

Abortion Policy and the Market

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Abstract

This essay extends the futures-of-value theory proposed by Donald Marquis and modified by David Boonin. Economic analysis suggests that abortion policy will fail to serve the public interest due to public choice and knowledge problems, and adversely distort beneficial market phenomena like adoption services. Even if markets fail to produce zero unwanted pregnancies, it is not clear that abortion policy has avoided more tragic government failures. Society suffers more now on account of the artificially extensive abortion market. Extending Julian Simon’s thesis, society loses from legalized abortion by losing a mind *and* from the social costs devolving from government failure that destroyed that mind. The Marquis theory should be amended to include these two social losses. American abortion policy is not congruent with classically liberal premises. Hence, classical liberals should embrace the recent pro-life momentum.

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ABORTION POLICY AND THE MARKET

The only truly scarce resource is the human mind. All other things that are commonly considered to be scarce can be found in more abundance, synthesized, or replaced through the powers of the human mind (Simon 1996). Yet abortion is perhaps the most potent enemy of the human mind, as abortion policy destroys the one thing in life that truly cannot be replaced. Theological premises and arguments have been used to oppose abortion policy, noting that nearly all abortion is the illicit destruction of the image of God (Genesis 1:26-27; 9:6). However, economic theory may also be utilized to question it. Indeed, there is a vibrant pro-life minority among classical liberals, and many in that group are not even nominally religious. Why is pro-life policy consistent with classical liberal principles? On the one hand, a Lockean philosophical explanation could be cited for this seemingly anomalous tendency among classical liberals and libertarians. On the other hand, there is also an economic rationale driving the perspective that every classical liberal should notice. The lion's-share of abortions are the result of distortions caused by government mishaps, myopic intervention, and policies that facilitate deleterious rent seeking, which lead to the destruction of that scarcest of resources, the human mind.

This essay extends the futures-of-value thesis proposed by Donald Marquis and modified by David Boonin, which says that abortions are morally wrong (especially late term ones) because they deny a human being of a life of value. In formulating the theoretical argument, this essay provides a review of: (A) the current abortion policy panorama and facts; (B) the moral philosophical bases of classical liberalism; (C) the legal issue of personhood; and (D) the futures-of-value thesis. Then, (E) an economic analysis is interposed where: (1) a market-based alternative to abortion policy (adoption services) is considered; (2) market failure analysis is employed to criticize abortion policy; and (3) an expanded argument about social cost is developed. This progression leads up to (F) a reformulation and improvement of the futures-of-value thesis.

Even if free markets fail to produce zero unwanted pregnancies, it is not clear that modern abortion policy has avoided more tragic government failures. Perhaps an apparent or presumed market failure is superseded by a more hearty government failure. Economic analysis suggests that abortion policy will fail to serve the public interest on account of government failure—fomented by public choice and knowledge prob-

lems. Beneficial market phenomena like adoption services are adversely distorted, and a greater social loss of minds is caused on account of the artificially extensive abortion market. Therefore, extending Julian Simon's thesis, society loses both from legalized abortion by losing a mind *and* from the social costs that devolve from government failure that destroyed that mind. The Marquis thesis should be amended to include these two social costs. Moreover, modern American abortion policy should be repugnant to classical liberals, who often decry government waste. It should come as no surprise that many classical liberals have embraced the recent pro-life momentum.

THE PANORAMA

“Few causes have more thoroughly fragmented contemporary America” than the controversial subject of abortion (Rosenbaum 2001: 707). Abortion policy is so divisive that it threatens the relative tranquility of constitutional liberalism. After all, if abortion is murder, then it trumps politics, and any resistance to abortion—even revolution—is justified no matter what the judiciary or the legislature may declare. Killing the unborn is a moral dilemma that theologians and philosophers have disputed for millennia. Especially from a Christian point of view, since all life is sacred and the gift of God, there can be no justification for killing another human being—especially one who has done no wrong. Christians believe that killing the unborn is wrong because God has created all human beings in His image and, as such, all humans have an immortal soul, a moral conscience, and a capacity to reason. Thus, all the efforts of those perceived to be on the dark side, who desire to engage the convictions of those of the resistance, are for naught; both sides are fierce in their resolve (Seery 2001: 346). Yet the struggle over abortion rights has not produced total gridlock. Indeed, even if many Americans are bored with the abortion issue, there is some evidence of movement toward the pro-life position. Few Americans today would deny that “abortion kills.” Perhaps that is why abortion choice advocates—sensitive to popular sentiment—resort to using euphemisms in their rhetoric like “products of conception” and “the termination of pregnancy.”

There are growing problems related to abortion policy that augment public unease. As in the classical pagan world, abandonment of infants is on the rise in American cities. Newborns are left in restrooms (even in toilets), in the snow, in rivers, or tied up in plastic bags and thrown into dumpsters. Pro-life thinkers

perceive such behavior as a natural extension of the “culture of convenience” (Rosenbaum 2001: 710). David Smolin points out the glaring inconsistencies of abortion policy given the nature of infanticide, the legal history of slavery, and the vision of the American Founders. “The core instability of the abortion liberty lies in the similarity between abortion and the culturally aberrant act of infanticide and the consequent irrationality of those placed in the position of defending practices that appear repulsive to most people. Culturally speaking, this instability is likely to remain until and unless our society develops an acceptance of infanticide” (Smolin 2001: 838). Many constitutional issues are overlooked, stemming from the principles of the Framers, the Fourteenth Amendment, and America’s organic link with historical, common law, natural law, and ethical traditions.

The instability of an amoral jurisprudence of unenumerated rights disconnected from the historical narrative of emancipation has facilitated a further instability—that of embracing as a fundamental right an act regarded as ethically aberrant by the broader society. The law and the Court have forgotten both the rich heritage of anti-slavery jurisprudence and their connection to the moral sensibilities of the society. A Supreme Court jurisprudence of unencumbered abstraction in the interest of ideology ill serves this nation and dishonors her history. One hopes that some day the Supreme Court will embrace a jurisprudence worthy of the nation’s ideals and the precious lessons taught by its history (Smolin 2001: 838-39).

