

ABORTION AND POLITICAL COMPROMISE

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When I wrote the initial version of this paper, it seemed that *Roe v. Wade* was clearly in for substantial pruning possibly even an outright overruling — in the near future, leaving the ball, so to speak, in the pro-life court. As it turned out, of course, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* the Court, with Justice Kennedy's defection, actually *reaffirmed* the central holding of *Roe v. Wade*, though it upheld most of the law at issue. That decision left the final abortion decision to women, subject to regulation at the margin by state and local government.

The recent congressional elections were a remarkable success for pro-life candidates, but it is not at all clear how much that success will be translated into practical political action. The early months of Congress have focused on issues of government structure and process and on the budget, for the most part, with abortion and other social issues very consciously put on a backburner. Republican presidential hopefuls have generally made it clear that they will not provide leadership on the issue, with the exception of Pat Buchanan and Alan Keyes, whose campaign styles, in my opinion, will succeed in mobilizing the party's intense antiabortion minority, but will not appeal (may even put off) the party majority comprised of less intense abortion opponents, those who are ambivalent, and the small but disproportionately influential and growing pro-abortion wing of the party. In the Democratic party, the good news was that Clinton might face an articulate antiabortion opponent, Bob Casey, former governor of Pennsylvania. The bad news is that

Casey has opted out of the race for the time being and, in any case, would have little chance of winning that party's nomination.

What the future holds, in both the judicial and the legislative/executive spheres is therefore very unclear at the moment, though I can't say that I'm optimistic. We'll simply have to wait and see how 1996 shakes out.

Nonetheless, I do believe that we must continue to grapple with the question of what we *can* do and what we *ought to* do with respect to the legality of abortion in this nation. This paper is a restatement of an earlier article's thesis that political compromise on abortion can be justified under some circumstances, even for those of us who believe that the direct procuring of abortion is *always* a terrible moral evil.ⁱ

THE CURRENT STATE OF PUBLIC OPINION

As James Davison Hunter's article in *First Things* (June/July, 1992) reminded us, Americans do not accept the positions of either pro-abortion or anti-abortion activists, but rather they agree with some elements of each. Most Americans agree that what is at stake in abortion *is* human life, and conclude from this that abortions should therefore not be performed for less than a serious reason. They are sympathetic to abortion when it comes to "the hard cases," i.e., life of the mother, serious health problems of the mother, rape and incest, and serious fetal deformity. They also tend to think it more legitimate to have an abortion early in pregnancy rather than later. In other words, they are genuinely ambivalent. One thing, however, seems quite certain: If Americans are given a choice between a pure pro-life position (no exceptions) and a pure pro-choice position, they will certainly choose the latter. In a culture that emphasizes individual liberty as much as ours does, ambivalence on an issue like abortion can easily translate into rhetorical power for a "pro-choice"

position — unless, that is, the pro-life movement adopts a flexible political position that accepts the most that prudent action can attain in the present state of American attitudes.

Now it could be said that Americans will not be given such a choice between two "pure" positions, because there will always be different shades of opinion represented in legislatures that consider it, and the result will be some sort of compromise. And if the final result of each legislative battle will be compromise, some might argue that the pro-life movement must be as unyielding as possible in its demands in order to improve the outcome of the negotiating process.

The problem with this argument is that the vote in the legislature (especially after the demise of *Roe v. Wade*) would not be the crucial one. The crucial votes are those cast in elections for the legislators. The key question, then, is how to win enough of such elections to obtain pro-life legislative majorities.

Before *Webster*, the pro-life movement had one tremendous advantage: it could unite people *against* a very extreme status quo. Even people who might favor abortion in a small number of hard cases could be aghast at the almost unlimited right to abortion afforded by *Roe*. With the cutting back of this decision, however, and the expansion of the power to regulate abortion "at the margin" upheld in *Casey*, it will no longer be possible to build a powerful political movement simply on the basis of opposition to the extreme *Roe* position. A larger number of voters will be concerned with the question of what will take its place. Even the withdrawal of the judiciary from this issue — which would, in any event, likely be only a partial one (continuing to protect abortion in some cases, e.g., life of the mother, rape, and incest) — inevitably shifts the focus to legislative battles. And the problem this poses for the pro-life

movement is that many of the people who are aghast at *Roe* are no less so at a pro-life position that is completely unyielding on the other side.

Given a choice between someone running on a Planned Parenthood (or national Democratic party) abortion platform and someone running on a no-exceptions pro-life platform, most citizens will — perhaps even with misgivings — vote for the former. (The term "no exceptions" should be understood to include positions that have an exception only for the life of the mother.ii) Given a choice between a "pure" position on *either* side and a compromise political position, most of the same voters would choose the compromise. It is harder to say what voters will do if given a choice between two compromise positions. For example, what if one generally pro-life candidate favored allowing exceptions in the "hard cases" and another generally pro-choice candidate accepted a prohibition of third trimester abortions and those based on sex selection? The generally pro-life position would have at least a good shot of carrying the day, though one cannot really be sure.

