Sacred Cows, Whole Hogs & Golden Calves

Paul Benjamin Linton

The pro-life movement is bedeviled by three ways of thinking that seriously impede its progress in eradicating the scourge of abortion from our law and our land. The first, which I call the "Sacred Cow" syndrome, is the uncritical acceptance of the opinions of certain legal experts-law professors and others-whose advice is unsound in theory and counterproductive in practice. The second, which I call the "Whole Hog" mentality, is the conviction that nothing short of an outright prohibition of all abortions (except, perhaps, those necessary to save the life of the mother) is ethically acceptable. The third, which I call "Golden Calf" worship, is the belief that recognition of the "personhood" of the unborn child-through a Supreme Court decision or a constitutional amendment-will make all (or virtually all) abortions illegal throughout the United States.

I was forcefully reminded of these ways of thinking when I read a report of an interview Charles E. Rice, professor emeritus of law at Notre Dame, gave to a Colorado radio station (KGOV) on December 12, 2006. Professor Rice is an editor of the American Journal of Jurisprudence, chairman of the Center for Law & Justice International (New Hope, Ky.), a director of the Thomas More Center for Law and Justice (Ann Arbor, Mich.), and visiting professor of law at Ave Maria Law School (Ann Arbor). He is regarded as the preeminent legal expert in the pro-life movement by many individuals and organizations, including the American Life League, to whom he serves as a consultant. He is well known for his "purist" views on abortion and his criticisms of "incremental" efforts to cut back on the number of abortions through laws regulating abortions. He is also known for his support of efforts to establish the constitutional "personhood" of the unborn child, either through litigation or by a constitutional amendment. I cite Professor Rice because many in the pro-life movement follow (or share) his views. For the good of the movement, however, those views need to be confronted and challenged.

In his December 12, 2006, radio interview, Professor Rice expressed the opinion that if *Roe v. Wade* were overruled and the issue of abortion returned to the states, hundreds of laws regulating abortion would have to be repealed before laws prohibiting abortion could be enacted, because such regulatory laws recognize abortion as a lawful procedure. (Professor Rice cited the Indiana informed-consent law as just one example.) But this reasoning does not withstand even a moment's scrutiny, and fails utterly to take into account why abortion regulations were enacted in the first place.

Paul Benjamin Linton, former General Counsel for American United for Life, is now in private practice, specializing in state and federal constitutional law and legislative consulting. The author of many law review articles, he has represented *amici curiae* in landmark Supreme Court cases, including, most recently, *Gonzalez v. Carhart* (upholding the federal partial-birth abortion ban). Mr. Linton received his undergraduate and law degrees from Loyola University of Chicago.

It is a basic rule of statutory construction that, to the extent an earlier enacted law conflicts with a later enacted law, the latter repeals the former even if the later law does not expressly repeal the earlier law. This rule is known as the doctrine of implied repeal. Although state legislatures that intend to enact laws prohibiting abortion may decide to repeal their existing laws regulating abortion, they would not have to do so in order to enact a prohibition. They could simply enact the prohibition-which, under the implied-repeal doctrine, would repeal the mass of laws regulating abortion to the extent that they conflict with the prohibition (arguably, the regulations would continue to apply to those few abortions that were not prohibited under the new law).

Professor Rice may deplore the adoption of abortion regulations because, for the most part, they were part and parcel of legislation repealing pre-*Roe* abortion prohibitions. Although, as a legal matter, pre-*Roe* prohibitions did not need to be expressly repealed in order to enact post-*Roe* regulations, as a political matter the pre-*Roe* laws may have been repealed as the price that had to be paid for enacting any laws regulating abortion. The regulations were aimed at restricting the "abortion liberty" to the maximum extent allowed by law, and providing a series of test cases for determining and limiting the ultimate reach of that "liberty." This strategy is generally known as "incrementalism."

