

PETER STEINFELS

ABORTION, RELIGION AND THE CONSTITUTION

A Catholic writer explores a divisive issue

ABORTION is a terribly difficult matter to discuss. When I explained to a friend that I was talking on "Abortion, Religion, and the Constitution" in Salt Lake City, she gave me a strange look—as though to check whether my eyes were bloodshot or I was frothing a little at the mouth.

"In Salt Lake City?" she asked.

I nodded.

"Before an audience you know nothing about, right?"

I nodded.

"On *abortion*?"

I nodded again.

"Well," she said, "I'm not exactly sure what your position on abortion is, but obviously you have no moral objections to suicide!"

If one accepted as true the impression of each side in the abortion debate that one gets from the other side—if pro-choicers are right about right-to-lifers and if right-to-lifers are right about pro-choicers—then one would have to conclude that a special mechanism was at work here: some kind of political and religious filtering device that sorted out from the entire American population the most hypocritical, the most repressive, the most self-centered, the most callous, the most authoritarian, the most elitist, the most just plain nasty people in the society and distributed them evenly between the

activists in the pro-choice and right-to-life ranks. However, my impression is quite the opposite—some of the most concerned and conscientious people in our society are to be found highly visible in the ranks of both sides.

Why, then, this focus on all the shortcomings of the opposition? One reason is that abortion involves death. Just what it is that dies—and whether that death is justified—is, of course, part of the debate. But death there is, and death is hard to deal with—which is why it is easier to look at a lot of peripheral questions like the moral failings or inconsistencies of our opponents.

I edited a book about death—but I'm not very good at dealing with it. I'm not very good at condolences, for example. Partly because I'm a coward. Partly because I'm a writer and an editor and I have a strong sense of the cheapness, almost the tawdriness, of all but the greatest prayers and poems in the face of death. That is the way, I need hardly add, that I feel about words in the face of abortion. Whether we think of the terrible toll of a million and a half abortions a year or the single abortion that is chosen in anguish by a friend, an acquaintance, or family member, words pale before the reality. But words are all I have to work with this evening. So I take courage from something the Catholic theologian Richard McCormick wrote:

Both positions reflect a sad fact about our culture—the belief among too many that our deepest values cannot be challenged and reformed or affirmed by reasonable discussion.

Abortion is a matter that is morally problematic, pastorally delicate, legislatively thorny, constitutionally insecure, ecumenically divisive, medically normless, humanly anguishing, racially provocative, journalistically abused, personally biased, and widely performed. It demands a most extraordinary discipline of moral thought, one that is penetrating without being impenetrable, humanly compassionate without being morally compromising, legally realistic without being morally positivistic, instructed by cognate disciplines without being determined by them, informed by tradition without being enslaved by it. . . . Abortion, therefore, is a severe testing ground for moral reflection.

Noting that abortion may well be “a paradigm of the way we will face other human problems in the future,” he adds, “Many of us are bone-weary of the subject, but we cannot afford to indulge this fatigue. . . .” (Richard McCormick, *How Brave a New World*, 118-19.)

I see three ways in which abortion is thought of as a “religious issue.” At least one of these ways has been argued to have a direct bearing on the constitutionality of legislation restricting abortion. All affect the way that abortion should be treated in a pluralistic society.

THE first way in which abortion is said to be a “religious issue” has usually been put forward by those opposed to laws restricting access to abortion. It is true that the views on abortion of some pro-choice advocates have a religious basis. But when they describe abortion as a religious issue, what they usually mean is that the *opposition* to abortion is essentially religious in nature. Religious here refers to something beyond ordinary grasp of reasoning, something that can be known and held only by an act of faith, something that is defined by a theology and affirmed, taught, and celebrated by an existing tradition, faith, or church.

Now the opposition to abortion rests largely on a belief about the human fetus—that it is the sort of entity (some would say a human *life*, or a human *individual*, or a human *person*) that is as deserving of protection from destruction as the newborn infant or the grown adult. And this belief, say at least some pro-choice spokespeople, is—can only be—a religious one. It is the result of theological doctrine or church teaching or a supernatural experience. It may depend, for example, on an authoritative interpretation of passages in sacred scripture. Or it may derive from the notion that every human individual is animated with an immortal soul directly or indirectly created by God at the first moment of life, a soul of infinite value in the eyes of God and demanding respect and protection from human society.