NO EXCEPTIONS?

But does it make any sense to talk of a "generally pro-life position"? Does not the allowance of exceptions undermine the position by forfeiting its grounds in principle? Moreover, would not such a position be seen as a politically disastrous "waffle," even by those voters who are in the middle themselves? In short, is there such a thing as a morally acceptable political compromise on abortion?

A good way to find the sound affirmative answer to this question is to look at St. Thomas Aquinas' answer to the problem of "whether it belongs to the human law to repress all vices?" (*Summa Theologica* I-II, Q. 96, Art.

4). (Note that "vices" here refers not to personal foibles but to clear moral evils.) St. Thomas says that laws imposed on men should be in keeping with their condition, for (quoting Isidore) law should be "possible both according to nature, and according to the customs of the country." This possibility is related to interior habit or disposition, some things being possible for one who has a virtuous habit that are not possible for others. "Human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained; thus human law prohibits murder, theft, and suchlike." In one of the responses, Aquinas adds that the danger of imposing on imperfect men precepts that they cannot bear is that "the precepts are despised, and those men, from contempt, break out into evils worse still."

On the question of abortion, to be sure, this analysis can cut both ways. Those who argue for an uncompromising position on abortion could point out that abortion falls precisely into the category which St. Thomas gives as the area where law should repress vice, that is, the area where harm is done to others — particularly, of course, the crime of murder. Since abortion is a species of murder, it always ought to be repressed.

But to take such a position is not the best way to apply St. Thomas' analysis. For one thing, the general criterion he offers for determining what vices human law may forbid is those vices that the majority of human beings are able to abstain from. The quotation from Isidore above suggests that this possibility is defined

not just with respect to human nature in general, but also with respect to the customs of the country. The question of which vices the citizens of a given community are capable of abstaining from is an empirical one.

For another thing, while St. Thomas says that the vices from which a majority can abstain are chiefly those to the hurt of others, without the prohibition of which human society cannot be maintained, that does not necessarily mean that any action involving serious harm to others should automatically be repressed. For example, it may not always be possible to enforce laws against prostitution (II-II, Q. 10, Art. 11), though men's transactions with prostitutes clearly harm wives and children. That acts harming others need not automatically be repressed is especially clear if one gives due weight to the qualification "without the prohibition of which human society cannot be maintained."

Moreover, the reference to murder need not be interpreted as applying to every act that is murder. If we are talking about laws without which human society cannot be maintained, then the reference seems to mean that we cannot forego murder laws *in general*. But there can be laws against murder in general without prohibiting every single form of murder. Even if it is true that any inconsistency on this point "tends" to undermine society, it is nonetheless true that many human societies based on great injustice have been able to maintain themselves for a long time.

This does not mean, of course, that the law should repress only those vices without the prohibition of which human society could not be maintained. The criterion here is that the law should repress those vices which men of imperfect virtue are by nature and by the customs of their country capable of abstaining from.ⁱⁱⁱ

Again, the question here is an empirical one.

Another criterion to be considered is the greater evils that can occur if a particular evil is not tolerated. For one, there is the consequence that the law will be despised and that those who cannot bear the law will, from contempt, break out into worse evils still. It is not hard to see that the inability of society to enforce a law may lead to disrespect for law. While the example is by now overdone, the case of Prohibition in the U.S. illustrates the danger very vividly. It seems very likely that an abortion law with no exceptions would be widely disobeyed. What might be the greater evils to follow from this? One would be the development of a thriving black market for abortions — one that would take all comers (rather than limiting abortions to particular cases), thus resulting in some deaths that might be prevented by a narrower law. An effect more difficult to predict and evaluate would be the effect on the body politic as a result of the disruption, including hatred and violence, that might accompany an abortion law that greatly exceeded what the customs of our country would accept. This hatred and violence, in addition to being an evil in itself, might turn public opinion (especially people with less firm moral views — "the muddled moderates") against the whole effort to prohibit the evil of abortion at all. Finally, perhaps the most obvious "greater evil" of a no-exceptions abortion law would be simply that it would never pass; the law would allow many abortions that might as a result of compromise have been prevented.

Applying St. Thomas' analysis, thus interpreted, one can argue that abortion in general should fall in the category of vices that ought to be repressed (the customs of our country are not so corrupt as to require abortion on demand), but one can also argue that the law would be prudent to withhold criminal punishment of

certain forms of abortion (since the customs of our community clearly do make a total proscription of abortion impossible).

"COMPROMISE"

At this point, it seems useful to make some distinctions about the term "compromise." It is important to understand that the advocacy of political compromise does not involve compromise on the moral issue of abortion itself. Morally speaking, it is *never* acceptable directly to take the life of an innocent person, which the unborn child always is. ("Directly" means that, in some cases, it may be possible to permit the death of the unborn child as an unintended but unavoidable side effect of another action that is morally good, e.g., the case of removing a cancerous uterus.) "Legitimate compromise" on abortion, then, should always be understood to mean *political* compromise, that is, compromise about when the law should punish abortion as a criminal act.

