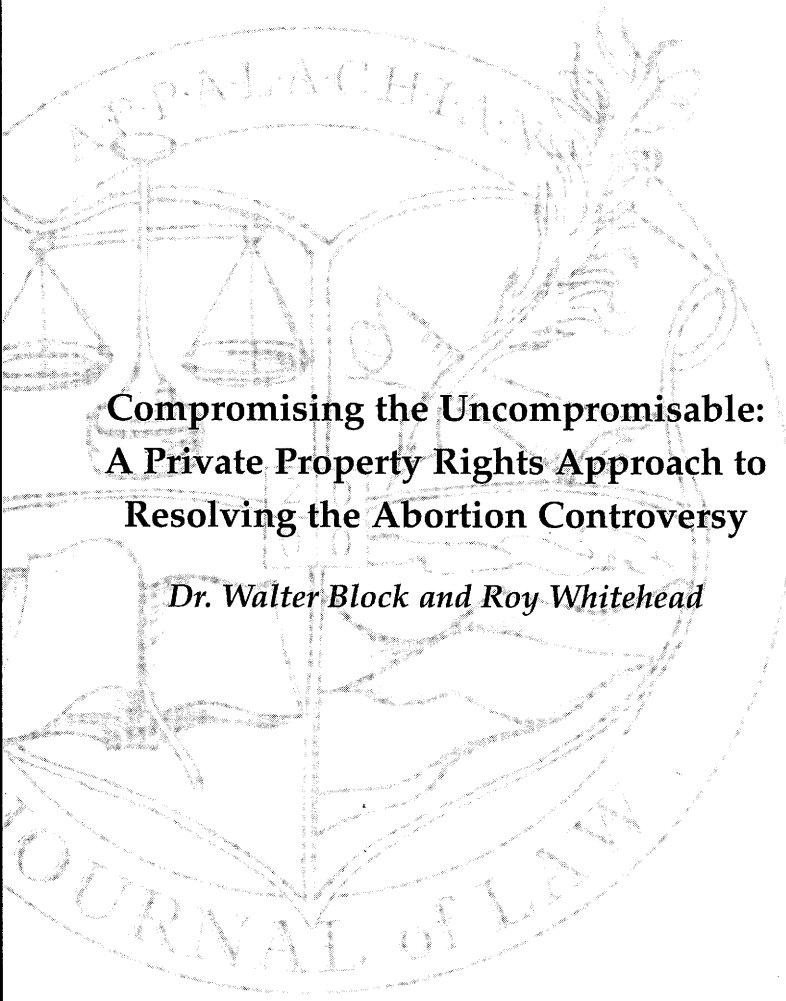
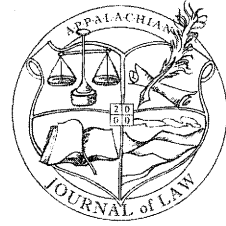


APPALACHIAN
SCHOOL OF
LAW

APPALACHIAN JOURNAL OF LAW



**Compromising the Uncompromisable:
A Private Property Rights Approach to
Resolving the Abortion Controversy**

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Spring 2005

Volume 4
Issue 1

COMPROMISING THE UNCOMPROMISABLE: A PRIVATE
PROPERTY RIGHTS APPROACH TO RESOLVING
THE ABORTION CONTROVERSY

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I. BACKGROUND

In this article we advocate a liberty and private property rights approach to the issue of abortion. While some contend that the famous cases of *Roe v. Wade*³ and *Planned Parenthood v. Casey*⁴ settles forevermore the question of whether a woman had a legal right to an abortion, a great deal of controversy still lingers. This is so because abortion has become all too commonplace. About thirty-five percent of all American women will obtain an abortion during their childbearing years.⁵ This easy availability fuels the ire of and represents the equivalent of a holocaust to anti-abortion advocates.⁶ Some believe that 39 million lives have been snuffed out by abortion since *Roe* was decided.⁷ President George W. Bush is critical of the easy availability of abortions.⁸ Critics claim his administration is engaged in a war against women's reproductive rights by appointing anti-abortion advocates to the federal standing advisory committee of the FDA on reproductive health and trying to establish a link between breast cancer

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This article is dedicated to the anti-abortionists most akin to the abolitionists in the early part of the 19th century who not only wrote and spoke out against slavery, but actually did something to stop it: namely, those who physically interfered with abortion clinics and with abortionists. But, as will be explained below, this applies only to those who help stop abortions when eviction is an option.

The authors of the present article wish to congratulate the editors of the *Appalachian Journal of Law* for their courage in publishing it. This article was accepted for publication previously by both the *Thomas M. Cooley Law Review* and the *Manitoba Law Journal*; in each case, the editors reneged and refused publication despite their initial acceptance.

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3. 410 U.S. 113 (1973).

4. 505 U.S. 833 (1992).

5. See generally Roger Simon, *The Argument that Never Ends*, *U.S. News*, www.usnews.com/usnews/issue/030120/usnews/20roe.htm (Jan. 20, 2003).

6. *Id.*

7. *Id.*

8. See *id.*, where White House Chief of Staff Andrew Card is quoted as saying that ending abortion is "a high moral priority" for the president.

and abortion.⁹ Many believe that the current Republican majorities, as slim as they are in the House and Senate, will lead to a push for the abolition of a woman's right to an abortion.

Some members of the Senate have made it clear that they intend to do what they can to overcome the holding of *Roe v. Wade*.¹⁰ Anti-abortion activists believe that there are two key steps that must be achieved in order to overturn *Roe v. Wade*.¹¹ First, they must establish by law, government policy, and most important, in the minds of voters, that a fetus¹² is a human being.¹³ If a fetus is human¹⁴ it warrants the equal protection of the law afforded to the mother. Secondly, anti-abortion activists seek to get more conservative judges appointed.¹⁵ On the other hand, those opposed to whittling away the so-called privacy right to abortion announced in *Roe v. Wade*, desperately seek to thwart the confirmation of conservative judges. Witness the brutal and unprecedented filibuster of an appeals court judge in the case of Miguel Estrada.

II. THE GUIDING CASES

Before turning to our discussion of the liberty and property interest involved in the abortion question, we commence with a discussion of the guiding cases of *Roe v. Wade*¹⁶ and *Planned Parenthood v. Casey*.¹⁷ *Roe* was a pregnant single woman who brought an action challenging the Texas criminal abortion laws that prevented procuring or attempting an abortion

9. Caryl Rivers & Rosalind C. Barnett, *The War Against Reproductive Rights*, Boston Globe A15, (Mar. 1, 2003).

10. See generally Jim VandeHei, *GOP Looks To Move Its Social Agenda*, Wash. Post A1 (Nov. 25, 2002).

11. *Id.*

12. The question of whether the mother is carrying a fetus or an unborn child is an emotionally charged one in the abortion debate. Witness the uproar that followed when the *Boston Globe* described an unborn child killed in the mother's womb by a stray gunshot as a fetus. Several readers were "horrified" by the *Globe's* alleged insensitivity for the life of what they regarded as a living baby. They thought the *Globe* was taking sides in the abortion debate. The paper's concern about the outburst of criticism required a response by its ombudsman. The paper's editors decided in the future to use terms "like the child the woman was bearing," rather than fetus. See Christine Chinlund, *Fetus or Baby*, Boston Globe A13 (Feb. 17, 2003).

13. *Supra* n. 5. See also, Meghan Cox Gurdon, *Mother of All Rights*, Wall St. J., Jan. 21, 2003, where the author writes, "Abortion doctors dispatch unwanted 'fetuses,' but at crowded fertility clinics those same organized clusters of cells are referred to as 'babies.' Well, which is it?"

14. In Mississippi "it" is a person. The Mississippi Supreme Court recently decided that a non-viable fetus was a person for the purposes of the state's wrongful death statute. See *Federal Credit Union v. Tucker*, 853 So.2d 104 (Miss. 2003).

15. *Supra* n. 5.

16. *Roe*, 410 U.S. 113.

17. *Planned Parenthood*, 505 U.S. 833.

except on medical advice for the purpose of saving the mother's life.¹⁸ The only exception to the Texas criminal proscription was the purpose of saving the life of the mother.¹⁹ Roe claimed she was entitled to terminate her pregnancy by an abortion performed by a competent physician under safe medical conditions.²⁰ She could not obtain an abortion in Texas because her life was not threatened by the pregnancy.²¹ This plaintiff alleged she could not afford to travel to a jurisdiction where abortions were legal.²² She said that the Texas statutes infringed upon her right of personal privacy under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the Constitution.²³ In effect, she claimed that the Texas statute infringed the right of a pregnant woman to terminate her pregnancy.²⁴ This right is discovered, according to Roe, in the personal liberty rights found in the Fourteenth Amendment's Due Process Clause and/or in the personal, marital, familial, and sexual privacy protected by the Bill of Rights.²⁵

Speaking for the majority, Justice Blackman indicated that there are three "recognized" important life and health risks associated with abortion.²⁶ They are: "a. the skill of the physician, b. the environment in which the abortion is performed, and above all c. [t]he duration of pregnancy, as determined by uterine size and confirmed by menstrual history."²⁷

Given the foregoing, the Court decided that the state has at least three legitimate interests in regulating abortion. One is to see that the abortion is performed under conditions that insure safety for the patient.²⁸ This interest includes the physician and his staff, facilities used, and the availability of adequate care for any complication or emergency that might arise either during or after the procedure.²⁹ Justice Blackman pointed out that this interest is justified by the high mortality rate at non-regulated

18. *Roe*, 410 U.S. at 120.

19. *Id.* at 118.

20. *Id.* at 120.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 129.

25. *Id.* See generally, *Griswold v. Connecticut*, 381 U.S. 479, 481-486, where the Court decides that the Connecticut statute forbidding the use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of marital rights. The Court concludes that the idea of allowing the police to search the marital bedroom for evidence of the use of contraceptives is repulsive to the privacy that protects the marriage relationship. *Id.* at 486.

26. *Id.* at 145.

27. *Id.* (internal quotation marks excluded).

28. *Id.* at 150.

29. *Id.*

“abortion mills.”³⁰ As a consequence, the government has an interest in protecting the health of the mother.

Finally, the state has an interest, or even a duty, to protect prenatal life.³¹ Justice Blackman indicated that some wish that this interest commenced at conception.³² If life begins at conception, obviously, the only legitimate justification for abortion would be to protect the life of the mother.³³ But the Court did not adopt that approach. The majority decided that they could give recognition to a less rigid rule to determine when a potential life is involved.³⁴

The Court said that while the Constitution does not mention any specific right to privacy, it has long recognized a right of personal privacy and that there is some guarantee of zones of privacy under the Constitution.³⁵ In any event, the right of privacy, wherever found, includes a woman’s decision on whether or not to have an abortion.³⁶ All sorts of detrimental results might naturally flow from the state denying a woman’s right to an abortion. Among them are psychological harm, lack of child-care, the trauma of the unwanted child, the stigma of being an unwed mother, the mental and physical health of the mother, the resources of the mother, and the mother’s ability to care for the child.³⁷

Roe argued that a reasonable consideration of these factors made the woman’s right to an abortion absolute.³⁸ In other words, she could terminate her pregnancy at any time for whatever reason she chose. The Court disagreed.³⁹

The Court held that at some point in the pregnancy, the state’s interest in safeguarding health, maintaining medical standards, and protecting the life of the fetus, become compelling enough to sustain legitimate regulation of the factors that govern the abortion decision.⁴⁰ As a consequence, the mother’s privacy interests are not absolute.

The Court continued, “We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”⁴¹ The majority believed that at some point the government’s

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (otherwise, abortion would clearly be murder.)

34. *Id.* at 150–152.

35. *Id.* See *Griswold v. Connecticut*, 381 U.S. 479, (1965)(holding that a privacy right to use contraceptives fit within the penumbra of rights found in the Bill of Rights).

36. *Roe*, 410 U.S. at 153.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 154.

41. *Id.*

interest in protection of health, medical standards, and prenatal life, became compelling enough to justify regulations that limited the woman's right to an abortion.⁴² It is long established that when fundamental rights are involved that any regulations impacting those rights are only justified when there is a compelling state interest.⁴³ But the government has a compelling interest in protecting health and prenatal life that justifies regulation, according to this finding.⁴⁴

The Court next took up the question of whether or not a fetus is a "person" within the meaning of the Fourteenth Amendment of the Constitution.⁴⁵ This is a critical issue because if a fetus⁴⁶ is a person from the moment of conception⁴⁷ then a right-to-life would be guaranteed by the Fourteenth Amendment.⁴⁸ Sadly, for judges, there is little authority in the Constitution for deciding on a definition of a "person."⁴⁹ In almost all instances this word is used in the post-natal sense.⁵⁰ As a consequence, the Court was convinced that the word "person" does not refer to the unborn.⁵¹ That said, the Court's conclusion that a fetus is not a person does not foreclose the state's interest in regulating abortion. Why?

42. *Id.* at 155.

43. *Id.* (citing *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969)).

44. *Id.* at 156.

45. *Id.* at 157.

46. Recently the Michigan Court of Appeals took up the question of whether an expectant mother who stabbed to death her boyfriend could use a "defense of others defense" because she feared for her fetus. The fetus was in its sixteenth or seventeenth week and would not be considered viable under *Roe v. Wade*. One of the issues was whether an unborn child was a person entitled to the defense. The trial court ruled that there had to be a "living human being independent of the mother." The Michigan Court of Appeals decided that the defense could be used because the state's public policy was to protect a fetus from an intentional act. They found the basis for the public policy in the Michigan's Fetal Protection Act. See *People of the State of Michigan v. Kurr*, 253 Mich.App. 317 (Mich. App. 2002), appeal denied, 467 Mich. 943 (2003).

