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The Coercive Reality behind Pro-Choice Rhetoric: Identifying What "Popular Sovereignty," "Reproductive Freedom," and "Death with Dignity" Demand from Those Who Disagree

Ryan C. MacPherson

ABSTRACT: Advocates for political rights to abortion and physician-assisted suicide often support their positions with pro-choice rhetoric: a woman should be free to choose whether or not to carry a child to term; terminally ill patients should be free to choose whether to wait until the disease completes its course or to end their lives sooner. In each case, however, a coercive reality lies behind the pro-choice rhetoric. That is to say, advocates for the apparent right to choose seek legislation that ultimately coerces dissenters to become complicit against their will. The current political debates on these issues therefore bear close analogy to America's antebellum debates over slavery: rhetoric that initially seemed to be an argument for states' rights or popular sovereignty soon revealed itself to be an emergent national policy that required all non-slaveholders, including abolitionists, to take action in support of the slavery regime. Similarly, political activists who deploy pro-choice rhetoric in favor of abortion or physician-assisted suicide resort to coercion in order to obtain and exercise the power to make such choices. Arguably, it cannot be otherwise, for coercion is necessary to maintain widespread social acceptance of choices that so fundamentally violate natural law.

A STATUE AT THE NATIONAL ARCHIVES BUILDING in Washington, D.C., bears the inscription "What Is Past Is Prologue." This paper aims to persuade you *that neither abortion nor physician-assisted suicide can comfortably exist in American society unless the individual liberties of a significant portion of our population suffer*

severe restrictions. But first, I begin with a story from the past, a story concerning popular sovereignty in the years before the Civil War. All this bears relevance to my thesis concerning abortion and physician-assisted suicide, for "what is past is prologue."

The year was 1850, the place the American West, the issue slavery. And the contest was for the future of a nation. Two years prior, the United States had concluded a war with Mexico, resulting in the acquisition of territory that today comprises six southwestern states. Residents of the California territory applied for statehood in 1849, submitting for Congressional review a proposed constitution containing this provision: "Neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State."[1] Congress accepted California as a free state in 1850, but during that same year also voted to permit slavery in the New Mexico and Utah Territories if the settlers there desired it. Meanwhile, Congress hotly debated whether to protect or abolish slavery within Washington, D.C. As auctioneers sold African slaves to the highest bidders just outside the U.S. Capitol Building, Congress at last resolved to permit the practice of slavery to continue while at the same time forbidding any further slave trade between the District of Columbia and other slave regions. But the most controversial piece of legislation in what became known as the Compromise of 1850 was the Fugitive Slave Act.[2]

The federal constitution, as ratified in 1788, included a fugitive slave provision according to which states that forbade slavery within their own borders were nonetheless required to lend reasonable assistance to slaveholders from other states whose runaway slave had fled to a free state. The Fugitive Slave Act of 1850 elevated this

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[1] Constitution of the State of California (1849), Art. I, Sec. 18, *www.sos.ca. gov/archives/level3_const1849txt.html*.

[2] For the history of the Fugitive Slave Act's impact in the antebellum sectional crisis, see David M. Potter, *The Impending Crisis, 1848-1861*, edited and compiled by Don E. Fehrenbacher (New York NY: Harper and Row, 1976), pp. 121-40; James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (New York NY: Ballatine, 1988), pp. 78-89.

reasonable assistance to a new level, and did so at a time when Americans were more divided than ever over the moral, social, and political ramifications of slavery. This new fugitive slave law coerced northern opponents of slavery to participate in the perpetuation of slavery by avoiding acts that would free slaves and by committing acts that would ensure the re-enslavement of escaped slaves. Moreover, in cases wrongfully decided, the law required northern abolitionists to participate in the enslavement of legitimately free blacks who had been mistaken as escaped slaves. Admitting a surprisingly blatant bias, the law offered financial incentives to federal commissioners, who were paid twice as much if they decided disputes in favor of slaveholders rather than in favor of persons suspected of being runaway slaves.[3] The law specifically required both federal agents and ordinary U.S. citizens to comply with its provisions on behalf of slaveholders. Any person found to assist a runaway slave, in any manner, whether "directly or indirectly," could be fined up to $1,000, imprisoned up to six months, and required to reimburse the slaveholder for the loss of his human property.[4]

These provisions infuriated northern abolitionists, who had been calling for the outlawing of slavery for two decades, as well moderate northerners who had been willing to tolerate the slave practices of their southern neighbors so long as slavery did not expand into the rest of the Union. Amid such sharp political divisions, one politician believed he could hold the nation together: Senator Stephen Douglas from Illinois. It was Douglas who had orchestrated the Compromise of 1850, letting one side have a free California and an abolition of slave trade in Washington, D.C., while letting the other side have the prospect of slavery's expansion into Utah and New Mexico and the continuation of slavery within the nation's capital. The Fugitive Slave Act, however, left the political balance leaning eerily in favor of the slaveholders. Even so, Senator Douglas tried to maintain common ground throughout the 1850s.

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[3] Fugitive Slave Act (1850), sec. 8, *www.usconstitution.net/fslave.html.*

[4] Fugitive Slave Act, sec. 7.

He did so primarily by advocating the freedom of choice, but his efforts ended in utter disaster. Promoting a slogan of "popular sovereignty," Senator Douglas proposed in 1854 that the Kansas and Nebraska Territories should be organized under the principle of local, representative democracy: let the settlers themselves freely choose whether to allow or forbid slavery in those western lands; Congress should not restrict their freedom of choice.[5] Few proposals could sound so quintessentially American, and yet no proposal would prove so dangerous to the American Republic as the Kansas-Nebraska Act of 1854.

What Congress accepted in the name of allowing local populations the freedom of choice soon manifested itself as a coercive effort by one faction to dominate its political opponents. A legislature formed of pro-slavery advocates in Lecompton, Kansas, prepared a constitution to apply for statehood. In addition to guaranteeing slaveholders the right to own slaves, they also took steps to prevent slavery's opponents from gaining a foothold in their slaveholding society. The Lecompton Legislature made it a felony to publicly question, whether in speech or in print, the right of a slaveholder over a slave. Slavery's opponents also were forbidden from serving as jurors in cases on this topic.[6] It was clear

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[5] "It [is] the true intent and meaning of this act not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States." Kansas-Nebraska Act (1854), Sec. 14, *avalon.law.yale.edu/19th_century/kanneb.asp*.

[6] "Section 12. If any free person, by speaking or by writing, assert or maintain that persons have not the right to hold slaves in this territory, or shall introduce into this territory, print, publish, write, circulate, or cause to be introduced into this territory, written, printed, published or circulated in this territory, any book, paper, magazine, pamphlet or circular, containing any denial of the right of persons to hold slaves in this territory, such person shall be deemed guilty of felony, and punished by imprisonment at hard labor for a term of not less than two years.

"Section 13. No person who is conscientiously opposed to holding slaves, or who does not admit the right to hold slaves in this territory, shall sit as a

that slavery would remain intact wherever slaveholders wanted it.

But could that principle apply also to free areas? Could a slaveholder claim a right to his slave even in a northern state or in a particular territory where slavery was forbidden by law? A man named Dred Scott thought not. Scott, a slave from Missouri, had been brought by his master into the free state of Illinois and a free territory then called Wisconsin–actually, present day Minnesota, at Fort Snelling. While working for his master, or rented out to others, in these slave-banning areas of America, Scott had been trusted to travel without supervision. He also had been granted a civil marriage to the woman he loved. In brief, he had enjoyed core characteristics of freedom. And so he petitioned, first to the courts of Missouri and eventually to the federal courts, to be declared a free man, liberated forever from slavery.[7]

The history of British and American jurisprudence was on his side. Lord Mansfield rendered a verdict in England in 1772 that the moment a slave sets foot on a territory where slavery is outlawed, he becomes forever a free man. His reasoning was that slavery is so contrary to human nature that it cannot possibly exist unless a society enacts laws to create and preserve it.[8] Similarly, courts of several southern states, including Missouri, had ruled in favor of slaves' petitions for liberation during the 1820s and 1830s.