Political compromise itself can be subdivided into at least two basic types. The first is what may be called "tactical compromise." This involves fighting in the legislature to obtain a prohibition of all directly procured abortion, using all one's resources possible to obtain this end, but when the final vote arrives, accepting something less than that complete prohibition because nothing more is possible at that moment. For example, Henry Hyde has provided admirable pro-life leadership in Congressional battles over the years, working to prohibit any funding of abortion; but on some occasions he has been compelled by political realities to cast a final vote for bills that have allowed funding in some cases, e.g., cases of rape and incest. This kind of political compromise is very limited, for the vote in favor of such a law is occasioned only by immediate political

necessity and it simply leads right into the next political battle to achieve complete prohibition.^{iv}

The second, more controversial, kind of compromise (the one I want to advocate) may be called "strategic compromise." A prudent strategic political compromise on the abortion issue would start with a reminder of what we all agree on: The *political* battle is merely one front in a larger war; the ultimate goal is not merely to obtain laws that will *compel* women not to have abortions, but to form a polity that recognizes the sacredness of human life and whose citizens reject abortion as a violation of that principle. The "cultural" battle is not separate from the "political" battle — there is an intimate connection between the two — but there is a difference. At least part of that difference has to do with the nature and limits of law.

A strategic compromise on abortion would pursue the full moral principle at the level of the cultural or educational battle, while at the political level accepting "for the time being" laws that do not prohibit all abortion, or at least explicitly withhold criminal punishment for some of them, i.e., abortion "in the hard cases." "For the time being" means until public opinion can be brought around to the view that all abortion is wrong. Such compromise therefore goes well beyond the kind of tactical compromise that is forced, say, on a legislator in a given political vote, since strategic compromise amounts to a kind of temporary, political, "truce" on the exceptions.

This truce is limited to the political battlefield — it does not apply to the cultural one. In some ways, policy here might be likened to U.S. strategy in the Cold War, in which the country adopted a policy of containment, accepting for the time being the immoral conquests of the evil empire and looking forward to some day in the future when the Soviet Union would collapse (largely

through defeat in the "war of ideas"). And — to spell out one of the less than fully palatable implications of this strategy — just as the containment policy led the United States to avoid using tactical opportunities to make inroads into the Soviet Empire, e.g., as in the case of the Hungarian Revolution of 1956, so the pro-life movement might not for the time being automatically press for the most protective law that short-term political circumstances made possible.

For example, it is easy to imagine a situation in which a series of political "accidents" might give strong pro-lifers a majority in the legislature of a particular state in which at the same time public opinion would not support prohibition of abortion without exceptions in the hard cases. In such a case, political prudence might suggest that a no-exceptions bill not be pushed for in the legislature, even if the votes were there.

A parallel instance of the latter argument is provided by the recent situation faced by Catholics in Poland. In view of the power and prestige of the Church there, derived from both history and from the Church's leadership in the resistance to Communism, it was tempting for Catholics to push for laws that embodied moral principles as fully as possible. But efforts of that kind — even if partly successful in the short run — seem to have produced a substantial backlash against the Church, with a substantial forfeiting of the Church's influence in politics and in society (which raises the question of the longer-term viability of the laws that were passed).

Closer to home is a recent example from New Jersey politics. In 1992, the New Jersey legislature had a Republican majority that was largely "accidental," a popular reaction to unpopular tax policies of a Democratic governor. Should pro-life legislators in such a situation have pressed to obtain the maximum pro-life

legislation that could be passed in that session? Or should a pro-life legislative strategist consider, not just what could be obtained by a vote of the current legislature, but also whether this legislation could be *maintained* and whether it might, due to a backlash, lead to something far worse?

Both tactical and strategic compromise are based on prudential considerations. Since part of the prudential norm is that exceptions be tolerated only as much as and for as long as they *need* to be tolerated, there is a natural tendency to look at things from a short-term perspective ("do we have the votes now?"). That might well be a mistake, especially in a democracy, where elections occur regularly and are often affected by accidental factors. Our prudential evaluation of circumstances affecting how closely we can bring our law into line with the moral law (and in this case, the moral ideal is clearly the political one as well) should consider the ways in which short-term "successes" built on accidental factors might lead to disaster.

The legitimacy of this position turns on an important assumption, namely, that a disputed question of moral philosophy can be resolved in its favor. One of the fundamental principles of morality is that evil may never be done (directly intended) to obtain good, though evil may sometimes be "tolerated" as a side-effect in order to obtain a greater good. Some pro-life moral philosophers are concerned that, when strategic political compromise is used to justify *not* pursuing the full protection of the innocent for which we have the votes right *now*, that refusal to act is directly willing an evil (the injustice of failing to protect some unborn) — not as an end in itself, of course, but as a means to protect other unborn children. Those of us who advocate such strategic compromise are convinced that proper moral analysis will show that it does not directly

will an evil (it is not directly willing, even as a means, the refusal to protect those who have a right to be protected), but merely tolerates it as a side-effect.