47. One commentator sums up the question in stark terms. "If the fetus isn't human, then getting an abortion is no different than getting a tattoo or a nose job. It's a victimless procedure that is nobody's business and should be legal. If a fetus is human, then the logical conclusion is inescapable: abortion by definition is homicide and should be illegal except when, to save the her own life, the mother aborts in self-defense." See Norah Vincent, *Wrong Focus on Abortion Issue*, Los Angeles Times (Jan. 9, 2002). (available at www.latimes.com/news/opinion/la-oe-vincent9jan09).

48. *Roe* at 156-157. See *supra* n. 5, where the Simon article points out that to some in our society abortion represents an American holocaust resulting in the "mass murder of the unborn that has claimed more than 39 million lives since the Supreme Court made abortion legal on Jan. 22, 1973."

49. *Id.* at 157.

50. *Id.*

51. *Id.* at 158.

Because at some point in the life cycle, the fetus surely becomes a person entitled to life.⁵²

The pregnant woman is not alone in her privacy. She is joined by and possesses an embryo and later a fetus, and it is appropriate according to the legal philosophy we are examining, for the state, at some point, to develop an interest in the health of both the mother and that of the potential human life.⁵³

Texas argued that life begins at conception.⁵⁴ The Court indicated that it need not resolve the difficult question of when life begins because even those trained in philosophy and theology are unable to agree on an answer.⁵⁵ And it refused to speculate on the correct answer.⁵⁶

The Court pointed out that on the question of when life begins, the common law found great significance in quickening.⁵⁷ On the other hand, physicians and scientists have regarded quickening with less interest and have generally focused on conception, live birth, or some interim point in which the fetus becomes "viable."⁵⁸ The Court concluded that viability⁵⁹ usually occurs at about twenty-eight weeks but, in some cases, may occur earlier.⁶⁰

The majority announced that it would not agree that by adopting the Texas theory that life begins at conception that the state may override the privacy rights of the pregnant woman.⁶¹ The Court, however, also announced that the government had a legitimate interest in protecting the health of the pregnant woman and the potentiality of the human life she bears.⁶² How best to do that was the tricky question. The Court recognized that the interest of a woman seeking an abortion and the interest of the potential life in her womb may conflict with one another. At some point during the woman's pregnancy, the interests of each party become "compelling."⁶³ The question to be resolved is "When is that point?"

First, the Court dealt with the health of the mother. It announced that with respect to the state's legitimate interest of helping her, the "compelling" point, in light of present medical knowledge,⁶⁴ is at approximately

52. *Id.* at 159.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 160.

58. *Id.*

59. *Id.* (the ability to live outside the womb.)

60. *Id.*

61. *Id.* at 162.

62. *Id.*

63. *Id.* at 162-163.

64. Does this mean that medical advances might result in a different "point?" See below for a discussion of this question.

the end of the first trimester.⁶⁵ From this point on, the state may monitor the abortion procedure to the extent that the regulation relates to the preservation and protection of maternal health.⁶⁶

It follows, on the other hand, that for the period of pregnancy prior to the “compelling” point, the doctor and the pregnant woman are free to determine whether or not the patient’s pregnancy should be terminated.⁶⁷ If they so decide, the woman is entitled to an abortion, free from any interference from the state.⁶⁸

Next, the Court dealt with the interests of what is called “potential life.”⁶⁹ Consequently, the state’s legitimate interest in potential life, the so-called “compelling” point, is at viability.⁷⁰ At this stage of the pregnancy the state has a compelling interest in the potential human life contained in the woman’s womb.⁷¹ The Court decided that the Texas penal code was too restrictive because it made no distinction between abortions performed early in pregnancy, before the viability of life, and those performed later.⁷² Secondly, it was too restrictive in that it limited abortion to a single reason, “saving” the mother’s life.⁷³

The Court indicated that its decision allowed the state to place more stringent restrictions on the availability of abortion as the length of the pregnancy increases, as long as they are tailored to consider the “compelling” interest of both the mother and potential life.

65. *Id.* at 163 (The court said this is a reasonable point because mortality in abortion prior to this point is less than mortality in normal childbirth).

66. *Id.* (The court listed examples of permissible regulation as “qualifications” of the doctor, “licensure” of the doctor, and designation of the facility as a clinic or a hospital.)

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (The ability to live outside the womb.)

71. *Id.* (Once the state has a compelling interest in the viable life it may regulate abortion.)

72. *Id.* at 164.

73. *Id.* at 164-165. Here, the court summarized and repeated its decision. The court indicated: “A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment. (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician. (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”

III. RECONSIDERING ROE: PLANNED PARENTHOOD V. CASEY

Roe v. Wade was decided in 1973. For nineteen years the Court's determination that the Constitution protects a woman's right to terminate her pregnancy in its early stages was sharply questioned. Finally, in 1992 in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁷⁴ the Supreme Court was given an opportunity to reexamine the principles that undergird *Roe*. Recall that *Roe* decided that a woman's decision to terminate her pregnancy is a "liberty" protected by the substantive rights found in the Due Process Clause of the Fourteenth Amendment. Obviously, the Fourteenth Amendment does not specifically describe the limits of the substantive rights contained therein. Consequently, the adjudication of substantive due process rights requires the Supreme Court to exercise its judgment in determining boundaries between the individual's liberty and the demands of society in protecting the unborn. Those boundaries were again explored in *Planned Parenthood*. The issues raised in *Planned Parenthood* were framed by six provisions of the Pennsylvania Abortion Act of 1982. Briefly they are that the Act requires that: 1. the woman seeking the abortion give her informed consent prior to the abortion procedure; 2. that she be provided certain information at least 24-hours before the abortion is performed;⁷⁵ 3. that in the case of a minor, she have the consent of one of her parents;⁷⁶ 4. that a married woman who seeks an abortion must indicate in writing that she has notified her husband of the intended abortion;⁷⁷ 5. compliance is exempted with the first three requirements in the event of a "medical emergency;"⁷⁸ and, 6. there are reporting requirements placed upon facilities that provide abortion services.⁷⁹ The district court found that all provisions at issue were unconstitutional.⁸⁰ The Court of Appeals for the Third Circuit upheld all the regulations except for the husband notification requirement.⁸¹

The High Court commenced its analysis by stating that the Due Process Clause of the Fourteenth Amendment provides a constitutional protection of a woman's decision to terminate her pregnancy.⁸² The Court indicated the controlling word in the Fourteenth Amendment that governs

74. 505 U.S. 833 (1992).

75. *Id.* at 844.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Planned Parenthood v. Casey*, 744 F. Supp. 1323 (E.D. Pa. 1990), *aff'd in part and rev'd in part*, 947 F.2d 682 (3d. cir. 1991), *aff'd in part rev'd in part*, 505 U.S. 833 (1992).

81. *Planned Parenthood v. Casey*, 947 F.2d 682 (1991), *aff'd in part and rev'd in part*, 505 U.S. 833 (1992).

82. *Planned Parenthood*, *supra* note 74 at 846.

a woman's right to an abortion is "liberty."⁸³ The Court commenced its analysis by reaffirming what it called the three essential holdings of *Roe*:

1. The right of a woman to have an abortion before viability and without undue interference from the state.⁸⁴ (As previously indicated, before viability, the state's interest will not support the imposition of a substantial obstacle to the woman's elective right to an elective procedure.)

2. The state's power to restrict abortions after fetal viability, when the law has exceptions for pregnancy problems that might endanger the woman's life or health.⁸⁵

3. The state has a legitimate interest from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child.⁸⁶

The Court clearly indicated that it continued to follow each of the foregoing three principles.⁸⁷ The majority concluded that any reservations the justices may have expressed about the central holding of *Roe* are clearly outweighed by the individual liberty interests involved when they are combined with the force of the doctrine of *stare decisis*.⁸⁸ The Court pointed out that although much criticized, *Roe* has not been proven "unworkable."⁸⁹

The High Court said that even if the three principle holdings of *Roe* were in error that would only concern the strengths of the state's interest in fetal protection. That is, the central recognition afforded women's liberty interest by the Constitution would stand even if *Roe* was overruled.⁹⁰ According to the Court, the liberty interest, which supports the *Roe* decision includes:

'[T]he interest in independence in making certain kinds of important decisions.' While the outer limits of this aspect of protected liberty have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.⁹¹

The High Court forcefully stated that there is a constitutional liberty interest on the part of a woman to have some freedom to terminate her

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 853.

89. *Id.* at 855.

90. *Id.* at 858.

91. *Id.* at 858. (citing *Carey v. Population Serv.*, 431 U.S. at 684–685 (citations omitted)).

pregnancy.⁹² As a consequence, the Court believed it was unable to repudiate the constitutional basis on which *Roe* was decided.⁹³ But that right is not completely free from reasonable state regulation that protects the interest of both the woman and the unborn child.⁹⁴ And, as the Court said in *Roe*, at the point of viability the government has an interest of sufficient force to regulate the right of the woman to terminate her pregnancy.⁹⁵

The Court then faced the central criticism that the line drawn by the *Roe* court to allow government intervention, the viability of the fetus, was somewhat puzzling.⁹⁶ The *Planned Parenthood* court's response was that the claims of women to retain the ultimate control over their destiny and their bodies, claims implicit in the very meaning of liberty, required it to decide when the unborn child was viable.⁹⁷ The Court said, "Liberty must not be extinguished for want of a line that is clear."⁹⁸ But the duty of the court required it to draw a line.

The Court forcefully concluded that the line should be drawn at viability. Thus, before that time a woman has a right to choose to have an abortion.⁹⁹ There are two reasons to abide by that principle. First, while there is always a risk that the judicial act of line drawing may seem arbitrary, *Roe* was a reasonable decision reached with great care.¹⁰⁰ The great doctrine of *stare decisis* requires that the Court adhere to the principles announced in *Roe*. Secondly, viability is the time when there is a possibility of maintaining and nourishing a life outside the womb. Consequently, the independent existence of a second life can reasonably be the object of state protection that now overrides the liberty interest of the woman.¹⁰¹

The Court was much concerned that overturning *Roe*'s limitation on state power would result in serious inequity to people who had relied on the decision for close to two decades. The judges pointed out that men and women have organized intimate relationships and made choices that define themselves and their places in society relying on the availability of an abortion in the event that contraception should fail.¹⁰² The majority believed that the ability of women to participate equally in the economic and social life of the nation had been greatly advanced by their capacity to control their reproductive lives.¹⁰³ Overruling *Roe* would come at a great

92. *Id.* at 869.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 870.

100. *Id.*

101. *Id.* See *Roe*, 410 U.S. at 163.

102. *Planned Parenthood*, 505 U.S. at 856.

103. *Id.*

cost for people who have adopted their thinking and their lifestyles on the basis of the holding of that case.¹⁰⁴

It is possible that maternal health care advances after the *Roe* decision may very well allow safe abortions at a later time than the current viability standard.¹⁰⁵ Also, post *Roe* neonatal care may have advanced viability to a point somewhat earlier in time.¹⁰⁶ However, these possible changes only go to the time limits of the competing interests of the mother and the potential life.¹⁰⁷ They have no bearing on the correctness of the critical holding of *Roe* that viability – at whatever stage in the pregnancy this applies — marks the earliest point in which the state’s interest in fetal development is sufficient to justify a legislative ban on abortion.¹⁰⁸

Additionally, the Court was much concerned that overruling *Roe*’s central finding, in addition to being contrary to the doctrine of *stare decisis*, would also weaken the Court’s authority to exercise judicial power and function as a supreme court of the land. After all, the Court’s authority depends greatly on its reputation for fairness and consistency. Decisions like *Roe*, said the judges, are entitled to a strong and effective use of the doctrine of precedence to counter the resistance to implementation.¹⁰⁹ Overturning the central ideas found in *Roe* would result in a great loss of confidence and unnecessarily damage the Court’s reputation.

The judges then announced a number of guiding principles that should control their assessment of the Pennsylvania statute. They are: 1. To protect the central liberty rights recognized by *Roe* and at the same time to accommodate the state’s compelling interest in protecting potential life, an undue burden standard should be employed.¹¹⁰ An undue burden exists and is an invalid law, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before her fetus attains viability.¹¹¹ 2. The Court rejected *Roe*’s rigid trimester framework.¹¹² It declared that the state might take reasonable measures to insure that the woman’s choice about whether to have an abortion is informed.¹¹³ Measures, however, designed to advance this informed choice interest should not be invalidated when their purpose is to persuade the woman to choose childbirth over abortion.¹¹⁴ 3. Finally, the government may attempt to further the health and safety of a woman seeking an abortion

104. *Id.* at 856.

105. *Id.* at 860.

106. *Id.*

107. *Id.* at 861.

108. *Id.* at 860.

109. *Id.* at 865.

110. *Id.* at 878.

111. *Id.* at 870.

112. *Id.* at 878.

113. *Id.*

114. *Id.*

but may not impose health regulations that present a substantial obstacle to the woman's ability to obtain an abortion.¹¹⁵ 4. Adoption of any of these broad standards does not overrule *Roe's* critical holding that a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy prior to the potential life's viability.¹¹⁶ Finally, it was decided that the government may regulate or proscribe, but only after viability has been reached.¹¹⁷

The majority then applied this reasoning to the Pennsylvania law. First, the High Court determined that the state's medical emergency definition, intended to assure compliance with the abortion regulations, would not in any way impose a threat to a woman's life or health.¹¹⁸ Consequently, it does not violate the essential holdings of *Roe*. Second, the husband notification provision constitutes an undue burden of the woman's interest in an abortion and is therefore invalid.¹¹⁹ The Court was clearly concerned that a number of women might be prevented from obtaining an abortion because of this provision. The judiciary was not convinced that the father's interest in the fetal welfare was equal to the mother's protected liberty interest.¹²⁰ Obviously, the state regulation with respect to the fetus will have a greater impact on the pregnant woman's body than it will on her husband.