The incremental strategy seeks to reduce the number of (and perceived need for) abortions, while simultaneously chipping away at the foundations of *Roe v. Wade* until the Supreme Court is prepared to discard whatever remains of Roe. In *Planned Parenthood v. Casey* (1992), the Supreme Court reaffirmed what it characterized as the "core holding" of *Roe*, that states could not prohibit abortion before viability. The Court's failure to overrule Roe (which both "purists" and "incrementalists" had sought) obviously disappointed the pro-life movement and certainly set back efforts to restore state authority to protect unborn human life. At the same time, however, it must be noted that *Casey* upheld much broader state authority to regulate abortion before viability than had theretofore been allowed. In so doing, the Court overruled, in part, two of its earlier decisions, *City of Akron v. Akron Center for Reproductive Health* (1983), and *Thornburgh v. American College of Obstetricians & Gynecologists* (1986).

As a result of the Court's decision in *Casey*, states may impose meaningful and detailed informed-consent requirements for both adults and minors; may insist that some or all of the information given to women be provided by physicians themselves, as opposed to their agents; may impose short waiting periods for both adults and minors; and may require the informed consent of a parent of a minor seeking an abortion. Many states have seized the opportunities offered by *Casey* and have enacted legislation consistent with that decision. There is now an impressive body of peer-reviewed statistical evidence set forth in social-science and economics journals-journals that cannot be described as pro-life in any respect-that regulatory legislation, particularly parental-notice or parental-consent laws and public-funding bans, as well as mandatory waiting periods, significantly reduces the number of abortions. In addition to the impact of these measures, adoption of comprehensive clinic regulations has driven many marginal abortion operators out of business. Fewer abortions and fewer abortion clinics mean more lives saved.

None of this appears to mean much to Professor Rice, however. In both his radio interview and his published writings, he has described laws regulating abortion, such as parental consent or notice and informed consent, as "unwise," and neither "practical" nor "prudent" (Rice, *The Winning Side: Questions on Living the Culture of Life*, St. Brendan's Institute, 1999, p. 227), but not necessarily immoral (pp. 226-27, 229-31). He concedes that these laws reduce the numbers of abortion ("a requirement that an unmarried minor obtain parental consent before an abortion does decrease the number of abortions from those under a previously unrestricted law," p. 239), but asserts that they implicitly, if not explicitly, recognize abortion as a lawful procedure and undermine the principle that "human life must be legally respected" (p. 236).

Professor Rice poses the questions: "If every abortion is the murder of an innocent human being, how can a movement be pro-life unless it insists that the killing be stopped, absolutely? Is it effectively pro-life to 'settle' instead for a rule that the killings can be done only for certain reasons, under certain conditions and with prescribed formalities?" (p.236). "The incremental approach," he concludes, "should be rejected not as necessarily immoral but as counterproductive" (p. 237). Rice advocates a "no exceptions" strategy under which pro-life legislators "would decline to vote for laws that provide funding for *any* abortions [including life of the mother], laws that outlaw abortions subject to exceptions such as life of the mother, rape, incest, etc., or laws that equate abortion to getting one's ears pierced by allowing it for a minor provided she has parental consent, or the approval of a court, before she can legally kill her child" (p. 243; italics added).

What are the practical consequences of adopting such a "no exceptions" strategy, that is, a strategy that forsakes the opportunity to reduce the number of abortions through practical, regulatory measures in the name of maintaining a theoretical moral consistency? The consequences, which cannot be denied, are that tens of thousands of unborn babies who might have been born alive-because of a parental-consent or parental-notice law, an informed consent law, a law mandating a waiting period, a law denying public funding of abortions (subject to the exceptions for life, rape, and incest currently required by the Hyde Amendment), or a law making it more difficult for an abortion clinic to operate-will instead die at the hands of abortionists.

Professor Rice and those who follow (or share) his views may view this consequence with equanimity. I cannot. In my judgment, it is profoundly immoral not to save those lives that can be saved, even if-for the time being, because of the Supreme Court's abortion jurisprudence-not all can be saved. Unlike the "purists" who insist on a morally perfect law (which may not be politically possible, as the failure of South Dakota's abortion referendum last fall revealed), "incrementalists" recognize that we live in an imperfect society and that there are many thousands of lives that can be saved by regulatory measures that fall short of outright prohibition. Incrementalists certainly do not disagree with purists about the end to be achieved (establishing legal protection for *all* unborn human life), but they vigorously disagree with them that *some* legal protection is worse than none while we all work toward completely just laws.