For casuists, I offer the following analogy. A nation has a moral obligation, in justice, to protect its people from unjust attacks. But when a nation is invaded, strategic considerations may require that, tactically, an invading army be permitted to overrun part of the country (killing some of the citizens), that could be protected more fully, but only at the expense of longer-term success in the war.

Perhaps this is not merely hypothetical. Churchill knew that the Germans were going to bomb Coventry, because the Allies had broken the German code. But, in order to prevent the Germans from realizing that the code had been broken (an invaluable benefit in the long-term prosecution of the war), Churchill decided not to take some of the measures that would have reduced the loss of life in that attack (though, certainly, the nation has an obligation in justice to protect its citizens).

I don't think that Churchill was a great moralist, but I think he did the right thing in that case.

THE FEDERALISM CONTEXT

In considering what pro-life strategy should be, I think that it is necessary always to keep in mind that ultimately the resolution of this matter must be accomplished at the national level. Simply returning the issue to the states cannot be a long-term solution. For one thing, some of the states that will probably maintain strongly pro-abortion laws, such as New York and California, account for a large percentage of the abortions in the country. For another, anti-abortion state laws will increase the price and the difficulty of an abortion by the price and difficulty of a bus trip to a pro-abortion state. The increased cost and inconvenience

may reduce the number of abortions, but hardly significantly. In the long run, then, the resolution of the abortion issue must be achieved by a Human Life Bill in Congress (pursuant to its power to enforce Fourteenth Amendment "equal protection of the laws") or, more fundamentally, by a Human Life Amendment.

It is, however, necessary to point out that a national resolution is not imminent, to say the least. The national Democratic party is firmly controlled by pro-choicers, and the Congress, while controlled now by Republicans, is clearly ambivalent about even relatively limited forms of restricting abortion. In the near future, then, the pro-life movement must continue its incremental strategy, focusing primarily on overturning *Roe v. Wade*, so as to make abortion restrictions possible at the state level, and then on obtaining whatever restrictions are possible to obtain state by state. These efforts will typically start with the areas that have the strongest support in public opinion, using these victories to educate and to build political momentum for future and broader legislation. Given the considerable variations in public opinion in different states, the legislation it will be possible and prudent to pursue in one or another will vary substantially.

A more difficult question is whether, since the national battle must remain the ultimate focus, state battles ought to take into consideration the possible effect of state laws on national public opinion. And if highly protective state laws (e.g., those that would allow exceptions only for the life of the mother) would provide ammunition for the national pro-choice movement, then prudence might suggest second thoughts about them.

IS COMPROMISE SELF-DEFEATING?

It could be, and indeed is, objected that the policy of strategic compromise would be morally and politically

disastrous. This objection must be taken seriously. How can avowedly "pro-life" candidates, whose position is based on the contention that abortion is taking the life of an innocent human being, compromise on the hard cases, without appearing to be, and being, unprincipled? Besides, voters may disagree with public figures who hold fast to principle but they positively despise those who compromise their principles merely to win political power. Look at the electoral fate of such "wafflers" on this issue as the candidates for governor in New Jersey and Virginia in 1990.

Nevertheless, a strategic compromise that forbids abortion in general but withholds criminal punishment of abortion in the hard cases is compatible both with principle and with electoral necessities.

An example of such a compromise law would be the Utah abortion statute, as amended in 1991. This law would limit abortions to those "necessary to save the pregnant woman's life" or "to prevent grave damage" to her health or "to prevent the birth of a child that would be born with grave defects"— all of these to be determined "in the professional judgment of the pregnant woman's attending physician"— and to cases where the pregnancy is a result of a previously reported act of rape or incest, and within 20 weeks of conception.

Ideally, this law would be reformulated so that instead of "authorizing" abortion for the exceptional circumstances it would prohibit abortion in general, explicitly withholding criminal sanctions in the exceptional cases. (It may also be that leaving decisions to the judgment of doctors may have the practical effect of preventing effective enforcement of the law.)

The above concerns aside, why is a law like this a morally acceptable political compromise? To begin

with, the strategic compromise position is in no way based on the contention that abortion, very much including the hard cases, is morally legitimate. Its advocates must emphasize — and unfortunately, many allegedly pro-life Republican leaders who favor certain forms of "compromise" are failing to do this — that their overall position on abortion continues to be that abortion is always wrong because it involves the direct killing of an innocent person. Moreover, they should indicate that they intend to pursue the long-term goal of persuading society that abortion is always wrong, thereby establishing the conditions of a law that fully respects the moral principle of the sanctity of innocent human life. The classic model here is Abraham Lincoln, who was able to favor a compromise solution on slavery "for the time being" while making very clear his commitment to the principle that slavery is wrong.