The Court also found the state's informed consent provision that required consultation before the procedure was not an undue burden on the woman's right to terminate a pregnancy.¹²¹ It said that requiring the woman be informed of the availability of information relating to the consequences to the fetus does not interfere with her constitutional right of privacy and does not override her right to an abortion.¹²²

Despite the controversy surrounding the implementation of *Roe*, the Court was firmly convinced that it was in the continuing national interest to uphold the core values of that opinion. As previously indicated, those core values are embedded in the "liberty" interest found within the Four-

115. *Id.*

116. *Id.* at 879.

117. *Id.*

118. *Id.* at 880.

119. *Id.* at 895.

120. *Id.* at 881.

121. *Id.* at 883. On this issue the High Court on February 24, 2003, refused to hear the appeal of a 7th Circuit decision which held that a requirement that a woman get face to face counseling at least 18 hours prior to obtaining an abortion was constitutional and did not unreasonably interfere with her liberty interest in an abortion. A lower court had found that about ten percent of women who received counseling changed their mind about getting an abortion. See, *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684 (2002), cert. denied, *A Woman's Choice-East Side Women's Clinic v. Brizzi*, 537 U.S. 1192 (2003).

122. *Id.*

teenth Amendment. The reference to a liberty interest is important but generally ignored. It indicates that the majority did not rest their decision solely on the right of privacy, which requires a balancing of interests. Instead it rested on “liberty” that is specifically mentioned in our constitution. Liberty interests of the individual are presumed constitutional, and the burden is on the government. The government bears the burden of proving the necessity of restricting a liberty interest. This was recognized by the *Casey* opinion by the quote, “Neither the Bill of Rights nor the specific practices of states at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amend. 9.”¹²³

Why is our reliance on a liberty interest wise? Because that appears to be the way of the Supreme Court. In *Lawrence v. Texas*,¹²⁴ Justice Kennedy’s opinion concerning the conduct of two gay men in their own home is based on “liberty” not privacy. He begins:

Liberty protects the person from unwarranted governmental intrusions into a dwelling or other private places. In our tradition the state is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the state should not be a dominant presence. Freedom extends beyond spatial bounds. *Liberty* presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves *liberty* of the person both in its spatial and transcendent dimensions.¹²⁵

Clearly Justice Kennedy has shifted the burden of proof. If liberty is the issue, the government is compelled to justify any restriction of the individual’s liberty as necessary. If privacy is the issue, the burden is on the individual to show that the right of privacy being exercised is somehow a fundamental right. This is not to say that the government may never restrict liberty. Surely, behavior that is violent to the rights of others may be prohibited without violating liberty rights. This is why it is so necessary to properly define the status of fetus or unborn child. Is it not reasonable to suppose that among those other spheres of liberty referred to by Justice Kennedy is the abortion decision and the liberty interests of the mother and the fetus? This we attempt.

Having explored the current legal status of the issue of abortion, we now turn to a compromise for the seemingly uncompromisable conflict that daily rages between fierce, and often violent, anti-abortion critics of

123. *Id.* at 848.

124. 539 U.S. 558 (2003).

125. *Id.* at 562.

Roe v. Wade like Operation Rescue and the pro-choice forces of groups such as Planned Parenthood.

IV. INTRODUCTION TO THE COMPROMISE

There is a strong analogy between the anti-abortionists active in the modern era and the abolitionists¹²⁶ who tried to end slavery in the pre-Civil War¹²⁷ period. Each attempts (attempted) to safeguard the well-being and even the very lives of a particularly helpless group of people.

If anything, the present day pro-life forces are in a worse position than their nineteenth century counterparts. For one thing, the fetus is far more helpless than was the black slave. The latter could “run away” with the help of the Underground Railroad and other such institutions. No three-week old fetus has the maturity to initiate or even remotely cooperate in any such venture. True, the pro-lifers can try to convince a pregnant woman not to abort, but in order to save the baby’s life they have to convince the potentially evil doer mother,¹²⁸ not of course the fetus. In contrast, the organizers of the underground railroad did not have to convince the masters of anything – not very likely, in any case – but only the slaves, a far less difficult task.

Another analogy in this regard is that between abortion and the Nazi holocaust. Both incidents are associated with massive slaughter of innocents. If the immorality of an act is correlated with the helplessness and innocence of the victims, then the moral outrage now directed at Nazis might better be vented in the direction of pro-choicers. For surely the Jews who were slaughtered, no matter how innocent of any wrong doing themselves, were at least more responsible for their fate than the fetuses victimized by abortion.¹²⁹

This practice attacks the weakest and most defenseless members of our society. It is one thing to do away with adults, as in the case of the Jewish Holocaust, the Bosnian “ethnic cleansing,” or the mass murder in Rwanda. The suffering is pitiful, but at least for the most part the victims

126. Afgem, *The Abolitionist*, <http://afgem.com/slave1.html>, (last accessed Feb. 16, 2005); InfoPlease, *Abolitionists*, <http://www.infoplease.com/ce6/history/A0802190.html>, (last updated Feb. 16, 2005).

127. Strictly speaking, a “Civil War” is conducted between two contending forces, each of whom wishes to rule the entire country. A more accurate description of the conflagration of 1861-1865 would thus be “War between the States.” Pejoratives on the other side of this debate are “War of Northern Aggression” and “First War of Southern Secession.” For intellectual support of the latter two see Thomas DiLorenzo, *The Real Lincoln: A New Look at Abraham Lincoln, His Agenda, and an Unnecessary War* (Random H. & Hummel 2002); Jeffrey Rogers, *Emancipating Slaves, Enslaving Free Men: A History of the American Civil War* (Open Ct. 1996).

128. Who, by analogy now takes on the position of the slave master, not the slave.

129. This is meant not to “blame the victims” of the holocaust, but to underscore the even greater blamelessness, or, better, helplessness, of the fetus.

were adults. In the event, they were unable to protect themselves against their enemies. But they had this option, at least theoretically.

The only group of sufferers whose plight even remotely approaches that of the fetus is the abused (small) child. This is surely one of the most pitiful sets of victims, but even they, in contrast, have had some years of life. The fetus stands alone, even compared to these other unfortunates.¹³⁰

It is for this reason we maintain that abortion is an abomination. It is a massive killer. More people¹³¹ die annually as a result of it (1,591,000) than perish from heart disease (720,058), cancer (505,322), stroke (144,088), or all accidents (91,983).¹³² Adding insult to injury, death occurs in these cases because of the purposeful action of other people.¹³³

There is another parallel between the position occupied by the pro-lifers in the modern period and the abolitionists in the 1840s. Then, the war that was to take place in twenty-five years hence would “solve” the problem. But in the interim, between 1840 and 1865, the abolitionists did what they could to bring this event about; at the very least, they prepared the way for it on philosophical grounds.

130. An anti-abortion exhibit displayed at Boise State University has drawn the ire of Rabbi Daniel B. Fink, of the Ahavath Beth Israel synagogue in Boise, Idaho. The presentation features three horrific pictures, one of Jewish victims of the Nazi holocaust, a second one of a black man being lynched, presumably by the KKK, and the third of an aborted fetus. The first is labeled as “Ungentile,” the second as “Unwhite,” and third as “Unborn.” Rabbi Fink objects on the ground that this depiction is “racist, anti-Semitic,” and “exploitative” (see Richard Morgan, *Sense and Censorship*, *The Chronicles of Higher Education* A6 (Apr. 12, 2002)). He opposes the equation of these three sorry episodes in human history. We, too, object; but likely for reasons opposite to his. In our view, what we do to very young human beings is far worse than what we do to either of these two other groups of people, and thus should not be equated with them. And this for two reasons: one, fetuses are more helpless than either Jews or blacks; two, far more of them have been murdered. Lynched blacks number “only” in the thousands. There were “only” six million Jews who perished in the holocaust. But, given that somewhat more than 1.5 million fetuses are killed every year in the U.S. alone, it takes only four short years to reach totals attained by the Nazis regarding the Jews.

131. For the purpose of this article, fetuses are counted as people. Reasons are given for this stance below.

132. Source *Statistical Abstract of the United States*, 1993; table #128, page 93 for heart disease, cancer, stroke and accidents in 1990. Data for abortion from tables #112, 113, page 83 in 1988. The Canadian death figures for 1991 are as follows: abortion, 70,463, circulatory system illness, 75,089, cancer 52,425, respiratory ailments, 16,272, accidents and adverse effects, 12,057 (*Canada Yearbook*, 1994, table #4.4 page 149), abortion 70,463 (*Statistics Canada: Therapeutic Abortions*, 1991, 82-219). Thus, abortion is the leading cause of death in the U.S. and the second leading cause in Canada. For more statistical data on the number of abortions conducted in the U.S., see <http://www.abortiontv.com/AbortionStatistics.htm#United%20States>; <http://www.abortionfacts.com/statistics/statistics.asp>. (accessed on 3/6/03)

133. Further, baby murder leads to a callous indifference to all life. A society which treats the least of us in so cavalier a fashion tends to find it easier to do away with older people against their will as well. All of life becomes cheaper.

In the present case, it is the contention of this article, new medical technology will “solve” the abortion problem. But this will obtain only if pro-lifers borrow a leaf from their abolitionist forebears. That is, they must work morally and philosophically to pave the way for this eventuality. The thesis of the present article is that, on a pragmatic level, the only way to resolve this vexing question, in a way that will satisfy both sides - at least partially - is to rely on new medical technology.¹³⁴ These breakthroughs will, hopefully, allow the pregnant woman who wishes to exercise her rights to free choice one additional option: to rid herself of the burden of bearing the fetus without endangering its life. This is not a pipedream because research in this area is proceeding apace. According to a report in *The New Republic*, scientists are perfecting a process called “ectogenesis” that allows a fetus to gestate in an artificial womb, separate from its biological mother.¹³⁵

However, just because aborting the fetus is abominable, it does not follow that it should be prohibited by law. Under a just e.g., libertarian law code,¹³⁶ there are numerous despicable acts, which are not legally proscribed, since they do not constitute “invasions” or “border crossings.” Abortion falls into this category. It is a failure to come to the aid of or an unwillingness to become a “good Samaritan.” The woman who refuses to carry her fetus to term is in exactly the same position as a person who refuses to rescue a drowning swimmer. Abortion is not, in and of itself, an act invasive of other people or their property rights, even when fetuses are considered persons.

There is perhaps no more intractable dilemma facing us today than abortion. Not since pre-civil war days has our country been so divided over a moral issue. The position adumbrated in this article, hopefully, provides a clear way out, a compromise not otherwise obtainable.

134. “. . . the time of viability is, to a large extent, determined by the advances in technology.” James J. Mulligan, *Choose Life*, 59 (The Pope John 51 Center 1991).

135. See Sacha Zimmerman, *The Future of the Abortion Debate*, *The New Republic* (Aug. 18, 2003). (The article suggests that this process might be available in 5 years.)

136. Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics and Ethics* (Dordrecht, 1989); Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Kluwer 1993); Murray N. Rothbard, *The Ethics of Liberty* (Humanities Press 1982); Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto* (Collier Macmillan 1973); Bruce L. Benson, *The Impetus for Recognizing Private Property and Adopting Ethical Behavior in a Market Economy: Natural Law Government Law or Evolving Self Interest*, 6 *Rev. Austrian Econ.* 43; Walter Block, *Defending the Undefendable* (Fox and Wilkes 1991); Williamson N. Evers, *Toward a reformulation of the law of contracts*, 1 *The J. of Libertarian Studies* 3 (Winter 1977).; Williamson N. Evers, *Social contract: a critique*, 1 *The J. of Libertarian Studies* 185 (Summer 1977); Tibor R. Machan, *Social Contract as a Basis of Norms: A Critique*, 7 *The J. of Libertarian Studies* 141 (Spring 1983); George H. Smith, *William Wollaston on property rights*, 2 *The J. of Libertarian Studies* 217 (Fall 1978).

Let us begin at the beginning. At what point does human life begin? There are really only two reasonable possibilities: at conception or at birth; all other points of development in between are merely points along a continuum which begins and ends with these two options. At any point before the fertilization, there is only a sperm and an egg. Neither, without the other, is capable of developing into anything else, let alone anything human.¹³⁷ But the fertilized egg most certainly will become a human being, if kept in the womb for nine months.¹³⁸ At any point after birth, there is similarly no question: if a baby is not a human being, then no one is.

So which is it? Does life begin at the beginning point of this nine-month continuum or at the end of it? We take the former position. We maintain that the fetus is an alive human being from day one onward, with all the rights pertaining to any other member of the species.¹³⁹

We take this position for two reasons. First, if not interfered with, without any further effort, the fetus is already on its way to human status. Surely an entity, which after a nine month “sleep” will wake up as a human being, has already attained that status. Consider the alternative. Here, the fetus of thirty-five weeks and several days, although viable outside the womb in virtually all cases given present technology, has no rights at all. It can be killed with legal impunity. It will be a fully rights bearing baby in a mere matter of hours, and yet now it can be “disposed of.” Compare two entities, assuming that this was technologically possible: one, the new-born babe, still attached to its umbilical chord, a few seconds old. The other, its sibling, is still in the womb but due out in a matter of minutes. No two entities could be more alike, biologically, spiritually, or in any other way. Yet, in the “pro-choice” philosophy, it would be murder to kill the one and a matter of complete judicial irrelevance to kill the other. Surely, this is a travesty not only of justice but also of common sense.¹⁴⁰

The second reason is a logical - rhetorical - pedagogical one. Paradoxically, considering the foregoing, we shall be defending the “pro-choice” position. It behooves us, then, to place every obstacle in our own way lest we become involved in a process of demolishing straw men. That is, given it is our view that a woman has a right to rid herself of the fetus at

137. When, and if, parthenogenesis ever develops for the human egg, or sperm, this statement will have to be reexamined.

138. With the advanced technology that the next few decades are sure to bring, it will be possible for the fertilized egg to develop outside the womb as well: in the laboratory, in a host mother, etc.

