it would be helpful to build a record that would support an alternative holding that homosexuals are a suspect class for Equal Protection purposes. A majority of the Supreme Court has not clearly signed up for this yet, and this kind of record could be helpful in getting them there, as an unchosen orientation could be argued to be more akin to status, like race, and thus entitled to stricter scrutiny when *state* discrimination based on sexual orientation is challenged under Equal Protection. However, this short-term goal by no means causes Walker to ignore the long-term goal, the goal not merely of changing laws, but of social and cultural transformation.

If it were only the short-term goal of legal equality at issue, one would expect the factual record to be filled with examples of past legal discrimination against homosexuals. In fairness, one could grant judicial notice of this, since there has been not only discrimination, but outright criminal prohibition of homosexual conduct, through much of the history of the nation prior to *Lawrence*. Perhaps, to the extent that Walker was making a point about how the right to marry would help remedy discrimination against homosexuals in accommodation, for example, detailing a history of how homosexuals have been subject to such discrimination would be completely understandable. Indeed, there are extensive findings on past legal discrimination. Yet Walker’s factual findings go beyond what would seem “rationally related” to showing secular discrimination against homosexuals.

In a telling part of the opinion, the finding of fact with the greatest number of sub-sections occurs under the headline, “Religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians.”³⁵

This finding goes at length, not through any single act of legally cognizable discrimination, but through the *doctrines* of the Catholic Church and major Protestant denominations that, in accordance with their Biblical and religious world views, find homosexual activity sinful. The Southern Baptist Convention (“Legalizing ‘same sex marriage’ would convey societal approval of a homosexual lifestyle, which the Bible calls sinful”), the Vatican’s Congregation for the Doctrine of the Faith (“Sacred Scripture condemns homosexual acts as a serious depravity,” and “There are absolutely no grounds for considering homosexual unions to be ‘in any way similar or even remotely analogous to God’s plan for marriage and family’”), the Evangelical Presbyterian Church (“homosexual practice is . . . a perversion of the sexual relationship as God intended it to be”), the Free Methodist Church (“Homosexual behaviour, as all sexual deviation, is a perversion of God’s created order”), the Orthodox Church of America (“homosexuality is to be approached as the result of humanity’s rebellion against God”), and the Lutheran Church-Missouri Synod (“The Lord teaches us through His Word that homosexuality is a sinful distortion of His desire that one man and one woman live together as husband and wife”) are all, in this finding of fact, complicit in the creation of a moral climate that does not tolerate homosexual conduct, and certainly not same-sex marriage. To make sure the appropriate inference is drawn, the finding of fact also notes political scientist Gary Segura for his testimony that “Religion is the chief obstacle for gay and lesbian political progress.”³⁶

How exactly does this finding of fact advance the legal determination of whether the asserted bases of Proposition 8 meet or do not meet the rational-basis test? Possibly, though not persuasively, one might say that if Proposition 8 were challenged under the Establishment Clause as establishing a religious view of marriage, such quotes might be relevant if they showed that some specific finding in the preamble of the law tracked a specific religious tenet. For example, Justice Stevens, dissenting in *Webster v. Reproductive Health Services*,³⁷ thought that the preamble to the Missouri abortion statute upheld in that case should be invalid under the Establishment Clause for finding that “life begins at conception,” a purely “religious view” without secular basis.³⁸ But of course, in *Perry*, there is no Establishment Clause challenge, and Proposition 8 on its face asserts secular interests for the limitation of marriage to a man and a woman, related to the promotion of opposite-sex, biological parenting, resulting stable family units, and the like. Moreover, the fact that individual voters may have based a vote for Proposition 8 on their religious beliefs is irrelevant. Even Justice Stevens, dissenting in *Webster*, noted that his conclusion “did not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions or on the fact that the legislators who voted to enact it may have been motivated by religious considerations.”³⁹ And obviously so, lest we render constitutionally suspect a law prohibiting racial discrimination

because some proponents may have been motivated by a religious view on “the equality of all people before God.”

So what exactly is the purpose of these extensive fact findings on the doctrinal tenets of major Christian groups against homosexuality? Read together with the findings that social acceptance, and not mere legal equality, is the object of plaintiffs, it becomes increasingly clear that the ground is being laid for an assault on the perceived obstacles to full acceptance of the homosexual lifestyle, which are two. First, as Walker already has quoted Segura to explain, is religion, and specifically the religious world view adopted by the above-quoted tenets that provide for a moral norm under which homosexual marriage would contravene the common good. Second, and closely aligned to it, is the natural fact that these world views interpret as counter-indicating homosexuality, namely, the sexual complementarity of man and woman.

Together, these two factors, nature and religion, form a powerful combination that, in Walker’s view, stands in the way of homosexual progress. The natural fact of sexual complementarity of man and woman is initially the more powerful hurdle because on its face it is scientific and secular. One can, quite legitimately, have no religious world view at all and rationally posit that biological, opposite-sex marriage and parenting are socially beneficial for the reasons discussed above. This then creates the first hurdle by justifying differential *legal* treatment of same-sex and opposite-sex marriage. The religious element, though at first seemingly the less powerful of the two because it does not play a direct legal role, plays an ultimately more important function by investing the natural fact of complementarity with purpose and metaphysical meaning, as only a developed world view can do. Whereas the secular same-sex marriage opponent would point to the physiological, developmental, and social benefits of opposite-sex marriage, the religious world view allows people to see the higher beauty and meaning of committed heterosexual married love. In this view, it is no mere accident that the very love of a man and woman, which leads them to consummate their emotional and spiritual closeness in physical intimacy, is tied by nature (to be clear, by the very functioning of the bodily organs involved) to the awesome power of bringing forth new life—rather, it is a deeper reflection of the design of the Creator that graciously allows that form of love to essentially cooperate with His own power of creation. Cooperate with and not copy to be sure, for no human power could approach the unique divine power of creation *ex nihilo* that brought the whole universe into being; but, nonetheless, by cooperating with this divine purpose through the very act of their marital intimacy, it endows their union with a meaning and fruitfulness and beauty to which mere sense-gratifying sex acts appear crude in comparison.

This world view is elaborated at some length to show why Walker may be right that it is a powerful hurdle to his real goal, and also that religion and nature, though

at first seemingly two separate hurdles, are actually closely intertwined in the way that the one invests the other with meaning and leverages it for its resonance with people who experience it first hand through marriage and child rearing. As long as this and similar world views have power, there will remain the real likelihood that *even if* the civil law recognizes same-sex marriage, the result will not be instant status for same-sex marriage, but rather *decreased status for the civil law*.

There is nothing Walker can do about this in this decision. If he can bring about the change in civil law, he will certainly in his mind, and the minds of same-sex marriage advocates, have done his job admirably for today. But by laying the foundation for identifying the real enemies of full acceptance, he prepares the record for the cases that will surely follow. What will be their targets?

Again, the record gives ample clues. Recall Walker's breathtaking finding that there is no rational reason to prefer biological parenting at all. This is summed up most succinctly in the findings used by Walker to support his legal conclusion that same-sex parents and opposite-sex parents are of equal quality. Again, it would be one thing to acknowledge that many homosexuals could be good parents, and in specific circumstances better than a specific natural biological parent. But Walker's finding is that "the genetic relationship between a parent and a child is *not related* to a child's adjustment outcome."⁴⁰ The whole presumption of the law that a biological father or mother has certain rights because of that biological relationship is now seriously undermined. If we can treat as unhelpful, or in any event irrelevant, the biological and genetic bond between parents and children, what reasons are there for legal custody to go by default to the biological parents? Since these bonds are irrelevant, and invoking family-court notions of "best interest of the child," how far a step is it to envision a *Perryesque* opinion deciding that a better, more suitable, set of parents would deserve custody of a child, especially compared with a set of biological parents that were likely to "indoctrinate" the child in "anti-egalitarian" world views? This might seem an extreme and unrealistic concern, except that there are published views of authors like Richard Dawkins, and feminist legal scholars, advancing the notion that religious upbringing is a form of "child abuse."

Besides using a breaking of the "biological bond" in this very direct and practical way to undercut the transmission of religious world views to children, there is a more far-reaching way in which this severance would hold out the glimmer of a perhaps decisive victory for the complete obliteration of gender roles. As noted above, the differentiated and complementary gender roles attending procreation and parenting are the "inconvenient truth" that lurks in the background to stymie the complete end to gender, and consequent obliteration of any discrimination, indeed any meaningful differentiation between same-sex and opposite-sex marriage. Yet how far would this go? If the elimination of any legal "preference" for biological relationship carries such an important victory for the marriage-equality and broader

homosexual-acceptance agenda, might some consider it worthwhile, to bring it about, even to make all child rearing “egalitarian”? Since biological child raising even as a default position creates the one stubborn argument for favoring opposite-sex marriage, and at the same time allows the propagation of undesirable world views, why not eliminate it entirely? Already we have seen steps toward biological parenting being treated as a commodity: rent-a-womb surrogates, all manner of artificial conception, sperm and eggs sold on eBay for their eugenic qualities. If biological reproduction is recast as a commodity, commodities, like all commercial transactions, can be controlled by the state. Welcome to Brave New World.

Of course, we would expect many voices to speak out against such a trend, but, most likely, wouldn't they be the very voices of the same world views that have proven so troublesome? There might be some old-time liberals, people who remember where eugenics really came from, and who actually read *Brave New World*. For the most part, though, we would expect opposition to come from religious world views, precisely because they have the strongest views on the importance of biological parenting not only for society, but also because of its metaphysical meaning.

If the continued, cogent expression of the religious world views proved an ongoing hurdle to homosexual acceptance, how long would Walker continue to promise reassuringly that no religious group would be required to recognize marriage for same-sex couples against their religious beliefs?⁴¹ We have already seen that the cause of homosexual acceptance will not readily brake for others' First Amendment rights. Whether it was the so-called Human Rights Commission of the City of New York trying to force the Ancient Order of Hibernians, an Irish Catholic fraternal organization, against their will, to include an Irish GLBT float in their privately organized New York St. Patrick's Day Parade, or a majority of the same Massachusetts Supreme Judicial Court that invented same-sex marriage in *Goodridge* having upheld Massachusetts' attempt to compel a Boston St. Patrick's Day Parade to do the same, the brigades of political correctness are not gentle when it comes to the free-speech or free-exercise rights of those who would stand in the way of progress. Fortunately, in both those cases, the federal courts admirably performed their role of vindicating constitutional rights, in the latter case by a unanimous decision of the U.S. Supreme Court overruling the Massachusetts SJC.⁴² But just as Lamb's research could not be “sealed” from the evolving academic political power of the pro-homosexual agenda, how long will the federal courts, coming as they do from a law-school culture that is largely controlled by the same agenda, continue to apply those principles impartially? The U.S. Supreme Court's 5-4 decision just last June in *Christian Legal Society v. Martinez*⁴³ is hardly encouraging in this regard. Once the legal framework for traditional marriage, though supported by the people and amply rational, is thrown aside by

judicial fiat, the next target will be the very world views and natural order of procreation itself that stand in the way of complete social affirmation of homosexuality and the obliteration of gender.