Turning its back on these case precedents, the U.S. Supreme Court ruled in *Dred Scott v. Sandford* that Scott remained the property of his master, who had a right to travel with him throughout the United States, in both slave zones and free zones, even as a man may travel with his horse or other property. Nullifying federal law, the nation's high court

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juror on the trial of any prosecution for any violation of any of the sections of this act." An Act to Punish Offenders against Slave-Property (1855), as quoted in Sarah T. L. Robinson, *Kansas: Its Interior and Exterior Life* (n.p.: n.p., 1856), chap. 7, *www.kancoll.org/books/ robinson/r_chap07.htm*.

[7] Paul Finkelman, ed., *Dred Scott v. Sandford: A Brief History with Documents* (Boston ma: Bedford/St. Martin's, 1997).

[8] The case of *Somerset v. Stewart* (1772) is discussed in Finkelman, *Dred Scott*, pp. 20-21.

declared that slavery must be protected in all territories.[9]

But this judicial victory for southern slaveholders would also lead to their demise, for in affirming the right of a slaveholder over his slave even in a place where the law prohibited slavery, the court had denied Senator Douglas's doctrine of "popular sovereignty." In place of the people's choice to have or not to have slavery, the court had issued a federal mandate forcing slavery to be recognized even in places where Congress had sought to restrict it. The coercive politics of slavery, manifesting itself now through both the Fugitive Slave Act and the *Dred Scott* decision, betrayed the southerners' pretension to be defenders of liberty or of states' rights. Their "peculiar institution," their "southern way of life," depended, for its very existence, not upon states left free to decide for themselves, but upon a federal government that would enforce slave laws even in those northern states where the local population loathed slavery.

It was precisely this realization, this demise of Senator Douglas's "popular sovereignty" compromise, that Abraham Lincoln brought before the American people in his campaign for the presidency. His election would prompt eleven southern states to secede from the Union.[10] South Carolina explicitly based its secession on the failure of the federal government to enforce the Fugitive Slave Act in states that did not wish to support slavery.[11] The Confederate Constitution accordingly included a stronger and clearer fugitive slave policy,

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[9] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

[10] The "Deep South" states of South Carolina, Georgia, Alabama, Mississippi, Florida, Louisiana, and Texas seceded in direct response to Lincoln's electoral victory, December 1860 through February 1861. The "Upper South" states of Virginia, North Carolina, Tennessee, and Arkansas joined them after shots were exchanged at Fort Sumter in April 1861.

[11] "Declaration of the Immediate Causes which Induce the Immediate Secession of South Carolina from the Federal Union," 20 December 1860, *avalon.law.yale.edu/19th_century/csa_scarsec.asp*.

echoing the *Dred Scott* decision.[12] It also required that all states entitle citizens from each state to "the right of transit and sojourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be thereby impaired."[13] The Confederacy's Constitution forbade its Congress from enacting any "law denying or impairing the right of property in negro slaves."[14] This new constitution also required that state laws be subordinate to federal law and to the federal, slavery-protecting constitution.[15] Rather than reserving slavery as a state's right, as Douglas's doctrine of popular sovereignty would have had it, the Confederate States of America charted a course in which a new federal power–that of the Confederacy– would ensure slavery's continued existence.[16]

In its short-lived history, from 1861 to 1865, the Confederacy demonstrated itself as a coercive national force intent upon preserving

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[12] "No slave or other person held to service or labor in any State or Territory of the Confederate States, under the laws thereof, escaping or lawfully carried into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such slave belongs, or to whom such service or labor may be due." Constitution of the Confederate States of America (1861), Art. IV, Sec. 2, Clause 3, *avalon.law.yale.edu/19th_century/csa_csa.asp*.

[13] Constitution of the Confederate States of America, Art. IV, Sec. 2, Clause 1.

[14] Constitution of the Confederate States of America, Art. I, Sec. 9.

[15] "This Constitution, and the laws of the Confederate States made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the Confederate States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." Constitution of the Confederate States of America, Art. VI.

[16] Only after secession, and even more so after the Civil War, did the myth of the Lost Cause emerge, with its emphasis on states' rights. Prior to the Civil War, southerners demanded federal enforcement of the Fugitive Slave Law and *Dred Scott* decision. See Alan T. Nolan, "The Anatomy of the Myth," ch. 1 in *The Myth of the Lost Cause and Civil War History*, ed. Gary W. Gallagher and Alan T. Nolan (Bloomington IN: Indiana Univ. Press, 2000), pp. 11-34.

the right of slaveholders to keep human slaves as property. As one American history textbook notes, "[t]he Confederacy reached levels of government involvement unmatched until the totalitarian states of the twentieth century."[17] In part, this was a war-time necessity, as industries were nationalized for military production and taxes were collected upon imports, exports, and incomes.[18] But state coercion also went deeper: suppressing freedom of speech and freedom of the press by labeling arguments against slavery as treason.[19]

What may have begun as a question of personal liberty to transport one's property in slaves from one state to the next, or as a state's right to regulate its own peculiar institution, became a national policy that had no toleration for dissent. The protection of a slaveholder's choice to own another human being required the coercion of an entire society by force of federal law. Or, as Lincoln had observed as early as his "House

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[17] Larry Schweikert and Michael Allen, *A Patriot's History of the United States: From Columbus's Great Discovery to the War on Terror* (New York NY: Sentinel, 2004), pp. 325–26.

[18] Richard Bensel, "Southern Leviathan: The Development of Central State Authority in the Confederate States of America," *Studies in American Political Development* 2 (1987): 68-136.

[19] "It [the CSA] has passed laws making it treason to say or do anything in favor of the government of the United States, or against the so-called Confederate States. It has prostrated and overthrown the freedom of speech and of the press; it has involved the whole South in a war whose success is now proven to be utterly hopeless, and which, ere another year roll round, must lead to the ruin of the common people. Its bigoted, murderous, and intolerant spirit has subjected the people of Tennessee to many grievances. Our people have been arrested and imprisoned; our houses have been rudely entered and shamefully pillaged; our families have been subjected to insults; our women and children have been tied up and scourged, or shot by a ruffian soldiery; our towns have been pillaged; our citizens have been robbed of their horses, mules, grain, and meat, and many of them assassinated and murdered." Tennessee Governor William G. Brownlow, Message to the Joint Committee on Reconstruction of the First Session, Thirty-Ninth Congress, 6 April 1865 (Washington, D.C.: Government Printing Office, 1866), 13-14, *adena.com/adena/usa/cw/cw156.htm*.

Divided" speech of 1858, "If any one man desires to enslave another, no third man has the right to object." Thus, Lincoln was convinced that "this Government cannot endure permanently half slave and half free.... It will become all one thing or all the other."[20] In the Confederate States of America, it had become coercively all slave.

With brilliant foresight, Lincoln had seen it all coming. A moderate on the issue of slavery, and certainly not an eager proponent of social equality between the races, Lincoln would try to maintain peace as long as he could. But already in his presidential campaign speech at Cooper's Union in New York City in February 1860, Lincoln identified the root of the civil war that soon would erupt:

> What will satisfy them? Simply this: We must not only let them alone, but we must somehow, convince them that we do let them alone.... What will convince them? This, and this only: cease to call slavery *wrong,* and join them in calling it *right.* And this must be done thoroughly–done in *acts* as well as in *words*. Silence will not be tolerated–we must place ourselves avowedly with them. Senator Douglas'[s] new sedition law must be enacted and enforced, suppressing all declarations that slavery is wrong, whether made in politics, in presses, in pulpits, or in private. We must arrest and return their fugitive slaves with greedy pleasure. We must pull down our Free State constitutions. The whole atmosphere must be disinfected from all taint of opposition to slavery, before they will cease to believe that all their troubles proceed from us.... Holding, as they do, that slavery is morally right, and socially elevating, they cannot cease to demand a full national recognition of it, as a legal right, and a social blessing.[21]

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[20] Abraham Lincoln, "A House Divided," 16 June 1858, *www.americanrhetoric.com/speeches/abrahamlincolnhousedivided.htm*.