139. Steven Luper, *Invulnerability: On Securing Happiness*, 106 (Open Ct. 1996), states: “Of course, it does not follow that the death of a fetus is unfortunate. For that conclusion we would need to assume that fetuses are selves.” This is perhaps one of the most extreme articulations of the pro-choice view.

140. Contrast this with the case of partial birth abortions.

any point in this process, for any reason deemed sufficient by herself alone, matters would be far too easy for us if human life began only at birth. For then the decision to terminate the pregnancy would be non-debatable. However, if we can show, as we intend to do, that it would be licit for her to end the pregnancy even given that the fetus has all human rights, the analysis would be the more logically robust.

Since we end up taking a “free choice” position, in order to make our case as difficult for ourselves as possible, we begin by conceding to the anti-abortionist side that human life begins in the very early stages of pregnancy¹⁴¹ and not after birth.¹⁴² Given this, how can we defend the mother’s right to kill the fetus?

Simple. She owns her own body, and the unwanted fetus growing within it is in effect a trespasser or parasite. This may sound harsh, but when the property rights in question are thoroughly analyzed, it is the only possible conclusion that may be reached. To see this point, consider the following case:

Suppose one day you wake up to find yourself attached to another person, e.g., Thompson’s¹⁴³ by now famous violinist, through your kidneys. You have two healthy organs, and the other person has none that are functioning. During the night, while you slept, doctors performed an operation connecting that person to your kidneys through a sort of umbilical chord, and there you lie. This operation was conducted without the permission or even knowledge of either “patient.”

What rights and obligations do you have with regard to this violinist? First, let us stipulate that the person in question is a complete innocent. Last night he was in a hospital bed; this morning he woke up in your bed attached to you. He is not a rapist. You were “raped,” but this was not done by your bedmate; instead, it was the act of evil doctors who have since vanished from the scene. What you are confronted with is the result of the rape, namely, this person lying in bed with you attached to your kidneys¹⁴⁴ completely dependent upon you for his life.

141. Actually, with the fertilized egg.

142. Judith Jarvis Thompson, *A Defense of Abortion*, 1 *Phil. and Pub. Affairs* 47 (1971), (reprinted in *Moral problems* (James Rachels, ed., 2d ed., Harper and Row, 1975)), seems ambivalent as to whether “a line can be drawn” between the human and the non human being. Roger Wertheimer, *Understanding the Abortion Argument*, 1 *Phil. and Pub. Affairs* 69 (1971), makes this question a central focus of his analysis.

143. Judith Jarvis Thompson, *Rights, Restitution and Risk* (Harvard U. Press 1986); Judith Jarvis Thompson, *The Realm of Rights* (Harvard U. Press, 1990).

144. For the argument in favor of legalizing markets in used body parts, see generally A. F. Adams, A. H. Barnett, & D. L. Kaserman, *Markets of Organs: “The Question of Supply*, 17 *Contemporary Econ. Policy* 147 (Apr. 1999); W. L. Anderson & A. H. Barnett, *Waiting for Transplants*, 17 *The Free Mkt.* 1 (1999); A. H. Barnett, T. R. Beard & D. L. Kaserman, *The Medical Community’s Opposition to Organ Markets: Ethics or Economics?*, 8 *Rev. of Indus. Org.* 669 (1993); A. H. Barnett, R. D. Blair & D. L. Kaserman, *Improving Organ Donations:*

What can you do with this person? Suppose he goes back to sleep and is thus totally helpless. Can you just slit his throat? That would be murder and must therefore be opposed.¹⁴⁵ Killing him is aggressive; it constitutes initiatory violence. Even if you can get away with it on practical grounds, it should certainly not be allowed on the basis of legal principles.

What can you do? Do you have to let him stay attached for nine months or for any particular length of time? Instead of slitting his throat, can you sever the connection between the two of you - which would also cause his death? If you did that, you would still be guilty of the initiation of coercion, surely a crime, specifically, murder. What you must do is notify somebody - the association "Friends of Kidney Victims" or a hospital or the Salvation Army or the Church and have them sever the connection between you two, without thereby killing this dependant.

If a parent abandons a newborn in the woods or shoves a five-year-old out into a blizzard, he is doing something akin to that of slitting the chord between you and the kidney victim who is attached to you. It is incumbent upon the individual to at least make a phone call to an orphanage, or

Compensation Versus Markets, 29 *Inquiry* 372 (Fall 1992); A. H. Barnett, & D. L. Kaserman, *The 'Rush to Transplant' and Organ Shortages*, 33 *Econ. Inquiry* 506 (July 1995); W. Barnett II, *The Market in Used Human Body Parts*, 6 *The Free Mkt* 5 (1988); William Barnett & Michael Saliba, *A Free Market for Kidneys: Options, Futures, Forward and Spot*, — *Managerial Fin* —, (forthcoming); W. Barnett, II, M. Saliba & D. Walker, *A Free Market in Kidneys: Efficient and Equitable*, 5 *The Indep. Rev.* 373 (2001); D. Barney Jr. & L. Reynolds, *An Economic analysis of Transplant Organs*, 17 *A. Econ. J.* 12 (September 1989); R. D. Blair & D. L. Kaserman, *The Economics and Ethics of Alternative Cadaveric Organ Procurement Policies*, 8 *Yale J. on Reg.* 403 (1991); W. Block, *The Case for a Free Market in Body Parts*, 6 *The Free Mkt.* 3 (1988); Walter Block, Roy Whitehead, Clint Johnson, Mana Davidson, Alan White & Stacy Chandler, *Human Organ Transplantation: Economic and Legal Issues*, 3 *Quinnipiac Health L.J.* 87, (1999-2000); A. L. Caplan., *If I Were a Rich Man Could I Buy a Pancreas? And Other Essays on the Ethics of Health Care*. (Ind U. Press 1992); C. T. Carlstrom & C. D. Rollow, *The Rationing of Transplantable Organs: A Troubled Lineup*, 17 *Cato J.* 163 (Fall 1997); W. DeJong, J. Drachman, S. L. Gortmaker, et al, *Options for Increasing Organ Donations: The Potential Role for Financial Incentives, Standardized Hospital Procedures, and Public Education to Promote Family Discussion*, 73 *The Milbank Q.* 463 (1995); H. Hansmann, *The Economics and Ethics of Markets for Human Organs*, *J. Health, Pol., and Policy* and L. 57 (Spring 1989); D. L. Kaserman & A. H. Barnett, *An Economic Analysis of Transplant Organs: A Comment and Extension*, 19 *A. Econ. J.* 57 (June 1991); Dennis Prince, *Organ for Sale—Not Wurlitzer*, <http://www.auctionwatch.com/awdaily/dailynews/1-090399.html> (1999); J. R. Richards, *Nepharious Goings On: Kidney Sales and Moral Arguments*, 21 *J. of Medicine and Philosophy* 375 (August 1996); S. Rottenberg, *The Production and Exchange of Used Body Parts*, 2 *Towards Liberty* 322 (1971); R. Schwindt, & A. R. Vining *Proposal for a Future Delivery Market for Transplant Organs*, 11 *J. Health Policy and L.* 483 (Fall 1986); A. R. Vining, & R. Schwindt, *Have a Heart: Increasing the Supply of Transplant Organs for Infants and Children*, 7 *J. Policy Analysis and Mgt.* 706 (1988).

145. Christine Overall, *Ethics and Human Reproduction: A Feminist Analysis* (Allen and Unwin 1987), reaches a similar conclusion.

put the child on the proverbial Church steps,¹⁴⁶ or be in touch with whatever organization functions in this capacity in any given society. It is only if no help is forthcoming from any such quarter that these actions can possibly not be interpreted as murder.

This case is not analogous to the one where an individual is invited on an airplane trip, and then halfway, while he is up in the air, the owner states that the invitation was only for fifteen minutes and that the time is now up . . . so stop trespassing and leave forthwith, sans parachute. There is an implicit contract in force in that instance.¹⁴⁷ In contrast, there *can be* no such contract in the case of pregnancy, at the very least because there is simply no child to have a contract *with* at the point of intercourse when the child is created.¹⁴⁸ The fetus does not yet exist, and even when it does, it is impossible to have a contract (implicit or otherwise) with a one-week-old baby.¹⁴⁹

Consider another mental experiment. It is one hundred years in the future. With modern technology it is possible to take a fetus at any stage of development out of the womb and place it in a test tube or a host mother or in some other way for the mother to abandon the fetus without killing or even harming it in the least. Suppose that under these circumstances a woman had an abortion – that is, she refused to notify anyone or used the “Church steps”¹⁵⁰ – when she could as easily have saved the life of this fetus by engaging in this modern technology. Under these conditions, the individual would be guilty of an initiatory aggressive act that would certainly be contrary to all known principles of law. Under these assumptions, one would have to evict the fetus, not abort it.

146. We consider below whether, and if so to what extent, this requirement is inconsistent with the libertarian proscription against positive obligations.

147. One must of course tread carefully through the minefield of implicit contracts, but it would appear that here we have a paradigm case of this type of “agreement.” Surely no one would ever enter an airplane (or a car, train, etc.) if he were liable to be pushed out while at full speed.

148. We abstract from the possibility of the mother having a contract with the father to raise the child.

149. One could of course have an *obligation* to a small child, but cannot be bound by an implicit contract to such a person. This is because *explicit* contracts with babies (without parent or guardian consent) are impermissible, and an implicit contract is merely the embodiment of an explicit one.

150. There is an episode of the television show M*A*S*H where Hawkeye and Fr. Mulcahy brought a baby born to a Korean woman but fathered by an American G.I. to a monastery-orphanage for safekeeping since no one else would care for it. We owe this example to Hannah Block.

V. EVICTIONISM

The word “abort” is used in different ways. It is absolutely crucial that a distinction be made between killing and eviction.¹⁵¹ This future technology would allow the individual to do the one without the other. If and when it becomes possible, the individual would have an obligation, similar to the one owed to the person you woke up in bed with in the attached kidney case, not to kill but merely to evict.¹⁵² If this were not done, it would be similar to abandoning the baby in the woods.

From these examples is derived the principle that when one evicts a trespasser, or deals with any other violator of rights, one is obliged to do so in a certain way; it must be done in the least invasive manner possible consistent with upholding property rights. If a trespasser is on your lawn and you have a bazooka, you are not entitled to blow him away – not as a

151. Not every analyst of abortion seems aware of this distinction. Those who have utilized it include: Robert A. Frietas Jr., *Fetal Adoption: A Technological Solution to the Problem of Abortion Ethics*, *The Humanist* 22 (May/June 1980); Raymond N. Herbenick, *Remarks on Abortion, Abandonment and Adoption Opportunities*, 5 *Phil. and Pub. Affairs* 98 (1975); John Morreall, *Of Marsupials and Men: A Thought Experiment on Abortion*, 37 *Dialogos* 16 (1981); Susan T. Nicholson, *The Roman Catholic Doctrine of Therapeutic Abortion*, *Feminism and Phil.* 392 (Nary Vetterling-Braggin, Frederick A. Elliston, & Jane English eds., Littlefield, Adams, 1978); Christine Overall, *Ethics and Human Reproduction: A Feminist Analysis* (Allen and Unwin, 1987); Ellen Frankel Paul & Jeffrey Paul, *Self Ownership, Abortion and Infanticide*, 5 *J. Med. Ethics* 134 (1979); Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto* 108 (Collier Macmillan 1973); Judith Jarvis Thompson, *A Defense of Abortion*, 1 *Phil. and Pub. Affairs* 47 (reprinted in *Moral problems* (James Rachels, ed., 2d ed. Harper and Row 1975)); Daniel I. Wikler, *Ought We to Save Aborted Fetuses?* 90 *Ethics* 64 (1973); Walter Block, *Abortion, Woman and Fetus: Rights in Conflict?*, *Reason* 18 (April 1978).

Steven L. Ross., *Abortion and the Death of the Fetus*, 11 *Phil. and Pub. Affairs* 232 (1982), offers somewhat awkward subscript nomenclature for this distinction. His “abortion1” depicts the case “where the pregnancy but not the life of the fetus would be ended.” This is what we have been calling “eviction.” His “abortion2” refers to the case “where the fetus would be killed despite the fact that this was not at all necessary to our accomplishing (abortion1).” This, we would characterize as out and out murder. Ross’ “abortion” refers to “current practice, where separation and death occur more or less simultaneously.” This is the complex, two stage affair of eviction plus killing to which we refer as plain “abortion.”

Abortion has been defined as “the removal of a non-viable fetus from the uterus; or, the killing and removal but non killing of a viable fetus” Mulligan, *Choose Life* at 353. What about removal but non-killing of a viable fetus? That is eviction.

See generally John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *Yale L.J.* 920, 935 (1973); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, *The Supreme Court Review* 1973 (Phillip B. Kurland, et. al., eds. U. of Chicago Press 1974); Joel Feinberg, *Matters of Life and Death: New Introductory Essays in Moral Philosophy* (Tom Regan ed., Random H. 1981); Lawrence Tribe, *Abortion: The Clash of Absolutes* (W.W. Norton 1990).

152. We assume, in order to strengthen the analogy, that “modern technology” would allow you to detach yourself from the kidney victim without killing him.

first step in any case. That is far too extreme and incompatible with the doctrine of private property rights. The homeowner has the right to make sure that the outsider does not trespass further, but he must be evicted in the gentlest manner possible. Suppose a viable baby was removed from the womb, and the doctor killed it afterward.¹⁵³ It seems crystal clear that would be first-degree, premeditated murder and ought to be dealt with accordingly. It is an understatement of the highest order to say that this is hardly the gentlest manner possible.