VIII. Conclusion

Perry aims a dagger at the heart of marriage as we know it. Taking it at its word and applying principles of consistency and logic, it cannot help but result in the expansion of marriage until it encompasses bigamy, incest, wider groupings of association, and finally loses its meaning. As regrettable as this would be, it might be preferable to a regime that insisted on a sacred marriage based on sexual intimacy, but did so in a way that tried to obliterate any distinction based on gender. What would follow would inevitably be a gradual delinking of marriage and intimacy from biological procreation, and the substitution of technological means and commercialized surrogacy for traditional biological mother-and-father-based families. Ultimately, the temptation would arise for the state to take over the role of assigning children to suitable “parents,” since biological ties would no longer be recognized as dispositive. The likelihood of this progression of events can be reduced by recognizing the rationality and validity of traditional one-man-one-woman marriage and defending it. Stopping the dangerous logic of *Perry* in its tracks is the place to start, ideally by judicial reversal, if necessary by other constitutional means.

NOTES

1. Pub. L. 104-199, 100 Stat. 2419 (Sept. 21, 1996).
2. 704 F. Supp. 2d 921 (N.D. Cal. 2010). Citations in this article to the Findings of Fact (“FF”) and opinion in *Perry* are to the slip opinion, which can be easily accessed at <https://ecf.cand.uscourts.gov/cand/09cv2292/files/09cv2292-ORDER.pdf>.
3. As of this writing, *Perry* is on review in the U.S. Court of Appeals for the Ninth Circuit, with oral argument having been heard on December 6, 2010, before Circuit Judges Reinhardt, Hawkins, and N. R. Smith. In addition to the constitutional merits, the appeal involves a complex Article III standing issue related to the right of Proposition 8’s proponents, as defendant-intervenors, to maintain the appeal, in light of the refusal of California officials to defend the measure. On January 4, 2011, the Ninth Circuit panel decided that its resolution of this federal standing question required a determination of whether California law would afford defendant-intervenors such a right, and certified such question to the Supreme Court of California. The appeal was stayed pending a response. On February 16, 2011, the Supreme Court of California voted unanimously to take up the certified question, and a hearing will likely be set for late 2011. The jurisprudential aspect of this article focuses on the substantive constitutional merits of Judge Walker’s Due Process and Equal Protection conclusions, and discussion of the appeal is omitted.
4. 798 N.E.2d 941 (Mass. 2003).
5. *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008); *In Re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Varnum v. Brien* 763 N.W.2d 862 (Iowa 2009). Even in the judicial arena, though, the majority of state and federal courts to consider the issue so far have upheld the constitutionality of the traditional limitation of marriage to one man and one woman and rejected any constitutional right of same-sex couples to be married. *See, e.g., Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. App.

- 2005); *Standhardt v. Superior Court ex. rel County of Maricopa*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006)(upholding Nebraska state constitutional amendment limiting marriage to one man and one woman against federal constitutional challenge).
6. In Re Marriage Cases, *supra*.
 7. As noted above, as of this writing, the Maryland Senate has approved the Civil Marriage Protection Act, which would recognize same-sex marriage; consideration has moved to the Maryland House of Delegates. If this Act is approved and signed by the Governor, then six rather than five states would recognize same-sex marriage, and three rather than two would have done so without judicial compulsion.
 8. In contrast to Congressional attitudes in support of the Defense of Marriage Act, Congress passed amendments to the National Defense Authorization Act, signed into law by President Obama on December 22, 2010, that repealed the so-called “Don’t Ask, Don’t Tell” policy barring homosexuals from openly serving in the U.S. Armed Forces. While some have been puzzled by a perceived inconsistency between these positions, they should not be. As discussed at length, *infra*, Proposition 8 supporters reject the charge that their opposition to same-sex marriage connotes some “naked desire to harm” homosexuals, and rather assert that it is the unique aspect of marriage as cementing the biological family relationship that requires it be limited to opposite-sex couples. In this light, it should not be surprising that many who oppose same-sex marriage also oppose *unnecessary and invidious* discrimination against homosexuals, in contexts, such as the military or commercial workplace, where gender and sexual orientation simply may not have the relevance that they do in the context of promoting the stability of biological family units. By the same token, it is farfetched to suggest, as Attorney General Eric Holder does in his public statement explaining the decision to cease defending DOMA in court, that repeal of Don’t Ask Don’t Tell somehow changes the constitutional landscape for same-sex marriage, or in any way undercuts the overwhelming evidence cited in the text that same-sex marriage has never approached the status of a “fundamental right.”
 9. 388 U.S. 1 (1967).
 10. 539 U.S. 558 (2003).
 11. *Id.* At 605.
 12. 381 U.S. 479 (1965).
 13. 388 U.S. at 12.
 14. *Loving*, 388 U.S. at 12, citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).
 15. 410 U.S. 113 (1973).
 16. See, *Hernandez*, 7 N.Y.3d at 359.
 17. *Perry*, slip op at 127.
 18. *Accord*, *Citizens for Equal Protection v. Bruning*, 455 F.3d at 868, and cases cited therein.
 19. *Perry*, FF 70.
 20. FF 71.
 21. FF 70.
 22. Testimony from Day 5 of *Perry* Trial, as reported by *New York Times* blog at <http://bayarea.blogs.nytimes.com/2010/01/15/same-sex-marriage-case-day-5-raising-children/>
 23. *Perry*, Slip Op. at 128 (emphasis added).
 24. FF 55.
 25. Forty-seven states, should Maryland pass the Civil Marriage Protection Act.
 26. 98 U.S. 145 (1878).
 27. *Id.* At 164.
 28. 478 U.S. 186 (1986).
 29. *Id.* at 196.
 30. *Lawrence*, 539 U.S. at 605.
 31. *Perry*, slip op at 110, 114.
 32. FF 52, slip op at 116.
 33. E.g. FF 46, citing psychologist Gregory Harek: “Among gay men, 87 percent said that they experienced no or little choice about their sexual orientation.”
 34. To be sure, an unchosen sexual orientation might do much to mitigate individual responsibility for certain actions. Many unchosen genetic predispositions may make it more objectively difficult for those with such genetic makeup to conform to norms that are, on a societal basis, most conducive to the common good. To this extent, unnecessary discrimination based on such actions

may be wrongful, and attacks on persons based on the predisposition itself may be rightly seen as hateful. The point here, however, is that the unchosen nature of the predisposition *vel non* does not remove all of its consequences from *any* moral analysis, nor does it require that broader considerations of the public good be ignored when society considers which activities and lifestyles to promote.

35. FF 77.

36. FF 77(c).

37. 492 U.S. 490 (1989).

38. *Id.* at 566-67.

39. *Id.*

40. FF 73 (emphasis added).

41. See, FF 62.

42. See, Hurlley, *South Boston Allied War Veterans Council v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), reversing 418 Mass. 238, 636 N.E.2d 1293; *New York County Board of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp 358 (S.D.N.Y., 1993).

43. 561 U.S. ___, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010).

POSTSCRIPT

Since the submission of this article in early March, several developments of note have occurred.

The Civil Marriage Protection Act which was passed by the Maryland Senate, see, note 7, supra, and which would, if passed, have made Maryland the sixth state to allow same-sex marriage, fell short of expected support in the Maryland House of Delegates. On March 11, the House of Delegates leadership conceded it could not pass and withdrew the Act from the floor in a major defeat for same-sex marriage advocates in that state. As most same-sex marriage supporters had assumed House support was even greater than that in the Maryland Senate, this result was quite surprising. Analysis suggested that African-American constituencies were particularly active in raising objections to the legislation with their elected delegates. In line with Section II, supra, these constituencies rejected the comparison of laws limiting marriage to a man and a woman to pre-Loving racial discrimination in marriage laws.

In April, a move by same-sex marriage supporters in Rhode Island to pass legislation in that state, legislation that Governor Lincoln Chafee had promised to sign, stalled due to lack of support in the legislature.

As of this writing, efforts are under way in New York to pass same-sex marriage legislation, which have the strong support of Governor Andrew Cuomo. New York's Senate rejected similar legislation in 2009.

All of these developments show that same-sex marriage continues to be a politically heated issue that is being actively engaged by the democratic process. At the same time, with same-sex marriage having been rejected every time it was considered by popular referendum, and with still only two states that have legislatively adopted same-sex marriage free of judicial compulsion, Judge Walker's assertion that "the time has passed" for traditional notions of marriage remains as spurious as ever.

On April 25, a motion was filed in the Perry litigation to vacate Judge Walker's original decision. The motion is based on Judge Walker's failure to recuse himself from the case in light of the fact that, as disclosed in interviews he gave in early April following his retirement from the federal bench, he had been in a ten-year same-sex relationship, and would stand to benefit directly from his ruling, in contravention of judicial ethics rules. The motion is under consideration as of this writing.

APPENDIX A

[Paul Greenberg is the editorial page editor of the Arkansas Democrat-Gazette and a syndicated columnist. The following columns appeared (respectively) January 4, and January 21, 2011, and are reprinted with permission. © 2011 Tribune Media Services, Inc.]

They're Back! The Return of the Death Panels

Paul Greenberg

They were supposed to be gone. They were supposed never to have existed. Remember the foofaraw over the part of ObamaCare that was going to have Medicare finance, uh, consultations about end-of-life treatment? They soon were dubbed death panels. The name stuck, and every time advocates of the idea derided it — untrue! fictional! absurd! wholly imaginary! — they only gave it more currency.

Which term do you prefer, end-of-life counseling or death panels? It makes quite a difference when discussing the issue. Because when it comes to a political conflict, vocabulary remains the Little Round Top of every engagement, the strategic height that determines the outcome of the battle. And any mention of death tends to, well, kill off enthusiasm for a proposal. Whether we're talking death panels or the death tax. (Its advocates much prefer to speak of the estate tax even if it's the same thing.) Why be blunt? Especially if it's going to cost your side of the debate votes.

Awkward facts must be sidestepped, euphemisms invented. The way abortion has become Choice. Names count; what a proposal is called may determine whether it ever gets into law. And so the death panels/end-of-life consultations had to be dropped from the final version of ObamaCare, which goes by an official euphemism of its own: the Patient Protection and Affordable Care Act (PPACA) of 2009. And its Section 1233 raised concerns that the patient might be protected to death.

At the least the controversial section was sure to produce a whole new paramedical sub-specialty. For where there's a Medicare payment, payees are bound to spring up. (In economicspeak, this is called incentivizing.) What do you think the practitioners of this new art/science would be called? Nothing very precise, one can be sure. Preferably something long and latinate, a term that softens the hard edges of its meaning, something high-toned, even classical. How about thanatopsists?

You can almost see the new occupation being plugged into every top-flight medical center's table of organization. ("Thanatopsy? It's in Annex B on Level II. You'll have to take the elevator to the main floor, cross the parking lot, go through the underground garage, enter the red door and get off on Blue Level. It's simple. Just follow the signs. Be sure to bring your parking ticket, photographic ID, proof of insurance, medical records, list of pharmaceuticals, and....")

Thanatopsy. What better way for fledgling bioethicists to begin a long career of not calling things by their right names? Why alarm people by facing the facts of life, or rather death? Better to speak of end-of-life care or advance planning or, well, anything but death. Euphemism is the health of bioethics, which is never to be confused with ethics, or at least the kind explored by Aristotle or Bonhoeffer.

It's a strange thing: The very people so eager to plan for death never use the

word. In any event, Section 1233 and its provision for periodic consultations about (insert appropriate euphemism here) never made it into law. Oh, death, where is thy sting, grave thy victory?