[21] Abraham Lincoln, "Cooper Union Address," 27 February 1860, *showcase.netins.net/web/creative/lincoln/speeches/cooper.htm*. I thank Welsley J. Smith for brining this passage to my attention. Smith employed it (as I do, below) in comparison to today's debates over physician-assisted suicide. Wesley J. Smith, "Post Mortem on the 2008 Elections," presentation at the 2008 National Convention of Christian Life Resources, Pewaukee WI, 15 November 2008.

INTRODUCTION

I write this essay in the spirit of Abraham Lincoln, who identified the coercive reality behind the pro-choice rhetoric of his day. Back then, debates over slavery gripped the nation's conscience. Today, other issues polarize our politics. Arguably, abortion and physician-assisted suicide rank at the top of the list. Just as Lord Mansfield had claimed that slavery could not exist in any society unless laws were passed to promote it, so also I am of the opinion that neither abortion nor physician-assisted suicide can receive widespread or long-lasting social acceptance, unless the force of law makes it so. More specifically, *I endeavor to persuade you that neither abortion nor physician-assisted suicide can comfortably exist in American society unless the individual liberties of a significant portion of our population suffer severe restrictions*.

My thesis may seem entirely wrongly founded to some, and I readily admit its counterintuitive character. Americans of the late twentieth and early twenty-first centuries have become accustomed to viewing abortion as a question of private choice, not public coercion. The same sort of pro-choice rhetoric that has championed a woman's right to abort her child also has been applied to permit terminally ill patients a right to physician-assisted suicide. Neither case offers any obvious evidence for my thesis concerning social coercion.

But I wish to scrutinize the sincerity behind the often recited claim that abortion and physician-assisted suicide should be tolerated because our national commitment to individual liberty supposedly necessitates it. In questioning the sincerity behind the "pro-choice" arguments offered in defense of these practices, I do not question the sincerity of the persons employing such "pro-choice" rhetoric. I merely assert that those who are sincere also are mistaken. To state my thesis again: *I endeavor to persuade you that neither abortion and nor physician-assisted suicide can comfortably exist in American society unless the individual liberties of a significant portion of our population suffer severe restrictions*. My title thus summarizes my message: "The Coercive Reality behind Pro-Choice Rhetoric."

REPRODUCTIVE FREEDOM: THE COERCIVE REALITY BEHIND ABORTION RIGHTS

Commentators frequently cite *Roe v. Wade* (1973) as the landmark Supreme Court case that legalized abortion. More accurately, it *nationalized* abortion,[22] an activity that already was legal, in varying degrees, throughout nearly half of the states. On the eve of the *Roe* decision, twenty-two states plus the District of Columbia permitted abortion at least in some cases, such as to save the mother's life. Fourteen of these states also allowed abortion for broader considerations, including rape, incest, or the psychological well-being of the mother, following a model law prepared by the American Legal Institute.[23] In 1970, New York's legislature voted to permit abortion on-demand up to the 24th week of pregnancy. The prevailing argument behind the New York law relied upon recently coined phrases, including "a woman's right to choose," "pro-choice," and "reproductive freedom."

Dr. Bernard Nathanson introduced these expressions while working

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[22] *Roe*'s mandate for abortion on demand destroyed the compromises of the past, rendered compromises impossible for the future, and required the entire issue to be resolved uniformly, at the national level." *Planned Parenthood v. Casey*, 505 US. 833, 995 (1992) (Scalia, J., dissenting).

[23] By the 1950s, Alabama and Washington, D.C., permitted abortion "to preserve the mother's health" and Massachusetts, New Jersey, and Pennsylvania allowed for "lawfully" performed or "lawfully" justified abortions, leaving the definition for the courts to determine. During the 1960s and early 1970s, other states began to allow for abortion, too. "Fourteen States...adopted some form of the ALI statute," by allowing for abortion in cases of rape, incest, and/or maternal health concerns: Arkansas, California, Colorado, Delaware, Florida, Georgia, Kansas, Maryland, Mississippi, New Mexico, North Carolina, Oregon, South Carolina, and Virginia. "By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements": Alaska, Hawaii, New York, and Washington. *Roe v. Wade*, 410 U.S. 113, 140 and 140n37 (1973).

with the National Association for Repeal of Abortion Laws (NARAL).[24] Despite his lip service to "choice" and "freedom," Nathanson himself was trapped in a dismal culture of death. Raised by a controlling father, he entered medical school to fulfill parental expectations and, after impregnating his girlfriend, accepted a $500 gift from his father to pay for her abortion. "The night before the abortion we slept together huddled in each other's arms; we both wept, for the baby we were about to lose, and for the love we both knew would be irreparably damaged by what we were about to do."[25] They soon parted ways, and Nathanson married another woman, whom, he later admitted, he also did not love. After divorcing his first two wives and impregnating a new girlfriend, Dr. Nathanson performed the surgery to abort his very own child. As abortion was legalized in New York, hospitals became overwhelmed by the demand for first-trimester abortions. Dr. Nathanson therefore pioneered an outpatient procedure that would allow clinics to take over. During his career, he supervised over 75,000 abortions, most of them as director of "the biggest abortion clinic in the western world," New York's Center for Reproductive and Sexual Health.[26] Meanwhile, his public speaking engagements in the medical and legal communities earned him the nickname "the abortion king."

The power of Dr. Nathanson's pro-choice rhetoric manifested itself most strongly when he began serving as the Chief of Obstetrical Services at St. Luke's Hospital, also in New York. There he experienced the "moral whipsaw" of aborting a 23-week-old fetus at the request of

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[24] Jennifer Taylor, "The Choice of Liberty," *H[uman] L[ife] I[nternational] Reports*, rpt. *The Catholic Exchange*, 27 May 2002, *catholicexchange.com/2002/05/27/95308/*; Nathanson also is credited with introducing the slogan that "verbal engineering always precedes social engineering." See American Life League, *Pro-Life Activist's Encyclopedia* (1998), chap. 15, *prolife.ath.cx:8000/*.

[25] Bernard Nathanson, *The Hand of God: A Journey from Death to Life by the Abortion Doctor Who Changed His Mind* (New York NY: Regency, 1996), p. 56.

[26] Nathanson, *Hand of God*, p. 92.

one woman while trying, during the very same shift, to rescue another 23-week-old fetus for a woman who went into premature labor and wanted her baby saved. In the era of legalized abortion, personal choice had the power to determine the difference between life and death.[27]

The rhetoric of choice leaves an easy-to-follow trail in the history of higher court decisions concerning abortion. Attorney Sarah Weddington argued before the Supreme Court in *Roe v. Wade* that a woman

> should be allowed to make the choice as to whether to continue or to terminate her pregnancy.... [T]he freedom involved is that of a woman to determine whether or not to continue a pregnancy.... We do not ask the Court to rule that abortion is good or desirable in any particular situation. We *are* here to advocate that the decision as to whether or not a particular woman will continue to carry or will terminate a pregnancy is a decision that should be made by that individual. That in fact she has a constitutional right to make that decision for herself.[28]

The court essentially accepted Weddington's argument, ruling in 1973 that "[t]he right of privacy...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[29]

Nineteen years later, in *Planned Parenthood v. Casey* (1992), the Court reaffirmed this "recognition of the right of the woman to choose to have an abortion...and to obtain it without undue interference from the State."[30] In this instance, a woman's right to choose meant that the State of Pennsylvania could not limit her choice by requiring that she first notify her husband of her intent to procure an abortion. The court reasoned that a woman's right to choose an abortion takes priority over any right that her husband or the father of the child may have, particu-

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[27] Nathanson, *Hand of God*, p. 128.