Just about one-half of one percent of the population in the United States is aborted each year. In Britain, less than one-third of one percent of the population is aborted annually. Some 173,701 abortions were performed in England and Wales in 1999, and about 175,000 are planned for 2003. Nearly 90 percent of abortions were performed within the first 12 weeks of pregnancy (no more than 1.5 percent after 20 weeks). The government pays for most of these abortions (Derbyshire 2003: 8). The British Pregnancy Advisory Service performs almost 50,000 abortions annually, with 50 percent of these done for “free” on behalf of the National Health Service (Greenwood 2001: 2). Abortions are not permitted in Northern Ireland, so women must travel to England to have one.

Around the world, the United Nations Population Division has estimated that nearly 40 percent of the 50 million abortions done worldwide each year are done illegally (which is a major health concern). Authorities in these countries either ignore or tolerate the performance of these illegal abortions. About 70,000 women die each year after an unsafe abortion, while another 5 million are temporarily or permanently disabled (Ahmad 2002: 64). In America, as in Finland, post-abortion syndrome is prevalent, where “higher death rates associated with abortion persist over time and across socioeconomic boundaries. This may be explained by self-destructive tendencies, depression, and other unhealthy behavior aggravated by the abortion experience” (Reardon, et al 2002: 834).

In accord with worldwide experience, abortion policy and problems are not new features of the American political landscape. Abortions were commonplace and widespread during the nineteenth century due to the fact that abortion was not considered a crime before “quickening” (that is, the fourth or fifth month of pregnancy when the unborn child’s presence can be detected by the mother). However, doctors who preferred more scientific determinations—who also cited the Hippocratic Oath—tended to prefer far more restrictive abortion policies, and their influence began to be felt after the establishment of the American Medical Association in 1847. Thus, rules tended to favor a more restrictive perspective for over a century. Then, in the decade preceding *Roe v. Wade* (1973), many states deliberated, and thirteen of them adopted, therapeutic abortion rules (Nosiff 2001: 31-32, 41). (Therapeutic abortions are performed by means of medication rather than surgery.) The years leading up to the *Roe v. Wade* decision were marked by intense interest group activity, most notably in New York and Pennsylvania. “Radical feminist groups,” which emerged by the end of the 1960s, were leading the pro-abortion rights charge with pooled resources and a strong communications network. Estimates of annual illegal (pre-1973) abortion incidence ranged from 200,000 to 1,200,000, with 800,000 possibly being the best estimate (Cates, et al 2003: 25-26). There were, of course, considerable difficulties in collecting data on the number of abortions when it was an illegal practice and, thus, the estimates vary widely. The 800,000 figure would suggest that abortion incidence almost doubled for most of 30 years following *Roe v. Wade*, although total population also grew from 179 million in 1960 to

281 million in 2000 (about 12 percent per decade), which might account for half of the growth in abortion incidence.

In many states, there was pro-abortion choice policy prior to 1973. By 1970, Alaska, New York, Hawaii, and Washington had already enacted legislation that permitted early-term abortions (Nosiff 2001: 57, 77, 106-22). Thus, state abortion policy was being established before 1973, and the states have continued to go their own, different ways ever since (Cates, et al 2003: 25-26). About half of the states, chiefly in the Midwest and the South, are moderately-biased or strongly-biased toward the pro-life position in terms of the information disseminated to prospective abortion candidates (Schroedel 2000: 86-92). On the one hand, this fact is not surprising since states would ostensibly be the main beneficiaries of a larger taxpaying populace and a larger inventory of potential military personnel. On the other hand, states with strong constituencies of abortion rights proponents are likely to see such sentiment reflected in court rulings and especially legislation decreed by elected officials.

Abortion policy has continued to expand in scope and be refined by the judiciary, with the original *Roe v. Wade* decision reaffirmed in many subsequent cases, although many restrictions have been placed on abortion provision. The U.S. Supreme Court has effected restrictions regarding waiting periods, informed and spousal consent, parental notification, reporting requirements, disposal of fetal remains, abortion advertising, and who can perform abortions and where (Gerard 2001: 6-22). Yet, to the chagrin of American liberals, increased receptivity to abortion policy restrictions is part of a “rising trend of concern over gender-related developments that many traced to feminism and saw as detrimental to families and children” (Smith 1994: 647-48).

Such things could be regarded as a swing back toward the pro-life position. Even though states have widely varying rules about when a fetus becomes viable or a person, a pro-life undercurrent exists: “Despite these disparities, fetal rights are generally expanding across policy areas” (Schroedel 2000: 185). For example, recent court rulings and legislation in at least a dozen states, including Arkansas, California, Missouri, North Dakota, Ohio, Pennsylvania, South Carolina, Tennessee, Utah, Washington, West Virginia, and Wisconsin, have granted rights of personhood to the unborn child who is killed by a third party. Theorists have

been moving in a pro-life direction as well. Backing off from permitting abortion up to the moment of birth, some scholars have articulated a revitalized quickening concept. They say that the fetal brain develops “consciousness” between the 21st and 28th week of pregnancy and, therefore, the fetus may only be justly aborted prior to the 20th week without doing murder (McMahan 2002: 267-68 & Boonin 2003: 128-29). Adding deeper support, researchers in Great Britain have recently found that the fetus develops consciousness long before the 24th week of pregnancy, which is the current outside limit for having a non-exceptional abortion in England or Wales (Derbyshire 2003: 8).

Still, abortion is one of the most frequently performed surgical procedures in the United States. Over one-fifth of all pregnancies are terminated by abortion. About 90 percent of abortions in the United States occur during the first three months of pregnancy, and typically only 1 percent occurs after the 20th week (Boonin 2003: 91, 128). These facts might not be surprising given that almost half of American pregnancies are unintended. Women have come to accept abortion as an alternative, and have availed themselves of the general availability or accessibility of abortion services. While the number of abortions in the United States held steady at around 1.5 million per year during the 1980s, peaking at 1.61 million in 1990, the figure dropped to 1.36 million in 1996 (the most recent year that comprehensive abortion incidence data were collected). The abortion rate declined 23 percent from 1980 to 1996, reaching the lowest levels of incidence since the 1970s (Finer & Henshaw 2003: 6, 9). The abortion rate in the United States decreased by 11 percent between 1994 and 2000 (the decline was 39 percent for girls aged 15 to 17), although it rose among women with lower income levels, who accounted for 57 percent of all abortions in 2000. Some liberal scholars claim that the number of abortions in the United States is underreported due to “social pressures” and the fact that women are reluctant to talk about their abortions. They also insist that the recent decline in the abortion rate, 1994-2000, has resulted from better use of contraceptives and “larger social and economic developments” (Jones, et al 2002: 226-28). Other reasons suggested for this decline include reduced sexual activity among teenagers, and more effective use of contraceptives—although teenage women account for only 20 percent of all abortions. Perhaps insufficient federal funding under Medicaid and Title X funds for free and low-cost family planning services could have in part caused the decline in the number of abortions

by inhibiting women's access to both family planning and abortion services (Finer & Henshaw 2003: 6, 14-15). Conversely, abortion restrictions in a state have not been found to significantly impact the state's abortion rate, or to significantly increase out-of-state abortions (Medoff 2002: 481, 490-92).