Answer: In a brand-new Medicare regulation in effect as of this brand-new year — January 1, 2011 A.D. Issuing a regulation is always the fallback position for an administration that can't convince Congress to follow its lead. What an inconvenience it is to have to deal with popularly elected legislators anyway; they're so fickle, so sensitive, so slow to see reason ... and so accountable to the voters at the next election. Why not just work around them? Spare them the heat. We'd be doing them a favor, right?

And so it was done. Section 1233 now has been reborn as a Medicare regulation authorizing payment for “voluntary advance planning” to discuss, uh, end-of-life issues with patients and provide them with information about preparing an “advance directive” should they develop a life-threatening illness. Or well before.

With the disappearance of the old-time family doctor (and friend) in American medicine, the kind of physician who might be counted on to know a patient's condition, convictions, temperament and particular idiosyncrasies, we can now rely on experts to conduct these consultations. What a comfort. Kind of.

Don't get me wrong. There's no reason to doubt the president when he assures us in his ever-delicate way that there's nothing in his vast new health plan that “would pull the plug on grandma.” These doctors, or some specially trained intern on their staff, would just ask the old lady a few questions periodically.

But as every polemicist knows, the way a question is asked can determine the answer. To quote one of those experts — a thanatopsist? — at the University of Michigan, someone with heart disease might be asked: “If you have another heart attack and your heart stops beating, would you want us to try to restart it?” Or someone with emphysema could be asked, “Do you want to go on a breathing machine for the rest of your life?” Or the cancer patient would be asked, “When the time comes, do you want us to use technology to try and delay your death?” As if anyone could know when the time will come, and how the patient will feel about it then. And please note the phraseology: It's not save your life, but delay your death. Never underestimate the power of negative thinking.

Life-and-death decisions that once could be safely left to the common-sense wisdom of the doctor most familiar with the patient now can be boiled down to a standard form — and a standard, billable procedure. Welcome to this Brave New World where any mention of death is banished. Just call it end-of-life. Euphemism is the first sign that you don't want to look too closely at what is being proposed.

Like a zombie who was supposed to have disappeared at the end of the first act of this drama, Section 1233 now has been revived. Even though it's taken on the form of a regulation instead of legislation. Thanks to the convenience of modern bureaucracy, all that messy business of congressional hearings and votes and open debate can be avoided just by issuing a new rule. But don't noise it about. Its modest backers have tried to keep its resuscitation as quiet as possible.

To quote an e-mail sent out by the Hon. Earl Blumenauer, a congressman from Oregon and an enthusiastic backer of this stealth regulation, the new rule represents a “quiet victory.” Or as he told supporters: “While we are very happy with the result, we won’t be shouting it from the rooftops. ... The longer this goes unnoticed, the better our chances of keeping it.”

The surest sign of a suspect political project is that it has to be adopted as quietly as possible. In this case, quiet as death.

So those celebrating this latest advance in society’s pervasive culture of death are advised to sip their champagne without making much ado about it. No sense in alarming the rubes, who tend to have this irrational attachment to life.

Who Needs Democracy?

What a bother having to deal with Congress, public opinion, elections, the whole complicated web that the Founders in their antiquated vocabulary referred to as the consent of the governed.

How much simpler to pass your own laws. Just call them executive orders or administrative rules, official regulations, whatever designation applies. Hesto, presto, a provision nixed after long hours of tedious debate and much public furor can be enacted by arbitrary decree. It’s so much quicker that way, and nobody needs to know. At least till the public wakes up.

In place of the messy, unpredictable democratic process, let an expert make the decisions. No fuss, no muss, no votes, not even a discussion. Just a decision. Problem solved. There, see how easy that was? Who needs all those old checks and balances, anyway? They just get in the way and upset people. Knowing what’s going on so often does.

See the case of the death panels—excuse me, consultations about end-of-life treatment—that were authorized by the new head of federal Medicare and Medicaid Services. At least till the public got wind of what was going on, and this administration had better and more democratic thoughts. And rescinded the controversial new regulation.

By deciding which medical services will be subsidized, and which won’t be, the country’s health-care czar can pretty much determine the shape of American medicine. Subsidize a procedure, test, treatment or just consultation, and there’s bound to be more of it. That’s not some sophisticated medical principle, it’s just simple economics. Hey, it’s free—at least to the consumer—so why not take advantage of it?

The provision for “end-of-life consultations” and “advance planning” was nixed in the rundown to the final passage of ObamaCare, that largely unexamined 2,000-page horse-choker of a bill. But the administration’s man in health care wasn’t about to let that stop him. He just issued a regulation—ever so quietly, almost unnoticeably—and the deed was done. Who needs democracy?

The game being played here should be familiar to anyone who's ever been pressured by an insurance company to get somebody in the family into hospice care as soon as possible and so avoid more expensive treatment. (I've been there.) The impetus for such pressure isn't medical but economic. Or as a doctor friend e-mails me:

"Many people do not understand that the intent of end-of-life planning is not so much whether someone should get care in an ICU, but rather to discourage expensive therapies which statistically either have only a limited degree of success or may prolong life for only several months or years, particularly among elderly patients. I emphasize the word statistically, since statistics can never reflect every individual case, and therefore treating patients based solely upon alleged statistical data is, I believe, medically immoral, inasmuch as the physician is supposed to be treating a patient and not a statistic.

"Doctors have always discussed various therapeutic options and the patient's prognosis with their patients—this is standard medical practice and does not require separate reimbursement. The obvious intent of this administrative decree is to have doctors dissuade patients from certain therapies in order to limit health costs. This may sound innocuous, but, when combined with Medicare's ultimate refusal to pay for these therapies, it starts to become clear that these consultations can easily morph into discouraging the patient from embarking on further expensive treatment—a decision that may be based on bureaucratic, not medical, criteria."

And if doctor-patient consultations about end-of-life (don't use the D-word) are to be paid for by Medicare like any other procedure, surely we'll want to include the appropriate medical specialist(s) in the consultation—cardiologist, oncologist, nephrologist, psychiatrist, geriatrician, whatever applies. Plus a radiologist or maybe two. (Different doctors can read the same X-ray differently.)

And what about your minister/priest/rabbi/imam/psychologist, depending on your religious or irreligious preference? And don't forget the morticians. Who more appropriate to consult with about end-of-life arrangements? They deal with the inevitable every day, and offer good rates for advance planning.

It doesn't take much imagination to see how what is now the quiet little doctor-patient conversation about When the Time Comes could morph into Sarah Palin's death panels, or even a death industry, given enough of a government subsidy. Call it thanatopsy.

Ridiculous? Unthinkable? Lots of things are, or at least were at one time. Long ago and in another culture, when *Roe v. Wade* was first handed down (Jan. 22, 1973), those wide-eyed alarmists over on the Religious Right warned that it could lead to a hundred thousand perfectly healthy babies being aborted every year. Ridiculous? Unthinkable? Turns out they were understating the case. By a factor of 10. The unthinkable can become the acceptable, even ordinary, with remarkable ease. It's extraordinary what we learn to accept as ordinary.

And shouldn't advance directives about medical care, or declining it, involve legal as well as medical advice? Badmouthing lawyers is an American habit by

now, and I've done more than my share of it, but while lawyers in general may be less than popular, one's own is indispensable—a source of counsel, support, comfort and even friendship.

The biggest hole in the administration's regulation, which was soon terminated itself, was that it left out the role of lawyers and law in advance planning. Not that the government should be in the business of subsidizing such legal consultations; responsible people will do it on their own. And have been doing it. Then why should government be subsidizing such consultations?

It's hard to think of a reason except to hold down the medical costs that government pays through Medicare and Medicaid. So when the administration is caught pulling a sneak play like this, you have to wonder if it's practicing medicine or just cost-accounting.

In a society acculturated to devaluing life, euthanasia for economic reasons shouldn't trouble any more than abortion for any reason at all. Or even destroying human embryos for research purposes.

Just last March, this president, overturning precedent (the Dickey-Wicker Amendment) and his predecessor's long-considered and carefully nuanced policy, proudly announced that the federal government would now subsidize experiments that would destroy human embryos in order to further stem-cell research.

The first federal grants for embryonic stem-cell research were announced just last month with little fanfare. Death goes on. If ever so quietly. What once might have shocked becomes routine. Hannah Arendt's phrase about the banality of evil remains relevant—if anyone still remembers it.

Far from rebutting moral objections to such a change of policy, Barack Obama seemed oblivious to them. If he spoke of them at all, it was as an inconvenience. An inconvenience. Morality. Ethics. Reverence for life. They were all dismissed as “inconvenient” obstacles to scientific progress.

But why should we ordinary citizens concern ourselves with the ethics of life and death? Leave it to the experts. Science *uber alles*! The president's pronouncement could have been translated from the original German. For when it comes to embryonic stem-cell research, Barack Obama has achieved what some of us might once have thought impossible. He's made George W. Bush sound like a Socratic philosopher.

APPENDIX B

[Anne Conlon is managing editor of the Human Life Review. A different version of the following appeared in the February 2011 issue of catholic **eye**, a monthly newsletter, published by the National Committee of Catholic Laymen, which she edits.]

A Philadelphia Story

Anne Conlon

“In fact, Gosnell’s crimes only underline the need for all women to have access to affordable and genuinely safe providers. His patients subjected themselves to terrible abuses because that’s what women will do when they’re desperate and they don’t see other options . . . No woman would subject herself to such a place if she thought she had somewhere else to go”—Michelle Goldberg, www.thedailybeast.com, Jan. 20.

Ms. Goldberg, a New York-based journalist (and author of *Kingdom Coming: The Rise of Christian Nationalism*), speaks for what this newsletter has called the abortocratic class, those for whom legal abortion is a *sine qua non* of the civilized life. “Gosnell’s crimes,” in case you hadn’t heard about them—national media coverage was fast, furious, and gone with the wind—were *murders*: Dr. Kermit Gosnell, aged 69, was indicted on eight counts last month by a Philadelphia grand jury that flat out called his Orwellian-named Women’s Medical Society an “abortion mill”—a “mercenary,” “corrupt” and “criminal enterprise, motivated by greed.” [N.B.: There are no “scare quotes” in what follows here. All unattributed quoted material is taken from the grand jury report, accessible online at www.phila.gov/districtattorney/PDFs/GrandJuryWomensMedical.pdf]

Gosnell, a “family practitioner” with no OB-GYN certification, was charged in the deaths of one woman from a botched abortion, and seven infants, who were delivered alive at his “baby charnel house” and promptly put to death in a manner not unlike the scissors-stabbing abortion procedure that, despite a decade-long campaign by abortocrats to preserve it, was outlawed when George W. Bush signed the Partial Birth Abortion Ban Act of 2003—upheld by the Supreme Court in *Gonzales v. Carhart* (2007).

“I understand the one count,” Gosnell said at his arraignment, “but I don’t understand the seven counts.” Poor Gosnell, who, the grand jury reported, “routinely cracked jokes about babies whose necks he had just slit.” Okay, not so poor: He made nearly \$2 million a year charging low-income women—mostly immigrants and minorities—high prices for late-term abortions performed “without regard for legal limits.” His back-alley was a long way from the mainline beat of Ms. Goldberg; or, for that matter, Justice Anthony Kennedy, who in his majority opinion for *Carhart* had painstakingly mapped out “the way in which the fetus will be [legally] killed,” identifying the “anatomical landmark” or “prohibited point,” past which the abortionist may not deliver a *live* child. But “an abortion procedure involving the delivery of an expired fetus,” Kennedy affirmed, was “not restrict[ed]” by the ban. Kennedy also stressed it was the “intent” of the abortionist that mattered: “[A] doctor . . . will not face criminal liability,” he stipulated, “if he or she delivers a fetus beyond the prohibited

point by mistake,” and then “completes [the] abortion by performing an intact D&E,” that is, the (otherwise outlawed) partial-birth procedure.