What then is the basis for such a compromise? It is the limits of politics and of coercive law. The fact that something is contrary to the moral law does not automatically mean that it ought to be forbidden by civil law. When a society is deeply divided on a moral issue, it is not always possible or prudent to try to settle the matter fully by the coercive power of law.

A large majority of Americans think that, as a general rule, innocent human life should not be destroyed. There may even be a majority who believe that human life, in some sense, begins at conception. This by itself would seem to provide a sufficient basis for a law generally prohibiting abortion. Unfortunately, however, there are many of our fellow citizens who believe (1) that the value of unborn human life, important as it is, does not always override other, serious values, and (2) that there are different levels of importance to life at various stages of pregnancy. Until we can *persuade* Americans that it is a mistake to "balance" human life

against those other values, it would be imprudent to embody in the criminal law an absolute ban on abortion.

WHAT STRATEGIC COMPROMISE?

One question this leaves for me is whether there is any prudent line to draw with respect to "strategic" compromise.^v Could strategic compromise justify, for example, tolerating all first-trimester abortions, with strict limits on abortions thereafter?^{vi} I would argue against accepting this form of legislation, as a "strategic" compromise, on the grounds that it simply gives away too much. One should only "tolerate" an evil if, on balance, the benefits of doing so justify the toleration. I do not think a law that left abortion wide open during the first trimester would, on the whole, be prudent. Perhaps most importantly, such a law would, by its likely "educative" message, undercut the effort to bring public opinion to a deeper awareness of the evil of abortion. A law that compromised on the so-called "hard cases" would be different in that respect, I believe.

The difference with the "hard cases" is precisely that they involve genuine difficulties that make it much harder for most ordinary people to live out the implications of respect for life. Abortion in the case of a threat to the life of the mother is the best example, since it is possible that one of the very highest prices will be exacted from the mother, father, and the rest of the family for adherence to the moral law. Rape and incest, serious health problems for the mother (those that may inflict substantial and irreparable physical harm) and grave fetal deformities (those which, again, are serious and irreparable) also constitute extremely difficult circumstances under which to bear a child.

It is no answer to such problems, politically speaking, that they occur only in a few cases and therefore are

not relevant to the abortion debate. Not surprisingly, public opinion would refuse to accept that, and argue instead that precisely if it is "only" a few cases, then exceptions for them ought to be permitted.

One does not want to exaggerate the difficulties of pregnant women in these situations, as is often done; still, it is desirable to avoid a certain kind of obliviousness to human suffering that adherence to principle can sometimes lead to. And I think it is imperative that those who represent the pro-life movement make clear their compassion for those who suffer, even while refusing to concede that sympathy for the suffering can justify the commission of morally evil acts. (Equally important must be the denial that abortion, on the whole, alleviates suffering; rather, it must firmly be maintained that abortion deals only with symptoms, serving as an excuse *not* to deal with the real, underlying causes of suffering.)

None of these circumstances changes the basic moral issue, since such considerations do not justify *doing* a moral evil. They do, however, have an impact on the moral burdens that human beings of "imperfect virtue"— "ordinary people" — are able to bear. This would be true, I would guess, in most times and places.

It is especially true of our contemporary culture, in which many of the "customs of the community" — affluence, materialism, sensuality, utilitarian morality — tend to undermine people's fortitude in dealing with moral choices that involve pain or discomfort. This may be a strong argument for using issues like abortion to educate people to a deeper sense of the priority of "the good" over "the pleasant," but in our national circumstances it would not be prudent to try to accomplish this education through the coercive power of the criminal law.

Putting this argument in a somewhat milder, more

rhetorical form (it would probably not be advisable for candidates in elections to tell people that most of them fall in the category of "those of imperfect virtue") one can say that human law — especially the criminal law — does not ordinarily demand "heroism" of people.^{vii}

The pro-life movement can, and ought to, exhort people to respond heroically to difficult moral circumstances. One way in which many pro-lifers do in fact exhort and encourage is by setting an example themselves: helping people in those circumstances, with much self-sacrifice. But to demand heroism *through the criminal law* is likely to breed widespread resentment, disrespect for the law, and illegal action (both public civil disobedience and surreptitious evasion of the law). It is also likely to lead to a political backlash that results in repeal of the law, that discredits those who supported it, and that makes for legislation far worse than the moderate measure that might have been secured in the first place.

Nor would strategic compromise have to appear to be a "waffling" position. Of course, if not presented and defended articulately, it might come across that way. But the "wafflers" who went down to defeat in New Jersey and Virginia in 1990 were not men who clearly and forcefully enunciated the kind of strategic compromise described here; they seemed rather to be trying to duck the issue or push it to the side.