Perhaps reflecting the "not-in-my-backyard" principle, about 87 percent of American counties do not have an abortion services provider. This fact alone suggests one strong reason why the rate of abortions has been declining. Relatively few of the 48,000 practicing American obstetrician-gynecologists perform abortions. Yet 95 percent of all abortions are performed in 1,219 clinics and doctor's offices (Joffe 2003: 29-30). Economists have shown that the demand for abortions in Texas was negatively impacted by the travel cost and distance that a woman, especially a Hispanic one, had to travel to see an abortionist. "Pregnant women who reside in counties with longer travel distances to the nearest abortion provider have lower probabilities of aborting their pregnancies than women in counties closer to abortion providers" (Brown, et al 2001: 666). Other social scientists have found that Hispanics are influenced by the same variables that influence non-Latinos, even though Hispanics (especially Mexicans) have a slightly greater tendency to oppose abortion altogether than non-Hispanics (Bolks, et al 2000: 257-59).

Has there grown up a quiet acquiescence to greater pro-life sentiment among Americans? Is it true that the general public's perception that everything possible to say about abortion had already been said? Is the public bored with the issue (Mathewes-Green 2002: 16-18)? One explanation might be that while many American voters are willing to tolerate legal abortion policy, most consider abortion "distasteful and will accept an array of restrictions on it," and the pro-abortion choice camp bemoans that this "ambivalence gives the anti-abortion forces a tactical advantage" (Greenberg 2001: A25). Still another possibility is that there is certainly a general reluctance or a stigma associated with being an abortionist—even if some abortionists straightforwardly take pride in their craft. For some physicians, providing abortion services is a positive (and no doubt lucrative) career move, and probably not an activity done out of social duty. They provide a highly demanded service (Stewart & Darney 2003: 35). But the fact remains that most physicians do not provide abortion services, perhaps because they view abortion as repulsive. Or, perhaps, a less complicated reason for

the decline in abortion incidence might simply be that the vast majority of Americans think that abortion is immoral, if not outright murder:

77 percent of Americans believe that abortion is at least the taking of human life, if not murder itself. More specifically, 49 percent considered abortion “murder,” while an additional 28 percent thought of it as “the taking of human life.” Several more recent polls confirm that virtually half of all Americans consider abortion to be “murder.” As sociologists James Davison Hunter and Carl Bowman rightly conclude, “The majority of Americans morally disapprove of the majority of abortions currently performed” (Forsythe 2003: 21).

Many classical liberals have a similar sentiment. A February 1998 *Liberty* poll found that 43 percent of Libertarian or classically liberal respondents agreed with the proposition: “abortion is wrong.” Thus, we might conclude that pro-life sentiment exists within a substantial minority of classical liberals—and not just within the Religious Right. There are even prominent “Jewish atheist civil libertarians” like Nat Hentoff who are pro-life. Hentoff cites the Reverend Jesse Jackson who once said to him: “Don’t let the pro-choicers convince you that a fetus isn’t a human being. That’s how the Whites dehumanized us by calling us niggers.” The fetus is alive and is a separate genetic entity, and its humanity cannot be questioned scientifically since it is not another species: “That it is dependent on another makes it qualitatively no different from countless other human beings outside the womb...It strikes me that to argue one may take an innocent life to preserve the quality of life of another is cold, and carries utilitarianism to an obscene extreme” (Hentoff 2001: 16).

CLASSICAL LIBERALISM VS. PROACTIVE PUBLIC POLICY

Rickie Solinger argues that the fancied idea of having a “right” to “choose” is “fairly ridiculous” (Solinger 2001: 7). She notes that a *right* is a privilege to which one is justly entitled. In order to avoid the possible implication that government can grant such rights, a better definition would be: a right is something to which one has a just claim or may properly claim as due. Solinger also notes that to *choose* is to be able to exercise discrimination (or discretion) in the marketplace between alternatives for a person of means. “Our Constitution does not, of course, guarantee anyone the right to enter the marketplace of reproductive (or any

other) options” (p. 7). Even so, public policy has a unique and powerful place in the discussion of rights, or what might be better termed *liberties* in a classical liberal paradigm.

Notwithstanding the rhetoric and logical maneuvering regarding personhood, viability, consciousness, and futures-of-value, public policy must first have a clear rights basis in order to function properly. In brief, public policies always presume a rights paradigm. If one class of human beings is going to have rights to something, then some moral philosophy will be at the core of the policy that affects human rights. In order to be fair, one might suggest the classical liberal premise that all human beings forming a national polity should share in the rights or privileges recognized by public policy *equally* (Kreeft 2000: 26). There is really no other way to do policy fairly or justly. Hence, a philosophical basis must be adopted, and only then may policy be prescribed. But there must *not* be a policy of favoritism to any class of human beings within the nation or cohort. The American Founders adopted this vision.

Denying rights to certain classes of human beings on philosophical grounds has for centuries been a hallmark of leftists (including Nazis, communists, and some liberal democrats) and a trademark of criminals. Their idea is simple: let an elite few reason and decide whether some classes of human beings should be excluded from being rights-bearers, and enforce the rule via proactive public policy (Cobin 2003b: 27-32). The criteria used might be genetic, ethnic, superficial (for example, skin color, age, or stature), or some arbitrarily picked level or point of human development.