Location, location, location. Gosnell, who also ran a lucrative side practice dispensing “fake prescriptions” for painkillers like Oxycontin—this, not his infanticide business, was what led prosecutors to him—evidently did get the message that *where* the baby was when he killed her might have legal implications. The grand jury report notes that after “the law changed,”

[he] tried to inject a drug called digoxin into the fetus’s heart while it was in the womb.

This was supposed to cause fetal demise in utero. But because Gosnell was not skillful enough to successfully administer digoxin, late-term babies continued to be born alive, and he continued to kill them by slitting their necks.

Perhaps, as the testimony of one of his employees implies, Gosnell thought his actions were covered by Kennedy’s “intent” loophole:

So he tried to do the needle in the stomach and that’s what was supposed to have killed the baby before the baby came out, but if it didn’t, he’ll say, oh, well, the law says that I can do it. I can still slit the baby’s neck because it didn’t work. The needle didn’t work.

Over the years he apparently killed hundreds of “viable, moving, breathing, crying babies”—“The bigger the baby, the more he charged,” the report states—by, to use his cuddly term, “snipping” their spinal columns after piercing their necks with scissors. But records exist only for seven of these acts, hence the seven counts that, while baffling to Gosnell, have roused the abortocratically correct establishment from its usual *omerta*: “If [he] is guilty of even a fraction of the carnage he’s been charged with,” Goldberg ventured, “he should spend the rest of his life in prison.”

Reading the grand jury report (261 pages plus appendices) is to be reminded that truth can be *scarier* than fiction. If Kermit Gosnell and his grisly crew were characters in a novel or movie (except perhaps the *Sweeney Todd* variety), reviewers would pan the plot for straining credulity. But for decades this really happened: During the day, Gosnell’s unlicensed staff induced labor in pregnant women—most in their second or third trimester and many past the 24-week legal limit for abortion—while administering anesthesia “cocktails” to keep them quiet, often rendering them comatose. “He didn’t want [women crying out in pain] in his office,” one staffer testified. “He didn’t like nobody calling the police or anything.” The doctor showed up in the evening to deliver and execute the babies. But according to the report, babies often “fell out” during the day—on recliners, on the floor, in toilets. “If Gosnell was absent, his employees would kill viable babies.” One employee “described how he had to lift the toilet so that someone else—he said it was too disgusting for him—could get the fetuses out of the pipes.” Another “told the jurors that Gosnell once joked about a baby that was writhing as he cut its neck: ‘that’s what you call a chicken with its head cut off.’”

What do you call someone like Kermit Gosnell? How about serial killer? We wonder what FBI profilers on the popular TV show *Criminal Minds* would make

of the man the grand jury branded a “butcher.” When the real FBI raided his clinic on Feb. 18, 2010, agents found “fetal remains haphazardly stored throughout” the “filthy” and “deplorable” place—“in bags, milk jugs, orange juice cartons, and even cat-food containers.” In a freezer in the basement was the “intact 19-week fetus of Mrs. [Karnamaya] Mongar,” the woman whose death—from an anesthesia overdose three months earlier—Gosnell has been charged with. FBI agents also found “a row of jars containing just the severed feet of fetuses.” Gosnell said he had kept them “should paternity ever become an issue,” but as the jury pointed out, “[a] small tissue sample would suffice to collect DNA.”

The butcher didn’t just have a foot fetish. Another staffer told jurors “the doctor would often photograph women’s genitalia before he performed their abortions.”

According to Massof, Gosnell told him that he was photographing women from Liberia and other African countries who had undergone clitoridectomies . . . for “his teaching,” but Massof said that he was unaware that Gosnell taught anywhere. Gosnell would often show the photographs to Massof and exclaim about the skill of the surgeons who had sewn the women’s labia together, leaving only a small opening to allow menstrual flow.

Steven Massof, or “Dr. Steve,” as he was known at the Women’s Medical Society, went to medical school in Grenada but never received a license. The 48-year-old “fake doctor,” who worked for Gosnell for five years, was indicted on two counts of murder for slitting the necks of living, breathing infants the way, he said, his mentor had taught him to in “maybe 2004, sometime within a year I started working there.” (That was two years after Bush signed the Born Alive Infants Protection Act, which extended full legal rights to babies who survived abortion attempts.) Massof was the resident executioner of babies who “fell out” when Gosnell wasn’t around; “slitting,” he told the grand jury, was “standard procedure.” In their report, jurors concluded that “all the employees of the Women’s Medical Society knew [what was going on]. Everyone there acted as if it wasn’t murder at all.” They weren’t the only ones. Here’s what a friend of Massof’s who was interviewed by the *Pittsburgh Tribune-Review* had to say about “Dr. Steve”:

Steven is not an evil monster . . . I think he got caught up working for an untrustworthy person and was trying to keep his job. He’s the kind of person you would want to have as a friend. His behavior has always been above reproach . . . This is a tragedy on so many levels. Judgment has been passed, and he has been tried and convicted in the public eye, and it’s unfair. He was a model citizen (January 29).

Pace his friend, this “model citizen” was “convicted” by his own grand jury testimony.

Katha Pollitt, writer for the *Nation* and prominent abortocrat, complains that “prochoicers are being blamed for this rogue operator” when proliferators are really at fault. She argued in a Jan. 27 column that “[w]hat fuelled Gosnell’s business were the very restrictions the [Pennsylvania] legislature was so keen on passing—parental notification, waiting periods, biased counseling and, most important, a ban on state

funding for abortion for low-income women.” Ah, yes, the women. Like Goldberg, Pollitt’s concern isn’t for the little ones Gosnell and his protégés—one was a 15-year-old high-school student when she began working for him—dispatched, but for their “desperate” mothers: “Only women who felt they had no better alternative would have accepted such dangerous, degrading and frightening treatment,” she claims. And then this: “In a way, *that’s the saddest part*—that women didn’t feel they could turn around and leave” (our emphasis).

Pollitt laments that Gosnell’s clients were willing to put their own lives at risk because they deemed death a “better alternative” to bearing the child they were carrying. If that was indeed the case, who is responsible for so many women suffering from such a grossly masochistic misperception? Prolifers, who have established a vast network of crisis pregnancy centers nationwide? Or pro-abortion-on-demand ideologues like Goldberg and Pollitt—and groups like NARAL and NOW—who constantly pressure politicians to close down these centers where desperate women are offered a truly life-saving choice? (Regarding “choice,” the grand jury was “particularly appalled” by evidence that Gosnell “performed forced abortions” on women who would have preferred to keep their babies, but whose “partner or parents” didn’t agree.)

In March, the New York City Council passed a bill forcing pregnancy centers to blazon their walls and advertising with disclaimers saying they don’t dispense contraception or do abortions. Should abortion clinics have to post disclaimers saying they don’t do abstinence counseling or encourage adoption referrals? Like bubble-zone laws that restrict peaceful protest on public property outside abortion clinics, forcing these disclaimers on crisis pregnancy centers is another example of how abortion correctness continues to distort our legal system. In the years since *Roe*, as the Philadelphia grand jury report exhaustively details, a bureaucratic double standard on abortion policy spawned layers of “official neglect,” amounting to “utter disregard both for the safety of women who seek treatment at abortion clinics and for the health of fetuses after they have become viable.” Why was this allowed to happen? “We think the reason no one acted is because the women in question were poor and of color, because the victims were infants without identities, and because the subject was the political football of abortion,” the jurors concluded. (The occasional white student or woman from the suburbs who found her way to Gosnell’s clinic, however, got special attention from the doctor himself and “did not have to wait in the same dirty rooms as black and Asian clients.”)

Even Goldberg had to admit that the “grand jury report is scathing about the failures of the Pennsylvania Department of Health.” Section VI, titled “How Did This Go On So Long?” and running 80 pages, is indeed a scathing indictment: of the state’s health department, which, it charges, “has deliberately chosen not to enforce laws that should afford patients at abortion clinics the same safeguards and assurances of quality health care as patients of other medical service providers”; of Pennsylvania’s Department of State, which ignored complaints about Gosnell and “failed to investigate a 22-year-old patient’s death caused by [his] recklessness”;

of Philadelphia's Health Department, whose employees "ignored the serious—and obvious—threat to public health posed by Gosnell's clinic"; and finally, of "fellow doctors who observed the results of Gosnell's reckless and criminal practices," when his injured victims sought treatment at nearby hospitals, and "failed to report him to authorities."

Curiously, while the grand jury recommended indictments for Gosnell and several of his staff, it did not do so for any public employee, despite adducing that "the [state] Department of Health's neglect of abortion patients' safety and Pennsylvania laws is clearly not inadvertent: *It is by design*" (their emphasis). Even Janice Staloski, who over the years held several important health department jobs but "never ordered *even one* inspection" of an abortion facility, and "ignored two deaths and other serious injuries at [Gosnell's] clinic," was spared judicial action. Meanwhile in Philly, another grand jury working for Seth Williams—the city's District Attorney, and a Catholic—has issued another scathing report, this one concerning clerical sex abuse. Based on information the DA received from the Archdiocese itself, three priests and a lay teacher were indicted for raping two minor boys. And, for the first time, a priest who was *not* alleged to have engaged in sexual abuse, Msgr. William Lynn, Secretary for Clergy under Cardinal Anthony Bevilacqua (who retired in 2003), was indicted for endangering the welfare of a minor—a charge justified, the report states, by "his lengthy history of failing to investigate allegations of sexual abuse, allowing known abusers unsupervised access to children, and recommending transfers of credibly accused priests to unsuspecting parishes . . . *knowing* the danger in which he was placing innocent children." We don't question the appropriateness of the charge. But why did Ms. Staloski, who had to have known the dangers to which she was submitting countless women, get a pass? Could it be the political football of abortion?

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[*William McGurn, a former chief speechwriter for President George W. Bush, is a VP of News Corp. where he writes speeches for Rupert Murdoch. He also pens the weekly Main Street column for The Wall Street Journal. The following appeared in the Journal January 18, 2011 and is reprinted with permission of the author and The Wall Street Journal © 2011 Dow Jones & Company, Inc. All rights reserved.*]

Rising Above *Roe v. Wade*

William McGurn

Are babies better than abortions?

That's not a question we are accustomed to hearing. For the most part, abortion—America's most divisive issue—plays out as a question of competing rights. So it will be this weekend as pro-life and pro-choice legions each mark the 38th anniversary of the Supreme Court's landmark *Roe v. Wade* decision on abortion.

Yet a simple figure released earlier this month by the Chiaroscuro Foundation, a private nonprofit organization, provokes a different question. After crunching the latest statistics from New York City's Health Department, the foundation reported that 41% of pregnancies (excluding miscarriage) in New York ended in abortion. That's double the national rate.

So again the question: As a society, does this figure say anything about the choice between a baby and abortion? Even for those who believe the choice for an abortion belongs to a woman alone and ought to be unfettered by city, state or federal law, is there any ratio such a person would say is too high?