Whether or not it can be argued that this level of technology exists now or for what term of the pregnancy is unimportant. One hundred years ago there was no question of any such technology. At that time the question arose, "Does the individual have to carry this perhaps unwanted visitor that was not contracted for to a term of nine months?" Based on the private property rights philosophy, the individual then had the right to evict the trespasser in the most gentle manner possible. If there was no gentle manner feasible, an individual's property rights to her womb transcend the so-called "right to life" of anyone else. No one has a "right to life."¹⁵⁴

Individuals only have a right not to be aggressed against. The fetus is not being aggressed against by eviction from a woman's womb, which is her property; that is, this "facility" is owned by the woman not the fetus. On the contrary, the fetus aggressor, albeit not purposefully, is the initiator of violence.

All fetuses have equal rights. They are all equally innocent. Consider those who are created as the result of rape. Clearly, here, there was no agreement or consent or invitation between the mother and the baby. But such a fetus is still a trespasser; it is in effect a parasite to the woman who does not want that fetus in her body. She has a right to evict it.

The private property rights position on this issue is thus a moderate one. Pro-abortion radical feminists and others who think they have a right to kill fetuses, even if it is possible to evict them without harm, represent one extreme¹⁵⁵ in this debate. They hold the view that it is the pregnant woman's right to determine whether or not that fetus will live. Nor does

153. Partial birth abortions consist of allowing the baby's head to protrude, but then to kill it by removing its brains with suction.

154. That would imply positive rights. Others would have an obligation to help. For a libertarian critique of this Good Samaritan or brother's keepers' philosophy, see Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Pol. and Ethics* (Dordrecht 1989); Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Kluwer 1993); Murray N. Rothbard, *The Ethics of Liberty* (Humanities Press 1982); Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto* (Collier Macmillan 1973); Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974).

155. Steven L. Ross., *Abortion and the Death of the Fetus*, 11 Phil. and Pub. Affairs 232 (1982).

this apply only in the case of rape. This position defends a woman's choice to abort when intercourse for the purpose of procreation occurs voluntarily, but later on she decides not to carry the baby to term. Women have a right to kill their unborn children, even if medical technology exists which would save it, in this view.

On the other side of the spectrum are the anti-abortionists, who would violate the woman's right to her own body to the extent of insisting that a trespasser, a parasite, be allowed to remain there for nine months against her will.¹⁵⁶

This position is also unjustified, from a libertarian point of view. The position herein advocated is to allow for eviction, not killing; it does not support trespassers "rights" over those of the legitimate owner of the maternal property in question.

Causation is not directly a legal concern. The law is a normative science; causation is at most an element in a positive science. It is a category mistake to conflate causation and rights violations. We are not now involved with positive causality, only with normative rights violations. All sorts of harm are *caused* by people, and these actions would not be proscribed because they are all well within our rights. Certainly, in the case of rape there is no such cause. The woman is a totally innocent victim. She did not cause that baby to come into being. The reason that fetus came into being was "caused" by the rapist. The key is not causation. Our perspective does not deal with cause but rather with rights violations. The key is not who caused the death, it is rather who violated the rights of the individual. Rights are not violated by evicting a parasite or trespasser.

The bottom line, here, is the question of legality: under what conditions is it justified to use force? In our own personal view, abortion is an evil; we oppose it. It would be nice if all women carried babies to term, and that as a result there were fewer, or better yet, no people killed in this manner. We are pro-people. We also oppose drugs, alcohol, cigarette smoking, and chocolate eating. We try hard not to do any of these things. However, we would not impose a penalty on ourselves or anyone else for engaging in these actions. It is the same with abortion. The real question is, "What penalties should be imposed for engaging in this practice?" not whether or not it is virtuous or moral to indulge in them.

The anti-abortionist position, to be logically consistent, would have to hold this action as premeditated, first-degree murder. If the death penalty is justified in any case, it is justified in this one. It should apply to the woman who gets an abortion and to the doctor or whoever performs it. If that kind of penalty is not imposed, there is an inconsistency that is incom-

¹⁵⁶ Doris Gordon, *Abortion and Rights: Applying Libertarian Principles Correctly*, 1 Stud. in Prolife Feminism 121 (spring 1995).

patible with just principles of law. The logic of the premises is not being followed.

The position put forth here, in contrast, is one of eviction not of killing. However, if the only way to evict is by killing the fetus, then the woman's right to her property - that is, her womb - must be held above the valuable life of the fetus. At least in cases of rape, it is clear that the fetus is a trespasser and a parasite. This, then, is true in every case because all fetuses have the same rights.

Let us put this in other words. Must A agree to stay attached to B, who has no functioning kidney, for the rest of his life? Hardly. Individual B is a parasite, no matter how personally innocent. Must A agree to maintain this bizarre experiment for nine months, if that is how long it will take to uncover a new donor for B? Not at all. Any such requirement would entail slavery of A, for whatever the duration.

Nor, at the other extreme, may A simply haul off and shoot B to death. The latter is not guilty of any wrongdoing. Our theory would require that A detach himself from B in the gentlest manner possible, so as to give him the best chance for survival. This would entail, presumably, a visit to the hospital that very day, where they could be surgically disconnected, and the status quo ante achieved.

If this discussion is correct, we deduce that the pregnant woman may remove the fetus from her body in a manner that does the least harm to it possible. That is, she may evict but not kill it. True, one hundred years ago the only way to rid herself of the unborn human within her would have been to put it to death; one hundred years from now, it will presumably be possible to transfer it to a test tube or a host mother without disturbing it in the slightest.

At present, however, this policy prescription serves as a true compromise between the pro-choice and pro-life camps. The former gains half a victory: the woman may rid herself of the fetus, as is desired by the pro-choicers, but they will be disappointed in that she does not also have the right to kill it. Likewise, the latter also comes away with half a loaf; this side of the debate welcomes the fact that the baby will live, even if they cannot, under the compromise, force the biological mother to bear the child, as they would wish.

VI. COMPROMISE

This compromise, or eviction position, is a true intermediary between the two more well-known abortion theories, pro-life and pro-choice. It and it alone can be justified; the others cannot.

The key to the solution is to focus on the private property rights in question. In this case, it is the mother's womb; given that the fetus is unwanted, it is in effect a trespasser or a parasite. The mother, then, has a right to evict it -in the gentlest manner possible - but not to kill it.

One hundred years ago, this would not have had much practical import; eviction necessarily meant killing. One hundred years from now, presumably, we will have the medical technology necessary to preserve the life of the fetus outside the natural mothers' womb during any stage in its development (whether in a test tube or in the womb of a host mother, etc.) Right now, medical technology can preserve the lives of some evicted fetuses but not all. This factor alone would render evictionism a true compromise.

But there are various other dimensions to it. These may best be brought out with the help of the following chart, which depicts three possible answers to a series of important questions, not merely two, as is usually supposed:

- A. Pro-abortion (pro-choice)
 - B. Eviction (pro property rights)
 - C. Anti-abortion (pro-life)
1. Is the mother compelled to bring the fetus to term; that is, to carry it for nine months?
A. no B. no C. yes
 2. Can the mother evict the fetus from her womb?
A. yes B. yes C. no
 3. Can the mother kill the fetus? (Would that new pill - RU 486 - which kills and then flushes out the fetus, be legal?)
A. yes B. no C. no
 4. Given century old technology, can the mother unilaterally determine that the fetus shall die?
A. yes B. yes C. no
 5. Given present technology, can the mother unilaterally determine that the fetus shall die?
A. yes B. sometimes C. no
 6. Given future technology, can the mother unilaterally determine that the fetus shall die?
A. yes B. no C. no

Pundits, editorialists, moralists, lawyers, judges, and advocacy groups have all been arguing over columns one and three. They ignore column two, which is a principled compromise that contains at least a potential solution to this seemingly intractable problem.

Evictionism also solves the challenge of anti-girl baby abortions. In China, India, and elsewhere, cultural phenomena influence women to abort baby girls in favor of their male counterparts. There are many difficulties in this arena, where modern leftist radical¹⁵⁷ feminism meets ancient culture and Malthusian¹⁵⁸ over populationist hysteria. Left feminists urge that women be free to choose whether to abort or not. Heavily populated countries such as China have instituted laws, which mandate the maximum number of children each mother may bear (typically, one). As a result, women in these third world societies have been making decisions all right but not in the direction presumably favored by Marxist feminists; to wit, they have been choosing to kill almost exclusively their baby girls.

There are numerous problems here apart from the sheer human tragedy of massive murder of the innocents involved in all abortions. For one thing, the radical feminists seem to have been hoisted by their own petard.¹⁵⁹ They have championed “choice” in these matters, and the decision of women has been, if anything, the exact opposite of what they would have asked of these women, had they been able to make that choice for them.¹⁶⁰

Another predicament has to do with sociobiology.¹⁶¹ Females, not males, are the limiting factor in population growth.¹⁶² It is for this reason that the farmer keeps twenty-five cows and one bull, not the reverse. Any

157. There is no reason to allow socialist women’s organizations to co-opt the honorific “feminism.” On the contrary, there are also feminists of almost diametric opposite viewpoints. See Wendy McElroy, *A Site for Individualist Feminism and Individualist Anarchism*, <http://zetetics.com/mac/> (Last updated Feb. 16, 2005); Joan Kennedy Taylor, *Reclaiming the Mainstream: Individualist Feminism Rediscovered* (Prometheus 1992).

158. Paul Ehrlich, *The Population Bomb* (Sierra Club- Ballantine 1968); Al Gore, *Earth in the Balance: Ecology and the Human Spirit* (Houghton-Mifflin 1992).

159. There are some who would not look upon this result exactly as a “problem.” See e.g. Michael Levin, *Comparable Worth: The Feminist Road to Socialism*, Commentary (Sept. 1984); Michael Levin, *Feminism and Freedom* (Transaction Books 1987).

160. States Christine Overall, *Ethics and Human Reproduction: A Feminist Analysis*, 20 (Allen and Unwin, 1987), “. . . sex pre-selection based on intrinsic sex preference is always irrational and wrong . . . except to avoid offspring with sex linked diseases.”

Further, Overall, maintains that “The technology of sex pre-selection enables people, particularly men, to act upon their biases against women; it is not an exaggeration to regard the potential results as a form of genocide - that is, a wrongful form of sexual discrimination that reduces the relative number of females. *Id.* at 31. Robyn Rowland, *Motherhood, Patriarchal Power, Alienation and the Issue of “Choice? in Sex Pre-Selection,”* in *Man-Made Women*, 75 (Gena Corea et. al., eds., Ind. U. Press 1987), refers to sex preselection, cloning, ectogenesis, surrogate motherhood as “. . . technology which could mean the death of the female.”

161. Edward O. Wilson, *Sociobiology* (Harvard U. Press 1980).

162. For the view that population growth is not a danger, e.g., that there is no overpopulation threat, see Julian Simon, *The Ultimate Resource* (Princeton U. Press 1981); Walter Block, *Population Growth: Is it a problem?* in *Resolving Global Problems into the 21st Century: How Can Science Help Proceedings of the Fourth National Conference of Canadian*

society, then, which limits its female population, is dooming itself ultimately to extinction. One reaction to this might be to adopt a “laissez-faire” attitude of “so be it”: if a group of people wishes to abort females and thus eventually vanish, let them get on with it; they have the right to make such choices, and if they result in the demise of their society, there will be no one but themselves to blame. Possibly, long before group extinction, it will be realized that this behavior is not exactly pro survival and will be ended voluntarily. If so, they will endure; if not, they will not. In either case, their fate is in their own hands.

Yet another concerns the kind of society that will be in existence roughly twenty years after such decisions are made. It will be one with hundreds of males for every female: surely a recipe for disaster, at least from a social and psychological perspective.¹⁶³ The result can only be massive homosexuality, or polyandry, or massive emigration, which will only start the problem off on another round elsewhere, if these mores are carried with them.

True, under evictionism, the “traditionalist” mothers would have chosen to evict, not abort, their female children. But this gratuitous killing of girl babies would be ended, since the ones who were evicted for this reason would grow up to be adults in any case, albeit in a test tube or host mother, not in the pregnant woman herself.

If so, none of these difficulties would arise, not the socio-biological ones or the social and psychological. As well, the left wing woman’s movement would be saved from an extremely embarrassing result, which, one might reason, would make them more receptive than otherwise to evictionism.

VII. PRAGMATIC ISSUES

Given, then, that abortion is an immoral¹⁶⁴ but not legally punishable offense, what can be done, short of using the majesty of the law, to stop

Pugwash, 30 (CSP Publications 1989); Daniel Coffey & Walter Block, *Postponing Armageddon: Why Population Growth Isn't Out of Control*, 15 *Humanomics* 66 (1999).

163. Sowell tells of the Japanese males who emigrated to the U.S. in the 19th century, and were prohibited by immigration law from bringing women who might have become their wives with them. See generally Thomas Sowell, *Race and Economics* (Longman 1975); Thomas Sowell, *Ethnic America* (Basic Books 1981); Thomas Sowell, *The Economics and Politics of Pace: An International Perspective* (Morrow 1983).

164. An argument can be made that abortion as a last resort in the case of rape or incest, or to save the mother’s life, is not immoral. But utilization of this procedure as a means of birth control hardly qualifies. However, the fetus who is a product of rape or incest is every bit as deserving of the right not to be aggressed against as any other fetus. Thus, abortion in even these cases would be unjustified according to libertarian law. Eviction, of course, would be justified for incest and rape. And the same applies to cases where the pregnant mother’s life is in danger: she may evict, but not evict and then murder, e.g., abort, unless medical technology is not advanced far enough to distinguish between the two. In any

this monumental slaughter of human infants? Paradoxically, one must embrace the notion of evictionism, and then count upon developing technology to save these countless baby lives.

Even on a pragmatic basis, the frontal attack on abortion simply does not work. Anti-abortionists have long pleaded with the political process to stop this unconscionable slaughter – all to virtually no avail.¹⁶⁵ The popularity of the present law, as revealed by numerous public opinion polls, indicates, moreover, that this state of affairs is likely to continue for the foreseeable future.