Alternatively, classical liberalism exalts individual human rights and liberty, and it is the logical outcome of the equality doctrine envisioned. It is the same doctrine that captivated the minds of the American Founders. The Founders, like John Locke, wanted to bring the divine law of the Scriptures into the arena of public policy by extending human autonomy within a liberal democratic society (Proietti 2000: 21). Our rights are not established or even confirmed by public policy; they are antecedent to it. How can there be any other genuinely classical liberal perspective? Thus, not surprisingly, 89 percent of respondents in a 1998 *Liberty* poll agreed with the statement: “All men by their nature have a right to life” and “liberty,” and 83 percent agreed “All men by their nature have a right to property.” Using a classical liberal framework, if any public policy is to be deemed “legitimate,” it must be reactive rather than proactive in nature (Cobin 2003b:

24-32). It must certainly not entail granting the state—or some coercive or otherwise authoritative communitarian entity—permission or office to decide which members of the human species has rights and when.

Especially for conservative and some libertarian scholars, the notion of tolerating a clear evil is both morally repugnant and socially unacceptable. Likewise, many Christian economists favor policies that integrate biblical ideals into public policy, rejecting both socialism and many relativistic and utilitarian approaches to policy (Stapleford 2000: 125). Accordingly, Robert George has questioned the central doctrines of liberal jurisprudence and political theory, arguing that contemporary natural law theory provides a superior means of thinking about basic problems of justice and political morality (George 2001). For instance, George criticized the liberal view of Jeremy Waldron and others that seeks to apply the rationale of slavery to abortion. To George, the idea, starting with Stephen Douglas, that someone can have a right to do what is morally wrong is mistaken. Furthermore, the notion that we have no right to interfere with the immoral actions of others because it is their right is spurious. There could well be a *duty* to intervene on behalf of the fetus, and there is no compelling reason to assume that indifference is the proper response to someone exercising his right to act immorally (George 1993: 110-28). As it was with slavery, there might be grounds for intervening on behalf of the unborn child if it is being subjected to immoral acts.

Consistent with the classical liberal framework, one may propose that (1) all living human beings have rights; (2) their rights are antecedent to the state or “natural” (or from nature’s God, as the American Founders believed); and (3) these rights are shared equally by all living human beings without any discrimination favoring one over another for any reason—criminals and outlaws excepted. These premises form a pure, classically liberal paradigm. Ironically, an implied view among libertarian (not just liberal) academics seems to be that the state or some social apparatus must first decide which human beings are qualified as “persons,” and then proceed to grant them rights. Hence, rights are not natural for these classical liberals, but are derived from the community or public policy. They can, with some simple manipulation of the three premises, artificially divide humans from their personhood, and enforce the sophistry with state power.

A theory of rights has far-reaching implications. For instance, the three propositions about human rights above can be rewritten by replacing the term “human beings” with the word “persons.” The result is a

policy-relevant rights theory that provides a rationale for killing. Permission is granted to kill non-persons, while mandating protection for the rest who have qualified as persons. For many libertarians, it may be a means of having their cake and eating it, too. However, it is no minor offense to classical liberalism that public policy or some authoritative social apparatus has been injected into the rights-granting process as the superior or grantor of rights. The quest for liberty and human rights for all people equally should lead freedom-lovers to oppose abortion policy. It would seem, at least for classical liberals, abortion policy should be viewed as an evil both morally and theoretically, since it stems from a philosophy of rights that is antagonistic to classical liberal principles. But such philosophical compromise is only the beginning of sorrows.

PERSONHOOD

Nearly all scholars now seem to accept the fact that fetuses and zygotes are human beings. “The argument that the unborn are human lives has been largely won” (Forsythe 2003: 21). There are still some holdouts. For instance, Noel Smith argues that pro-life scholars mistakenly utilize only biological determinants of personhood, when psychological determinants are also important. “The fetus cannot be considered human since it has not been exposed to or interacted with society...it can only develop a sense of personhood once it emerges from the womb and begins to learn from its environment” (Smith 1996: 29). Yet, the idea espoused by abortion choicers is that human beings must first be endowed with a sacred grail called “personhood” before gaining full protection under the law. This personhood status is granted upon being favorably inspected and approved by some social consensus or public policy, such as occurred in *Roe v. Wade*. Only after receiving this blessing does the human being become a “rights-bearing” individual. To accomplish the feat, abortion policy has mandated various tests of personhood, including viability and consciousness. Note that this idea of restricting who has rights is not novel. In fact, Americans have had considerable history of classifying one group of human beings as rights-bearing persons and another group as not, as was the case under legal involuntary servitude.

From a public policy and legal point of view, rationalization for dividing human beings into rights-bearing and non-rights-bearing classes may be based not only on *Roe v. Wade*, but also on an even more fun-

damental and ancient legal doctrine. Consider the following excerpts from the entry in *Black's Law Dictionary* for “person:”

A person is not such because he is human, but because rights and duties are ascribed to him. The person is the legal subject or substance of which the rights and duties are attributes....A child *en ventre sa mere* [in the womb] is not a person. *Dietrich v. Northampton* [1884], 138 Mass. 14, 52 Am.Rep. 242: but an infant is so considered; *Madden v. Springfield*, 131 Mass. 441 [1881]....Persons are the subject of rights and duties; and, as a subject of a right, the person is the object of the correlative duty, and conversely. The subject of a right has been called by Professor Holland, the person of inherence; the subject of a duty, the person of incidence. “Entitled” and “bound” are the terms in common use in English and for most purposes they are adequate. Every full citizen is a person; other human beings, namely, subjects who are not citizens, may be persons [cf. *Dred Scott v. Sandford* 1856]. But not every human being is necessarily a person, for a person is capable of rights and duties, and there may well be human beings having no legal rights, as was the case with the slaves in English law (1968: 1300).

Thus, at least from a legal point of view, an individual may be a human being but still not a person. Judges who can make such determinations obviously have enormous power—one that has been sought after by the executive branch too—and can manipulate the constitution on ideological grounds (compare Arkes 2002: 20).

Public policies promoting slavery, like those promoting abortion, used a liberal ideology to prohibit intervention on behalf of the victim: “You could not protest the existence or the treatment of slaves on the plantation because that was private, and therefore outside of your right to be concerned” (Hentoff 2001: 16). Like slavery policy, abortion policy is clearly driven by ideology, and *Roe v. Wade* evinces ideological forces at work in the judiciary. It remains one of the most socially tumultuous and controversial Supreme Court rulings in history, and scholars from all political persuasions have fervently attacked, probed, or tried to re-vamp it. Accordingly, many insist that Congress should have hammered out the issue instead of the courts,

so that it could have at least had a more Constitutional basis in *equality* rather than using the weaker *privacy* doctrine. In brief, some think that *Roe v. Wade* is a troubled, “fragile” ruling that might be overturned. Its logic is poorly justified, with too much influence from judicial activism (Mauro 2003: 6).