The question becomes even more compelling when broken down by race. For Hispanics, the abortion rate was 41.3%—i.e., more than double the rate for whites. For African-Americans the numbers are still more grim: For every 1,000 African-American live births in New York, there were 1,489 abortions.

These numbers can make *Roe* seem very distant. Years ago, Bill Clinton famously summed up the pro-choice argument as “safe, legal, and rare.” What can the qualifier “rare” mean, however, unless it means that in some fundamental sense, a baby is better than an abortion?

Some, of course, will argue that what they mean is that America ought to devote more resources to helping women prevent getting pregnant in the first place. Whether or not that's as easily done as said, a focus on not getting pregnant does nothing for the woman who is pregnant and finds herself with a hard choice.

So how is New York responding? Earlier this month, the Chiaroscuro Foundation put together a high-profile press conference that brought the archbishop of New York and the leader of one of Orthodox Jewry's most distinguished organizations (Agudath Israel of America) together with the African-American pastor of a large, Harlem church and a Latina who serves as a spokeswoman for Democrats for Life. As the New York Sun pointed out, notwithstanding all this ecumenical focus on New York's distinction as America's abortion capital, it elicited nary a peep from the mayor.

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Meanwhile, the speaker of the City Council, Christine Quinn, is pushing a bill designed to make it harder for people who are trying to help women keep their babies. Bill 371 targets Crisis Pregnancy Centers, and would require them, among other things, to advertise on site that they do not perform abortions or provide abortion referrals. It tells us something that there appears to be no interest in requiring that, say, Planned Parenthood post in their clinics some telling information of their own: 324,008 abortions nationwide against only 2,405 adoption referrals in 2008, the most recent year for which it reports statistics.

Rather than rehash the allegations against Crisis Pregnancy Centers—e.g., that they often disguise themselves as medical clinics, that they are not upfront about whether they offer abortion—let’s stipulate for the sake of argument that they are all true. In the end, a woman who wants an abortion can still walk out and get one, as many do. A woman who doesn’t necessarily want an abortion, however, can find all kinds of help: a place to live if her family or boyfriend has kicked her out; training for mother care; and, not least, the friendly face of a caring volunteer.

What kind of America might we have if all pregnant women—especially black and Hispanic women who are disproportionately aborting—could feel from society that same welcome and encouragement?

No doubt there are mothers who regret having their children. Occasionally you even read of one suing a doctor for not alerting her to a disability in her child that would have led her to abort if she had known. Far more common, however, are the websites with women repeating this heart-rending lament: “If only one person had encouraged me to keep my baby . . .”

On the moral claims and counterclaims on abortion, we have a vast chasm. Yet the moral divide can blind us to the possibilities that exist in all human communities. Might that start with recognizing that a 41% abortion rate means that many pregnant women are not getting the social help and encouragement they need to have their babies?

We all know people whose absolutism on a woman’s legal right to choose does not prevent them from celebrating and supporting a pregnant woman within their midst who announces she is going to have a baby. So put aside *Roe* for a minute. And ask yourself this: What kind of America might we have if all pregnant women—especially black and Hispanic women who are disproportionately aborting—could feel from society that same welcome and encouragement?

Would it be too much to say “better”?

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[*Seth Lipsky, founding editor of the New York Sun, is the author of The Citizen's Constitution: An Annotated Guide (Basic Books). The following editorial appeared January 10, 2011, on the paper's website (www.nysun.com) and is reprinted with permission.*]

Where Is the Mayor?

Seth Lipsky

The blitheness of Mayor Bloomberg toward the impact on New Yorkers of the Christmas blizzard of 2010 is driving down his approval ratings in the polls, despite the fact that the death toll in the storm was relatively modest. So what is one to make of his, and his administration's, blitheness in respect of the tragedy that the latest statistics on abortion disclose has been unfolding in the city?

The question has been nagging at us following the press conference Thursday at which religious leaders addressed the latest statistics. The numbers—which can be viewed at www.nyc41percent.com—show that in 2009 a staggering 41% of all pregnancies except those that ended in miscarriage ended in abortion. That reflects the count of 87,273 abortions performed in the city in 2009. The ratio of abortions here, nearly double the national ratio, makes New York one of the abortion capitals of the world.

No doubt some will suggest that it's hard to raise an alarm over abortion when, in the course of the decade, the absolute number of abortions and the ratio have been declining in the city. The decline—the ratio peaked at 46% in 1998—has not been steep. Not only are huge numbers of abortions performed in New York but in some sectors of our population, nearly half of all pregnancies are ended by abortionists. Among African-American women the number approaches 60%.

Where in the world are the mayor and the rest of the political leadership? It's not as if these numbers are being presented by marginal figures. Present at the press conference to discuss them were Archbishop Dolan of the Archdiocese of New York and Bishop Nicholas DiMarzio in Brooklyn; the executive president of the Agudath Israel of America, Rabbi David Zweibel, whose organization is affiliated with the Council of Torah Sages; the Reverend Michael Faulkner of the New Horizon Church in Harlem; and Leslie Dias, spokeswoman of Democrats for Life.

Newspapers and broadcasters covered the story. But the mayor and the government of the city of New York are unheard or unseen on this issue. The mayor can make a federal case out of cigarette smoking in restaurants. He can turn the city inside-out over the making of a French fry in the wrong fat. He can hold an impassioned press conference on the Ground Zero Mosque. But let 87,273 unborn babies be taken by abortion in New York in one year, and the mayor stands mute.

It's not as if the issue is being presented as a question of abortion rights, a point that was underscored by several of the figures at the press conference Thursday. They understand that abortion is unlikely to be outlawed in the city or the state, or nationally, any time soon. This was marked by Rabbi Zweibel, who said that the

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Orthodox constituency he represents would “welcome the overturning of *Roe v. Wade*,” which we also believe was, in constitutional terms, wrongly decided. But the rabbi went on to make the larger point.

“We’ve been hearing for many years from pro-choice supporters that abortion should be ‘safe, legal, and rare.’ Well, if that’s the goal, we’ve clearly, abysmally failed—especially here in New York City.” He noted that over the past decade the number of pregnancies ended by abortionists was well over 900,000.

“Our different faith traditions may have different perspectives on some of the important theological questions raised by the miracle of human life. But despite our different perspectives, we can all agree that there is something terribly wrong when abortion becomes just another method of birth control.” Asked he: “Can anyone deny, in good faith and conscience, that this drags us down as a humane, civilized society?”

That abortion is claiming a disproportionate number of lives in the minority community was the focus of much of the comment Thursday. In 2009, the number of abortions had by African-American women towered, at 40,798, over the number of live births, which was 27,405. The way the statistics were characterized by Reverend Faulkner is that abortion is “the leading cause of death among African Americans” in the city.

The reason we focus on the mayor is not just that he is the leader of the city in which these statistics are being reported. It is also that he has charted such a courageous course on immigration, which is a not unrelated issue. Like the cause of human life, after all, the cause of immigration reflects a comprehension of the value and possibilities of even those in the most wretched circumstances. It is a magnificent theme for the mayor of the city whose harbor hosts the Statue of Liberty. The mayor has publicly stated that he would like to be remembered as one of the greatest of the mayors in the city’s history of the city. How is he going to be able to do so while standing silent on an issue of this magnitude?

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[*Helen Alvaré is associate professor at George Mason University School of Law and a senior fellow of the Witherspoon Institute. Greg Pfundstein is the executive director of the Chiaroscuro Foundation. Matthew Schmitz is the managing editor of and Ryan T. Anderson is the editor of Public Discourse, where this essay appeared on January 17, 2011 (www.thepublicdiscourse.com). Copyright 2011 the Witherspoon Institute. All rights reserved.*]

The Lazy Slander of the Pro-Life Cause

Helen Alvaré, Greg Pfundstein, Matthew Schmitz and Ryan T. Anderson

One of the most frequently repeated canards of the abortion debate is that pro-lifers really don't care about life. As much as they talk about protecting the unborn, we are told, pro-lifers do nothing to support mothers and infants who are already in the world. Liberal writers such as Matthew Yglesias are given to observing that pro-lifers believe that "life begins at conception and ends at birth." At Commonweal, David Gibson, a journalist who frequently covers the abortion debate, asks how much pro-lifers do for mothers: "I just want to know what realistic steps they are proposing or backing. I'm not sure I'd expect to hear anything from pro-life groups now since there's really been nothing for years."

This lazy slander is as common as it is untrue. Of course, there is much more that needs to be done, but in the decades since *Roe v. Wade*, pro-lifers have taken the lead in offering vital services to mothers and infants in need. Operating with little support—and often actual opposition—from agencies, foundations, and local governments, pro-lifers have relied upon a network of committed donors and volunteers to make great strides in supporting mothers and their infants. It's time the media takes notice.

In the United States there are some 2,300 affiliates of the three largest pregnancy resource center umbrella groups, Heartbeat International, CareNet, and the National Institute of Family and Life Advocates (NIFLA). Over 1.9 million American women take advantage of these services each year. Many stay at one of the 350 residential facilities for women and children operated by pro-life groups. In New York City alone, there are twenty-two centers serving 12,000 women a year. These centers provide services including pre-natal care, STI testing, STI treatment, ultrasound, childbirth classes, labor coaching, midwife services, lactation consultation, nutrition consulting, social work, abstinence education, parenting classes, material assistance, and post-abortion counseling.

Religious groups also provide crucial services to needy mothers and infants. John Cardinal O'Connor, the late Archbishop of New York, famously pledged to assist any woman from anywhere experiencing a crisis pregnancy, and the current Archbishop of New York, Timothy Dolan, recently renewed Cardinal O'Connor's pledge. The Catholic Church—perhaps the single most influential pro-life institution in the United States—makes the largest financial, institutional, and personnel commitments to charitable causes of any private source in the United States. These include AIDS ministry, health care, education, housing services, and care for the

elderly, disabled, and immigrants. In 2004 alone, 562 Catholic hospitals treated over 85 million patients; Catholic elementary and high schools educated over 2 million students; Catholic colleges educated nearly 800,000 students; Catholic Charities served over 8.5 million different individuals. In 2007, the Catholic Campaign for Human Development awarded nine million dollars in grants to reduce poverty. And in 2009, the Catholic Legal Immigration Network spent nearly five million dollars in services for impoverished immigrants.

The Catholic Church is far from the only pro-life religious group that assists the needy. At the Manhattan Bible Church, a pro-life church in New York since 1973, Pastor Bill Devlin and his congregation run a soup kitchen that has served over a million people and a K-8 school that has educated 90,000 needy students. Pastor Devlin and other church families have adopted scores of babies, and taken in scores of pregnant women, including some who were both drug-addicted and HIV positive. The church runs a one-hundred-and-fifty-bed residential drug rehabilitation center and a prison ministry at Rikers Island. All told, the church runs some forty ministries, and all without a government dime.

No major pro-abortion group or institution has taken on a comparable commitment to vulnerable Americans. Pregnancy resource centers devote significant resources to supporting women who have already decided to have an abortion, but abortion advocates offer no similar support to women who wish to continue their pregnancies. Indeed, they often devote their resources to shutting down the services provided by pro-lifers. NARAL Pro-Choice America reports spending twenty thousand dollars on “crisis pregnancy centers” in Maryland in order to “investigate” and publicly smear such centers for demonstrating a bias for life. (One might point out that the same bias once motivated the entire medical profession.)