If people want to hold such religious beliefs, and act on them in their own cases, continue these pro-choice advocates, all fine and good. That is their right. But by insisting that *others* be obliged to act in accordance with such religious beliefs, anti-abortionists cross the line set up by the First Amendment that separates church and state and prohibits the legal establishment of religion.

Jehovah's Witnesses, to choose another example, have every right to exercise their religious beliefs by refusing blood transfusions for themselves, but it would be unconstitutional if they extended this religious proscription to the rest of the nation by somehow instituting a law prohibiting blood transfusions for everyone. To ban abortion, in this view of the matter, is to force others to conform to religious beliefs which they do not hold, which they may even have considered carefully and conscientiously rejected.

What are we to make of this argument? The first thing is to recognize the evidence that no doubt makes it persuasive to those who put it forward. It is undeniably the case, first of all, that throughout history, religious beliefs have been the major source of attitudes toward abortion and that it is within specific theological traditions that most of the debates about hard cases concerning abortion have been conducted. It is also true that religious beliefs are a major source today of Americans' views on abortion. Orthodox Judaism, Mormonism, some branches of Lutheranism, and a good part of evangelical Protestantism are agreed with Roman Catholicism in concluding that abortion is rarely, if ever, permissible. And no one can deny the crucial role taken by the Catholic church and religious activists from these other traditions in organizing the opposition to the Supreme Court's 1973 decision on abortion.

Is all this sufficient evidence to support the case that abortion is a religious issue—a religious issue in precisely the sense that to ban abortion, or to limit access to it, would be an unconstitutional imposition of religious beliefs and a violation both of church-state separation and the accepted norms of American pluralism?

My answer, of course, is no. And this is the answer, also, of the courts that have authoritatively dealt with the question. One gets a hint of why this should turn out to be the case as soon as one notices that list of faiths which have been outstanding in their anti-abortion posture. Orthodox Judaism, Mormonism, Roman Catholicism, and evangelical Protestantism—a curious list, indeed. Could one possibly find—at least in this nation—a grouping with more dramatic differences in doctrine—even as regards abortion itself—and with so many historical suspicions and antagonisms? How is it that such different faiths, different theologies, different structures and traditions of teaching authority, have converged on the same practical conclusion? One immediately suspects that there is some more general moral intuition at work here, an intuition these various doctrines each express in their particularistic ways. The same suspicion arises when one studies public opinion on abortion and discovers how much the division of opinion falls within churches as well as between them; and how even among Catholics, despite their church's clear-cut and uncompromising position, the rejection and toleration of abortion is shaded in a way not conforming to the church's formal teaching. Clearly

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there are other grounds for making up one's mind on this agonizing subject. Clearly there are grounds independent of theological or religious authority.

Of course there are such grounds. Orthodox Jews may originally derive their views on abortion from the Torah or Talmud, Catholics from the church fathers or the popes, Lutherans from Martin Luther or their synods. But all can offer to their fellow Americans an array of philosophical or non-religious ethical grounds for opposing abortion. These are grounds having to do with the common good, with consistency in defining and protecting human life, with the implications of our society's fundamental political and legal principles. Not all these arguments may be equally persuasive—or persuasive at all. But no one who is aware of the sizable library of philosophical and legal and medical literature on abortion and on the definition and rights of fetal life can deny that such arguments, whatever their worth, are there, and that they are not *religious* in the sense that they rely on an act of faith or on religious authority.

Return to the case of the Jehovah's Witnesses and blood transfusions. Is it truly parallel to the question of abortion? We might note, to begin with, that in regard to the morality of blood transfusions, there exist no body of nonreligious literature comparable to that on the morality of abortion. But let us imagine that such nonreligious literature did exist. Let us imagine that a significant current of opinion grew up, perhaps even prompted by Jehovah's Witnesses, holding that blood transfusions were somehow unhealthy, or discriminatory, or demeaning to free and equal citizens, or a wasteful use of a limited natural resource; and that, therefore, such transfusions should be banned. Such arguments might be ludicrous, but ludicrous theories have been known to gain wide followings; and if that one should win over a majority and a ban on transfusions be written into law, it might be unfortunate, it might be unconstitutional on some other grounds, but it would not be a "religious" matter that violated the principle of church-state separation.