The main ideology under debate is that of personhood. Raanan Gillon contends that the key issue in the abortion debate has been unchanged since 1967: the moral status of the human fetus. It is not primarily a moral debate, but rather a metaphysical or theological debate with large moral implications. It is about when a human being acquires a “right to life” (Gillon 2001: 5). However, there has been some theoretical movement toward the pro-life perspective that should be considered a *change*. Jeff McMahan proposes that late term abortions are in fact murder, but that abortions during the first half of pregnancy are not since the fetal brain has not developed a consciousness of its own, and thus the person is not considered to “exist.” He calls this test the “Embodied Mind Account of Identity.” He contends that the exact point at which existence or personhood begins is not important, so long as early term abortions are done early enough to avoid worry that murder has occurred. He also points out that the moral status of abortion changes over gestation, in the same way that killing an older child is morally more objectionable than killing a baby a few weeks prior to birth (McMahan 2002: 268-69, 277-78; compare Boonin 2003). Certainly, McMahan’s notion is not entirely new, but the depth to which he takes the argument in his book is fresh.

Peter Kreeft fairly points out that “The battle over abortion is only the most recent skirmish in a long war between two essentially opposed social and political philosophies...(1) that all human beings are persons, subjects of rights, especially the right to live, the right not to be killed by another, stronger human being, and (2) that only some human beings are persons, and others are not.” (Kreeft 1997: 1; Kreeft 1990: 14) The first notion stems from a fundamentally Judeo-Christian (and even Muslim) worldview, which Kreeft claims may also be found in the natural law tradition of Socrates, Aristotle, the Stoics, and Cicero. American public policy was originally based on such a premise as well. The second notion stems from what Kreeft derides as “human lust for power, pride, greed, arrogance and domination,” where one group of human beings decides that another group of human beings are not persons, and thus become the proper objects of slavery or selective extermination: “Sometimes the ‘others’ are political dissidents, as in the old Soviet Union.

Sometimes they are Jews, as in the Third Reich. Sometimes, they are Blacks [cf. *Dred Scott v. Sandford*], as with the Ku Klux Klan...sometimes, as with *Roe v. Wade*, it is the right to life itself that is stolen from pre-born human persons” (Kreeft 1997: 1; Kreeft 1990: 7-15).

However, this idea of having two classes of human beings runs contrary to consistently classically liberal thought—not to mention thinking from the pro-life camp—where the presumption is that living human beings are all persons and thus are rights-bearers on account of their membership in the species. As Kreeft demonstrates, human beings are a sub-class of persons, not the other way around. Following historical precedent, we have always included other living entities besides humans among persons, for example, God, extraterrestrials, angels, et al (Kreeft 1990: 13-14; cf. Pope 1995: 107).

THE FUTURES-OF-VALUE THEORY

One of the most recent developments in the abortion issue has been the future-like-ours argument, which says that in the same way that killing adult humans is wrong because it deprives them of “futures-of-value,” killing the fetus is wrong too because the fetus has a future of value. Donald Marquis argues that the morality of abortion must provide a defensible account of why killing both children and adults is wrong. To prematurely kill a human being is to deprive him of the good things of life he would have experienced. Thus, he concludes that killing human beings, including infants and unborn children, is one of the worst crimes (Marquis 2001: 363). Arguing whether fetuses are human beings or persons is inadequate, since each side’s claims rely on indefensible assumptions. “Why should being a human being or being a person make a moral difference?” (Marquis 2001: 363). As Marquis relates:

The most popular class of pro-choice argument strategies appeals to the view that some or all fetuses lack either a mental state or function or a capacity for a mental state or function necessary for possession of the right to life. Desires, interests, sentience, various concepts, moral agency, and rationality have all been suggested as candidates for this crucial mental role (Marquis 2001: 364).

Marquis’ idea has been the subject of considerable debate for the last decade. Mark Brown argues that the futures-of-value notion fails because if the nature of the future value is merely *potential*, people do

not have rights to what they need to fulfill their potential. The notion would likewise fail if the nature of the future value were *self-represented*, since the fetus does not represent its own future. Marquis falls back on the notion of liberty, arguing that such a right subsumes a right to what is necessary to sustain life. But Brown retorts that a right not to be killed “does not entail unlimited welfare rights”— the mother’s body in particular (Brown 2002a: 192-93). Furthermore, the Marquis argument does not necessarily imply a limitation on abortion rights, nor does it conclusively show that abortion is impermissible (Brown 2002b: 202). Simon Parsons avers that the Marquis argument fails to take into account that living is at the same time the process of dying. Hence, at some point, a human being realizes that all of his present realistic desires will never be satisfied. But that reality only implies that killing a conscious person can be wrong. Infants or fetuses that lack future desires are excluded, unless a third-party intervenes on their behalf to preserve them (Parsons 2002: 196). Not surprisingly, Marquis disagrees with Brown and Parsons, pointing out major difficulties in both the self-represented futures-of-value and the wrongness of killing accounts that they propose (Marquis 2002: 198). Fetuses, like all human beings at any state of development, have the property of having a future of valuable experiences.

Jeff McMahan recently raised another three-fold critique of Marquis. First, that Marquis fails to realize that we do not “exist” prior to the 20th week of gestation and therefore his futures-of-value argument does not apply to early term fetuses. Second, there is the problem of “correlative variation,” since Marquis gives no explanation why killing is a worse deprivation of futures of value than non-lethal deprivations such as stealing one’s wallet. Third, the logic of Marquis implies that killing the fetus is more reprehensible than killing a child because the average fetus has a longer future than the average born child. Since McMahan believes that most people would not accept this sort of reasoning, he holds that abortion policy must not cause a moral dilemma (McMahan 2002: 271-72).