The mistake has been to confront the problem totally and directly; e.g., to insist upon an end to abortion. This has not worked, will not work, and at least on the moral grounds we are now defending, should not work. All is not lost, however, in the fight to save the poor children who have had their lives cruelly snuffed out through this process. There is an alternative that may prove successful. (Given the vast amount of good to be attained by saving the lives of fetuses, anything may well be better than current efforts).

How will embracing the evictionism analysis help with saving precious human lives? Simple. With advanced medical technology, based on breakthroughs which are even now almost an everyday occurrence, it is extremely likely that a greater and greater number of fetuses will be able to be safely transported from the (original) mother's womb to another safe and supportive place: to a surrogate mother, to the uterus of an animal, to a mechanical or laboratory contrivance ("test tube"), to some other alternative which cannot even be imagined today. Is there any doubt that this will come to pass if it has not yet already occurred – in twenty-five, fifty, or one hundred years from now?

What will abortion law be like on that day? If there is little or no change from what prevails at present, the fetuses of the future will face the same fate as those today, despite the advances in medical technology that could otherwise have saved their lives.

With no distinction between eviction and abortion, and with the latter legal as it is at present, a woman who wishes to rid herself of an unwanted pre birth child will be able to do so with impunity. Even though there are (will be) facilities standing by which could preserve the

case, the present article is devoted not to an analysis of the moral status of abortion, but rather concerns something very different: what the law on this issue should be from the point of view of justice.

165. One indication of the fact that the anti-abortionists are losing the battle – apart from the sheer numbers killed – is the increasingly harsh treatment to which they are subjected to by the law and police when they attempt to blockade and picket abortion centers. In some jurisdictions, e.g., British Columbia, Canada, it is now illegal for peaceful pickets to come within several hundred feet of an abortion "clinic." This pro abortion "bubble law" is in sharp contrast with labor legislation in the province; in that case, there are very few limitations on picketing.

life of her fetus, she now is and will continue to be under no legal compulsion to choose this option.

But suppose that there were a very different legal regime in operation. How would the fetus fare under laws that prohibited abortion but allowed eviction? On the assumption that this law was obeyed,¹⁶⁶ the unborn child would be in a far better position. For now, if its mother wanted to rid herself of him, he would be guaranteed an alternative place of incubation.¹⁶⁷ Previously, in contrast, the maternal decision to kill off her child would have prevailed.

From a pragmatic point of view, then, “pro eviction” may well be a better strategy than “pro-life.” That is, if maximizing the number of babies saved is the goal,¹⁶⁸ it is far more likely to be attained if the pro-life forces throw their weight behind a law which allows eviction, than to remain in their present path and to continue to hold out for a law which prohibits abortion.

Why is this? There are several reasons:¹⁶⁹

1. The present tactic simply is not working. Right now, despite the best efforts of all concerned, like it or not, the pro-choice movement has won out. Legal abortions may now be obtained with about as much difficulty as prescription drugs. Nor is the prognostication for any change in the foreseeable future. According to public opinion polls, an imperfect but not fully misleading indication of future legislative enactments, this cannot be denied.

It is a basic aphorism of life that when you are losing, it often pays to consider a different strategy. This applies to sports, to examination taking, to love making, to playing a musical instrument - in a word, to just about every human endeavor imaginable. It would be amazing if one arena - saving the lives of human infants - were an exception to this general rule. It is time; it is long past time, that we pro-lifers at least consider the possibility that there may be a different means, which is better tailored to obtain the ultimate end - the safeguarding of innocent lives.

166. It would take us too far a-field to make any other assumption.

167. This guarantee would have to be financially supported by the pro-life community, or through similar charitable, efforts. Based on the vociferous opposition to abortion, there seems little doubt that this could easily be done. According to expert estimates, the black market price for an adoption is some \$25,000. There is little doubt that were this market legalized, a lion's share of these funds would be diverted toward saving the lives of fetuses. See generally Richard A. Posner, *Economic Analysis of Law*, 139 (3d ed., Little Brown 1986); Nancy C. Baker, *Baby Selling: the Scandal of Blackmarket Adoptions* (Vanguard Press 1978).

168. Is there any other pro life desiderata worth mentioning in the same breath? Hardly.

169. In this section we particularly ignore, for argument's sake, the moral issues. We focus on only one question: which course of action will maximize the preservation of human (e.g., fetal) life. Let it not be argued that this is not a worthwhile endeavor. To be sure, morality is paramount. But such concerns should not be allowed to completely blind us to *other* monumental tasks, that is, in this case, saving life.

2. Evictionism is a compromise position. It lies part way between the status quo, where babies are slaughtered with as much compunction as we would swat a fly, and the present official goal of the pro-life movement, which is to force all¹⁷⁰ pregnant women to carry their unborn child for nine months and then deliver them.

Under evictionism, each side gets half a loaf. The pro-lifers are assured¹⁷¹ that fetuses are not done away with in a cavalier manner. Had they their 'druthers, they would also insist that the natural mother bring the baby to term after a gestation period of nine months. This, they cannot have, under the terms of the evictionism compromise.

Similarly, the pro-choicers obtain some but not all of what they want. They wish the mother not only the right to cut short the pregnancy term but also to have a life and death say over the fate of the child they bear. Under evictionism, they could only retain the former; the latter would be denied them. That is, the mother could end the pregnancy any time she wished,¹⁷² but once she did so, the determination of life or death for her progeny would be out of her hands.

3. Moving from the present law of practically unlimited abortions, to the pro-lifers' ideal of (practically) none, is an all or none proposition. It is like betting the mortgage on one flip of the coin. It is an exceedingly high-risk strategy. If it prevails, well and good.¹⁷³ The pro-life community will have attained all it wants. If the change in law fails to occur, this movement will be pushed back to the status quo where it attains neither of its two goals (e.g., saving the fetus's life, the legitimate goal, and forcing the mother to bear the child, the illegitimate one from the libertarian point of view). Since the lives of potentially millions of babies are at stake, it may well prove better to adopt a more risk reducing stance: instead of holding out for the full loaf of bread, content oneself with half a loaf, given the greater likelihood of achieving the latter. This advice is certainly buttressed by past experience. Millions of dollars have been raised and spent. The courts have pretty much concluded, at least since *Roe v. Wade*, that a woman has the right to abort. Thousands of protests at abortion centers have been held. A few abortionists have even been killed. But at least so far, it is safe to say, the conscience of the nation has not been changed. On the contrary, the protesters who hold the vigils are widely seen as

170. In some cases, an exception would be made for the cases of rape, incest, or to save the mother's life.

171. This is based upon the assumption, of course, of medical technological availability.

172. As technology progresses, the time when eviction will be able to be completed safely will be extended more and more; eventually, there can be little doubt, transplants of the baby from the natural womb to a substitute will be a feasible even as late as the ninth month, and as early as a few days after conception.

173. Well and good for the pro-lifers, that is. But not for the libertarian, for whom evictionism is not a compromise, but rather the only system fully consistent with liberty and human rights.

“extremists,” something that does not bode well for the prospect of saving these helpless young lives.

4. Eviction has not failed. As it happens, it has never been tried. The main reason for this is that it is almost totally unknown as an option.¹⁷⁴ Now it may well be that this option, too, shall fail. If so, it will not be the first time in the history of the world that justice did not prevail. But should this occur, little will have been lost. The pro-life movement will be in no worse position, life saving wise, than now prevails. And at least we shall have had the satisfaction of striking out in a new *ex ante* promising direction. Perhaps, out of this failure, should it indeed occur, new ideas for subsequent attempts shall be born. But at this point in time, all this is a bit premature. No one knows if this strategy will succeed or not. It seems reasonable to at least give it a try, given that extant methods seem to be running up against the proverbial brick wall.

5. Eviction, even though characterized above as constituting “only half a loaf,” is all that the pro-life position, properly construed, really requires or is entitled to. As the very name implies, saving lives - nothing more, nothing less - is really what the pro-life movement is all about. All else, even if compatible with this end, is simply extraneous. And if incompatible, it must be jettisoned as not only irrelevant but as a positive danger to the main goal.

There is simply no reason why pro-lifers should prefer the traditional means of giving birth. They must of course oppose abortion, but for them eviction should be a perfect substitute even for normal births. All that should matter is that the fetus be safely born. If this is done the natural way, well and good. But if this goal is achieved in *any other* way (e.g., surrogacy, etc.), it should be a matter of complete indifference to advocates of the pro-life position. Life is life is life; where it occurs is only a matter of housing.¹⁷⁵

Even were this not so, pro-lifers cannot afford to spread themselves out too thinly. There are many good deeds simply crying out to be accomplished. For this movement to spend any effort whatsoever on promoting traditional birth methods implies just that much less can be utilized on their unique mission. Actually, to do so would be a betrayal of that philosophy. Worse, if this is done in the name of pro-life and with financial resources donated to that specific cause, then it amounts to no less than fraud.

174. See Walter Block, *Abortion, Woman and Fetus: Rights in Conflict?*, Reason 18 (April 1978).

175. We assume, needless to say, that surrogacy “housing” is not inferior to the natural kind. Whether it is or not is an issue too far a-field to be considered here. It is also irrelevant, given our main purpose: to shed philosophical light on the implications of a private property rights analysis of abortion.

But this may be a bit of overkill. It is not clear that there is any responsible person in the pro-life community who advocates eschewing the main life saving mission, even in part, so as to increase the likelihood of natural births. Again, it seems more reasonable to suppose that the reason both goals have been pursued in the past is due to a failure to see that there really *are* two separate and distinguishable elements in the demand that abortion be stopped: normal births and live babies.

What of the argument that the best policy may be to wait to support evictionism until the new technology kicks in? In that way the pro-life movement can, as it were, have its cake and eat it too.

This is a problematical strategy for several reasons. One, the new technology is already “kicking in.” If ever this were a reasonable tactic, it is no longer so. Two, why not use the extra time to organize? The other side certainly will. Three, it will be a lot easier to convince people of evictionism if advocacy of such a position is, and is widely seen to be, a defense for its own sake rather than merely as a second best policy. Long-term advocacy is usually more effective than being a Johnny - come - lately.

What of the argument that anti-abortion will save lives now and forever more; eviction will only save lives in the future, as technology develops. Therefore, embrace anti-abortionism, not evictionism (again, eschewing morality and focusing only on life saving). This argument, too, is fallacious. First, we have witnessed the utter failure of the pro-life movement to achieve its goals. Second, under a legal system of eviction, the requisite technology will develop faster than otherwise. The anti-abortionists will only be faced with a technical problem, not a political one, which they have so far been losing, with no prospect of a victory in sight.

Thus, the present stance of the pro-life forces is a highly risky one; by keeping their heads in the sand regarding evictionism, they are endangering the lives of millions of babies, the very opposite of their goal. Yes, if they win, they win right now. But if they lose, they lose forever more or at least as long as it takes to convince a majority of the pro-life anti-abortion case.

This, then, is the pragmatic case for taking on the banner of evictionism, and eschewing the demand that the natural mother be forced to carry the fetus for nine months and then give birth to it. Had the pro-lifers seen the difference between these two very different claims say, fifty years ago, it is just possible that many infants consigned to death today would already be saved. That was not to be. However, if a sea change can occur today, fetuses of the future may be spared the fate suffered by all too many at present.

If evictionism were to be instituted at present, at one fell swoop one-ninth or perhaps two-ninths of all babies would be immediately saved.

Partial birth abortions would immediately become a thing of the past. Moreover, within a few years, a third ninth of babies could be saved, as medical technology is enhanced. And so on. This process would continue until *all* fetuses would be kept alive.

VIII. IMPLICATIONS

In this section we explore the implications of the libertarian eviction theory for several related issues and questions.

1. Suppose eviction costs more than abortion; who pays?

If it costs more to engage in this technology, there is no positive obligation for the mother to pay the extra amount. This should be done by the Church or a group called the Friends of Babies or some pro-life type of group specifically set up for, and devoted to, this very purpose. However, the individual does have the obligation to make use of such modern technology. Consider a pregnant woman who refuses to avail herself of medical breakthroughs.¹⁷⁶ She has the right to refrain on her own accounts but not to kill (e.g., make it impossible for someone else, with a test tube incubator) her child.

2. Suppose eviction is more dangerous than abortion, should the mother be forced to undergo the former procedure? No, not a bit of it. The libertarian position is a true compromise, as it happens; some things go one way, others things not. On this issue, the private property analysis sides with the pro-choicers. Under libertarianism, there are no positive obligations. Thus, the mother is only to be forced to undergo an eviction procedure (on the assumption that she prefers aborting her child) when there is no increase in hazard to herself.

3. What should be the legal status of RU-486?

The abortion pill is known as RU-486 in France and a combination of mifepristone and misoprostol in the U.S. But whatever its name, it has been declared by our Food and Drug Administration to be safe, effective, and relatively risk free. The controversy surrounding this drug, however, arises from none of these sources. Instead, it emanates from the fact that this drug works not by making it impossible for the egg and sperm to come together, but, rather, by in effect killing off the fertilized egg, otherwise known as the fetus.

Our position on this drug should by now be clear. In the past, when fetal outplacement was impossible, the RU-486 was the most gentle (well, no more invasive than any other form of eviction) form of ridding the woman of an unwanted fetus. Therefore, it was justified. In the future, when it will be technologically feasible to more gently remove the fetus from the womb without harming it or the mother, use of this drug would be considered murder. At the present day – is not it ever this way? – things

176. Shades of Jehovah's Witnesses.

are more complicated. Our own technological knowledge admits of no answer to this question. But at least we have a principle to guide us through this moral thicket: if and to the extent outward transfer is possible, then and to that extent the drug should be prohibited for pregnant women.

Of course, an eviction pill, not an abortion pill, would be totally justified. That is, medicine, which results in the expelling of a healthy fetus (able to be hosted by a surrogate), would be entirely compatible with libertarian law.

