

ABORTION POLITICS & POLICY

IS THERE A MIDDLE GROUND?

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A NON-MORMON CALLS FOR COMPROMISE AND RECONCILATION

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ABORTION politics is high drama, occasionally comic, usually intense, always rooted in human tragedy. It has spawned a large industry of single-issue interest groups and has greatly exercised older, more established groups having broader political concerns. Because the issue involves a conflict of fundamental values, the politics of abortion has given rise to a political rhetoric and to political strategies that place more than ordinary strains on the American political system.

It is tempting to suggest—as a respectable anarchist might—that the abortion issue is beyond politics as we practice it, that for many reasons the political process simply cannot do justice to so complex an issue. This temptation must be resisted, for the reality is that in a presidential election year abortion politics won't go away. Moreover, the recent Federal District Court decision in the *McRae* case on Medicaid funding of abortions, now on appeal to the Supreme Court, insures that the legal battle will continue.

So long as the abortion issue continues to occupy a prominent place on the political agenda, efforts must be made to reconcile the radically opposed political positions and policy proposals of prolife and prochoice activists. To date, abortion policy has been determined largely through confrontation-style politics. The task for the 1980's is to see whether prolife and prochoice forces—or, at least, some elements within each of them—have any bases for political cooperation rather than political conflict.

It requires no great insight to realize that how one conceives an issue shapes the political strategy one adopts and influences the chances for political success. For our purposes, a useful illustration of this point is the

1965 Federal Aid to Elementary and Secondary Education Act, which passed only after years of almost intractable debate over issues such as racial integration, aid to parochial schools and federal control versus local autonomy. What finally broke the logjam on federal aid to education was the political genius of Lyndon Johnson, who essentially reconceived the issue and asked: Why not aid children instead of schools? The Johnson Administration linked aid to education with the war on poverty and proposed assistance to low-income school districts which could go to parochial as well as to public school children. A similar reconceptualization is necessary to break the political stalemate over abortion.

In attempting to redefine the abortion issue, it is useful to recognize how political concerns dictated the original definition of the issue and the language chosen by each side to justify its position. For example, resort to the courts to legalize abortion (because victory seemed possible only in the courts) meant that prochoice forces had to define abortion as a civil liberty—the right to reproductive freedom—much like freedom of speech or press. Similarly, given that the assumptions of our culture and our politics derive in greatest part from classical liberalism, prolife advocates undoubtedly felt constrained to phrase their argument in terms of fundamental, inalienable rights (the right to life).

Both these conceptions of abortion seem to miss the mark. In particular, the prochoice definition of abortion as a civil right akin to freedom of speech or press seems awkward, strained, and ultimately unconvincing. Most people would agree that having an abortion is not exactly a joyful, desired event but is rather a step taken with regret and pain. One can make a strong positive case for freedoms of speech and press, complete with

citations of Mill's famous essay. But it is hard to make a strong positive argument for the right to terminate a pregnancy and destroy a fetus. Those who favor the legalization and subsidization of abortion-on-request recognize this in their insistence that they are "not pro-abortion but pro-choice." There seems to be no denying that abortion is, at the least, a negative, unpleasant, disturbing event in a person's life.

Central But Intractable Issue

For their part, prolife advocates are tactically mistaken in their relentless insistence on the right to life as the foundation and sole content of their appeal to the public. By their all but exclusive attention to the right of the fetus, abortion opponents make the entire policy debate revolve around the question of what happens in conception. Admittedly the issue is central; yet it resists resolution and becomes, in practice, the focus of endless, fruitless argument. Moreover, prolifers' metaphysical certitude of the full human dignity of the fetus so determines their outlook that many of them characteristically impute evil motives or willful ignorance to those who see the matter otherwise.

Yet I believe persuasion is possible. If the aim is to reduce the number of abortions rather than to prove a metaphysical proposition couched in the language of absolute rights, there are profound elements of the prolife position that can have broad appeal. At some level other than the legal or the metaphysical, prolife advocates are saying that life is a gift to be welcomed, and that the attitude of welcoming or non-welcoming reflects the innermost judgments of persons and the community as to the worthwhileness of living. Thus the decision to give birth or to abort new life is very much a comment about ourselves and our conception of the good life. Prolifers ask: What kind of society are we that permits abortion on demand, that makes such a decision wholly an individual one and that, to protect individual freedom, tends to minimize the significance of the decision, even to portray it as ethically (or humanly) neutral?