[28] Sarah Weddington, quoted in *May It Please the Court: Transcripts of 23 Live Recordings of Landmark Cases as Argued before the Supreme Court*, edited by Peter Irons and Stephanie Guitton (New York NY: New Press, 1993), pp. 345, 346, 353.

[29] *Roe v. Wade*, 410 U.S. 113, 153 (1973).

[30] *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

larly in cases when a woman might suffer physical or psychological harm from a husband who would be upset by either her pregnancy or her choice to terminate a pregnancy. Justice Sandra Day O'Connor, writing for the majority, explained it thus:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[31]

In other words, women have a constitutional right to define for themselves the moral status of a fetus and to choose whether or not to continue to bear a child. Shortly after the Supreme Court issued this decision, a Texas abortion clinic hired a woman named Norma McCorvey. She was the "Jane Roe" of *Roe v. Wade*. The clinic's name, not surprisingly, was "A Choice for Women."[32]

But the most revealing example of how effectively the rhetoric of choice could expand a woman's right to abortion came in 1999 when the Supreme Court struck down Nebraska's law that prohibited "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery."[33] The court declared this partial-birth abortion ban unconstitutional on the conviction that "it 'imposes an undue burden on a woman's ability' to choose a D&E [dilation and extraction] abortion, thereby unduly burdening the right to choose abortion itself."[34]

In 2003, Congress enacted a partial-birth abortion ban, successfully seeking language different enough from that of the Nebraska law in

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[31] *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

[32] Norma McCorvey, with Gary Thomas, *Won by Love* (Nashville TN: Thomas Nelson Publishers, 1998).

[33] Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999), as quoted in *Stenberg v. Carhart*, 530 U.S. 914, 922 (1999).

[34] *Stenberg v. Carhart*, 530 U.S. 914, 930 (1999).

order to pass muster with the Supreme Court. During Congressional debates, Senator Hilary Clinton opposed the pending federal ban on partial-birth abortion because it did not allow for an exception that would permit a woman to choose a late-term abortion for a child discovered to be developmentally abnormal.[35] That is to say, Senator Clinton attempted to strengthen the rhetoric of choice by citing an example in which she expected her legislative colleagues to agree that a woman ought to have a choice: if the child is malformed anyway, why not choose abortion? And if a woman is to have the choice to abort, then why not give her the choice to do so even late in the game–say, in the eighth month of pregnancy, when so-called "partial-birth abortion" is the preferred means?

Four years after Congress debated this controversial issue, a Florida court awarded parents $21 million in a "wrongful birth" suit. That is, they sued their doctor for not detecting a genetic abnormality in their child prior to his birth, arguing that if only they had known, they would have aborted the child.[36] Thus, what began as one woman's right to

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[35] George Neumayr, "The New Eugenics," *American Spectator*, 13 July 2005, *www.spectator.org*. "We are talking about those few rare cases when a doctor had to look across a desk at a woman and say, I hate to tell you this, but the baby you wanted, the baby you care so much about, that you are carrying, has a terrible abnormality.... I will end by referring again to the young woman, Mrs. Eisen, who was in my office yesterday, about 25 years younger than I am. Hard to imagine. She said: I had no idea that the decision I made with my husband and my doctor to deal with this genetic abnormality was something I could have never had under the laws of where I lived before, and that if this passes, it will become illegal in the future." Sen. Hilary Clinton, as quoted in Congressional Record, March 12, 2003 (Senate), S3588. Following this statement, Sen. Santorum debated Sen. Clinton, noting that her argument would justify late-term abortions of children with cleft palates and spina bifida (based on statistics he cited of existing eugenic abortions for those conditions). Congressional Record, March 2003 (Senate), *frwebgate4.access.gpo.gov/cgi-bin/TEXT12 gate.cgi?WAISdocID=647065307461+2+1+0&WAISaction*.

[36] Elizabeth O'Brien, "Couple Receives over $21 Million Dollars for 'Wrongful Birth' of Handicapped Son," *LifeSiteNews.com*, 24 July 2007, *www.lifesitenews.com/ldn/2007/jul/07072403.html*.

choose has become her doctor's obligation to advise her choice so thoroughly as to remove all reasonable chance that she would give birth to a child she would not want.

And doctors do feel obligated–even doctors who know that the women they serve would never consider abortion. Our own family doctor knows that neither I nor my wife would consider an abortion. But clinic policy is clinic policy, and so our doctor handed us a free book that states in bald pro-choice rhetoric:

> Being tested [for congenital abnormalities] is a personal choice. Some couples choose not to be tested for birth defects. Others find that testing and counseling can help them make decisions and consider options.... Testing for birth defects during pregnancy can help a women decide whether to continue her pregnancy. If she finds out her baby has a severe problem, she has the option to end the pregnancy....
>
> There is no "right" choice in these cases. The decision is based on the values unique to each person. The choice that's right for one woman may not be right for another....
>
> Some choose to end a pregnancy. Others may choose to continue it even if the baby will have a problem.[37]

Apologizing to us, our doctor nonetheless asked the required question: Would we want any of the first-trimester screening for Down's Syndrome or other complications that the medical community regarded as indications for abortion?

When doctors worry about being sued for not recommending abortion, and parents worry about being burdened by special-needs children, "the temptation to eugenic abortion becomes unstoppable." Even pro-life mothers may succumb to persuasive techniques–nigh unto coercive–such as being shown a video of how challenging it can be to care for disabled children. "The right to abort a disabled child," notes one commentator, "is approaching the status of a duty to abort a disabled

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[37] American College of Obstetricians and Gynecologists, *Your Pregnancy and Birth*, 4th ed. (Washington, DC: ACOG, 2005), pp. 223-24, 234-35.

child."[38]

Still, the rhetoric supporting abortion rights emphasizes choice above duty. The proposed federal Freedom of Choice Act clearly fits this pattern, both in its title and in its content. Section 4(a) reads: "It is the policy of the United States that every woman has the fundamental right to choose to bear a child, to terminate a pregnancy prior to fetal viability, or to terminate a pregnancy after fetal viability when necessary to protect the life or health of the woman." Just as Senator Stephen Douglas as an antebellum Democrat from Illinois running for the U.S. presidency, promoted the pro-choice agenda of "popular sovereignty" with respect to slavery, so also another Democratic Senator from Illinois running for president–Barack Obama–championed the pro-choice rhetoric of the Freedom of Choice Act. During his campaign, Obama promised Planned Parenthood that he would sign this bill into law if elected president.[39]

But beneath the pro-choice rhetoric is a coercive reality. Section 4(b)(2) forbids any government from "discriminating against the exercise of the[se] rights...in the regulation or provision of benefits, facilities, services, or information."[40] This policy revision explicitly seeks to override any contrary "Federal, State, and local statute, ordinance, regulation, administrative order, decision, policy, practice, or other action enacted, adopted, or implemented before, on, or after the date of enactment of this Act."[41] For example, if the proposed Freedom of Choice Act becomes law, then the numerous state laws requiring parental notification or parental consent before minors may have an abortion would be repealed, as would 24-hour waiting periods and informed consent laws applicable to adults. The Freedom of Choice Act

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[38] Neumayr, "The New Eugenics."

[39] Penny Star, "Faith-Based Hospitals Could Close If Obama Signs Freedom of Choice Act," Catholic News Services, 1 December 2008, *www.cnsnews.com/public/content/article.aspx?RsrcID*.

[40] Freedom of Choice Act (FOCA), H.R. 1964 (introduced 19 April 2007), sec. 4(b)(2), *thomas.loc.gov/cgi-bin/query/z?c110:H.R.1964*.