4. Child abuse

What about preventing the pregnant mother from the “child abuse” of drinking wine or smoking cigarettes?

This is hard to answer, given the present medical uncertainty about the harm committed thereby. Instead, take a more radical case,¹⁷⁷ for which no one can be found who would deny that the substance harms the fetus: crack. If giving crack to an infant would amount to child abuse, then the same conclusion must be reached for the fetus. But abuse for a child, under libertarianism, would imply at the very least¹⁷⁸ that the victim be forcibly removed if by doing so the situation of the fetus would improve.

5. Does the pregnant woman have the right to commit suicide?

In the ordinary case, the answer is clear. Since libertarianism prohibits only the initiation of violence against another person or his property, and since suicide is violence against the self, not another person, this form of killing is legally justified.¹⁷⁹ Dr. Kevorkian would not be incarcerated in a libertarian society.

When the pregnant woman commits suicide, however, she of course ends the life of a person other than herself. Does this count as the initiation of violence against another person? Not at all, since the fetus, as we have seen, is the aggressor, trespassing on *her* property, that is, herself.

In the past, when there was no possibility of preserving a fetus outside the mother’s womb, the libertarian would have placed no legal barriers in the way of her suicide. Nowadays, of course, the position is a bit unclear. However, in the future, when medical technology allows for eviction, the

177. Or assume for the sake of argument that for a pregnant woman to indulge in alcohol or cigarette smoking constitutes child abuse.

178. For libertarian punishment theory in general, see Murray N. Rothbard, *The Ethics of Liberty* (Humanities Press 1982); Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto* (Collier Macmillan 1973); *Assessing the Criminal* (Randy Barnett & John Hagel eds., Balinger 1977). Specifically, the punishment for child abusers should be even more severe than that accorded those who engage in such attacks upon adults, if only because of their greater helplessness and dependency.

179. Not morally however. On this see Walter Block, *Libertarianism vs. Libertinism*, 11 J. Libertarian Stud.: An Interdisciplinary Rev. 117 (1994). For an alternative anti-libertarian view on suicide, see Milton Friedman, *Say “No” to Intolerance*, 4 Liberty Mag. 17 (1991).

mother must be prevented by law from committing suicide *before* transferring her child to another host. She cannot be kept waiting, certainly not for nine months or so. On the other hand, for reasons discussed below under the heading of “positive obligations,” she can be kept waiting for a “reasonable” amount of time, e.g., a few hours, analogous to her duty to inform others of a child available for adoption.

Of course, there is a distinct limit to the effectiveness of legal sanctions for those who wish to commit suicide. As a practical matter, pregnant women in that position will presumably do exactly as they please. But our task is to clarify what the law should be, and in this case it would prohibit suicide until an eviction team can be (reasonably quickly) brought to bear.

IX. OBJECTIONS

With these remarks, we have now presented the case for evictionism, the compromise between the pro-life (no eviction allowed) and the pro-choice (killing is allowed, even when not required to evict) positions. It now remains for us to defend this perspective against criticisms. As with all moderate philosophies, the libertarian must vindicate itself vis-à-vis objections from not one but both of the other two sides of this debate. It is to this task that we now turn.

1. Transplant analogy misses the mark

Some might object to the kidney “transplant” analogy on the ground that the woman is responsible for the pregnancy and must bear the full consequences of the act responsible for this state of affairs, while Mr. A, Thompson’s violinist who lacks a kidney, is a completely innocent party. But the woman, conceivably, could be ignorant of the causes of pregnancy; many were, in previous centuries. As well, the mother who was victimized by rape has in no way consented. And yet, her child has the same rights as all other children conceived in voluntary circumstances. Even on the assumption that the woman voluntarily agreed to engage in sexual intercourse, knowing full well that it might result in pregnancy, it by no means follows that she should be forced to bear the child to term. Under the libertarian code of law, we may be punished only for initiating violence against a non-aggressor, or for contract breaking, which amounts to the same thing. Yet, it is the unwanted fetus, not the mother, who is “initiating violence” by trespassing on private property (the womb). As for contract breaking, if the mother were paid to have a child by the father or by a third party, then and only then would eviction or abortion constitute a rights violation, not of the fetus but of the person who paid her. At the point of intercourse, there was simply no child or fetus in existence with whom she could have contracted, assuming that a person of such tender age would be in a position to engage in an agreement in the first place.

Further, there is something perverse in interpreting the requirement that people take responsibility for what they do in this manner. If a pregnant woman cannot evict her fetus on such a ground, what of the person who ate too many French fries? Logic would imply the illegitimacy of him obtaining an angioplasty. For if you eat too many fatty foods you are on your way toward having a heart attack, availing yourself of a coronary bypass or other such operation would be to fail to “take responsibility” for your initial actions. This is an obvious bit of nonsense. Yet, precisely this argument applies to the eviction case.

2. Positive obligations

Another argument against the libertarian view is that it amounts to a demand for positive obligations.

Before confronting this charge head on, let us place it in context. Our claim, here, is that if we are indeed guilty of making an exception to the general libertarian stricture against positive obligations, it is a very narrow and limited one. All that is required is that the pregnant woman notify an evictionist that she wishes to rid herself of the fetus. In the case of the post birth child, the “positive” requirement would be that the parent not simply hide the child in an attic or basement and refuse to feed it until it dies. Instead, the “obligation” is to engage in a public notification (to the newspaper or radio or church or orphanage or evictionist) to the effect that the parent in question no longer wishes to support his child. It is only if no one else in the entire world desires to take charge of the baby that it may legitimately die of neglect, under the libertarian code.

But even such a minimalist exception is still incompatible with the prohibition against compulsory Good Samaritanism. In order to see why such a charge does not apply, we must be clear on the relationship between parents and children under libertarianism.¹⁸⁰ A child falls part way between animals or land and other people. One may not own other adults; slavery represents an initiation of violence.¹⁸¹ One may own animals and real estate outright, after homesteading¹⁸² — mixing one’s labor with them.

180. Bill Kauffman, *The Child Labor Amendment Debate of the 1920’s; or, Catholics and Mugwumps and Farmers*, 10 J. of Libertarian Stud. 139 (Fall 1992); Williamson M. Evers, *Rawls and children*, 2 J. Libertarian Stud. 109 (Summer 1978); Williamson M. Evers, *The law of omissions and neglect of children*, 2 J. Libertarian Stud. 1 (Winter 1978); Walter Block, *The Employer of Child Labor*, in *Defending the Undefendable*, 247 (Fleet Press 1976); Murray N. Rothbard, *The Ethics of Liberty*, 97-112 (Humanities Press 1982).

181. For an analysis of “voluntary slavery,” see Walter Block, *Voluntary Slavery*, 1 The Libertarian Connection 9 (Apr. 1969); Walter Block, *Toward a Libertarian Theory of Inalienability: A Critique of Rothbard, Barnett, Gordon, Smith, Kinsella and Epstein*, 17 J. Libertarian Stud. (Spring 2003); Walter Block, *Alienability, Inalienability, Paternalism and the Law: Reply to Kronman*, 28 Am. J. Crim. L. 351 (Summer 2001); Walter Block, *Market Inalienability Once Again: Reply to Radin*, 22 Thomas Jefferson L. Rev., 37 (Fall 1999).

182. John Locke, *An Essay Concerning the True Origin, Extent and End of Civil Government*, in *Two Treatises of Government*, 17 (P. Laslett ed., Cambridge U. Press 1960); Hans-

After the homesteading period is over, ownership is no longer conditional; it applies even to absentee owners. With regard to children, the intermediate case, one may not own them outright; one may own the right to raise them, by homesteading, or mixing labor with them, or by hiring others to do so in one's stead; but here, all one owns is the right to continue this process. Once the support of children (whether in the womb or not) ceases, however, any rights of parenthood cease. One may abandon a child, but if so, gives up all rights pertaining thereto. There is no such thing as an absentee parent; once parental duties are relinquished, parental rights vanish.

So, what are we to say of a parent who no longer wishes to support his child's life, indeed, wishes for death for the child, and acts in this manner by hiding and failing to feed it, yet refuses to relinquish command of the child? This would appear to be as clear a case of murder as ever there was. Thus, it is not a positive obligation at all to be required to notify the public that you are about to relinquish your control over what was previously your baby. Once you stop caring for it, the child is no longer yours.

In effect, if not explicitly, when you took over the care of the baby,¹⁸³ you assented to an implicit obligation requiring you to continue to do so or to notify someone else of this fact. To fail to do so thus smacks of rights violation¹⁸⁴ rather than being forced to assume a positive obligation.¹⁸⁵

There are more pragmatic ways of reconciling the absence of "positive obligations" with saving a baby's life: medical technology once more rides to the rescue. When and if there is a way to evict the baby which is

Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Kluwer 1993); Murray N. Rothbard, *The Ethics of Liberty* (Humanities Press 1982); Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto*, (Collier Macmillan 1973).

183. Pre- or post-birth.

184. This way of putting the matter would not apply to the rape victim or to Thompson's forced host to the violinist. See Judith Jarvis Thompson, *Rights, Restitution and Risk* (Harvard U. Press 1986).

185. Hiding a newborn baby and starving it to death is akin to giving up land, but refusing to allow another homesteader access. Is the abandoner of the land really required to notify others of this fact? No, ordinarily, but then, land does not exactly have the same rights as people, at least under the libertarian code of law. But yes, the abandoner of land most certainly has the obligation of publicly notifying people of his new non ownership status if he has put up no trespassing signs, fences, etc., on his (ex)holdings. This is because if he refuses to do so, he is actively preventing others from claiming non-owned land. In keeping the baby (land) but not allowing anyone else to homestead (own) it, you are in effect preempting the rights of others to do so. No one may properly prevent others from homesteading virgin territory. A person who sets up a fence around a square mile of land, does not himself homestead, work or even claim the territory internal to that perimeter, and yet prevents others from so doing, is preempting virgin territory, contrary to homesteading theory. It is our claim that the parent who will not care for his child, and yet prevents other from doing so by hiding the baby from them, is guilty of a similar crime.

no more harmful, inconvenient, costly (or to pay the differential to the mum), risky, whatever; then, she should not be allowed to legally refuse the eviction, and we *still* do not have to concede that there are positive obligations placed on her.

Are there any positive obligations incumbent upon the kidney host person in the Thompson example? He cannot stab the kidney dependent violinist, but can he unhook the connection without so much as a by your leave? As a matter of practicality, as a non-physician, if he just cut the chord, *both* host and parasite¹⁸⁶ would likely die. As a result, he must get to a hospital or doctor to do the unhooking; and while the medical team does that, they can connect the parasite to another host or to a dialysis machine. But suppose the host is also a skilled physician in his own right. Then, by assumption, he can do the uncoupling all by his lonesome. Would he be guilty of murder if he did so (without giving even so much as a five minute warning to the violinist)? Our answer is that he would be guilty of murder. He would be doing far more than acting in mere self-defense. He would not be removing the (innocent) predator in the gentlest manner possible.

3. Returning stolen property

Consider another criticism that could be leveled against the eviction theory. This one charges an incompatibility between the libertarian position on abortion and on the ethics of stolen property.¹⁸⁷ What is the latter claim?

Suppose that A is the rightful owner of a VCR. For the Lockean, he built it out of materials available to all in nature.¹⁸⁸ For the Nozickian, he traded for it using other property or labor services to which he was entitled.¹⁸⁹ For the Marxist, A was the legitimate owner of the VCR because this was his share of the communal labor effort.¹⁹⁰ No matter what the justification, we assume that A had legitimate proprietary rights over this machine. B, then, comes upon the scene and steals the VCR away from A, whereupon he sells it to C, offering a fake bill of sale. C is totally innocent, at least in terms of *mens rea*; C is not a fence, not the knowing purchaser of stolen goods. On the contrary, C, too, like A, is a victim.

We, the forces of good or of law and order, now come upon the scene. We are the observer from on high. We know that the scenario as

186. "Parasite" has such a "bad press" in our common lexicon that we hesitate to imply this word to describe the fetus or kidney dependant person. Yet, the appellation fits, fully. We use it in the hope and expectation that the reader can uncouple the negative pejoratives usually associated with this phrase, and concentrate solely on the property rights relationships.

187. This was argued, forcefully, by Patrick English.

188. John Locke, *An Essay Concerning the True Origin, Extent and End of Civil Government*, in *Two Treatises of Government*, 17 (P. Laslett ed., Cambridge U. Press 1960).

189. Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974).

190. Karl Marx, *Capital* (Modern Lib. 1906).

depicted above is correct. Unfortunately, there are limits to our powers. Justice would consist of our seizing of B, and forcing him to remit the funds he had mulcted from C, and returning the VCR to A, the rightful owner. As it happens, however, while our knowledge of these occurrences is impeccable, B has eluded us; he is not to be found. All that remain to us is the VCR, now in C's possession, and A, the rightful owner, who looks longingly at his property now held by C.

What is the just course of action? C objects to our transferring of this property from himself to A on the ground that he, C, purchased it in good faith from B. He even has the contract to prove it. Unfortunately, for him, this contract was drawn by B, the admitted thief. It seems clear under these circumstances that C is out of luck.¹⁹¹ The VCR must be taken out of his hands and put into those of A, the original owner. Were B ever to be found, C would have recourse to him; since B by stipulation is unavailable, C must bear the loss.

Where is the analogy to abortion? Here, B is the rapist who, unfortunately, escapes justice. But which is which as far as A and C are concerned? Who must bear the cost of the "theft": the mother or the fetus?