In other words, prolife people are well positioned to mount a thoroughgoing and credible critique of contemporary society as excessively individualized, privatized, non-communitarian, and to show that these characteristics of our society are expressed and enhanced when abortion is portrayed as a matter over which society has no right or need to show concern or exert control. This value orientation is almost completely eclipsed by exclusive reliance on the language of rights. Further, in employing this language, prolife activists are choosing to contest the abortion issue on the home grounds of the prochoice advocates; for it is in the political and social theory of liberalism that rights and duties receive greatest emphasis as the framing timbers of society's structure; it is through the dominance of liberalism in our constitutional reflection that the woman's right of privacy with respect to decision over reproduction gained recognition. Relying on this same liberal theory to defend the right to life, prolifers show little awareness that the theory is neither universal, eternal nor immutable; they fail to recognize the historical, time-bound, conditional character of the assertion of such basic "rights" in society.

What I am suggesting is that both sides stop discussing

abortion as though it were a conflict between the right to life and the right to reproductive freedom. The vocabulary of rights and the assumptions of liberalism can be useful; they do not suffice to resolve every political dilemma. In the conflict over abortion, broad, phenomenological, experiential characterization must replace the relatively narrow legal conceptions of the issue. Having an abortion is not a matter of right(s) in the sense of a positive good to which one is entitled. It is a negative option, an undesirable, unfortunate event in a woman's life, perhaps a desperate measure undertaken "in necessity and sorrow." I suggest that the negative character of abortion is something about which both sides can agree, and that this agreement can form the basis for cooperative efforts to enact public policy. The aim of any practical policy on abortion that is politically feasible and minimally acceptable to both sides would be to *reduce the incidence of abortion without coercing women*.

There are some indications that some of the partisans in the abortion controversy are beginning to think in terms of political conciliation and cooperation. One indication was the early 1979 attempt by the National Organization of Women, the National Abortion Rights

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Action League and various prolife groups to discuss common concerns in Washington; another sign of some progress was the National Conference on Abortion held at the University of Notre Dame in October 1979; still a third indication was the Conference on the First Amendment and Abortion Legislation held at New York University Law School in December 1979. In admittedly hesitant, tentative fashion, some people on both sides are beginning to talk to each other, and this may be the first step in a shift from political confrontation to political cooperation.

Steps Toward Peace

How would stressing cooperation rather than conflict change abortion politics? For one thing, both prochoice and prolife groups would have to resist the impulse to push for total victory in the political arena. In a liberal democratic society such as ours, politics is, after all, the art of compromise. What is politically feasible will be what is acceptable to both sides, and this will require flexibility, concessions and the exercise of restraint. It must be stressed that such concessions need not be—in fact are not—denials of ethical principle; when total victory is impossible or will cause disproportionate evils, prudence not only permits but requires compromise.

Second, parties to this controversy will have to assess what public policy is politically feasible and acceptable not only to themselves but to the public at large. This will require fashioning a policy that can accommodate

the ambivalent positions of the majority of Americans concerning the morality of abortion and the conditions under which they believe it should be performed.

Third, both prolife and prochoice factions will have to assess what public policies are just and equitable. Here an important requirement is that no policy be unduly burdensome to any single class or group within society.

Assuming agreement between some prolife and some prochoice advocates that the aim of public policy should be to reduce the incidence of abortion without coercing women, how may these criteria for a sound, feasible abortion policy be applied to current policy proposals? In the effort to describe a practical, acceptable abortion policy, it seems easier to begin with the negative—that is, to say what such a policy would *not* be or do.

First, such a policy would not recriminalize abortion. Whatever else one may say about public opinion concerning abortion, it seems clear that a sizable majority of American citizens believe abortion should be legally available under certain conditions; (exactly what those conditions are, of course, is disputed). Moreover, even if a proposal to recriminalize abortion were politically acceptable, it would not survive judicial review by the Supreme Court; given the current composition of the Court, it is unlikely to change its mind on the legality of abortion in the foreseeable future.