[41] FOCA, sec. 6.

also would reinstate partial-birth abortion nationwide. Military and religious hospitals that presently limit abortion would be required to provide access on demand. The Hyde Amendment, restricting the use of federal money for funding abortions, would be repealed. American taxpayers opposed to abortion would thereby become complicit in it.[42]

A similar spirit of coercion animates President Obama's proposal to lift the "conscience clause" that presently implements existing federal laws to protect pro-life healthcare workers who wish to abstain from participation in, or referral for, abortion procedures. Without the conscience clause and the statutes it implements, pro-life healthcare workers would face the dilemma of becoming complicit in something they find immoral, quitting their job, or trying to keep their job while protesting the law in civil disobedience.[43] Senator Tom

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[42] For leading arguments in opposition to FOCA, see *www.fightfoca.com* and *www.focafacts.com*. For arguments in favor of FOCA, see NARAL Pro-Choice America's endorsement at *www.prochoiceamerica.org/choice-action-center/us-gov/foca.html*.

[43] The so-called "conscience clause" refers to a rule adopted in 2008 by the Department of Health and Human Services with encouragement from the Bush administration: "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," 45 CFR 88.4, final rule as adopted 3 December 2008, *www.nfprha.org/images/HHS_Regs.pdf*. Following President Obama's request, "HHS has issued a notice of proposed rulemaking to rescind the provider refusal rule–a recent regulation that expands the interpretation of existing 'conscience clause' statutes that protect the rights of health care professionals to refuse to provide abortion services. The comment period ended on April 9 [i.e., 2009]. After a thoughtful and serious review of all the comments, HHS will determine whether to rescind the regulations, modify the proposed rule, or propose an entirely new rule." U.S. Department of Health and Human Services, *Progress Report* (29 April 2009), 6, *www.hhs.gov/progress report/report.pdf* (accessed 7 May 2009). Unless the three sets of laws implemented by the conscience clause are repealed (e.g., by the adoption of the Freedom of Choice Act), the protections they identify would remain technically effective, even if the conscience clause is rescinded. "No matter which option is selected [rescind, modify, or replace the current rule], providers will continue

Coburn, an Oklahoma ob/gyn physician, has vowed civil disobedience if Obama rescinds the conscience clause: "I think a lot of us would go to jail," he told reporters.[44] The issue undoubtedly would find its way into the courts. And what then? It is difficult to predict, but pro-life healthcare workers have reason to worry. Consider, for sake of analogy, the 2006 New York court ruling that a group of Catholic charities were required to provide their workers with health insurance coverage for birth control despite the Catholic Church's official position against birth

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to be protected–as they have been for years–by the existing conscience clause statutes that will remain in place." HHS, *Progress Report*, 6. However, the current rule was adopted because of concerns that pro-life healthcare workers were not being fully informed of their rights under those statutes, namely, the Church Amendments (enacted various years during the 1970s), the Public Health Services Act of 1996, and the Weldon Amendment (2008). 45 CFR 88.1; cf. pp. 10-11 of the PDF document containing 45 CFR 88, cited earlier in this note. For example, an ethics opinion issued by the American College of Obstetricians and Gynecologists limits freedom of conscience by stating that "health care professionals have the duty to refer patients in a timely manner to other providers if they do not feel that they can in conscience provide the standard reproductive services that their patients request," that health care facilities serving patients likely to request controversial services (such as emergency rooms) should be staffed preferentially by persons willing to support the "prompt disposition of emergency contraception," and that institutions with religious objections to such practices should not position themselves as primary responders to victims of sexual assault. Committee on Ethics, "The Limits of Conscientious Refusal in Reproductive Medicine," *ACOG Committee* Opnion 385 (Nov. 2007), 5, *www.acog.org/from_home/publications/ethics/co385.pdf*. Such recommendations apparently conflict with federal law, insofar as the service providers are subject to the aforementioned statutes (e.g., if they receive federal funding, such as through Medicare or Medicaid). The current conscience clause serves to make that conflict more evident.

[44] Josiah Ryan, "U.S. Senator Says He Would Practice Civil Disobedience If Obama Repeals Abortion 'Conscience Clause,'" 2 March 2009, *Catholic News Service*, *www.cnsnews.com*.

control.[45] The lesson is this: religious freedom must yield to reproductive choice.

Clearly, then, some kinds of choices receive preference over others in the coercive reality that lies behind the pro-choice rhetoric promoted by abortion advocates. We might easily reconfigure the words of Lincoln in 1860:

> What will satisfy them? Simply this: We must not only let them alone, but we must somehow, convince them that we do let them alone.... What will convince them? This, and this only: cease to call abortion *wrong,* and join them in calling it *right.* And this must be done thoroughly–done in *acts* as well as in *words*. Silence will not be tolerated–we must place ourselves avowedly with them. The Freedom of Choice Act must be enacted and enforced, suppressing all restrictions against abortion as a moral wrong, whether made in clinics or hospitals, by physicians or nurses. We must pay taxes and fund their abortions with willing pleasure. We must pull down our pro-life constitutions and rescind the conscience clause. The whole atmosphere must be disinfected from all taint of opposition to abortion, before they will cease to believe that all their troubles proceed from us.... Holding, as they do, that abortion is morally right, and socially elevating, they cannot cease to demand a full national recognition of it, as a legal right, and a social blessing.

I will next apply this same analysis to physician-assisted suicide: a coercive reality lies behind the pro-choice rhetoric.

Death with Dignity: The Coercive Reality behind Physician-Assisted Suicide

Proponents of physician-assisted suicide emphasize a respect for patient choice as a key rationale. In brief, they argue that when a patient suffers from a terminal illness, particularly if it involves significant physical discomfort, then that individual should have the right to choose to end his or her life before the terminal illness finishes its course. They further conclude that the most humane way to exercise this right would be to

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[45] *Catholic Charities of the Diocese of Albany et al. v. Gregory V. Serio*, 127 NY Int. (2006).

secure the assistance of a physician who could prescribe a patient-administered lethal drug. In addition to patient choice, the rhetoric supporting this practice also emphasizes the concept of "death with dignity." Dignity, however, is in this context defined in terms of personal autonomy, that is, a person's ability to direct one's own affairs in a manner of one's own choosing. Thus, even the emphasis on "dignity" functions to reinforce the rhetoric of "choice."

An emphasis on personal choice in the dying process has underpinned the "right to die" movement from the start. Derek Humphrey, for example, whose book *Final Exit* brought popular attention to the euthanasia movement in America, summarizes the case for physician-assisted suicide thus: "While it is true that we have no control over our births, at least we ought to have control over our deaths. How can we claim to be free people if someone else's morals and standards govern the way we die? ... Knowledge gives choice.... Sometime in the [twenty-first] century, laws will be altered to permit voluntary euthanasia and physician-assisted suicide."[46]

The identification of physician-assisted suicide as a "choice" that people ought to have a legal right to make pervades the broader movement that Humphrey has inspired. In 2003, his organization, the Hemlock Society, changed its name to the Society for End-of-Life Choices. Two years later, End-of-Life Choices merged with a similar organization, Compassion in Dying, to form Compassion and Choices.[47] Its website features the following quotations from clients, each deploying a rhetoric of "choice" as foundational to the euthanasia movement:

- "Having the choice gives me comfort–just knowing there's an option,

[46] Derek Humphrey, "The Case for Physician-assisted Suicide," *www.finalexit.org/lit-essays.html* (accessed 10 February 2009).

[47] "Aid-in-Dying Timeline," *www.compassionandchoices.org/learn/timeline*; Herbert Handlin and Kathleen Foley, "Physician-Assisted Suicide in Oregon: A Medical Perspective," *Issues in Law and Medicine* (22 Sept. 2008).

knowing there's a choice. This has taken the fear out of dying for me."[48]
- "I felt alone until I called Compassion & Choices. They let me know I had choices and support. What a comfort that was."[49]

Compassion and Choices recently persuaded a Montana court to classify physician-assisted suicide as a constitutional right. Not surprisingly, the plaintiff, a 75-year-old cancer patient, summarized his attitude in terms of "choice": "It comforts me to know that my doctor can prescribe medications that I can take to bring about a peaceful death, that I can gather my loved ones and die with dignity in my own home. This is my personal choice, based on my values and beliefs."[50]

Barbara Lee, the president of Compassion and Choices, similarly summarizes the organization's mission in pro-choice language: "We dream of a time when all Americans can live and die as a free people, in dignity and according to their own values."[51] Lee's advocacy group further identifies itself as a leader in the national "choice-in-dying movement."[52] That movement recently secured enough votes in the State of Washington to pass Initiative 1000, the Death with Dignity Act.[53]

As a ballot initiative, the Washington proposal became law upon approval of the voters, but without the scrutinizing process ordinarily conducted in state legislative committees. Although the act itself contains 31 sections, spanning ten single-spaced pages, voters saw only the following summary on their ballots:

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[48] Char Andrews (identified as a "client with breast cancer"), quoted at *www.compassionandchoices.org* (accessed 10 February 2009).