Similarly, David Boonin rejects notions of “viability,” and concludes that the fetus gains a right to life somewhere between the 25th and 27th weeks of gestation, noting that the 20th week is the “conservative” limit or safe point for doing abortions, because around that point begins “organized cortical brain activity” (Boonin 2003: 127-32). But Boonin goes beyond just making a criticism of Marquis. He also creates a “su-

perior,” pro-choice version of the future-like-ours principle, called the “present ideal dispositional desire,” which holds that the *desire* to have a better future is more defensible across a wider variety of cases than Marquis envisions. If his version of the future-like-ours principle produces the same results in the uncontroversial cases (infants, suicidal teenagers, temporarily comatose adults, you or me), then there is again good reason to prefer it in general. Hence, since the preconscious fetus does not have desires like more developed human beings, the fetus in turn cannot have any future-of-value in the sense that Marquis wants to apply to it. The fetus may have the *capacity* to develop such desires, but there is no moral problem until he *actually* has them (Boonin 2003: 56-85, esp. 73, 76, 77, 80-82).

Boonin’s thesis could represent a “middle-of-the-road” policy prescription that would find support even among people within religious groups that are generally opposed to abortion. Some theologians have nitpicked the rhetoric of the Church Fathers regarding right-to-life issues and expressed their discomfort with bright-line framework theories of personhood. For instance, they highlight small distinctions between embryo and “preembryos”, that is, those embryos younger than 14 days that have yet to implant (Cahill 1992: 124-27). Moreover, historic Church leaders have had different understandings about personhood. Neither Augustine nor Aquinas viewed a fetus as a human person in the early stages of pregnancy (Campbell 2002: 937). Accordingly, some Catholics say that the Church is not authoritative on the abortion issue, and that each individual should let his own conscience decide (Kissling 2001: 26-27). For example, Stephen Mumford opines that, like a wounded animal faced with disaster, the Vatican’s “intense desperation on the matter of legal abortion and family planning” has caused “a hemorrhage in the credibility of this religious institution” (Mumford 2000: 31). Yet, in his 1995 *Encyclical Letter*, Pope John Paul II reaffirms the teaching of the Roman Catholic Church: “I declare that direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being. This doctrine is based upon the natural law and upon the written Word of God, is transmitted by the Church’s Tradition and taught by the ordinary and universal Magisterium” (Pope 1995: 112).

ADOPTION SERVICES

Both conservative and classical liberal scholars contend that markets provide better solutions to most social problems than governments can. Indeed, the welfare state has destroyed or at least displaced many helpful private charities and services that used to deal with social problems (Olasky 1995). Instead of the state, the family should be the primary provider of social values and heading off social difficulties (Palermo 1995: 51). Free markets function best when coupled with the virtue that devolves from good moral character and religious training in the home and church (Byker 2001: 1). However, modern social policies have wreaked havoc on the effectiveness of these market-based institutions.

Rickie Solinger points out that *Roe v. Wade* “dramatically tightened the supply of adoptable babies”, which has deepened interest in foreign adoptions from South America, Eastern Europe (for example, Romania), and the Far East, as well taking babies from the poorest “choiceless” women in the United States. She suggests that “choice” now is the idea that reflects the “commodification of reproduction,” along with a financial litmus test for motherhood, it perverts the meaning of full citizenship rights and reproductive dignity and autonomy (Solinger 2001: 32-33, 224). Such distortive outcomes are the result of government failures rather than market failures. Other such failures are also caused by governmental obstruction of information, for example, contraceptive information and market-based services like adoption agencies.

Yet, the rhetoric of “choice” as a quintessentially modern liberal idea has been both effective and ubiquitous, exalting the individual’s right to autonomy. Feminists hope to focus this rhetoric to a “more thoroughgoing adoption of liberalism’s basic tenets of the body as property and the right to self-determination” (Ruhl 2002: 37). Still others think that a reformulation of the liberal position is in order. Pregnancy entails a complex set of relationships, advice, and condemnations, including but not limited to the fetus, which requires something other than a conventional liberal framework. A form of liberalism is needed that goes beyond individualizing experience and responsibility to recognize that pregnancy is paradoxically profoundly private and profoundly social at the same time (Ruhl 2002: 58-60). Some regrouping may be needed in order to brake the recent pro-life momentum.

Social scientists found that anti-abortion activity has had a significant negative impact on both the demand and supply of abortion services, decreasing the market equilibrium abortion rate by an estimated 19 percent and raising the price of an abortion by about 4.3 percent. Anti-abortion activities have been successful in making abortion services scarcer (Kahane 2000: 463, 477). Thus, one would expect that these supply-inhibiting activities would make abortions more expensive. Moreover, one would expect that the adoption price paid by prospective adoptive parents would be reduced, since the marginal cost of abortion rises with increased protesting and restrictions, lowering the supply of abortion services. Women would be willing to settle for a smaller payment (whether direct or indirect) in order to avoid the higher costs of getting an abortion. If abortions had a zero price, then the supply of adoptable children would likely decrease, and the price of adoptions would rise, since a woman would prefer to not undergo the high costs of pregnancy and the emotional costs of giving her child away (assuming she has no adverse or costly feelings from having an abortion). Thus, abortion policy has a real, distorting impact on adoption markets.

This theory has been confirmed by empirical studies. The number of infants adopted is roughly the same as the marginal increase in the stock of “unwanted” children. Legal abortion would thus be expected to reduce the supply of children available for adoption and the number of adoptions. Some research suggests that policies that tend to reduce the number of abortions end up reducing the supply of adoptable children too. Other studies have been inconclusive, calling into question whether increased access to abortion leads to fewer adoptions. However, a recent study found that adoptions from white women indeed decreased 34-37 percent in the 1960s and 1970s as abortion became more accessible:

The relationship between adoption and abortion has public policy implications both because of the large, unmet demand for children available for adoption and because of concerns about the living circumstances of unwanted children. In 1995, for example, 9.9 million ever-married women aged 18-44 had ever considered adopting a child, 1.6 million had taken steps to adopt a child and 487,000 had actually adopted a child. Almost a half million women were planning or seeking to adopt a child in 1995. Consistent with findings from prior studies, our results suggest that abortion legalization led to a decline in the adoption rate and a

reduction in the number of “unwanted” children relinquished and available for adoption. This reduction may have improved average infant health and childhood living conditions (Bitler & Zavodny 2002: 31-32).