Further, even if Congress and Court were somehow to recriminalize abortion, enforcement would pose innumerable problems among doctors, police, prosecutors and women as women. Finally, such a policy making abortion a violation of criminal law would be inconsistent with the stated objective: preventing abortions without coercing women. Outlawing abortion would be coercive of both those women who think they should in conscience terminate a pregnancy and those physicians willing to perform abortions.

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The effort to enact a constitutional amendment defining a fetus as a human being with full legal rights from the moment of conception and restricting abortion to life-endangering pregnancies also faces innumerable obstacles. To date, the House and Senate have failed to report a human life amendment out of committee, let alone pass it by a two-thirds vote. The Senate, which has shown itself strongly opposed to severe restrictions on abortion funding, will hardly be more amenable to an almost absolute restriction on the abortion right itself. The alternative method of amending the Constitution—holding a constitutional convention upon the request of two-thirds of the states—seems no more promising for the prolife movement. Apart from the fact that this second method has never been used successfully in



American history, it seems highly unlikely that an amendment almost totally prohibiting abortion can collect favorable ratification majorities in the legislatures of 38 states. Moreover, the social cost of securing ratification would be an intolerable increase in political divisiveness. Finally, should a human life amendment ever be ratified, such a policy almost totally prohibiting abortions would meet with the same problems of implementation and the same ethical objections mentioned earlier.

If a human life amendment fails to satisfy our criteria of sound public policy, would a policy of preventing abortions through restricting public funding pass muster? Here I think prochoice advocates must at least recognize the plausibility to proilers of Hyde amendment type restrictions. Those who believe that abortion is the wrongful taking of human life object to having their tax money spent for purposes they consider gravely immoral. On this and other grounds, they have been able to persuade a sufficient number of legislators at congressional and state levels to support restrictions on Medicaid funding of abortions. In this effort, they have acted in the best traditions of democratic politics. They have mobilized political pressure at the grass roots on an issue about which they have strong moral convictions, and they have cared enough to stay with the issue in the halls of Congress and state legislatures. From a political scientist's viewpoint, those who decry apathy in American politics can only applaud this indication of active citizen participation in the political process. Moreover, in terms of political feasibility, abortion opponents do seem to reflect public opinion, which, for whatever reasons, is generally negative on the issue of Medicaid funding.

Legislating Against the Poor

However, our criteria as to sound abortion policy include a requirement that public policies be not only politically acceptable to a majority of the American population, but that they be just and equitable. In particular, such policies should not be unduly burdensome to any single social class or group within

society. Now it is the poor alone who bear the burden of this type of anti-abortion legislation. It is precisely because indigent women are dependent upon public assistance that the Hyde Amendment is so effective. Because they are poor, their behavior can be controlled in ways that the behavior of wealthy and middle-class women cannot. It seems arbitrary and unfairly discriminatory to single out the medical expense of abortion from a general medical program for the indigent and so make poor women bear the burden of prolife's opposition to abortion. It would be better, in my judgment, to focus the considerable energy and resources of the prolife movement on policies designed to prevent distressful pregnancies from occurring in the first place, rather than on policies designed to prevent one class of the population from choosing in conscience to exercise a legal right which other citizens may exercise because they are financially able. Apart from the merits or demerits of public funding of poor women's abortions, the Hyde Amendment raises tactical questions concerning the practice in Congress of attaching anti-abortion amendments to major pieces of legislation. Some argue that such riders are legislatively inefficient and inappropriate since they are usually unrelated to the substance of a bill and often result in prolonged conference-committee negotiations. I think this critique of prolife political strategy has only partial validity. After all, in the period immediately following the Supreme Court's legalization of abortion in 1973, anti-abortion forces in Congress attached to proposed legislation some restrictive amendments which, on balance, do not seem objectionable and in fact implement the rights so often invoked by abortion rights advocates. I am thinking in particular of the "conscience clauses" enacted by Congress and by 40 states protecting doctors and hospitals from being forced to do abortions against their moral beliefs and the moral beliefs of their trustees. Such conscience clauses are entirely consistent with the pluralism and freedom so heavily stressed in prochoice arguments.