Now let us quit fantasy for an actual episode in this century's history—Prohibition. Whether or not the movement for Prohibition of alcoholic beverages was prompted by the religious beliefs of temperance leaders, Methodists, and otherwise, there were still plenty of non-religious, secular grounds for instituting a ban on this powerful and widely-abused drug. The Great Experiment, as it turned out, failed. It was self-defeating. It only partially prevented the evils it took aim at, while provoking a mass of new evils it had not anticipated. Perhaps the religious leanings and longings of its proponents caused them to advance the multiple *secular* reasons for Prohibition without sufficient care and caution, but that does not expunge the fact that such secular reasons did exist. Prohibition may have been—I believe it was—a terrible political mistake; it was not an unconstitutional one.

It was in the litigation about Medicaid funding for

abortion that pro-choice lawyers proposed the idea that opposition to abortion was so exclusively or predominantly a religious matter that Congress could not legislate in this area without trampling on the First Amendment. Two courts commented on this notion, and although they divided on other matters, they agreed in rejecting the pro-choice argument about religion.

Wrote Judge John F. Dooling of the U.S. District Court in Brooklyn: "The argument from the establishment clause must be rejected." Even if the enactments under challenge reflected one religious view, he wrote, that "would not be decisive." In any case, he reminded his readers, the Hyde amendment reflected a view represented "in most state statutes of a generation ago"; it did not become a narrowly religious view "because, after 1973, the most vigorous spokesmen for it put their case in religious terms, and grounded them in religious reasons."

It is clear that the healthy working of our political order cannot safely forego the political action of the churches, or discourage it. The reliance, as always, must be on giving an alert and critical hearing to every informed voice, and the spokesmen of religious institutions must not be discouraged, nor inhibited by the fear that their support of legislation, or explicit lobbying for such legislation, will result in its being constitutionally suspect.

The Supreme Court was more terse: The fact that a statute "happens to coincide or harmonize with the tenets of some or all religions," wrote the Court, does not mean it violates the establishment clause of the First Amendment. "That the Judaeo-Christian religions oppose stealing does not mean that a state or the federal government may not, consistent with the establishment clause, enact laws prohibiting larceny."

In the course of characterizing opposition to abortion as essentially "religious" in nature, some pro-choice advocates proposed a sharp contrast between *scientifically* established truths and *religious* ones. Only the former, they said, should be allowed into the forum of discussion when laws are being passed. Since science could reach no agreement about whether conception or any other moment in fetal development entitled the unborn entity to all the rights of a "person," then there was no other basis—except, of course the improper one—for reaching a decision on this crucial question.

Now this set of alternatives—either a scientifically-based truth or a religiously-based one—is surely too narrow. The fact is that science provides no consensus on many, if not most, of the deepest human questions. Throughout history, there has been no scientific agreement that individuals, or races, or sexes, are fundamentally equal. There is no scientific agreement that societies that elevate individual liberty or care for the weak or allow open discussion or practice representative democracy or refrain from wars of conquest are necessarily longer lasting. Must we therefore abstain from judgment on the basic questions of social morality while we await a scientific verdict?

In our day doubts have been expressed about whether confidence in human intervention combined with dismissal of older, limiting kinds of wisdom and morality can lead us anywhere but toward catastrophe.

What this false set of alternatives leaves out is that there is a kind of moral reasoning, informed by science, informed by philosophy and political thought, informed by religious traditions and by common experience, that can legitimately be the basis for majority decisions in a pluralistic society.

Curiously enough, anti-abortion activists have frequently erected a kind of mirror version of the pro-choice argument about the absence of a scientific consensus. In effect, they *agree* that the moral status of fetal life can be settled by science. It can be shown that the complete "genetic package" of a distinct human individual is present from the time of conception—and that settles that. This was the drift of the hearings that Senator John East held a year ago on the question of when human life begins. But, in fact, that doesn't settle that. The question under debate is not whether the fetus, from the moment of conception, is human life as opposed to, say, vegetable or fish life. The question is not even whether the fetus, although dependent upon its mother, is in fact an independent and self-developing organism. The question is ultimately whether this stage of development—a dynamic but still microscopic being of a handful of cells—is deserving of the full protection under law that is the accepted right of the child or adult. I understand the case of those who answer that question yes; I even find their case plausible. But they are mistaken if they think it rests on scientific facts alone without the additional support of a number of philosophical principles and moral values.