MARKET FAILURE THEORY ANALYSIS

Unwanted pregnancies, in an economic sense, involve either crimes or what economists and public policy theorists call *negative externalities*. That is, they result from crimes like rape on the one hand or, on the other hand, they could be the unintended “bad” consequences of mutually beneficial exchanges. Accordingly, an unwanted pregnancy could be a *negative* externality and, conversely, a wanted pregnancy could be a *positive* externality. Something like 99.9 percent of all unwanted pregnancies would fall into the negative externalities category since they do not result from rape. Thus, any abortion policy discussion from an economic viewpoint should focus on this category. These negative externalities are one of the major categories of *market failure*, and some would be tempted to conclude that abortion policy rises to correct the failure of the market. But the veracity of that premise should be tested, not assumed, since the proliferation of abortion, if not abortion itself, might in large part be the product of *government failure*.

As with all negative externalities, there are three or more parties involved: two people who exchange and have mutually beneficial gains from trade, and one person who incurs costs as a by-product of the production of the others, while participating in none of the benefits of the trade. When property rights are clearly defined, the parties who exchange must compensate those who would be damaged by their production that are not parties to the transaction. The traders often buy insurance that will compensate for any unintended damages. Thus, in one-way or another, the social costs are internalized. However, when property rights are not well defined, that is, when it is cost-less to pollute or damage third parties (unintentionally), these social costs will not be internalized, and third parties will be harmed. Such a scenario would be deemed a market failure in the extant economics literature.

There are a couple ways to deal with, alleviate, or “solve” market failures like negative externalities. Ronald Coase and others outlined one way. When transactions costs are very low (that is, lower than litiga-

tion costs), and there is free bargaining, third parties will arrive at an agreement with those producing the damage without any government intervention, that is, they will receive some compensation. However, when transactions costs are high, Coase's argument implies that government-made or judge-made policy may be able to alleviate the problem better than the market can. In sum, judiciary-led proactive public policy is thought to be able to improve on what the market produces or alleviate the market's failure (Coase 1960; Cobin 2003a; Buchanan 1991; Buchanan and Tullock 1962, Mises 1966).

An abortion situation results in a negative externality in one clear way. The mother and the physician both have mutually beneficial gains from trade. The adversely affected third party is the unborn child. The transactions costs are very high for the unborn to bargain because he cannot yet talk, write, or negotiate in any way. Yet this fact does not necessarily justify empowering public policy to provide more optimal results than Coasean bargaining. Theologians will surely point out moral arguments against abortion, but there are also more objective or positive economic and legal arguments that should be considered. The unborn child is a minor and, therefore, just as a 5-year-old minor who is damaged by soot from a factory, someone else may vouch for him as guardian and vicar. Moreover, it is well-established practice in law that this benefactor need not be his natural parent. Indeed, classical liberalism would have no qualms with anyone entering on a child's behalf in order to save or protect him. Logistically, guardianship may be purely contractual, where one auctions off to the highest bidder the flows of utility that are expected to come from years of raising a child. So then, the costs are shifted to the guardian who becomes the unborn child's vicar, since the guardian's transactions costs of negotiating a settlement are far lower than the unborn child's would be. This outcome is not surprising. Markets automatically tend toward such cost-minimizing solutions.

Thus, there is little reason to doubt that some agreement would be reached in the market to deal with unwanted pregnancies without resorting to public policy—especially given the evidence of an extensive network of people who dedicate their time to helping the unborn and the high demand for adoption services. But adoption services compete with abortion services. They are two distinct solutions to the “market failure.” On the one hand, policy-sponsored abortion markets are largely artificial and prone to inefficiency—not to mention wrought with moral repugnance. On the other hand, there are many Coasean solutions to be found in

the adoption market. Conformably, public choice theory would suggest that any intervention precluding Coasean solutions would tend to make the abortion situation worse in terms of social efficiency, especially if there is government failure on account of public choice problems.

Free markets will never resolve the unwanted pregnancy problem perfectly but, over time, they will tend to provide the most efficient and effective allocation of productive resources, and create institutions and incentives that best maximize those goals and thus minimize abortions. In the market, ultimately, the number of abortions will depend on social pressures and individual preferences. Hence, absent the manipulation of information and encouragement of abortion solutions by puissant government decrees, it seems reasonable to conclude that preferences would not so strongly favor abortion. This makes some sense given that, at the present time, a mother's cost in terms of being responsible for her procreative actions is lower than it otherwise would be, since there is a socially accepted "way out" for her. In brief, proactive public policy has artificially reduced her costs. Thus, government failure artificially increases the number of abortions.

Government intervention to fix the alleged market failure tends to exacerbate the problem of unwanted pregnancies. Such proactive policies only tend to benefit rent seekers—those who benefit from creating artificial scarcity. In the case of abortion, artificial scarcity is created for abortion services, fetal tissue harvests, et al. There will always be a demand for abortion services and products, but abortion policies alter catallactic or market-based institutions and incentives. These changes permit special interest groups to capitalize on new opportunities by channeling more funds to their faction. In sum, people will demand far more abortion services than they would normally demand in the market on account of the policy designed to fix the market failure. Moreover, market-based institutions like adoption services will also suffer. Adoption is a market-based solution to the negative externality problem. No wonder that governments, which tend to coddle rent-seekers, end up hindering this institution. They also make it difficult for babies to be legally, unobstructedly, and positively priced in the market—leading to other distortions.

As a result, abortion policy yields social inefficiency and negative sum games. Abortion, the killing of innocent human beings, is not minimized. In fact, the statistics are engorged as rent seekers benefit from the policy. Society loses due to: (1) the reduction of human minds available; (2) the shift in labor from pro-

ductive activities into rent seeking and humanity-destroying activities; (3) the monopoly prices consumers face via restrictions on certain output pertaining to the abortion industry or in “buying” a child via adoption; (4) the diversion of scarce resources from their normal productive uses into abortion prevention or promotion; just as devoting time and money to prevent burglary is a “waste” or non-productive, so preventing the killing of innocent human beings is a costly activity that channels resources from productive activity; and (5) the public choice costs of “paperwork contests” that are generated as many rent seekers spend resources to obtain or retain the same booty which only one can win. Herein the value of public choice analysis in the abortion discussion is evident. Economic analysis of government failure can add something to the conversation. Moreover, policymakers never had a chance to achieve their public benefit goals anyway, even if they really were publicly spirited, on account of the “knowledge problem” that they face (Hayek 1945; Mises 1981). They cannot possibly garner sufficient social knowledge to improve on the market or correct its “failure.” In fact, public choice and knowledge problems could well lead to government failures that eclipse any market failures in both size and scope.