The greatest virtue of this strategic compromise is that it will save many lives that might otherwise have been lost. If a policy of strategic compromise succeeds, it will eliminate a large percentage of our current abortions, numbered these days in the millions.

How many abortions there would be under such a dispensation is hard to say. It would depend partly on the care with which the policy is drafted, so as to prevent exceptions from becoming large loopholes.

(One presumes that at least some in the medical profession will try to help pregnant women to evade the law.) It also will depend on strong pro-life efforts to back effective enforcement efforts.

This justification based on the limits of law would not be readily available for compromise based on the stage of pregnancy, which, as I have suggested, the pro-life movement should avoid, with one (unfortunately massive) exception. Compromise on the basis of the stage of pregnancy would undercut the principle of respect for human life far more than making exceptions in the hard cases, by permitting abortions for something other than "serious reasons," indeed for any reason, however trivial. Obviously, it is lamentable that the law should embody a principle that fails to respect human life (against direct taking) for *any* "reason." But at least requiring a "serious reason" preserves some fuller sense of the principle.^{viii}

The one, unfortunately necessary, exception to avoiding "stage of pregnancy" lines is at the beginning of pregnancy, i.e., the case of abortifacient "contraceptives." The tendency of many ordinary citizens to say, "If it looks like a baby, it must be a baby" — which helps to provide the pro-life movement with much of its support — also has the effect of depriving the pro-life movement of support when "it" doesn't look like a baby, i.e. the time immediately after conception (and at least through implantation). That factor, plus the deep attachment of American culture to contraception, mean that an effort to prohibit abortifacient contraceptives would be hopeless. It would clearly discredit the pro-life movement with many people.

Unfortunately, the battle is likely to shift to that front. One can see that in Laurence Tribe's exaltation of the principle of "privacy in the home," even as he expresses

some misgivings about *Roe v. Wade*.^{ix} The misgivings do not lead him to oppose *Roe* — he supports it by adding an equal protection argument — but his enthusiasm for the decision is decidedly muted. It seems plausible to speculate that he is hoping the abortion issue can be resolved by the advent of the "abortion pill" that can be taken in the privacy of one's home.^x

But precisely because the future of the pro-life movement is clouded by the likelihood of such future developments, it becomes all the more important to try to get as strong a principle of respect for life into the law as we can now.

SUPPORT FOR PREGNANT WOMEN

Another element in an effective pro-life strategic compromise would be efforts in the law to support women in carrying their unborn children to term. Especially where the temptation to abort children stems from economic hardship, it is desirable to eliminate this incentive to have an abortion. Thus, even if criminal penalties are withheld from abortion in the hard cases, that does not mean that the law must always be "neutral" regarding such cases. It is possible for the law to encourage and support pregnant women in carrying their children to term, whether or not abortions are prohibited.

A very difficult issue in regard to support for pregnant women is whether or not it exacerbates the problem in the long run. Charles Murray and others have made persuasive arguments that government programs in aid of unwed mothers help to create a culture of dependency that worsens the problem by creating perverse incentives. Murray is generally persuasive, although it is not easy to know what conclusions to draw from his analysis. But in the instance of abortion, it is

important that one impact of such programs, intended or unintended, is to show people that the political community that forbids the "easy way out" of abortion is not indifferent to their difficulties. Unless some other way out of the dilemma is possible, this argument, in my opinion, outweighs Murray's.

The current form of that hard question concerns welfare reform. If Congress adopts rules that cut off additional government support for women on welfare who conceive new children outside of marriage, or that cut off welfare for girls under 18 who conceive out of wedlock, there is a likelihood that there will be at least some short-term increase in abortions. (A recent rise in New Jersey abortions may be an example of that.) The National Right to Life Committee and leading anti-abortion congressmen have opposed certain forms of welfare reform on these grounds.

My own view is that pro-life members of Congress should do as much as they can to limit possible incentives to abortion,^{xi} but that the possibility of some increase in abortions is not a conclusive argument against welfare reform. To say that it is to defend a form of extortion: "give me more money or I'll get an abortion." It is, moreover, to incapacitate the government from changing incentive structures that have had a profound effect of undermining family formation and stability in the United States.

Of course, if there are other ways to accomplish the goals of welfare reform (family formation and stability, fairness in allocating financial assessments by society) successfully, without any indirect spur to abortions, they would be preferable. But it seems to me that evaluating the likelihood of different effects of different measures would involve difficult prudential questions, and that it would be improper for leaders of the pro-life movement to make one particular position a *sine qua non* for their

political support in future elections.

THE NEED FOR COMPROMISE

In the long run, a no-exceptions position is likely to discredit not only "moralism" but the very source of morality itself. One reason it is very difficult to get Americans to take natural law thought seriously is that historically, i.e. in the Middle Ages, the natural law was articulated in a form that considerably devalued personal liberty, especially in the area of religion. Criminal laws that track the moral law closely (even where there is little in the mores to support such laws) can only serve to exacerbate the suspicion of natural law thinking.