Nevertheless, the attachment of anti-abortion riders to bills designed to help women in their reproductive functioning, thereby tying up the proposed legislation in committee or stalemating it in joint House-Senate conference committees, seems counterproductive and, in the long run, self-defeating for prolife forces. It is counterproductive because, if it is incumbent upon prochoice advocates to demonstrate that they care about the welfare of the unborn and seek to reduce the incidence of abortion, it is equally incumbent upon prolife activists to demonstrate solicitude for the welfare of women and concern for the increasing numbers of women who seek to combine parenting with full-time participation in the workforce.

A case in point is the Beard Amendment (proposed by Representative Edward Beard of Rhode Island) to the 1978 Pregnancy Discrimination Act. Women's rights groups introduced this legislation in Congress in an effort to reverse the 1976 Supreme Court decision, *General Electric v. Gilbert*, which held that employers were not required to include pregnancy in their disability

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payment plans. The proposed legislation prohibited discrimination against pregnant women in any area of employment, including hiring, promotion, seniority rights and job security. It also required employers who offered health insurance and temporary disability plans to provide coverage to women for pregnancy, childbirth and related medical conditions. Passage of this legislation was thought to be relatively easy since many groups were stunned by the Supreme Court's 1976 decision, and there seemed to be a general consensus in Congress that pregnant workers ought not be subject to job discrimination.

In October 1977, the Senate passed its version of the proposed bill by a vote of 75 to 11. In July 1978, the House passed the bill but in an amended version; the Beard Amendment allowed employers to exempt abortions from medical or disability coverage except if the life of the mother were endangered by carrying the fetus to term. The bill then went to conference and a three-month stalemate ensued which threatened to scuttle the legislation entirely. Finally, House-Senate conferees agreed to accept a slightly modified version of the anti-abortion amendment and the Pregnancy Discrimination Act was passed by Congress and signed by President Carter in October 1978.

The point of recounting the legislative history of this law is that on occasion abortion opponents seem willing to jeopardize legislation that in the long run should work to reduce the incidence of abortion in American society by making it possible for women to combine parenting and employment. In the past, working women who became pregnant and could not afford the loss of income, seniority and job security occasioned by time-



out for childbirth often felt constrained to have abortions. The Pregnancy Discrimination Act was designed to remove this constraint from the lives of American working women (who constitute more than 40 percent of the labor force); as such it seems foolish for prolife activists to have attached the Beard Amendment and so risked defeat of the bill. This less than enthusiastic support of the goals of the women's movement must be changed if prolifers are to work effectively and credibly with prochoicers to prevent abortion without coercing women.

Thus far I have described a public policy on abortion in negative terms. Such a policy would not recriminalize abortion through passage of a human life amendment; it would not, through denial of funding, restrict abortions for indigent women alone and it would not sacrifice, to the single issue of opposition to abortion, legislation designed to help women in their professional, vocational and social roles.

Creating New Options

A public policy designed to reduce abortions without coercing women would contain positive programs of assistance to women rather than negative prohibitions restricting their options. Such measures would include: comprehensive welfare programs for mothers and children; greater support for childcare, part-time work (with fringe benefits) and flexi-time scheduling to enable mothers to combine childrearing and gainful employment; increased funding of research on more effective contraceptives; better sex education programs; improved adoption services (including government subsidies for foster care and the adoption of hard-to-place children); support for parents raising retarded children; and better all-round programs for teenagers at risk of pregnancy.

I believe that both prochoice and prolife movements could redirect their energies and resources in a cooperative effort to enact public policies of this nature. The general thrust of such policies is to increase the range of women's choices and reduce the need for and the number of abortions.

It would be foolishly optimistic to suggest that prolife and prochoice forces will be able in the near future to opt for detente and work together for public policies such as these. Detente will not come easily; in particular, the developing confrontation over the appeal of *McRae* to the Supreme Court may simply reinforce polarization. In the short run, therefore, and particularly in this election year, abortion politics will probably become more heated and intense, at the risk of undermining long-range possibilities for cooperation. Accommodation will not come about unless partisans on both sides are convinced (1) that they cannot win using the old strategies (at least, not without great damage to the social fabric), and (2) that they can achieve many of their aims more effectively through cooperation rather than confrontation.