[49] Tom McDonald, (identified as an "end-of-life client"), quoted at *www.compassionandchoices.org* (accessed 10 February 2009).

[50] "Montana Court Decides Terminally Ill Patients Have Right to Death with Dignity under Montana Constitution," *Medical News Today*, 8 December 2008, *www.medicalnewstoday.com* (accessed 17 February 2009).

[51] Barbara Lee (identified as "President, Compassion & Choices"), quoted at *www.compassionandchoices.org* (accessed 10 February 2009).

[52] *www.compassionandchoices.org/learn.*

[53] "Victory in Washington: Destination Dignity," *Compassion & Choice*, (Winter 2008) 5, *www.compassionandchoice.org*.

> This measure would permit terminally ill, competent, adult Washington residents medically predicted to die within six months to request and self-administer lethal medication prescribed by a physician. The measure requires two oral and one written request, two physicians to diagnose the patient and determine the patient is competent, a waiting period, and physician verification of an informed patient decision. Physicians, patients and others acting in good faith compliance would have criminal and civil immunity.[54]

Several key phrases in that ballot summary frame the issue in pro-choice rhetoric: "competent, adult Washington residents...to request and self-administer...informed patient decisions." Opponents of the ballot measure sought a court order requiring that ballots identify the proposal's intended effect as the legalization of "physician-assisted suicide," but Thurston County Superior Judge Chris Wickham ruled that such language was too "loaded." In an attempt to be impartial, the judge also ruled out the supporters' preferred phrase, "death with dignity."[55] (Oddly enough, the voters would check "Yes" or "No" next to a paragraph forbidden from using the phrase "death with dignity" even though the impact of "yes" votes would enact a law entitled "The Washington Death with Dignity Act."[56])

Whatever its official description, favorable editorialists clothed it in the language of choice: "This law would allow the dying patient to make his/her own choice about how to exit. Some will argue that can only be God's choice. Proponents see it as God helping those who help themselves."[57] Televised commercials supporting the proposal featured

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[54] "Washington Initiative 1000 (2008)," *ballotpedia.org/wiki/index.php/Washington_Initiative_1000_(2008)*.

[55] Brad Shannon, "Ruling Aims to Keep Ballot Title Neutral for End-of-Life Measure," *The Olympian*, 1 March 2008, *www.theolympian.com*; Richard Roesler, "No 'Suicide' Label on Initiative," *Seattle Times*, 2 March 2008, *seattletimes.nwsource.com*.

[56] The Washington Death with Dignity Act, *wei.secstate.wa.gov/osos/en/Documents/I1000-Text%20for%20web.pdf*.

[57] "Death with Dignity Initiative Promotes Humane Choice," editorial, *Newcastle News*, 7 October 2008, *www.newcastle-news.com*.

slogans such as "It's My Decision."[58] One commercial featured former Oregon governor Barbara Roberts, suggesting that other states could follow the example of Oregon's Death with Dignity Act. She portrayed the law as benefitting patients primarily by expanding their choices: "It has given them dignity. It has given them choices. It has given them a sense of self-control."[59] Another commercial concluded that "it is compassionate to allow terminally ill patients the choice of ending their suffering."[60]

One may infer that the eventual passage of the Washington State act resulted more from the effectiveness of the pro-choice rhetoric employed in the political campaign than from a thorough understanding among voters as to what the full text of the ballot initiative meant. The Washington initiative closely mirrored the provisions of the Oregon Death with Dignity Act, adopted by voters in 1994 as the nation's first physician-assisted suicide initiative. That precedent-setting act employed phrases that, however clear to lawyers, would leave most laypeople befuddled: "except as otherwise required by law... notwithstanding the provisions of subsections (1) to (4) of this section," etc. Debate within legislative committees may have encouraged greater scrutiny of the Washington proposal; TV sound bites and editorial one-liners, by contrast, reduced the matter to a question of allowing someone the "choice" to "die with dignity." Legal scholars who defended the Oregon law after its enactment similarly framed the argument in terms of "the patient's autonomous choice about how to treat his/her suffering" and ultimately concluded that, "for terminally ill patients, respect for autonomous choices about how best to deal with their own experience

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[58] "It's My Decision: Yes on I-1000" (2008), *www.youtube.com*.

[59] Barbara Roberts (Oregon Governor, 1991-1995), in "Oregon Governor Speaks Out on DWD Act," video, 3 August 2008, *www.youtube.com/atch?v=z718hwqs3s*.

[60] "Martin Sheen Lies about I-1000," 1 October 2008, *www.youtube.om/atch?v=T-DwFmZP0Lw*

of suffering validates physician-assisted suicide."[61] But how many people who favor legalized physician-assisted suicide–particularly those who voted "Yes" without reading the full text of the proposed legislation–how many of them recognize that the details of both the Oregon and Washington acts invoke significant state coercion against dissenters?

Indeed, both the Oregon Death with Dignity Act (1994) and Washington's Initiative 1000 (2008) include several coercive provisions that limit the liberty of persons and organizations who do not wish to support physician-assisted suicide. The laws go so far as to require broad classes of citizens to actively promote a practice concerning to which they may feel either neutral or opposed. Specifically, these laws coerce dissenters to become complicit in the following six ways:

1. *Doctors are required to be dishonest*. The Washington law insists that "the patient's death certificate...shall list the underlying terminal disease as the cause of death," despite the fact that death results from ingesting a lethal drug prescribed specifically for that purpose.[62] Presumably this provision seeks to protect the privacy of persons wanting to terminate their own lives through a physician-prescribed method without letting their family know that they have done so.

2. *Citizens are denied liberty of contract with respect to any agreement that would impinge any person's access to physician-assisted suicide*. The Oregon and Washington laws both state that any contract, will, or other agreement, whether written or oral, that is in anyway contingent upon whether or not a person requests lethal medication from a physician, is invalid.[63]

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[61] Emily P. Hughes, "The Oregon Death with Dignity Act: Relief of Suffering at the End of Medicine's Ability to Heal," *Georgetown Law Review* 95/207 (2006): 207-35, quoting 207, 235.

[62] Washington Death with Dignity Act, Sec. 4(1)(k)(2).

[63] "(1) No provision in a contract, will or other agreement, whether written or oral, to the extent the provision would affect whether a person may make or rescind a request for medication to end his or her life in a humane and dignified manner, shall be valid. (2) No obligation owing under any currently existing

3. *Insurance companies are forbidden from applying a suicide exclusion of benefits to acts committed under the new laws*. Under Oregon law, life insurance companies may exclude coverage for persons who commit suicide in the traditional sense of the term.[64] However, Oregon law coerces insurance companies to grant full coverage for persons who self-administer a lethal drug for the purpose of ending their life in compliance with the Death with Dignity Act.[65] The Washington law similarly constrains liberty of contract for insurance companies.[66]

4. *State government officials are forbidden from using the term "assisted suicide" to describe what must instead be called "self-administering life-ending medication."* The Washington law specifies that "state reports shall not refer to practice under this chapter as 'suicide' or 'assisted suicide.' ... State reports shall refer to practice under this chapter as obtaining and self-administering life-ending

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contract shall be conditioned or affected by the making or rescinding of a request, by a person, for medication to end his or her life in a humane and dignified manner." Oregon Revised Statutes, 127.870 §3.12. The Washington law similarly states that "any provision in a contract, will, or other agreement...[that would] effect whether a person may make or rescind a request for medication to end his or her life...is not valid." Washington Death with Dignity Act, Sec. 16(1).