And for those who look to the Roman Catholic Church for moral guidance in this area, it must be noted that the official teaching of the Catholic Church disagrees with the purists, as Professor Rice himself acknowledges (pp. 225-27, where he recognizes, with certain qualifications, that incremental laws are morally defensible if, in his view, impractical and imprudent). In his encyclical *Evangelium Vitae* ("The Gospel of Life"), the late Pope John Paul II made it crystal clear that it is morally permissible to support and vote for imperfect laws so long as "perfect" laws (which remain desiderata) are not politically achievable and the "imperfect" laws represent an improvement in restricting abortion over the legal status quo. That is precisely what abortion regulations achieve. It may not be possible to rescue everyone from a sinking ship, but surely it would be immoral and irresponsible not to save *some* simply because not *all* could be saved. And to take an example from our own history, it may not have been politically possible, before the Civil War and the Reconstruction Amendments, to eliminate slavery in the Southern States, but it was certainly within Congress's power to ban slavery in the federal territories. Was such legislation "immoral" because it did not tear out slavery root and branch from the entire country?

Many in the pro-life movement entertain the fond hope that the Supreme Court may be persuaded-someday-to recognize the "personhood" of the unborn child under the Fourteenth Amendment, based upon the scientific and medical evidence of the child's humanity. Forsaking any effort at saving lives now by incremental legislation, purists gaze at this far horizon and sigh, "If only it were so." But, in the absence of a constitutional amendment defining the unborn child as a constitutional person (which, for reasons discussed below, is no legal panacea either), the prospect of a Supreme Court decision adopting personhood is exactly like the horizon-you can see it, but you can't get there. (I have previously written on this subject-in "How Not to Overturn *Roe v. Wade*," *First Things*, November 2002-and refer interested readers to that article. I will just briefly touch on the highlights of that article here.)

In Roe v. Wade, the Supreme Court held that the unborn child is not a "person" within the meaning of the Fourteenth Amendment. Although both Justice White and then-Justice Rehnquist dissented from the Court's other holdings in *Roe* (recognizing a fundamental right to obtain an abortion, devaluing the state's interest in "potential" life prior to viability, and adopting the trimester scheme), neither justice dissented from the "personhood" holding. Indeed, nineteen justices have sat on abortion cases since *Roe v. Wade* was decided-and not one has ever said that the unborn child is, or should be regarded as, a constitutional "person." Anyone who doubts this need only refer to Justice Scalia's dissent in *Casey*. Justice Scalia wrote, "The States may, if they wish, permit abortion-on-demand, but the Constitution does not require them to do so." This statement, in a dissent that Chief Justice Rehnquist, Justice White, and Justice Thomas joined, quite obviously is not compatible with a recognition of constitutional personhood.

The notion that the Supreme Court can be forced to recognize that, as a matter of scientific and medical evidence, the unborn child is a human being—i. e., that it is alive, developing, and genetically human—is equally naive. In his *Casey* dissent, Justice Scalia wrote that the question of when human life begins is not "a legal matter" capable of

resolution by a court, but, instead, is "a value judgment" that may be made only by the political branches of government. That hardly suggests that Justice Scalia, much less the other members of the Court, is willing to resolve the question of when human life begins. That may come as a shock to many, but it should be very sobering to all. To speak in spiritual terms, the problem with the Supreme Court is not an intellectual one (inadequate information about the unborn child), but a volitional one (an unwillingness to recognize the obvious). Every justice on the Supreme Court understands that the purpose and effect of an abortion is to kill an unborn child.

Even if the Court were willing to consider a "personhood" decision (for which there is no evidence whatsoever, as Professor Rice admitted in his December 12, 2006, radio interview, and in his book, *The Winning Side*, at p. 243), the legal impact of such a decision (or its equivalent, the Paramount Human Life Amendment, which Professor Rice endorses) would be considerably less than what Professor Rice and others claim for it. With the exception of the Thirteenth Amendment, which prohibits slavery and involuntary servitude, the Constitution is a limitation on *governmental* conduct, not *private c*onduct. The Due Process Clauses of the Fifth Amendment and the Fourteenth Amendment prohibit the federal government and the states from depriving anyone of life, liberty, or property "without due process of law." These clauses do not apply to the conduct of private parties, as the Supreme Court has made clear on numerous occasions (see, e.g., *DeShaney v. Winnebago County*). But virtually all abortions are performed by private physicians in their own offices or by physicians operating in freestanding clinics that have no governmental affiliation. Recognizing the "personhood" of the unborn child would not affect the legality of those abortions under the Due Process Clauses.