To pave the way for future cooperation, each side in this controversy must renew efforts to understand the deeper value perspective of the other side and to make its own position intelligible. Prochoice supporters must articulate a feminist view on the necessity of legalized abortion, and they must also make intelligible the case for reproductive freedom. A rigorous, systematic defense of reproductive freedom should not be confined

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only to the realm of individual rights. It should offer a philosophical conception of what it is to be human—of an ideal human life—in order to make humanistic sense of the control of biological reproduction that modern medical technology makes possible. Short of this we are left with a negative conception of freedom that does not do justice to the prochoice perspective. It is not merely that women are to be free from the external restraints of biological and social control; the question is what are women to be free for? What are the moral ends (service to others? self realization? both?) for which women are to be free?

In a more practical vein, prochoice activists must recognize the danger that abortion, admittedly a negative option, can become and to some extent has already become very commonplace—another form of birth control. Prochoice adherents who regard abortion as a negative, last-resort option will appear far more credible to prolife adherents if they work vigorously to expand the nonabortion choices of women. There is no reason, for example, why a pregnant teenager should not have an opportunity for genuine choice in her decision-making, which means that social workers and planned parenthood counselors should inform her, in truly impartial fashion, of all the options available, including placing the baby for adoption. Abortion should not become an instant panacea for the problem of teenage pregnancy.

Listening to 'Enemies'

Chances for political cooperation would be enhanced considerably were prochoice advocates to demonstrate that their views and sensibilities take account of the strength and plausibility of prolife arguments. For example, the prolife position strongly rejects quality-of-life arguments that suggest some human lives have more dignity or importance than others. It is frankly distressing to see how this strong plank in the prolife view—which many prochoice adherents accept with respect to racial equality and equality of the sexes—is virtually ignored by activists on the other side.

Striving for a thorough understanding of the other side's arguments also entails striving for a fair appreciation of the people on the other side. Prochoice adherents would demonstrate credibility and willingness to cooperate concretely by refusing to indulge in stereotypes that depict all prolifers as fanatical, single-issue, right-wing extremists. In actual fact, there are a considerable number of abortion opponents on the left who have a broad respect-for-life ideology extending to such issues as disarmament, nuclear energy, gun control, capital punishment and food for peace (the National Youth Pro-Life Coalition is an example). Also, abortion proponents themselves, or some of them, are not above the use of single-issue tactics and political action committees to target Congressional candidates for defeat.

As a prelude to or preparation for political cooperation, prolife adherents must also attempt to understand what the other side is really saying and to articulate their own views more clearly. Those who oppose abortion have failed to make intelligible their profound disagreement with the values of a society that not only permits but condones abortion on demand. Opposition to this policy is rooted in the prolife critique of an excessively individualistic, privatized culture that de-emphasizes the values of family and community and exalts the ethos of liberal pluralism.

Prolifers take exception to this type of liberalism with its emphasis on private choice and the corollary virtue of public tolerance of private choice. They do not think it possible for the government to remain neutral on the abortion issue by removing restrictive laws from the books and leaving the question up to individuals (they would argue that leaving the question up to individuals is as much a value-position as the argument that the fetus is a human being from the moment of conception). Since it is impossible for government to remain neutral, law and public policy, they argue, should reflect the judgment that abortion is a matter of social concern and that it is a negative option. In short, there seems to be only one alternative left to government and that is to reinstate laws prohibiting or severely restricting abortion.

Here, however, I think the prolife movement and, within that movement, Roman Catholics in particular may find elements within their own tradition that suggest why they should cease and desist from the campaign to enact a human life amendment.

Within the Catholic tradition, some respected theologians have suggested that the church's own principles and doctrines on religious liberty (in particular, the Declaration on Religious Freedom of the Second Vatican Council) afford a basis for seeking a

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public policy that will respect individual conscience in this matter. Here the peculiar, somewhat idiosyncratic nature of this particular issue must be acknowledged. Were there virtually no disagreement as to the immorality of abortion, the law could presumably prohibit it. But in a pluralistic society in which public opinion is deeply divided on the morality of abortion, the Church's commitment to religious freedom entails a duty to respect the autonomy of those who, in obedience to a duty of responsible parenthood, think they should terminate a pregnancy.