[64] Shenker and Bonparte, LLP, attorneys at law, "Life Insurance Claims/Suicide Defense," *www.ashenkeresq.com/lawyer-attorney-1369288.html* (accessed 12 February 2008).

[65] "The sale, procurement, or issuance of any life, health, or accident insurance or annuity policy or the rate charged for any policy shall not be conditioned upon or affected by the making or rescinding of a request, by a person, for medication to end his or her life in a humane and dignified manner. Neither shall a qualified patient's act of ingesting medication to end his or her life in a humane and dignified manner have an effect upon a life, health, or accident insurance or annuity policy." Oregon Death with Dignity Act, 127.875 §3.13. 127.875 §3.13.

[66] "A qualified patient's act of ingesting medication to end his or her life...shall not have an effect upon a life, health, or accident insurance annuity policy." Washington Death with Dignity Act, Sec. 17.

medication."[67]

5. *The state is prohibited from prosecuting cases of such self-administration of life-ending medication as any form of wrongful death*. In Oregon, "Actions taken in accordance with [the Death with Dignity Act] shall not, for any purpose, constitute suicide, assisted suicide, mercy killing or homicide, under the law."[68] The law reads nearly identically in Washington.[69] Thus, family members of the deceased would have no case against a physician who prescribed a lethal drug to their loved one, so long as the physician did so as set forth in the Death with Dignity Act. In other words, so long as the physician obtained informed consent from the patient at least 15 days in advance, fabricated the death certificate to protect the patient's privacy, and so forth. Legal immunity also is provided to home visitation workers, from organizations such as Compassion and Choices, who coach patients through the process of taking the lethal drug prescribed for their "dignified death."[70]

6. *Professional medical associations are forbidden from disciplining physicians who prescribe fatal doses of medication for a patient to end his or her life*. The Oregon law states: "No professional organization or association, or health care provider, may subject a person to censure,

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[67] Washington Death with Dignity Act, Sec. 18(1). The Oregon law does not explicitly forbid referencing such acts as "assisted suicide" but does preference alternative terminology identical to that used in Washington. It is telling, however, that the Public Health Division of the Oregon Department of Human Services uses the abbreviation "pas" (presumably for "physician-assisted suicide") in the website directory for official information on the Death with Dignity Act. *www.oregon.gov/DHS/ph/pas/* (accessed 17 February 2009).

[68] Oregon Death with Dignity Act, 127.880 §3.14.

[69] "Actions taken in accordance with [the Death with Dignity Act] do not, for any purpose, constitute suicide, assisted suicide, mercy killing, or homicide, under the law." Washington Death with Dignity Act, Sec. 18(1).

[70] For a case-study analysis of a Compassion in Dying (now called Compassion and Choices) home visitation team, in comparison to the approach taken by a non-suicide-recommending organization, see Herbert Hendlin and Kathleen Foley, "Physician-Assisted Suicide in Oregon: A Medical Perspective," *Michigan Law Review* 106 (2008): 1613-39, at 1629-33.

discipline, suspension, loss of license, loss of privileges, loss of membership or other penalty for participating or refusing to participate in good faith compliance with [the Oregon Death with Dignity Act]."[71] Once again, the Washington law sets forth a similar restriction, barring medical associations from disciplining doctors who would intentionally assist their patients in achieving death.[72]

In summary, when it comes to "death with dignity," the state's legal protection of one person's "choice" translates into the state's coercion of dissenters to become complicit in the very act they loathe. Physicians must write dishonest death certificates. Freely contracting adults are no longer free to make a contract that limits in anyway a person's access to such assisted-suicide. Insurance companies may not exclude coverage in cases of self-administered lethal medication, although they still may do so for suicides not assisted by a physician. The state forbids its record-keepers from labeling the self-administration of intentionally lethal prescription drugs as "suicide" and prevents its justice department from prosecuting such cases as forms of wrongful death. Ultimately, state power goes so far as to limit dissenters' freedom of association, which arguably is still protected by the federal First Amendment; but until the courts rule otherwise, both the Oregon and Washington laws forbid medical associations from limiting their membership to physicians who vow never to prescribe lethal drugs to their patients.[73] Quite

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[71] Oregon Death with Dignity Act, 127.885 §4.01(1).

[72] "A professional organization or association, or health care provider, may not subject a person to censure, discipline, suspension, loss of license, loss of privileges, loss of membership, or other penalty for participating or refusing to participate in good faith compliance with [the Washington Death with Dignity Act]." Washington Death with Dignity Act, Sec. 19(1)(b).

[73] In *Lee v. Oregon* (1997), a federal appellate court dismissed the plaintiff's complaint that the Oregon Death with Dignity Act restricted healthcare providers' "freedom of association" by forbidding them from limiting physician memberships to those who do not participate in assisted suicides. The court cited lack of jurisdiction as its grounds for dismissal, since the situation remains hypothetical until a healthcare provider encounters an actual instance of prosecution under the act. *Lee v. Oregon*, 107 F.3d 1382 (9th

ironically, these laws have so exalted the patient's choice to die, that physicians no longer have the liberty to form medical organizations committed exclusively to the promotion of life.

Could it have happened otherwise? Probably not. The pro-choice rhetoric, though expressed in terms of *individual liberty*, necessarily requires *state coercion* for its realization. Why? Because humans are social beings. We lack the level of personal autonomy assumed by the "death with dignity" movement. Even supporters acknowledge this when they refer to their cause as "aid in dying." Aid from whom? From another person, of course. Therefore, the state must ensure that other people make such aid available. Said another way, "physician-assisted suicide" requires not only a suicidal patient, but also a physician, an insurance company, and a public records office, not to mention a mortician. A coercive state does not arise in a democratic society by accident; rather, once a society becomes committed to guaranteeing for one individual a "right to die," all other parties impacted by this seemingly private "choice" must play their appropriate public roles; if any of them refuse, the state, empowered by the collective will of the voters, will coerce them. Oregon, Washington, and Montana mark the beginning of a movement that already has a strong footing in Arizona, California, Wisconsin, and other states.

Indeed, nothing short of nationwide coercion will satisfy the "Death with Dignity" advocates. What will satisfy them? Simply this: We must not only let them alone, but we must somehow, convince them that we do let them alone. What will convince them? This, and this only: cease to call physician-assisted suicide *wrong,* and join them in calling it *right.* And this must be done thoroughly–done in *acts* as well as in *words*. Silence will not be tolerated–we must place ourselves avowedly with them. The Death with Dignity Act must be defended and enforced, suppressing all restrictions against physician-assisted suicide, whether by physicians or state record officers, by insurance agents or family members. We must defend and promote death with dignity in the name

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Cir. 1997).

of personal pleasure. We must pull down our pro-life constitutions. The whole atmosphere must be disinfected from all taint of opposition to physician-assisted suicide, before they will cease to believe that all their troubles proceed from us. Holding, as they do, that physician-assisted suicide is morally right, and socially elevating, they cannot cease to demand a full national recognition of it, as a legal right, and a social blessing. Abraham Lincoln spoke similarly concerning slavery and its supporters in 1860.

Conclusion

My intention was to persuade you *that neither abortion nor physician-assisted suicide can comfortably exist in American society unless the individual liberties of a significant portion of our population suffer severe restrictions*. Despite the pro-choice rhetoric, a coercive reality limits the choices of those who would object to these practices. As I have demonstrated, the tendency is toward requiring everyone to participate, at some level, in the promotion or preservation of abortion and physician-assisted suicide. There is an obvious reason why this must be so.