Sometimes this appeal by anti-abortionists to hard, scientific fact is made in reaction—in *overreaction*—to the charge that their case is a religious one. In their different sorts of appeals to science, both these defenders and these opponents of abortion short-circuit the discussion. The one says, look, in the absence of a scientific or medical consensus on the value of fetal life, we have no other resources for reaching a conclusion about the morality of abortion. The other says, look, in view of the scientific fact about conception marking the beginning of a genetically distinct individual, we *need* no other resources for reaching a decision about the morality of abortion. Both positions reflect a decision about the morality of abortion. Both positions reflect a sad fact about the state of our culture: the belief among too many people that our deepest values cannot be discussed and challenged and reformed or affirmed by reasonable discussion—that they must be, on the one hand, scientifically verifiable or, on the other hand, a matter of either religious faith or mere arbitrary opinion.

I WOULD like to turn now to a second sense in which the abortion issue has been described as "religious." This is the sense of "religious" that refers less to the source of beliefs and more to the manner in which they are held. For many people, abortion is an issue that stirs fervor, that compels them in a way we associate with religion. Abortion presents them with a challenge, an

imperative, an obligation that goes beyond the everyday ones. The issue is presented in religious language, with religiously evocative references and symbols. I have recently read two books by opponents of abortion: one was titled *Slaughter of the Innocents*, the other *Rachel Weeping*. Even when the political debate and contest is conducted, strictly speaking, in secular terms, it is infused with religious feeling; it becomes part of a cosmic struggle of good and evil, life and death; it elicits condemnations; it refuses compromise.

This is what pro-choice spokespeople have in mind, at least in part, when they refer to the anti-abortion movement as "absolutist." They are usually unaware of the extent to which their own efforts partake of the same or of a parallel spirit. But the religious element—which is, after all, an outstanding element in almost all American political struggles—does present problems. It should not be left to non-believers to recall the tragic results to which religious militancy has often given rise—the persecutions, violence, wars, hatreds, that so dismayed and disgusted many of the educated classes of Europe in the centuries after the Reformation that they turned to scepticism and laid the foundations for what various fundamentalists are today wont to denounce as secular humanism.

When a political struggle takes on the character of a religious crusade, there are at least three dangers that readily present themselves. The first is to assume that the adversaries' adherence to a different position stems not from a difference of principle or even from a commonly respected value that is held by the other side in different proportion, or applied in a different way, but that it stems from moral laxity. The second is to assume that law and morality should be identical. The third is to assume that compromise is impossible.

I have already mentioned my impression that the abortion issue, when compared to other political struggles, probably has a much higher, rather than lower, proportion of morally conscientious and concerned people engaged on both sides. But both sides have enormous blind spots in regard to the other. The pro-choice activists refuse—at least publicly—to take seriously the anti-abortionists' concern for fetal life. The anti-abortionists, on the other hand, refuse to perceive that the question of fetal life is simply not so clear, particularly in its earlier stages. After all, one of the world's great faiths, the parent of Christianity, has never recognized the fetus as a "person" in the full sense, even when it would not allow abortion on other grounds. If this was true for a great religion, true even in regard to the fully developed fetus, is it surprising that others do not perceive the moral status of the developing human individual at stages of early cell division, or before the heart starts beating, or the basic spinal and nervous structure is present, or before brain activity begins, or before the fetus has taken on even a miniscule human resemblance, or before it can feel pain? Anti-abortionists can present their reasons—and they are not inconsiderable ones—why fetal life even at these stages

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should be valued so highly that tragic consequences must be incurred by the fully grown adult who is the mother. But anti-abortionists are wrong if they assume, as I believe they often do, that those reasons have the same compelling clarity as, say, their protests of later-stage abortions, when the fetus has so visibly and completely the aspects of a tiny infant.

In their religious dedication, anti-abortionists are also apt to assume that law and morality must be congruent. Yet one principle of morality, in fact in Aristotle's view the guiding principle for the practical application of morality, is *prudence*. Prudence takes into account the actual circumstances in which morality must be realized. As regards the law, prudence allows for the fact that if it is to be respected, law cannot deviate too far from the public consensus on an issue, even if that consensus does not represent the highest morality. Now we know that the public's views on abortion are considerably at odds with those enacted into law by the Supreme Court's decision of 1973. Most Americans believe that the unborn individual deserves greater legal protection than the justices would grant; most reject abortion-on-demand; most oppose abortions after the first trimester; most are unhappy with the idea of abortion as a means of family planning or for social and economic reasons rather than because of a serious threat to the mother or a serious genetic deformity.