An insistence on no exceptions would doom the pro-life movement to political inefficacy for the foreseeable future. Nor is there any reason to believe that "purifying" the pro-life movement would increase its influence in the long run. The number of Americans who would actively work for a public policy that coincided with the full demands of the moral law is extremely small.

One difficulty here is that a policy of no exceptions would require principled opposition to any and all abortifacient contraceptives. In the short run, that would mean a very small core of activists representing a relatively small portion of the population, serving as "prophets" without political influence. These activists would presumably have a beneficial effect on the lives of some citizens who were persuaded by their advocacy; and however small the number, such an effect should not be dismissed as minor. That is why it will always be good and necessary to have some people in the pro-life movement who represent the "no-exceptions" position.

But the long-term influence of a pro-life movement

that, for the most part, accepts strategic compromise would also be valuable, notwithstanding arguments that it would lose its capacity to persuade or transform by its unwillingness to adhere to principle: first, because it could and should make clear its adherence to principle, and second, because it would obtain a hearing from many people who would not bother to listen to those who are completely unyielding on the question of legal prohibitions.

IS THIS CUOMOISM?

But does not this position, it might be asked, much resemble that of Mario Cuomo — and is not Cuomo's position one that no pro-lifer would be willing to call "pro-life"? Now, it is true that Cuomo's description of general principles is fairly accurate. He is right when he says that the civil law need not always fully enforce the moral law, and that what the law can do is ultimately a matter of prudential political judgment. His problem is that his prudential judgments are poor — so much so that their congruency with political expediency both in New York and in the national Democratic party lead one to certain nagging suspicions about their source.

Cuomo opts for the easy assertion that "abortion is a tragedy." Therefore he limits his anti-abortion stance to saying that we should do all we can to make it easier not to make that choice — by supporting social welfare laws. But "abortion is a tragedy" is too vague and too minimal: It is not only a tragedy, but a terrible injustice as well. In the words of Princeton's Professor Robert George, "A child getting run over is a tragedy; deliberately running over a child is an injustice." Cuomo believes that no restriction on abortion is possible, and even that much opposition to public funding of abortion is impossible. Alas, what he means by "possible" others might be tempted to define as "pussilanimous,"

in the root meaning of the term.

Finally, he likes to treat abortion as a "Catholic" issue, and then to argue against imposing church morality on our pluralistic society. This is his deepest failure, not only as a Catholic layman but also as a politician. He cannot shift responsibility for moral positions to the Church, and then use that as an excuse not to defend fundamental principles of justice. Abortion is not bad because the Church says so. The Church says that it is an "unconscionable crime" because it is so — in ways that any person, whatever his or her religion, should be able to see. Cuomo would do well to remind himself that while Lincoln compromised on slavery, in the end he is remembered by all as the great opponent of slavery. Cuomo's so-called "compromise" on abortion is simply to support abortion-on-demand and abortion funding and to beef up government social services and contraception. No one will ever remember him as having been an opponent of abortion.

One of the most difficult problems in pursuing a policy of strategic compromise is how to prevent such a policy from being interpreted as a *moral* compromise. Professor Charles Rice argues that "every time a pro-lifer proposes a law that would tolerate the execution of some unborn children, his pro-life rhetoric is drowned out by the loud and clear message of his action, that he concedes that the law can validly tolerate the intentional killing of innocent human beings."^{xii} That is, the law does not speak — and educate — merely through its rhetoric. The simple fact of the law is itself profoundly important. No matter how carefully the law is framed in words that respect the ideal of the sanctity of human life, compromise legislation still has as its bottom line the toleration of some abortions. And people being the way they are, some, perhaps many, will conclude from the fact that an act is not illegal that it is not immoral.

THE LEADING EXAMPLE OF MODERATE MORALISM

An example of this impact, but perhaps also an example of the limits of this argument as well, can be found in the case of slavery. Most of the leading founders believed that slavery was unjust and should be eliminated when that became possible. Yet they compromised in the Constitution and tolerated slavery, in the expectation that it was "in the course of extinction" (for reasons related both to economics — it was inefficient — and the spread of enlightened republican principles, such as those found in the Declaration of Independence). Unfortunately, the founders' toleration of slavery made it possible, not long after the founding, for a new generation of Southern leaders not only to defend slavery as a practical necessity (the line generally taken by the representatives of the slave interest during the founding), but also as something positively good, reflecting a natural order.

Eventually, it was necessary for American society to insist on its commitment to its founding principles, and it did so under the leadership of Abraham Lincoln. Lincoln was unwilling to say that slavery was compatible with the principles of our government, arguing that this nation could not long endure "half-slave, half-free." He favored a policy of preventing the spread of slavery any further, trusting that in due time this would lead to its extinction. But at the same time he was willing to accept slavery "for the time being," denying that the federal government had any right to interfere with slavery in those states where it already existed. Indeed, on the eve of the Civil War Lincoln was willing to agree to a constitutional amendment guaranteeing non-interference with slavery within the states.