When political activists deploy pro-choice rhetoric in defense of choices that violate the natural moral order, then they must, if they want to obtain and exercise the power to make such choices, soon resort to coercion. Why? Because few people will be willing to choose freely that which so fundamentally violates the natural moral order; even those who do, will not be willing to do so for very long. Natural law has its way of "talking back." Just as gravity has its way of making that which goes up come down,[74] so also "the moral law within," to borrow Immanuel Kant's expression, or the "conscience," to borrow St. Paul's term, holds

[74] For the parallel between the physical law of gravitation and the natural moral law, see William Blackstone, *Commentaries on the Laws of England*, 1st American ed. (1771), Introduction, Section 2, *www.yale.edu/lawweb/avalon/blackstone/blacksto.htm*.

in check those who make immoral choices.[75]

And so it is today. Recall what Lord Mansfield had said of slavery: it would fade out of existence unless laws artificially preserved it. Even Stephen Douglas had to admit, in his famous debates with Abraham Lincoln, that if popular sovereignty truly were followed–that is, freedom of choice without coercion from the Supreme Court's *Dred Scott* decision–slavery could never survive in the north.[76] Even in the south, slavery would not have been as pervasive without state policies that actively promoted and preserved it.[77] Likewise, without state coercion to perpetuate abortion and physician-assisted suicide, these practices would never amount to more than marginalized aberrations of an otherwise stable social order.

Nevertheless, advocates for such practices, when they express their case in pro-choice rhetoric, claim that it is the opponents of abortion and the opponents of physician-assisted suicide who resort to coercion. By outlawing abortion, are not pro-lifers coercing all pregnant women to bear children, rather than allowing them the liberty to choose for themselves? By outlawing physician-assisted suicide, aren't pro-lifers coercing terminally ill patients to suffer an undignified death?

These are, of course, loaded questions. No doubt one could make a case that pro-lifers "coerce" women to bear children and terminally ill patients to refrain from suicide. But as I have demonstrated in this paper, the alternative positions also are coercive--despite the pro-choice rhetoric they deploy. Thus we must face the real question: it is not a

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[75] Immanuel Kant, Conclusion to *The Critique of Pure Practical Reason*, in *The Philosophy of Immanuel Kant*, edited and introduced by Carl J. Friedrich (New York NH: Modern Library, 1993), p. 288; Romans 2:14-15.

[76] Harold Holzer, ed., *The Lincoln-Douglas Debates: The First Complete, Unexpurgated Text* (New York NY: Harper Perennial, 1994), pp. 88-89.

[77] "Ultimately slavery could exist only through the power of the state": laws prohibited slaveholders from freeing their slaves or educating them; laws prohibited slaves from testifying in court; laws required all citizens to assist in apprehending fugitive slaves; laws restricted the migration even of free blacks in the south. Schweikert and Allen, *Patriot's History*, pp. 260-61.

matter of choice vs. coercion, but a matter of public norms, of social values. One side envisions a society in which the public funds abortion and all healthcare workers must be willing to participate, a society in which patients have access to physician-assisted suicide and physicians must record dishonest death certificates to protect the patient's privacy. The other side envisions a society in which abortion is prohibited except for the rare emergency cases, a society in which terminally ill patients may be cared for by others but not killed by themselves. Other participants in the debate envision yet another sort of society, but the point is that each society will rely, to some degree, upon state coercion for stabilization, just as property rights depend upon the punitive force of government to fine or imprison those who shoplift or burglarize.

And so we return to the real question at hand: Which ultimate values ought we desire that the coercive force of government would promote and protect? This, and not the "pro-choice" pretension of personal liberty, is at the center of the real debate. As our society wrestles with this question, numerous proposals will be entertained–a new law here, a new court decision there. But just because the current problem we face may be coercive state policies favoring abortion or physician-assisted suicide does not mean the only solution, or even the best solution, involves coercive legislation from the other side. Other remedies exist.

First, there is the possibility of favoring the particular social values that can subsist with a minimal of state regulation. Although some state regulation may be helpful or even necessary–for example, to permit an emergency procedure that saves the life of a mother even when it risks the life of her unborn child–such laws will be far less invasive, far less coercive, than those that guarantee to women in all circumstances the right to an abortion by demanding of others some level of complicity in her act of killing. We need not delve into all the details now; it suffices to say that one can imagine laws disfavoring abortion and physician-assisted suicide that would be far less coercive than those favoring these practices. What Jennifer Roback Norse has noted in her critique of no-fault divorce applies also to abortion and physician-assisted suicide:

"The supposedly libertarian subtext of this idea is that people should be as free as possible to make their personal choices. But the very non-libertarian consequences of this new idea is that it obliterates the informal methods of enforcement."[78] In other words, by severing the family into autonomous individuals, "pro-choice" policies render each of them as wards of a coercive state.

But I also want to go beyond the political dimensions of the problem and conclude with some brief remarks about the ethical dimensions. By the late 1970s Dr. Bernard Nathanson, the "abortion king," had come to regret his participation in the horrors of abortion. Ultrasound images persuaded him that life within the womb *is* life: a fetus visibly struggles to avoid the abortionist's scalpel and vacuum-suction tube. The "abortion king" thus became a pro-life leader and used his documentary ultrasound film *Silent Scream* to change the minds of others. Eventually he even came to recognize the forgiveness won for him by Christ. How deeply it pains him that the pro-choice rhetoric he invented cannot be so easily retracted.[79]

And what about Norma McCorvey–the "Jane Roe" from *Roe v. Wade*? She, too, repented in sorrow and then rejoiced to know forgiveness in Christ. "Though painful emotions still return, bringing with them doubts concerning God's love, McCorvey finds comfort especially in these passages: 'If anyone is in Christ, he is a new creation; old things have passed away; behold, all things have become new' (2 Corinthians 5:17); 'If we confess our sins, He is faithful and just to forgive us our sins and to cleanse us from all unrighteousness.' (1 John 1:9)"[80]

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[78] Jennifer Roback Morse, "Why Unilateral Divorce Has No Place in a Free Society," ch. 4 in *The Meaning of Marriage: Family, State, Market, and Morals*, edited by Robert P. George and Jean Bethke Elshtain (Dallas TX: Spence, 2006), pp. 74-99, at 77.

[79] Nathanson, *Hand of God*, p. 141 (*Silent Scream*), pp. 191-96 (conversion to Christianity).

[80] Ryan C. MacPherson, "How a Christian Child's Love Won Jane Roe's Heart," review of *Won by Love*, by Norma McCorvey, The Hausvater Project, 22 Jan. 2009, *www.hausvater.org*.

How did this change come about in the hearts of Dr. Nathanson and Miss McCorvey? It was through gentle, kind, and loving words and actions from Christian friends. "Christ's love, communicated in actions and not just in words, transformed America's most infamous abortion advocate[s] into...Christian defender[s] of purity and life."[81] If we want to change the world, we now know how.

If we reject the "pro-choice" agenda for the façade of coercion that it is, we should embrace the pro-life calling for the compassionate lifestyle that it is. This means not merely steering a woman away from abortion, but providing her with food when she hungers, clothing when she is cold, comfort when she is heartbroken, and encouragement from God who promises daily bread for all and eternal life in Christ. If we don't wish to be compelled by the state to support a woman's choice to kill her child, then we need to ask God to move us with love to assist a woman who needs help raising her child.

And likewise for the terminally ill who contemplate physician-assisted suicide. Ultimately it is not, as Abraham Lincoln so starkly framed it, simply a contest between them and us, but rather a calling for us to serve them–to show them how the coercive reality behind their pro-choice rhetoric entraps not only us, but also themselves, and to help them break free from the sorrow, the pain, the confusion, and the guilt that would drive them toward such choices in the first place. Is this not what it must mean in early twenty-first-century America for Christians to live as the salt and the light of the world?[82]

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[81] MacPherson, "How a Christian Child's Love Won Jane Roe's Heart."

[82] An earlier version of this presentation, which included also a critique of the coercive reality behind the pro-choice rhetoric deployed in favor of same-sex "marriage," was delivered at Bethany Lutheran College, Mankato, MN, 16 April 2009. I thank my colleagues and students at Bethany for their feedback and encouragement, and the administration for fostering an atmosphere in which these delicate topics can be discussed in a manner that compassionately seeks objective moral truth.