If pro-life Americans provide so many (often free) services to the poor and vulnerable—work easily discovered by any researcher or journalist with an Internet connection—why are they sometimes accused of caring only for life inside the womb? Quite possibly, it is the conviction of abortion advocates that “caring for the born” translates first and always into advocacy for government programs and funds. In other words, abortion advocates appear to conflate charitable works and civil society with government action. The pro-life movement does not. Rather, it takes up the work of assisting women and children and families, one fundraiser and hotline and billboard at a time. Still, the pro-life movement is not unsophisticated about the relationship between abortion rates and government policies in areas such as education, marriage, employment, housing, and taxation. The Catholic Church, for example, works with particular vigor to ensure that its social justice agenda integrates advocacy for various born, vulnerable groups, with incentives to choose life over abortion.

One of the significant ironies of accusing pro-lifers of being “anti-vulnerable,” “anti-women,” and “anti-poor” is that poor women tend to be more pro-life than their more privileged counterparts. It is especially important, therefore, to offer them options that do not simply appeal to their economic interest or personal

autonomy narrowly understood, but rather that accord with their moral outlook and overall wellbeing.

Abortion advocates, however, continually argue that one public policy in particular—further increases in government-supplied birth control—can become a panacea for high abortion rates. However, there is more than a little doubt about the claimed relationship between contraception programs and abortion rates. Rather, in the altered sex and marriage markets made possible by contraception and legal abortion, more and more women engage in non-marital sex without any “shotgun marriage” guarantee in the event of pregnancy. This leads (ironically) to more non-marital pregnancies, more non-marital births, more sexually transmitted diseases, and (irony of ironies) more abortions.

Figures out just in the past few weeks show that this contraception-related increase in abortion is not limited to the United States. In Spain, legal availability of birth control and abortion has drastically increased, with some 60 percent more women reporting that they used contraception in 2007 than in 1997. Over the same period, researchers found abortion rates more than doubled. The results of government policies promoting widespread contraception are clear: more of every outcome that birth control and abortion were promised to curb, including non-marital pregnancies, births, and abortions. Not to mention sexually transmitted infection testing and treatment; is it any coincidence that Planned Parenthood serves roughly the same percentage of clients for STIs (31%) as it does for contraception (36%)?

No one doubts that birth control used in a particular instance of sexual intimacy increases a woman’s chances of avoiding pregnancy. But the social policy of widely available birth control has been accompanied by an increase of out-of-wedlock births and abortions. In New York City some 41 percent of all viable pregnancies ended in abortion in 2009 despite the fact that the city distributed 40 million free condoms during the same year.

The insistence that pro-lifers make birth control the centerpiece of a pro-life strategy has reaped a three-fold reward for abortion advocates. First, its surface logic (“birth control equals no baby”) has blinded onlookers to the historical results of birth control as a social policy. Second, pro-lifers are easily tagged as “religious zealots,” ignoring the most obvious solution to abortion for irrational, theological reasons. Third, abortion advocates can claim to be women’s best friend—by increasing sexual autonomy—despite the dubious effects of their proposed solution.

In sum then, the charge should be laid to rest once and for all that the pro-life movement is not active on behalf of women, children, and vulnerable persons generally. Those bringing the charge—the same groups that do very little personally to help women and children—should be held to account, both for their lack of real charity and for their refusal to acknowledge that their entire strategy—state supplied birth control and unlimited abortion—has backfired upon the very groups they promised to help.

While the pro-life cause has always been animated by the conviction that life begins at conception, it has never forgotten that it continues after birth. The pro-life

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movement's message has been vindicated by 40 years of legalized abortion: the personal dignity, happiness, and prosperity of women, children, men, and the nation is advanced when life is cherished both before and after birth.



"You must be my new upstairs neighbor."

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[*Carol Crossed* is a consistent life activist and member of the Board of Directors of *Feminists for Life of New York*. This column appeared in the January 2011 edition of *US Catholic* and is reprinted with Ms. Crossed's permission.]

Frosty Reception

Carol Crossed

I was in the Arctic Circle, in Greenland, for some R&R and to learn about polar explorations. Having fallen in love with a pair of child's sealskin slippers, I was poised to buy them.

"You are from the United States, no?" the woman behind the counter asked in her nicest ever tour-guide voice. "It is one country you cannot bring in the skin of the seal."

Seeing my confused look, she explained, "It is, how you say, a populist law, only made in U.S." She paused to make sure there was no offense. "It is not fair law. We use every part of the seal and throw nothing away."

I remembered seeing foot-long strips of seal meat drying as they hung from porches on tiny colorful family homes for Greenlandic winter consumption and for their husky sled dogs laying around lazily in the summer sun. I recalled the stench wafting from the seal tanning factories on the harbors of tiny settlements, where warm outerwear was produced. It left me with little appetite.

"It is the baby seals that the U.S. tries to protect," said a fellow tourist, a Dane, chiming in on the conversation. I immediately remembered learning about the baby seals in a PBS documentary.

The tour guide responded gently with a question: "But in America you can take the knife to the Inuit not born, no?" As she caressed her midriff behind the kiosk, I saw that she was pregnant.

Inuit. At a lecture I attended by and about Arctic people, I learned that *Inuit* is another word for human being. I wondered if Greenland is like other European countries, struggling to maintain replacement levels of population. One tiny settlement of 150 that we visited boasted that they had 27 elementary children, whom they claimed as a cherished resource.

Her obvious reference to abortion rights left me dumbfounded. As a pro-life activist, didn't I come to the Arctic Circle to get away from debates like these?

I mumbled under my breath, "Don't go there with me."

"S'kuse me?" she said.

"I said I don't think that is right either—killing babies of any sort, seal or human. It's just that in our country one has a choice to believe if a baby is human or not human." I realized how utterly ridiculous that sounded only after I had said it.

"The baby seal is not human, yes? This is my choice to believe, no?" I really set myself up for that one.

This young bright woman should be doing something other than selling souvenirs.

But the Dane once again came to my rescue: "I think it is the clubbing of seals

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that the U.S. opposes.” (Please God; don’t let her ask me if clubbing a baby seal is less compassionate than scraping a human fetus from the womb with a curette.)

The conversation goes from bad to worse. “Ah. If we kill seals with the gun it would be, how do you say, political? Like the U.S. bombs in the war?” (Note to self: Vacation in Antarctica next year.)

“Actually all of these killings are wrong,” I replied. That’s me, the moralistic American.

“But some killings you can do. Because you can choose in America, no?”

I was slow on the uptake. I began to understand the posters I saw hanging on Greenland’s public buildings that read “Avoid Cultural Prejudice,” featuring two mocking Greenlanders in sealskin coats holding a young calf and the words “Save the baby veal.”

I slithered away, writing in my head a sequel to *The Ugly American*, starring myself.



“I guess he’s not too bad, as far as human garbage goes.”

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[Maggie Gallagher is the founder of the National Organization for Marriage and has been a syndicated columnist for 15 years. The following appeared on *uexpress.com* on January 25, 2011. Taken from the Maggie Gallagher column by Maggie Gallagher © 2011. Distributed by Universal UClick. Reprinted with permission. All rights reserved.]

Is abortion good for girls?

Maggie Gallagher

This week, on the 38th anniversary of *Roe v. Wade*, President Obama said *Roe* “affirms a fundamental principle: that government should not intrude on private family matters.”

Sen. Rick Santorum meanwhile sparked a controversy saying abortion is a “civil rights” issue akin to slavery that President Obama should understand.

He’s right. Slavery was once considered a “private family matter” too—a “domestic relationship” in which government had no right to interfere.

But I found it even sadder how a committed father of two daughters like President Obama could go on to say this about abortion: “And on this anniversary, I hope that we will recommit ourselves more broadly to ensuring that our daughters have the same rights, the same freedoms, and the same opportunities as our sons to fulfill their dreams.”

Abortion is a symbol of our aspirations for our daughters? Am I the only one who finds something grotesque in that?

I spent the anniversary of *Roe v. Wade* reading an important new book, “Premarital Sex in America,” written by two well-regarded young sociologists, Mark Regnerus of the University of Texas at Austin and Jeremy Uecker at the University of North Carolina-Chapel Hill.

They analyzed Add Health’s nationally representative data to find out how sex and abortion affect young women’s mental health and life satisfaction.

Their conclusion? The data “suggest that abortion may contribute to depression in emerging adulthood, independent of sexual-behavior patterns” in young women—and even after controlling for factors like race, family structure, parents’ education and educational attainment.

An even bigger problem for our daughters’ mental health is the low-commitment peer sexual culture that *Roe v. Wade* helped to spawn. Regnerus and Uecker find that “having more numerous sexual partners is associated with poorer emotional states in women, but not men.”

Overall 16 percent of young adult women say they’ve been diagnosed with depression. Among those who have 10 or more lifetime partners, 32 percent say they’ve been diagnosed with depression. Among those who’ve had 10 or more partners in the past year, almost half say they’ve been diagnosed with depression.

If less-committed sex makes women feel bad, why do they do it?

Well, Regnerus and Uecker provocatively ask, why do a growing number of young women engage in anal sex? By age 23, 33 percent of never-married young

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women in the Add Health survey say they've had anal sex (white women are the most likely). When asked if they enjoy it "very much," just 15 percent of women who've tried it say yes. So why do women do it?

Regnerus and Uecker speculate that it is for the same reason so many women are engaging in repetitive experiences of low-commitment sex that make them unhappy. Because they feel they have few alternatives. Anal sex in particular is a response to our porn-saturated culture, in which young men are increasingly viewing images of anal sex with women and asking their girlfriends for it. Women have less sexual power than they did even a generation ago. When it comes to our sexual mores, young men rule the roost.

Anal sex is painful, unsanitary, unsatisfying for women, and creates unique risks for serious physical diseases (if you doubt me, go read the Wikipedia entry on the subject) because the anus is not designed for sexual intercourse, increasing the risk of torn flesh and the intermingling of bodily fluids—blood, semen, fecal matter—that can spread an astonishing variety of diseases. The female partner is far more at risk than the man in these encounters. This should be a feminist issue.

But women are doing it to please their boyfriends. Because we have created a sexual culture that empowers young males (even as it stunts their incentives to grow to become successful, confident and happy family men) and disempowers women.

Women's bodies are designed for connection, to connect sex, love, and yes, even babies.

But *Roe v. Wade* symbolizes a sexual culture that teaches young women: To succeed you have to deform your body to be like a man, to do what men like. Or else you've failed and it's your fault.

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[Robert P. George is McCormick Professor of Jurisprudence and Director of the James Madison Program in American Ideals and Institutions at Princeton University. He sits on the editorial board of *Public Discourse*, an online publication of the Witherspoon Institute (www.thepublicdiscourse.com). The following appeared on February 27, 2011, and is reprinted with permission. Copyright 2011 the Witherspoon Institute. All rights reserved.]

Bernard Nathanson: A Life Transformed by Truth

Robert P. George

Tomorrow morning in St. Patrick's Cathedral, Archbishop Timothy Dolan will celebrate a Mass of Christian Burial for a giant of the pro-life movement: Dr. Bernard Nathanson.