But it must be equally noted that the public's views of abortion are also considerably at odds with the alternative proposal of the right-to-life movement—a constitutional amendment banning almost all abortions. A constitutional amendment of that sort will be widely flouted in practice; when enforced it will create sympathetic martyrs, and martyrs will enlarge public aggravation with the anti-abortion position and undermine its moral credibility. Just as Protestant political influence in America was never regained after the demise of Prohibition, so I believe that the anti-abortion forces will destroy their own influence by passing legislation that far outstrips what is the public consensus on abortion and the significance of fetal life. Of course, it is easy to understand how the logic of the anti-abortion position pushes them to that conclusion. But does not the ancient virtue of prudence dictate that they should not try to enforce by law *everything* that they believe should be observed by morality?

This brings me to my last point under this heading. Can there be a compromise on this issue? It has often been noted that a question like abortion, unlike one such as economic equality or tax reform or a labor dispute, does not lend itself to compromise. You cannot very well "split the difference." But I believe that the possibilities for compromise are greater than have been recognized. One form of compromise, of course, is the proposal to return the question to the individual states, where it was before the Supreme Court's 1973 intervention. That would result in an uneven pattern of laws across the country—an unsatisfactory resolution in many ways,

but one, nonetheless, that allows for the uneven views of the public to be better expressed. A second form of compromise would be a constitutional amendment that prohibited abortion, except in life-threatening circumstances, after the point—either 10 or 12 weeks*—by which time the most dramatic development of the fetus is complete—and reserved any further limits on earlier abortions to the individual states. At this point, neither the pro-choice nor right-to-life movements are willing to entertain thoughts of compromise. Such thoughts offend the religious spirit that animates them both.

I have so far considered two senses in which the abortion is said to be "religious." I have argued that it is not *religious* in the sense that opposition to abortion can be based only on an act of faith or a theological authority. I have argued that it *is* religious in the sense that it draws upon our strongest sentiments about good and bad and that therefore it risks the danger, on both sides, of reducing adversaries to morally blameworthy caricatures and of making any sane and viable compromise impossible.

FINALLY, I would like to discuss a third sense in which the abortion issue has been said to be "religious." This is the broadest meaning of that word—the sense in which it indicates some very fundamental stance toward the world and life. In this sense, again, it could be said that both sides in the abortion dispute are "religious." Since the pro-choice movement generally presents itself as secular, one has to discover for oneself what "religious" stance the movement actually represents. Many would say, the religion of choice itself, a deep commitment to individual autonomy against socially imposed norms. And this, no doubt, is part of the story.

Yet it is a puzzling part of the story. For once again, it leaves the fetus out of the picture. If the fetus is *not* left out of the picture, then it must be admitted that abortion certainly cuts off any possibility of *its* ever expressing choice, of the fetus ever enjoying any individual autonomy. A deep commitment to choice and autonomy does not explain why the boundaries of those who are to enjoy this self-direction should be circumscribed in this particular way, so as to exclude the living but not-yet-born.

I think the answer to that puzzle lies in another deep moral impulse that informs the pro-choice movement. And that is the heritage of humanitarianism which for two centuries has recoiled from and then striven to eliminate *visible* suffering. In demanding deliberate measures to remove obvious evils, this effort has often had to affirm the validity of planned human intervention

*Further reading and reflection on the facts of fetal development and their implications for a moral-political judgment in this area have convinced me that these dates are too late and that a legal limit would be more appropriately set at 8 weeks. I argued the case for a law of this sort in the 20 November 1981 issue of *Commonweal*.