Secondly, Catholics share with liberals a profound awareness of the distinction between state and society, and a recognition that one need not and, perhaps, should not look to the state to undertake all the functions of society. Whether one looks at the principle of subsidiarity in papal encyclicals, or to Aquinas' writings on the relationship between law and morality, the end result is the same: Legality is not coterminous with morality; government cannot, and should not attempt to, eliminate all evils; the state would do well to focus instead on its proper goals of maintaining public order,



peace and justice. I cannot spell out the details of this argument here, but, as applied to the question of abortion, the burden is that those interested in preventing abortions had best rely upon the educational resources and social services of the larger society, rather than upon the commanding power of the law.

Thus one theologian has suggested that the Roman Catholic Church could and should try to influence

society in the matter of abortion choice by establishing a nationally coordinated program voluntarily supported by Catholics and others (if they wish) to publicize that the Catholic Church will guarantee for any pregnant women the financial, psychological, medical and social help needed to carry her child to term and to care for that child after birth. The advantages of such a program are obvious. It would be effective in preventing some abortions, it would demonstrate a commitment to assisting women and at the same time it would bear witness and be prophetic within society without causing the excessive divisiveness of futile efforts to amend the Constitution.

Thirdly, in the past the American Church has prudently and realistically assessed the practical limits of politics and law in a pluralistic society. Catholics are fond of citing Prohibition as an example of the futility of attempting to use law and public policy to eliminate the evils of alcoholism. They cite the costs of this misconceived attempt: bootlegging, an increase in the black market, a resulting contempt for law on the part of average citizens, an increase in the power of organized crime. Those who support the legalization of abortion argue that outlawing has had and will have similar unintended consequences. They wonder why Catholics do not see that, with respect to the use of law as an instrument of social control, Prohibition and abortion are analogous.

Law and Consequences

Here abortion opponents have much to learn from prochoice advocates. Few among those who worked to legalize abortion ever held that abortion was a positive social good; they merely pointed out that abortions had been and were continuing to be performed, and that to outlaw them was not to eliminate them but to make



them dangerous. Similarly, they never offered a positive argument for abortion on demand as an unqualifiedly good public policy; they pointed out, rather, that (1) highly restrictive anti-abortion laws had unintended consequences; and (2) in practice a semi-restrictive law permitting abortion only under certain conditions

tended to collapse into a policy of abortion on demand. There was one significant exception to this tendency. For those too poor to pay private psychiatrists to certify that their pregnancies threatened their mental or physical health, semi-restrictive abortion laws did not mean abortion on demand; they meant seeking out illegal abortions at the hands of gross incompetents.

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Thus, in the pre-*Roe* period, the experience of those states with moderately restrictive ("reform" as opposed to "repeal") abortion laws indicated to prochoice advocates the practical impossibility and the social injustice of any *legal* situation short of abortion upon request.

This practical experience combined with those elements of Catholic tradition upholding religious freedom and distinguishing state from society all suggest that the effort to prevent abortions must be, in the final analysis, a social rather than a political effort. In the absence of ethical consensus, control of reproductive choices, including abortion, neither should nor can be achieved by police and prosecutors. This does not mean, however, that abortion is of concern only to the individual. It is a socially significant act. The way out of our dilemma is to redefine abortion as a serious *social* problem, not a political question. Unfortunately, it has become heavily politicized in the last decade; and we cannot (if we are to be Niebuhrian realists) ignore the reality that a large industry of single-issue pressure groups as well as abortion clinics and maternity homes have come to depend on this issue for their *raison d'être* and, in many cases, for their livelihood. These realities are obstacles to detente; one may hope they are not insuperable.

It may be felt that in urging detente, I am asking far less in the way of concessions from the prochoice camp than I ask of prolife advocates. In the long run, I think not. If significant numbers of prolife and prochoice people can join in furthering the policies suggested here, the most important effect will be to oppose the growth of the so-called "abortion ethic," by which I mean any attitude that trivializes abortion. Every victory of right-to-life forces in the political struggle stirs a resentful response that, among other things, fosters rather than resists the temptation to make of abortion an ethically neutral choice of no great human import. Against such attitudes, even the (probably impossible) re-enactment of criminal sanctions will have little power to prevail. A politics of unity, by treating abortion as seriously as it deserves, will serve both factions best: prochoice by eliminating the threat of coercion, prolife by bringing the educational and social services of the larger society into the effort to prevent abortion.



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