Public policy is typically fraught with public choice and knowledge problems that engender socially inefficient and even ineffective or bad outcomes. Indeed, the reason libertarians—and all who hold individual rights, liberty, and free markets in high regard—oppose proactive public policy is that government planning generally fails to serve the public interest and often creates more harm than if no policy action were taken at all. Therefore, why should anyone, especially those who profess to be libertarians or classical liberals, trust public policy to decree which human beings have rights and when?

The market indeed fails—at least in terms of producing zero unwanted pregnancies. Hence, the market could be construed as harmful or at least something less than paradise. However, public policy creates a government failure that ends up worse. We trade purgatory for hell. The rent-seeking game worsens as regressive, rent-seeking, entrepreneurs begin to “alertly” find arbitrage niches, like growing and harvesting fetal tissues. This again changes institutions and incentives and exacerbates the negative externality problem. Even if the number of abortions does not continue to rise perpetually, a distorted market equilibrium will be found which tends to make the number of abortions and unwanted pregnancies remain at new, artifi-

cially higher rates. On account of the institutional arrangements and ease of getting an abortion, mothers will have fewer incentives to avoid unwanted pregnancies. Then, as institutions also develop that benefit the mother in a pecuniary manner (for example, if she can be paid for selling off pieces of her unborn child), abortion will become more permanent and attractive. Such developments might tend to increase the rate of late term abortions (since an inventory of more developed fetal parts would presumably be more valuable). The bottom line is that many politicians are happy, rent-seekers are happy, certain moral philosophers and feminists are elated; but most individuals in society suffer on account of this artificially extensive market.

COUNTING THE SOCIAL COST

Government failure is only part of the overall social problem caused by abortion policy. The legalization of abortion in the United States has led to a decline in the birthrate of about 5-8 percent (with the largest declines occurring among teenagers, women over 35, unmarried women, and nonwhite women). It also altered social mores about premarital sex, the use of contraceptives, and a man's willingness to marry in case of an unplanned pregnancy. The policy has probably led to an improvement in neonatal mortality, and possibly, to an improvement in the average living conditions of children. But it also seems to have adversely affected adoption provision (Bitler & Zavodny 2002: 25-33). Accordingly, Stephen Mumford claims, "Americans do not benefit from any law now being used to restrict abortion" (Mumford 2000: 31). Nonetheless, his claim may be disputed theoretically. About one-half of one percent of all American humans, and almost one-third of one percent of all British humans, are aborted each year. Is this much abortion good for economic growth and prosperity? Julian Simon's thesis would lead one to reply "no."

Simon suggests that more minds bring some short-term costs, but far greater long-term gains (Simon 1996). The mind is the ultimate resource and the only thing that is truly scarce in absolute terms. Abortion thus adversely affects society by both reducing the quantity of minds available and by exacerbating negative externalities. Thus, abortion is not in the public interest on account of both of these reasons and, therefore, it cannot be a just or genuinely beneficial public policy. Abortion policy leads to negative sum games that, like murder, rape or theft, only benefit some at the expense of others.

Theologians will argue that killing innocent human beings is moral turpitude since an irreplaceable soul is lost. However, abortion is also a huge social loss in an economic sense. Society loses minds and the ideas they would have, as well as the resources that are siphoned off in order to kill and process them. But the murdered lose the opportunity to live and enjoy life, and all that living entails. Also, many have to bear the pain of being burned to death by saline solution or chopped up into pieces by sharp instruments, and would hardly be consoled by the fact that their remains will go to benefit medical science or rent seekers. Granted, many will argue that less than a million (2 percent of the 50 million worldwide abortions) of the fetuses each year were conscious and felt pain. But the fact that a victim feels pain or not while being killed is really not the principal moral issue. The key element is that an innocent life has been taken that might have developed into the next Einstein, Edison, Salk, Jefferson, or Beethoven. Who knows what great advancement has now been delayed or stifled on account of the termination of the life of a great thinker or a judicious entrepreneur? We cannot know in advance from where (or from whom) these rare but vital individuals will come.

Some say that abortion policy has eroded the moral foundations of the American civic community. Even so, the greatest individual losers or sufferers in the United States are, of course, those 44 million plus “innocent” unborn children who have been killed and the proximate millions that will be killed in ensuing years. In addition, the social loss from the depletion of fresh creative minds is huge and irreversible. For that reason, one might propose another revision to the futures-of-value theory, based on applications of both Julian Simon’s contributions and public choice theory. It is not simply the value of the future experiences that the individual himself loses that matters (Marquis), nor is it the value of his present ideal dispositional desire (Boonin). Rather, it is the sum of the loss of his personal future appraisal, however the moral philosophers want to define it, *plus* the value that society loses both on account of losing a mind *and* the social costs devolving from the government failure that destroyed that mind.

In sum, economic analysis suggests that abortion policy is not in the public interest—and no public policy can be justified which is against the public interest. The natural rights of an unborn child are negated by abortion and, by implication, those who adhere to modern abortion policy prefer that public policy decide

which human beings have rights and when. Although the recent debate is moving the bright line of fetal consciousness (or right to life) closer to conception all the time, various points (for example, the 20th week of gestation) up to birth are still chosen as being the time when the human being obtains or is endowed with rights. Such points in the life cycle are chosen based upon some developmental characteristic (viability for example), or some level of mental sophistication (for example, consciousness), in the human being. This more or less arbitrary decision must then be enacted and enforced by public policy. The classical liberal pro-life position opposes abortion at any stage because: (1) abortion violates the rights of a human being, all of whom should share natural rights equally; (2) it is in the public interest (a) to protect people who want to live, with the presumption being that all human beings want to live, whether or not they can speak (for example, the fetus), and (b) to promote an increase in the number of human minds (which is the ultimate economic resource); and (3) abortion relies on inefficient and problematic proactive public policy: (a) to implement and enforce it, and (b) to determine which human beings have rights and when, which will likely suffer from government failure.

In brief, state intervention supporting or promoting artificially high rates of abortion is simply deleterious in a social sense. Plus, the revised futures-of-value proposed in this essay suggests that modern abortion policy entails the epitome of economic inefficiency, social waste, and a high crime against humanity. Christians and pro-life advocates now have yet another line of reasoning to add to their current set of theological, philosophical, and other tools and premises in the cause of life.

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