Few people, if any, did more than Bernard Nathanson to undermine the right to life of unborn children by turning abortion from an unspeakable crime into a constitutionally protected liberty. Someday, when our law is reformed to honor the dignity and protect the right to life of every member of the human family, including children in the womb, historians will observe that few people did more than Bernard Nathanson to achieve that reversal.

Dr. Nathanson, the son of a distinguished medical practitioner and professor who specialized in obstetrics and gynecology, had his first involvement with abortion as a medical student at McGill University in Montreal. Having impregnated a girlfriend, he arranged and paid for her illegal abortion. Many years later, he would mark this episode as his "introductory excursion into the satanic world of abortion."

In the meantime, however, Nathanson would become a nearly monomaniacal crusader for abortion and campaigner for its legalization. And he would himself become an abortionist.

By his own estimate, he presided over more than 60,000 abortions as Director of the Center for Reproductive and Sexual Health, personally instructed medical students and practitioners in the performance of about 15,000 more, and performed 5,000 abortions himself. In one of those abortions, he took the life of his own son or daughter—a child conceived with a girlfriend after he had established his medical practice. Writing with deep regret in his moving autobiography *The Hand of God* (1996), Nathanson confessed his own heartlessness in performing that abortion: "I swear to you, I had no feelings aside from the sense of accomplishment, the pride of expertise."

In the mid-1960s, with the sexual revolution roaring after Alfred Kinsey's fraudulent but influential "scientific" studies of sex and sexuality in America, Hugh Hefner's aggressive campaign to legitimize pornography and, perhaps above all, the wide distribution of the anovulant birth control pill, Nathanson became a leader in the movement to overturn laws prohibiting abortion. He co-founded the National Association for the Repeal of Abortion Laws (NARAL), which later became the National Abortion Rights Action League (NARAL) and is now NARAL Pro-Choice America. Its goal was to remove the cultural stigma on abortion, eliminate all

meaningful legal restraints on it, and make it as widely available as possible across the nation and, indeed, the globe.

To achieve these goals, Nathanson would later reveal, he and fellow abortion crusaders pursued dubious and in some cases straightforwardly dishonest strategies.

First, they promoted the idea that abortion is a medical issue, not a moral one. This required persuading people of the rather obvious falsehood that a normal pregnancy is a natural and healthy condition if the mother wants her baby, and a disease if she does not. The point of medicine, to maintain and restore health, had to be recast as giving health care consumers what they happen to *want*; and the Hippocratic Oath's explicit prohibition of abortion had to be removed. In the end, Nathanson and his collaborators succeeded in selling this propaganda to a small but extraordinarily powerful group of men: in the 1973 case of *Roe v. Wade*, seven Supreme Court justices led by Harry Blackmun, former counsel to the American Medical Association, invalidated virtually all state laws providing meaningful protection for unborn children on the ground that abortion is a "private choice" to be made by women and their doctors.

Second, Nathanson and his friends lied—relentlessly and spectacularly—about the number of women who died each year from illegal abortions. Their pitch to voters, lawmakers, and judges was that women are going to seek abortion in roughly equal numbers whether it is lawful or not. The *only* effect of outlawing it, they claimed, is to limit pregnant women to unqualified and often uncaring practitioners, "back alley butchers." So, Nathanson and others insisted, laws against abortion are worse than futile: they do not save fetal lives; they only cost women's lives.

Now some women did die from unlawful abortions, though factors other than legalization, especially the development of antibiotics such as penicillin, are mainly responsible for reducing the rate and number of maternal deaths. And of course, the number of unborn babies whose lives were taken shot up dramatically after Nathanson and his colleagues achieved their goals; and they achieved them, in part, by claiming that the number of illegal abortions was *more than ten times higher* than it actually was.

Third, the early advocates of abortion deliberately exploited anti-Catholic animus among liberal elites and (in those days) many ordinary Protestants to depict opposition to abortion as a "religious dogma" that the Catholic hierarchy sought to impose on others in violation of their freedom and the separation of church and state. Nathanson and his friends recognized that their movement needed an enemy—a widely suspected institution that they could make the public face of their opposition; a minority, but one large and potent enough for its detractors to fear.

Despite the undeniable historical fact that prohibitions of abortion were rooted in English common law and reinforced and expanded by statutes enacted across the United States by overwhelmingly Protestant majorities in the 19th century, Nathanson and other abortion movement leaders decided that the Catholic Church was perfect for the role of freedom-smothering oppressor. Its male priesthood and authority structure would make it easy for them to depict the Church's opposition to abortion

as misogyny, for which concern to protect unborn babies was a mere pretext. The Church's real motive, they insisted, was to restrict women's freedom in order to hold them in positions of subservience.

Fourth, the abortion movement sought to appeal to conservatives and liberals alike by promoting feticide as a way of fighting poverty. Why are so many people poor? It's because they have more children than they can afford to care for. What's the solution? Abortion. Why do we have to spend so much money on welfare? It's because poor, mainly minority, women are burdening the taxpayer with too many babies. The solution? Abortion. Initially, Nathanson himself believed that legal abortion and its public funding would reduce out-of-wedlock childbearing and poverty, though (as he later admitted) he continued to promote this falsehood after the sheer weight of evidence forced him to disbelieve it.

Within a year after *Roe v. Wade*, however, Nathanson began to have moral doubts about the cause to which he had been so single-mindedly devoted. In a widely noticed 1974 essay in the prestigious *New England Journal of Medicine*, he revealed his growing doubts about the "pro-choice" dogma that abortion was merely the removal of an "undifferentiated mass of cells," and not the killing of a developing human being. Referring to abortions that he had supervised or performed, he confessed to an "increasing certainty that I had in fact presided over 60,000 deaths."

Still, he was not ready to abandon support for legal abortion. It was, he continued to insist, necessary to prevent the bad consequences of illegal abortions. But he was moving from viewing abortion itself as a legitimate solution to a woman's personal problem, to seeing it as an evil that should be discouraged, even if for practical reasons it had to be tolerated. Over the next several years, while continuing to perform abortions for what he regarded as legitimate "health" reasons, Nathanson would be moved still further toward the pro-life position by the emergence of new technologies, especially fetoscopy and ultrasound, that made it increasingly difficult, and finally impossible, to deny that abortion is the deliberate killing of a unique human being—a child in the womb.

By 1980, the weight of evidence in favor of the pro-life position had overwhelmed Nathanson and driven him out of the practice of abortion. He had come to regard the procedure as unjustified homicide and refused to perform it. Soon he was dedicating himself to the fight against abortion and revealing to the world the lies he and his abortion movement colleagues had told to break down public opposition.

In 1985, Nathanson employed the new fetal imaging technology to produce a documentary film, "The Silent Scream," which energized the pro-life movement and threw the pro-choice side onto the defensive by showing in graphic detail the killing of a twelve-week-old fetus in a suction abortion. Nathanson used the footage to describe the facts of fetal development and to make the case for the humanity and dignity of the child in the womb. At one point, viewers see the child draw back from the surgical instrument and open his mouth: "This," Nathanson says in the narration, "is the silent scream of a child threatened imminently with extinction."

Publicity for "The Silent Scream" was provided by no less a figure than President

Ronald Reagan, who showed the film in the White House and touted it in speeches. Like Nathanson, Reagan, who had signed one of the first abortion-legalization bills when he was Governor of California, was a zealous convert to the pro-life cause. During his term as president, Reagan wrote and published a powerful pro-life book entitled *Abortion and the Conscience of the Nation*—a book that Nathanson praised for telling the truth about the life of the child in the womb and the injustice of abortion.

Nathanson, long an unbeliever, continued to profess atheism for several years after his defection from the pro-choice to the pro-life side. His argument against abortion was not, he insisted, religious; it was based on scientific facts and generally accepted principles of the rights and dignity of the human person. In this, his views were very much in line with those of the great pro-life convert Nat Hentoff, a distinguished civil libertarian and writer for the liberal and secularist newspaper *The Village Voice*. But unlike Hentoff, who remains unconvinced of the claims of religion, Nathanson was gradually drawn to faith in God and ultimately to Catholicism by the moral witness of the believers among his newfound comrades in the struggle for the unborn.

As Nathanson frequently observed, it was not that he became Catholic and then embraced the pro-life view because it was the Church's teaching. If anything, it was the other way around. Having become persuaded of the truth of the pro-life position, he was drawn to Catholicism because of the Church's witness—in the face of prejudice Nathanson himself had helped to whip up—to the inherent and equal value and dignity of human life in all stages and conditions.

Nathanson was baptized and received into the Catholic Church in 1996 by Archbishop Dolan's predecessor John Cardinal O'Connor in a ceremony at St. Patrick's Cathedral. He chose as his godmother Joan Andrews Bell, a woman revered among pro-lifers for her willingness to suffer more than a year of imprisonment for blockading abortion facilities. Reflecting on her godson's conversion, she said that Nathanson was "like St. Paul, who was a great persecutor of the Church, yet when he saw the light of Christ, he was perhaps the greatest apostle for the Gospel. Dr. Nathanson was like that after his conversion. He went all around the world talking about the babies and the evils of abortion."

There are many lessons in Bernard Nathanson's life for those of us who recognize the worth and dignity of all human lives and who seek to win hearts and change laws. Two in particular stand out for me.

First is the luminous power of truth. As I have written elsewhere, and as Nathanson's own testimony confirms, the edifice of abortion is built on a foundation of lies. Nathanson told those lies; indeed, he helped to invent them. But others witnessed to truth. And when he was exposed to their bold, un-intimidated, self-sacrificial witness, the truth overcame the darkness in Nathanson's heart and convicted him in the court of his own conscience.

Bernie and I became friends in the early 1990s, shortly after my own pro-life writings came to his attention. Once during the question-and-answer session following

a speech he gave at Princeton, I asked him: “When you were promoting abortion, you were willing to lie in what you regarded as a good cause. Now that you have been converted to the cause of life, would you be willing to lie to save babies? How do those who hear your speeches and read your books and articles know that you are not lying now?” It was, I confess, an impertinently phrased question, but also, I believe, an important one. He seemed a bit stunned by it, and after a moment said, very quietly, “No, I wouldn’t lie, even to save babies.” At the dinner he and I had with students afterward, he explained himself further: “You said that I was converted to the cause of life; and that’s true. But you must remember that I was converted to the cause of life only because I was converted to the cause of truth. That’s why I wouldn’t lie, even in a good cause.”

The second lesson is this: We in the pro-life movement have no enemies to destroy. Our weapons are chaste weapons of the spirit: *truth and love*. Our task is less to defeat our opponents than to win them to the cause of life. To be sure, we must oppose the culture and politics of death resolutely and with a determination to win. But there is no one—*no one*—whose heart is so hard that he or she cannot be won over. Let us not lose faith in the power of our weapons to transform even the most resolute abortion advocates. The most dedicated abortion supporters are potential allies in the cause of life. It is the loving, prayerful, self-sacrificing witness of Joan Bell Andrews and so many other dedicated pro-life activists that softens the hearts and changes the lives of people like Dr. Bernard Nathanson.

May he rest in peace.

APPENDIX I

[Lord Nicholas Windsor studied theology at Oxford University and is patron of the Right to Life Charitable Trust and the Catholic National Library. Great-grandson of King George V of the United Kingdom, Windsor is the first blood member of the British royal family to be received into the Catholic Church since King Charles II on his deathbed in 1685. The following essay originally appeared in First Things and is reprinted with permission. Copyright © First Things (December 2010).]