Nor would a "personhood" decision provide protection to unborn children under the Equal Protection Clause of the Fourteenth Amendment. Although a "personhood" decision might prevent states from enacting laws *allowing* abortion, it would not require states to enact laws *prohibiting* abortion. The states, in fact, might choose to have no law on abortion, in which case abortion would remain legal. Most states are so-called "code" states, which mean that conduct is not criminal unless it is defined and proscribed by a statute of the state. If the state fails to define certain conduct as a crime, then it is not criminal to engage in that conduct. Even in the minority of states that recognize "common law" crimes, abortion was not generally recognized as a crime in English and American common law before "quickening," the stage of pregnancy when the pregnant woman first detects fetal movement (usually 16 to 18 weeks' gestation), as the Florida Supreme Court observed in a pre-*Roe* decision, *State v. Barquet* (l912). But the vast majority of abortions are performed long before "quickening." The upshot is that, in the absence of a law prohibiting abortion, abortion would remain legal, notwithstanding a "personhood" decision.

Advocates of "personhood" have argued that if the Constitution is interpreted (or amended) to define the unborn child as a constitutional "person," then it would violate the Equal Protection Clause for a state not to treat the killing of an unborn child any differently than the killing of a person who has already been born. Even if that argument is conceded, what is the practical judicial remedy for such an equal-protection violation? No court, especially no federal court, is empowered to extend, by court decision, the

reach of a state criminal statute to conduct that the statute clearly does not cover (e.g., extending homicide statutes, which generally apply only to born persons, to the unborn). In the alternative, a court, in theory, could hold that the homicide laws are unconstitutional (because they fail to treat born and unborn victims the same) and threaten to strike them down unless the legislature promptly extends the homicide laws to unborn children. Any bets on whether a court-state or federal-is likely to do that?

Finally, even on the unlikely supposition that a "personhood" decision (or amendment) would authorize courts to require homicide laws to be extended to the unborn, extension of homicide law principles to abortion would result in some unforeseen consequences. First, pregnant women themselves would not be exempt from criminal prosecution, as they generally were under pre-*Roe* abortion laws (there is no record in American law of any woman having been prosecuted, convicted and sentenced for consenting to an abortion or having performed an abortion on herself.) There is no "maternal" exception to the homicide laws for the killing of a *born* child. Thus, there would be no such exception for killing an *unborn* child if the homicide laws were to apply to the born and unborn alike. Second, if the homicide laws were applied to abortion, it is at least arguable that abortions could be performed for reasons relating to the pregnant woman's physical health. Under self-defense principles recognized in all states, a person may use lethal force not only to prevent death, but also to avoid serious (or grave) bodily injury.

In sum, there is no basis for believing that the Supreme Court would recognize the "personhood" of the unborn child, absent a constitutional amendment. Moreover, neither a "personhood" decision nor a "personhood" amendment would require states to adopt laws prohibiting abortion, at least no requirement that could be judicially enforced. To place the legal protection of unborn children beyond the power of a court or legislature to deny would require a constitutional amendment, but one that directly addresses abortion *qua* abortion. A "personhood" amendment, *by itself*, would not provide that protection. The pursuit of "personhood," especially as an alternative to reducing abortions through appropriate regulatory measures, is a counsel of despair dressed up in the guise of a false hope.

Everyone in the pro-life movement must work toward the day when *Roe v. Wade* is overruled and the states (and the federal government) have the authority, once more, to extend the protection of the law to the most vulnerable members of the human family. Until that day, however, we should also work toward reducing the number of abortions by appropriate regulatory legislation. Such legislation saves lives and reduces the perceived need for abortion. In the battle between the "purists," who will not act to save a single life unless they can save all, and the "incrementalists," who want to save all but are willing to save some rather than see all perish, it should not be difficult to see who occupies the moral high ground.