Must we abstain from judgment on the basic questions of social morality while we await a scientific verdict?

against those who insisted that the status quo reflected some underlying natural order which society could not impiously disrupt without suffering some eventual natural retribution. Though humanitarianism often protested the conditions consequent upon industrialization and urbanization, though occasionally it nursed a nostalgia for a stable, pastoral world, it was in fact a sharer in the optimistic, dynamic spirit that brushed aside pre-modern custom and religion in its headlong dismissal of pre-modern attitudes toward natural limits. In our own day, however, doubts, and even anguish, have been expressed about whether this confidence in human intervention combined with a dismissal of older, limiting kinds of wisdom and morality can lead us anywhere but toward catastrophe. Industrialization ignored the values that were not productive in the near term; humanitarianism has ignored the denials of human dignity that could not be directly seen and felt. In reacting to the depredations of nature that the first of these forces has caused, one Supreme Court justice even urged that swamps and woodpeckers be considered legal persons entitled to due process protection. "The problem," wrote William O. Douglas, "is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed." One wonders whether those who would recognize swamps and woodpeckers and inanimate objects as legal persons will admit the tragic irony of their denial of legal personhood to the unborn human—and will possibly admit that fetal lives, too, deserve to "have spokesmen before they are destroyed."

Just as the determining deep commitment of the pro-choice movement may appear to be individual autonomy, the fundamental stance of the anti-abortion movement is sometimes described as pro-family, a term which evokes images of discipline and stability to its admirers, of sexual repression and patriarchy to its critics. Yet again, this cannot be the whole story, no matter whose version one prefers. There is no conclusive evidence I know of showing that abortion cannot coexist comfortably, as in Japanese society, with strong family attachments, discipline, and stability. Many of those middle-class women who avail themselves of abortion can no doubt argue that they are doing so for the stability and well-being of their existing family. As for patriarchy, one of the fiercest examples of the patriarchal family—the Roman—was associated with the legitimacy of abortion and even infanticide. It was against this very patriarchal order that Christianity raised a challenge—insisting that there were values overriding parental rights and there were claims that transcended family ties.

So while it is true that a cluster of attitudes about sexuality and the family does often mark the right-to-life movement, I would argue that the fundamental impulse of the anti-abortion position needs to be located elsewhere. One Christian ethicist—a West Texas Methodist who calls himself a high-church Mennonite

and teaches in a theology department at a Catholic university—has written that "what is at stake in the fetus's existence is a fundamental option about our status as" humans, specifically, that "we must learn to regard another's life as good because it has being, not just because it is useful." And Richard McCormick has seen the traditional Christian position opposing abortion as rooted in an understanding of "God's special and costing love for each individual—for fetal life, infant life, senescent life, disabled life, captive life, enslaved life, yes, and most of all, unwanted life."

If this is the case, then—that at the deepest level the anti-abortion position is an affirmation that the universe, in some godly way, does really want the unwanted—well, it has profound implications beyond the abortion issue itself. It means for example a strong contradiction with any outlook that honors the robust and the productive individual at the expense of the vulnerable and the dependent. If the essential equality of all human creatures before God is at the root of the anti-abortion impulse, then right-to-lifers ought to consider the position of a friend of mine who is both a feminist and an opponent of abortion—and who believes that the same moral force underlies both the Human Life Amendment for the unborn and the Equal Rights Amendment for women. And if the right-to-life movement claims that there is a common humanity that must outweigh our desires for independence and our individual strivings, then it ought to recognize the curious coincidence between the slogan "freedom of choice" and the title "Freedom to Choose" that was chosen by Milton Friedman to sum up the *laissez-faire* economic philosophy now so honored in our nation's capital.

Abortion, I have argued, is not a religious issue in the sense that would bring the recognition of the rights of the unborn under the constitutional prohibition of a religious establishment. Abortion, I have argued, has been all-too-religious an issue insofar as it has frequently provoked the worst excesses of religious strife. And finally, as a problem that reveals or forces us back to our very fundamental stances toward the world and our place in it, abortion is indeed a religious issue and one that ought to pose even further and broader questions to those who have taken a stand on it.

But at this point, what was to be a lecture runs the risk of becoming a sermon, and for that you may want to invite a guest with a different kind of credentials.

PETER STEINFELS is executive editor of the Catholic lay periodical *Commonweal*. He received a Ph.D. from Columbia in European history. Formerly Assistant for the Humanities at the Institute of Science, Ethics, and Life Sciences at Hastings-on-Hudson, New York, he is author of *The Neoconservatives: The Men Who Are Changing America's Politics* (Simon & Schuster, 1980) and co-editor of *Death Inside Out*, a book of philosophical essays on death and dying.

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