Caesar's Thumb

Lord Nicholas Windsor

At the close of the last century, as the reckoning was drawn up in Europe for the actions and reactions of the twentieth century, could we not have been forgiven for tending a little toward the view that we had, after everything, acquitted ourselves rather well? Hadn't we a long list of accomplishments to admire in the years after 1945? We had expunged Fascism, at immeasurable human cost, and we had made profound reparation for its effects. We had washed our hands of colonialism and vastly improved the material lot of the poor in our own countries. We had built robust democracies and welfare states and novel institutions in Europe to defuse nationalisms and guarantee peace among former belligerents. We had advanced the rights of women—indeed, the whole spectrum of rights. We had won the Cold War.

Much more could be added, I think. Poised just then before the new millennium, seeing what vast work had been done in our societies, mightn't it have seemed quite possible that the greatest moral cancers in our civilization had been at least contained and possibly eradicated? Hadn't history, at least this moral cycle of history, really reached an end?

In the decade since the turn of the millennium, the cultural mood has been less happy, for a variety of reasons. Even at its most confident, however, the West generally recognized that some work remained to be done. So, for example, the position of the poorest in the world, it is held, will gradually and continually improve if enough effort is made, not least by the developed world. For the mitigation of global warming and climate change, political determination will suffice to alter the carbon-hungry lifestyles that cause the problem.

The point here is that moderate political activity is believed to be the sort of thing required to address these problems, and there is a reasonable degree of optimism that such political activity will be usefully brought to bear, without the need to resort to force.

A remaining category of problems still to be dealt with could be bundled together as "Rogue Regimes, the Taliban, and al-Qaeda." This category rightly causes public alarm and engenders calls for robust and, where necessary, lethal response. But these are not threats that appear existential and have not as yet provoked a real sense of public crisis. Neither have they brought about mass political action in the West. They are still, I believe, seen as problems that will ultimately be solved, or at

least kept at bay, without huge social upheaval on our home soil and certainly with nothing like the warfare resorted to by previous generations.

Is it still possible then that we can point to anything of any real significance that had been overlooked, anything dangerous smuggled into this new phase of history that has caught us unawares? I would say that this is indeed the case, and I would like to focus especially on a matter and a practice that constitutes the single most grievous moral deficit in contemporary life: the abortion of our unborn children.

This is a historically unprecedented cascade of destruction wrought on individuals: on sons, daughters, sisters, brothers, future spouses and friends, mothers and fathers—destroyed in the form of those to whom we owe, quite simply and certainly, the greatest solidarity and duty of care because they are the weakest and most dependent of our fellow humans. All else that we concern ourselves with in the lives of human beings derives from the inescapable fact that first we must have human lives with which to concern ourselves. By disregarding this self-evident fact of the debt owed immediately to the unborn—which is to be allowed to be born (and let us not forget that all of us might have suffered just the same fate before our birth)—humanity's deepest instincts are trampled and shattered.

This was only an implausible glimmer in the eyes of the most radically progressive thinkers and activists a century ago. Today legal, permissive abortion is a fact of life so deeply embedded and thoroughly normalized in our culture that—and this is the most insidious factor in that normalization—it has been rendered invisible to politics in Europe. Even mentioning it has become the first taboo of the culture.

There are consciences in Europe, it must be stressed, that glow white-hot for justice and strive continuously for this darkest fact of our public life to appear in public debate as clearly as it does across the Atlantic in the United States. For most of our contemporaries, however, this is a matter that impinges little. The effectiveness of determined campaigns of propaganda at the outset to harden consciences, and gradually to enforce a conformism that fears to question what is said to be a settled issue, has worked wonderfully well.

And this enforcement of a new status quo succeeds so well due, surely, to benefits enjoyed as a result—benefits of an order that make acceptable even the killing of innocents, by their protectors, on a scale that freezes the imagination. How much then must depend on its remaining so, remaining beyond question? This is the nub of that ideological word choice. So much else can be chosen in a given life if the option to dispose of unwanted children is dependably available. So many intoxicating freedoms are newly established, if only abortion is never again denied to women and to men.

But what of the cost? As with the cost of previous great willful destructions of human life, of whole classes of human life, the fact that it must and will be borne is a certainty, whatever the nature and scale of it. Of course, in the first order of consequences, the price paid by the victims is not obscure: We must never forget that the heaviest price is paid by those whose lives are not to be lived.

In the second order of consequences, however, we must look closely at the

hidden burden faced by those, especially mothers, who participate in these acts and the losses affecting present and future society. How will a society regard itself, or value its own distinctive culture, when it has placed this fearful act at its center—consciously approving, even celebrating, its own most egregious moral failing? Will it have the confidence simply to regenerate itself? To survive by producing the next generation of children in sufficient numbers?

I would like to emphasize that we must never mistake the secondary effects of this moral enormity for the primary, as this would surely be to instrumentalize the victims and fail again in our duty of respect toward them. It would be an absurdity such as if the real tragedy of the Shoah were felt first of all to lie in the social consequences. No, what we must first lament is the mass destruction of human beings who had first been deemed worthless. The fact in itself is what we must keep before our eyes, before and apart from our regard to anything that may derive from it.

We live in what is truly a moral world turned upside down, and the greatest irony may be that a broad consensus exists, in a highly rights-aware political establishment, in favor of one of the gravest and most egregious abuses of human rights that human society has ever tolerated. Didn't Europeans think they could never and must never kill again on an industrial scale? What a cruel deceit, then, that has led us to this mass killing of children, for a theoretical greater good, which in this case is simply the wish not to be bound by a pregnancy unless it is fully and freely chosen and which, outside of that parameter, is declared, by fiat, to be null and void.

The sophistry is overwhelming: If I choose and desire my child, then ipso facto I have granted it the right to live, and it will live. But the inverse is equally the case, by means of nothing more or less than my choice: Caesar's thumb is up, or Caesar's thumb is down. And when it comes to exporting this idea, we do it with zeal and determination through such institutions as the United Nations and the European Union.

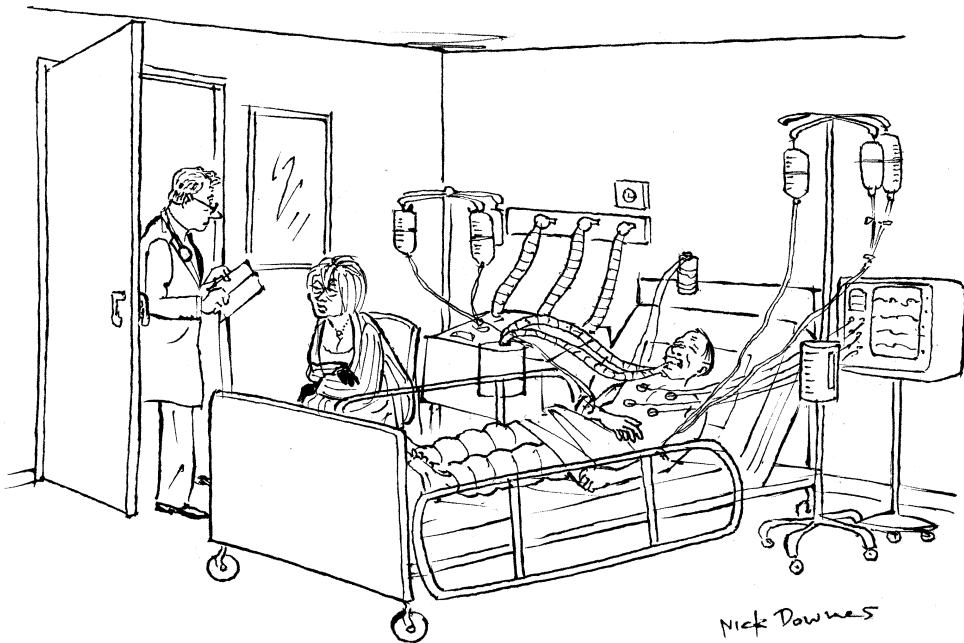
The granting to ourselves of the right wantonly to kill, each year, millions of our offspring at the beginning of their lives: This is the question of questions for Europe. The practice of abortion is a mortal wound in Europe's heart, in the center of Hellenic and Judeo-Christian culture.

Having so recklessly carried this poison out of the twentieth—the ugliest of all centuries—let us, for the sake of all that has been good and beautiful and true about the culture of the West, be clear that there is an urgent moral priority here. Call it a “New Abolitionism for Europe”—the word abolitionism emphasizing the continuity between the challenge faced now with the generational campaigns waged so clear-sightedly in late-nineteenth-century America to rid itself of the injustice of slavery. The abolitionists, I believe, exemplify the courage and imagination required, even if they do not provide perfect templates for what we face now.

This is a task that calls for a broader approach to the safeguarding of life, as taught to us by those earlier struggles to apportion value where it previously had not been deemed to exist. We must re-enliven the valuing of life, and this cannot restrict

itself to the question of abortion, despite its moral centrality. It must have regard to every threat to the integrity of human beings, at all stages of their being and in all circumstances.

The task for us is not merely to abolish. We must also creatively envisage new and compelling answers to the problems that give rise to this practice, when the easiest solutions may be destructive or distorting ones. And the goal is that human life, without any exception, may be as treasured and respected as the highest moral thought has perennially called for it to be, and as our consciences surely sound the echo.



Nick Dawnes

"Oh, Roger needs this, Roger needs that. What about my needs, doctor?"

APPENDIX J

[Michael New is an assistant professor at the University of Alabama and a fellow at the Witherspoon Institute in Princeton, N.J. This remembrance appeared on National Review Online (www.nationalreview.com) March 31, 2011 and is reprinted with permission.]

Ellen McCormack, RIP

Michael J. New

This past Sunday, longtime pro-life activist Ellen McCormack passed away. Since the pro-life movement often devotes little attention to its own history, her name may be unfamiliar to many young pro-lifers.

However, pro-lifers of a slightly older generation will remember her as one of the most famous pro-life activists of the 1970s. McCormack was a wife, mother, homemaker, and a pro-life activist. She got her start in politics in New York, which was a hotbed of pro-life activism when it became among the first states to legalize abortion in 1970.

McCormack is most well known for running for the Democratic party's nomination for president in 1976 on a pro-life platform. Her story is chronicled in Professor Jane Gilroy's recent book *A Shared Vision*.

Throughout her campaign, McCormack had little money, name recognition, or media coverage. However, she still received more votes than better known, better funded Democratic presidential candidates in a number of primaries and caucuses.

McCormack became the first female presidential candidate to qualify for federal matching funds and her campaign commercials which focused on pro-life issues reached tens of millions of voters. She received three delegates and received a nominating speech and a seconding speech at the Democratic National Convention that summer. Her campaign educated many about abortion and demonstrated that there was a sizeable contingent of Democrats who were willing to support a single-issue pro-life candidate.

Pro-life pioneers like Ellen McCormack deserve credit for the gains the pro-life movement has made in recent years. In its early years, the pro-life movement was very short on resources and received precious little attention from the mainstream media. As such, it was up to articulate volunteers and single-issue candidates like Ellen McCormack to keep voters informed. Furthermore, McCormack's campaigns raised the salience of sanctity of life issues and gave countless campaign workers valuable experience. McCormack went on to run for lieutenant governor of New York in 1978 and for president as a single-issue pro-life candidate in 1980. Her steadfast devotion to the pro-life cause will be missed. RIP.

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