The right-to-life critic of the eviction theory maintains that it is the fetus which properly takes on the role of A and the mother, C. That is, given that someone must suffer an uncompensated loss (because the guilty party, B, the one from whom any compensation would be derived, has disappeared), it should be the mother. She should be forced to bear the child until her pregnancy is terminated with a birth. Yes, she is guiltless; totally. The victim of a rape cannot not be construed in any manner, shape, or form as having agreed to give birth to a child. She is as innocent as C, as in the previous case. And this is precisely the point; when B absconds, whether the rapist or the thief, *someone* must endure an uncompensated loss. This stems from the nature of reality. Innocent people must sometimes be forced to bear losses, and the case of rape is one such.

There is, however, a reply available to the evictionist: A is really the mother, and C is really the fetus. It is thus the latter, not the former, who must be forced to endure the uncompensated loss. Why is the mother really the A (rightful owner of the VCR) of our story? This is because it is she, and she alone, who is the rightful owner of the property in question, the womb.

4. Endangerment

Here is another argument for preventing the pregnant woman from evicting her fetus. This, presumably, would apply under a state of technology that allows for viable evictions or under the lack thereof.¹⁹²

191. We assume there is no theft insurance policy in effect, otherwise it is the insurance company which is left holding the bag.

192. It is an element of moral reasoning that it be timeless in this sense. That is, applicable to all state of the world, epochs, levels of technological development. Murder is

The claim is that the pregnant woman is not quite the innocent victim some theories might see her as. On the contrary, she endangered the fetus by giving it life. That is, merely by conceiving of the fetus, she put it in danger.¹⁹³

Ordinarily, for this libertarian view, there are no positive obligations. Good Samaritan laws compelling a person to save someone else's life are illegitimate. However, if you first endanger a person, say, by throwing him in the path of a car, *then* it becomes legally incumbent upon you to pull the victim away, out of the path of the onrushing car.¹⁹⁴

Although clever - too clever by half - this argument fails.

Getting pregnant is not equivalent to endangering a person. Rather, it is enhancing the person, or creating him *de novo*, by giving him life. The danger, if danger there be, comes not from being pregnant but from being evicted (rather, being aborted).

What is the proper analogy to getting pregnant and then evicting? This is akin to first pushing someone out of the path of an onrushing car (where death would have been certain - as certain as not getting pregnant would not give life to this particular person) and then, pushing so hard that you push the saved person in an adjacent lake, whereupon he starts to drown. The "victim" then complains, "Hey, you pushed me into the lake, you are therefore required to get me out of here."¹⁹⁵ The proper response is that if we get you out of the lake it will be over and above the call of duty; we do not owe it to you. The proper interpretation of our act is not "endangering you", but rather "saving your life," at least for the few

wrong in the past of cave man days, at the present, and in the future of space-man days. Were this not to apply, we could scarcely hold murder to be ethically proscribed. On this see Walter Block, *Neglect of the Marketplace: The Questionable Economics of America's Bishops*, 2 Notre Dame J.L. Ethics & Pub. Policy 125 (1985); Walter Block, *The U.S. Bishops and Their Critics: An Economic and Ethical Perspective* (The Fraser Inst. 1986).

193. It is now subject to the risk that the mother might rid herself of it and either kill it (before the advent of eviction) or discomfort it (by making it move to a presumably less preferable locale). In contrast, presumably, before conception, the fetus (does it even make sense to speak of a fetus before fertilization?) was in no such "danger."

194. This duty to rescue, described to the senior by Karen Selick, is referred to as the "danger invites rescue doctrine." The doctrine says that if a person commits an act that endangers another, the actor will be liable not only to the person endangered, but also responsible for any injuries suffered by a third person in an attempt to rescue the endangered one. See generally *Govich v. North American Systems*, 112 N.M 226, 814 P.2d 94 (1991). This doctrine has entered the public conscious to the extent it even appears in popular fiction. See e.g. Orson Scott Card & Kathryn H. Kidd, *Lovelock*, 281 (Tor Books 1994) ("I also have a responsibility to protect it from all harm, because I brought it to life. . ." The character Lovelock makes this statement with regard to the baby Faith in this novel, under conditions while not exactly the same as we are discussing, are eerily similar.)

195. E.g., "Hey, you got pregnant with me, you created my life, you endangered me, you have to save me now."

seconds between being pushed out of the way of the car and the time when you fell into the lake.

This defense of eviction succeeds easily when the extant level of technology allows for the saving of the baby's life in a test tube or host mother. Here, by stipulation, the evicting mother is not at all endangering the baby; rather, she is merely transferring it to another "home." But what about the case when medical technology is not sufficiently developed to achieve this end. Then, is not the eviction identical to the abortion? And can it be seriously denied that an abortion harms or endangers the fetus?

Our reply is that when the mother conceived the baby, gave it life, the correct way to look upon this act is as if she pushed a person away from the path of an onrushing car. In so doing, the erstwhile victim of the automobile is pushed into the lake, where he proceeds to drown. It would be nice if the rescuer thereupon went into the lake to perform a further life saving effort; this would be virtuous; this would be highly moral. But in a libertarian society of no positive obligations, there can be no legal requirement toward this end. Similarly, after giving the fetus the boon of life, it would be highly desirable if the mother were to carry through with nine months of pregnancy and then further support until the child reached adulthood. This would be nice; this would be moral; this would be virtuous; this would be ideal. But it is simply not legally required, at least in a libertarian society.

5. "Plucking"

Consider the following:

"Close your eyes for a moment and imagine that, due to advances in medical technology or mutation caused by a nuclear war, the relevant cutaneous and membranous shields became transparent from conception to parturition, so that when a mother put aside her modesty and her clothing the developing fetus would be in full public view. Or suppose, instead, or in addition, that anyone could at any time pluck a fetus from its womb, air it, observe it, fondle it, and then stick it back in after a few minutes. What then would we think of aborting a fetus? And what does that say about what you now think?"¹⁹⁶

Obviously, men of good will would change what they now think about abortion and be more likely to embrace libertarian evictionism. If the fetus is viable at any time out there on its own, then how can killing it be just? Evicting it, when the mother no longer wishes to be burdened by it, yes, however morally repugnant; but out and out murder? Not at all.

196. Roger Wertheimer, *Understanding the Abortion Argument*, 1 *Phil. and Pub. Affairs* 86 (1971); (cited in Christine Overall, *Ethics and Human Reproduction: A Feminist Analysis*, 40 (Allen & Unwin 1987).

This, unfortunately, is not at all the conclusion self styled feminists wish to draw from Wertheimer's plucking scenario. On the contrary, they recoil in horror from so reasonable an inference. States Overall:

"Wertheimer predicted that if the developing embryo/fetus could be viewed and manipulated, attitudes toward it would change. About this he was quite correct; but what he did not foresee was that those changes might be morally undesirable. As the capacity to manipulate the embryo/fetus grows, the increasing tendency to commodify it and to view it as a work of art or an ongoing experiment should be resisted. Instead of treating the embryo/fetus as a distinct, separate, independent entity, it should be seen in a more holistic fashion as connected with its mother, who is not a danger to it but the source of its ongoing sustenance."¹⁹⁷

Seldom have more fallacies and refusal to face reality been packed into a smaller paragraph. First, Wertheimer's point was not at all that the baby would be seen as an art or an experiment; rather, it was to save its life by arguing against abortion. Second, commoditization¹⁹⁸ has nothing whatever to do with the case.¹⁹⁹ Whether the pre-birth adoption would be done for money or not is entirely irrelevant.²⁰⁰ Third, the essence of the argument was that under this scenario for the first time the young human being need *not* be seen as part and parcel of the mother; remember, with modern or perhaps futuristic technology, it will be able to do quite nicely outside of her womb. Therefore, the genetic or natural or even host mother is no longer a (necessary) "source of its ongoing sustenance." Last, and most important, the mother of the fetus most certainly is "a danger to it," specifically in the case where she wishes to abort her child.

6. Parental rights

There is an argument against mere eviction, as opposed to abortion, which claims that the parents have the right not to bring life forth unless they wish to do so. This point is made most forcefully by Ross who states: "The fetus is the only thing that someone - a parent - may with equal

197. Overall, *infra* n. 206 at 61.

198. For another viciously anti-commercial creed see Patricia Baird, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, 2 volumes, Ottawa, Canada: Minister of government Services, 1993.

199. For another unwarranted attack on commoditization, see Margaret Jane Radin, *Market-Inalienability* 100 Harv. L. Rev. 1849 (June 1987). For a reply see Walter Block, *Market Inalienability Once Again: Reply to Radin*, 22 *Thomas Jefferson L. Rev.* 37 (Fall 1999).

200. The presumption, however is that if an act is legally justified, then it is licit whether done for money or not. True, there are some things that by their very nature cannot be done on a commercial basis. For example, it is a logical contradiction to pay for the true friendship or true love. For there to *be* true friendship or true love, it cannot be done for money. However in every other case, if something is legitimate to do for free, it is legitimate to do for profit.

comprehensibility and legitimacy want dead.”²⁰¹ He defends this perspective on the grounds that parents have such an intimate relationship with their offspring:

“If upon entering a clinic women were told, ‘We can take the fetus out of your womb without any harm to you or it, keep it alive elsewhere for nine months, and then see it placed in a good home, many would, understandably, be quite unsatisfied. What they want is not to be saved from the ‘inconvenience of pregnancy’ or ‘the task of raising a certain (existing) child?’; what they want is *not to be parents*, that is, they do not want there to *be* a child they fail or succeed in raising. Are these people monsters? Hardly. Certainly anyone who wants the violinist they unplug themselves from, or a full-grown child they abandon, *dead is incomprehensibly malicious*. But it is precisely because our relationship to the fetus is not like either of these that the desire it be dead makes sense.”²⁰²

Elsewhere, Ross maintains, “one can simply want there to be no child at all,” and describes this as “a deeply felt personal preference subscribed to by some, yet intelligible to all.”²⁰³

Well, it may be intelligible to most of us, at least to all those who have ever wished someone else dead. But mere intelligibility is hardly sufficient to establish a just legal code. If it were, we would have to repeal the law against murder.²⁰⁴

Overall provides a good antidote to the excesses of Ross. She maintains, “This kind of feeling does not justify killing the embryo/fetus.”²⁰⁵

201. Steven L. Ross, *Abortion and the Death of the Fetus*, 11 *Phil. and Pub. Affairs* 236 (1982).

202. *Id.* at 238.

203. *Id.* For a view supportive of Ross’s, see Tristram H. Englehardt, Jr., *Viability and the Use of the Fetus*, in *Ethics and Public Policy*, 307 (Tom Beauchamp & Terry P. Pinkard eds., Prentice-Hall 1980).

204. What should be the legal status of those who physically interfere with abortionists (this analysis is limited to cases where eviction is possible) that is, either by destroying abortion centers, or killing abortionists? States Rothbard, *The Ethics of Liberty* at 77, “. . . if every man has the right to defend his person and property against attack, then he must also have the right to hire or accept the aid of other people to do such defending; he may employ or accept defenders just as he may employ or accept the volunteer services of gardeners on his lawn.” Extrapolating from this, the implication is that, while the fetus is in no position to “employ or accept defenders,” defenders may indeed come to the aid of those who are about to be murdered. Thus, it would be entirely appropriate, according to our understanding of the libertarian legal code, to kill those in the act of murdering fetuses and/or to destroy the means they use to this end, e.g., abortion clinics. But remember the caveat: this applies *only* to cases where eviction is not an option; otherwise, the mother’s property rights in her own person take precedence.

205. Overall, *Ethics and Human Reproduction: A Feminist Analysis* at 81.

Why not? Because for Overall “the mother does not own (the fetus) and therefore is not entitled to have it killed.”²⁰⁶ This is precisely in keeping with the libertarian view of the matter. There, the mother can only own the right to continue to parent the baby and can do so only by continuing this practice. Once she stops this support of her child, let alone wants to kill the fetus, all of her “homesteading” rights over it cease forthwith.

Overall, although she clearly sees the errors of Ross and Englehardt, unfortunately does not accept the entire libertarian package. For one thing, she balks in the case of the “embryo/fetus (which) is irretrievably deformed or damaged by the abortion process.”²⁰⁷ For another, she rejects “embryo adoption” because “at all points during pregnancy (it) is not yet technically possible and in any case raises its own moral problems: Should all aborted embryo/fetuses be candidates for adoption? What about those with defects? What women should be able to become their adoptive mothers? How should the decision be made?”²⁰⁸

We cannot deny that these are reasonable questions. But they all have libertarian answers. Yes, all aborted embryo/fetuses should be candidates for adoption. This should include those with defects. Only if not a single solitary person on the whole earth wants to adopt such an infant should it be allowed to die. (This is surely unlikely in the extreme, unless the entire pro-life movement is totally hypocritical.) Any woman (or man) should be allowed to become the adoptive parent, provided of course that the laws against child abuse be strictly upheld.²⁰⁹ The decision should be made by the institution called upon by the pregnant woman (upon pain of violating the law) to do so. Presumably, this would be a hospital, or a church, or some other organization set up to undertake such actions. Nor (contrary to Overall) would there be any law in the free society preventing the highest money bidder from becoming the adoptive parent.

X. CONCLUSION

We have attempted to explain the pro-life and pro-choice positions and to discuss their strong and weak points. We described a compromise, called evictionism, and showed how it is a true intermediary between the two more well-known positions on abortion. We have demonstrated how it can be justified, while they cannot.

The key to the solution is to focus on the private property rights in question. In this case, it is the mother’s womb; given that the fetus is unwanted, it is in effect a trespasser, or a parasite. The mother, then, has a

206. *Id.* at 82.

207. *Id.*

208. *Id.* at 84.

209. In the libertarian society, such behavior would be subject to very severe negative sanction; presumably less of it will therefore occur.

right to evict it - in the gentlest manner possible - but not to kill it, if technology permits her not to do so.

What remains, on a practical level, is to enact legislation based on this libertarian philosophy. That, in our opinion, constitutes the last best hope for saving millions of innocents from merciless slaughter, without in the slightest violating the rights of any pregnant woman.