Lincoln's position, then, was decidedly a "compromise"

position. Was Lincoln's approach immoral and/or ineffective because he compromised his principles? Some abolitionists thought so. But in retrospect most of us would disagree. In fact, if the only opposition to slavery had been the abolitionists, who knows how long it would have taken to eliminate slavery? Lincoln, because of his political compromise, was able to win election as President, so that the principle of freedom from slavery eventually guided the prudential decisions of the nation. If the pro-life movement hopes to guide national decisions in the foreseeable future, it will only be possible on the basis of a platform that announces its principle clearly, while accepting prudential limits on it in practice.

Of course, there are some crucial differences between the two issues of slavery and abortion. Among them is the fact that the country was split sectionally on slavery — there is something more like a national "consensus" on abortion, though with some state and regional variations. Abolitionists had considerable influence in the North, where opinion became strongly anti-slavery (enough to elect Lincoln); "no-exceptions pro-lifers" are not likely to be a significant political force anywhere. For the same reason — the sectional polarization — it was possible to "settle" the slavery issue by a war. That will not be the resolution of the abortion issue.

But the slavery issue does show us that compromise — even relatively long-term compromise — is compatible with maintaining political principle. If Lincoln could maintain principle while allowing deviations from it "for the time being," the pro-life movement can do so as well. And that is preferable to letting new generations be "drowned" in the widespread practice of abortion that will result if we do not act in ways that recognize the limits of politics and law in our nation.

NOTES

1. An earlier version of this article appeared in *First Things* Number 24 (June/July 1992) 22-29.
2. For the record, even a "life of the mother" exception raises some serious moral questions that can be resolved only by making careful distinctions. A utilitarian calculus that says the mother is "more important" than the child, and therefore the child may be killed in order to save the life of the mother, is morally unacceptable. On the other hand, actions to save the life of the mother, when they have the unintended but foreseen side-effect of leading to the death of the child, may be morally licit.
3. I do not take up here the question of how law might be limited by its purpose of prohibiting vice that is contrary to the *common* good, and whether there are moral evils whose effects are so much confined to the individual (and whose effects on the common good are *de minimis*) that they should not be prohibited by law. These questions clearly do not apply to any form of abortion.
4. I assume that this form of compromise is legitimate. For Catholics, the issue has been settled clearly by Pope John Paul II in *Evangelium Vitae*, No. 73: "A particular problem of conscience can arise in cases where a legislative vote would be decisive for the passage of a more restrictive law, aimed at limiting the number of authorized abortions, in place of a more permissive law already passed or ready to be voted on. . . . In a case like the one just mentioned, when it is not possible to overturn or completely abrogate a pro-abortion law, an elected official, whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at limiting the harm done by such a law and at lessening its negative consequences at the level of general opinion and public morality. This does not in fact represent an illicit cooperation with an unjust law, but rather a legitimate and proper attempt to limit its evil aspects."
5. With tactical compromise, there are fewer questions of line-drawing, since the "line" is set, rather simply, by the strongest form of legislation that you have the votes to get.
6. Mary Ann Glendon, in her thoughtful and provocative *Abortion and Divorce in Western Law* (Cambridge, Mass.: Harvard University

Press, 1987), seems to advocate such a position (though, primarily, I think, to "open up" her overwhelmingly pro-abortion audience to some sorts of limits on abortion). On this issue, see my review of Glendon in *The Political Science Reviewer* 19 (1990) 291ff.

7. I say "ordinarily," of course, because in some situations the law must require heroism. For example, a person could not obtain the return of a kidnapped wife by agreeing to the kidnapper's demand that he kill another innocent person. In principle, that heroism is what the ideal law would require with respect to abortion in the hard cases as well. But something short of the ideal may be necessary in the circumstances of a given polity.

8. Such a law would, in addition, be much less likely to reduce substantially the number of abortions that would occur (the "greater evil" that toleration of the lesser evil attempts to avoid). Planned Parenthood and its allies would simply have to work harder to catch pregnant women earlier in pregnancy — which is in any case when most abortions already occur.

9. Laurence Tribe, *Abortion: The Clash of Absolutes* (New York: Norton, 1990).

10. Not, by the way, RU-486. A pill that often requires a woman to "deliver a dead baby" is not likely to be the abortion movement's "magic bullet." Neater, less messy pills that are variants of today's abortifacient contraceptives are likely to be the answer — at least until easily-reversible sterilization methods become the anti-procreative technique of choice, with abortion pills as a rarer alternative.

11. A flat bonus for lower illegitimacy, for example, without any effort to prevent this from becoming an incentive for states to encourage abortions, would be a mistake. Better to provide a bonus for fewer illegitimate births *less* the number of abortions in such cases.

12. Charles E. Rice, *Fifty Questions on Abortion* (Notre Dame: Cashel Institute, 1979).

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