Bush's Second Chance

by Hadley Arkes

O*ut of this nettle, danger, we pluck this flower, safety* (Henry IV, Part 1). The sense of relief, felt so deeply in the pro-life community on November 3, 2004, seems to have drifted away in the weeks and months since the presidential election. It is already easy to forget how great a threat the election posed: even the most sober observers of the political scene recognized that a Kerry presidency would mark the end of any prospects for the pro-life cause in Congress or the courts. Some pro-life conservatives were on the threshold of concluding that the issue of abortion had been lost beyond retrieval, that the return of an administration unrelievedly pro-abortion would be a terminal event for the pro-life cause. For such an administration would show no inhibition in its willingness to solidify the right to abortion with every executive order, every appointment to the courts, and even in international conventions, where it would use the United Nations to endorse, at every turn, "reproductive rights." At the same time, the ground would have been prepared, in stages, for the installation of same-sex marriage by the courts. There would have been a decorous interval, of course, as the public had to be prepared and led, step by step, but so certain did the outcome seem last fall that many conservatives, not at all fainthearted, were coming to the conclusion that this issue, too, had been lost.

On the morning of November 3, however, those threats seemed to have been swept away. Eleven states voted on constitutional amendments that would confine marriage to a man and a woman as husband and wife. The amendments passed in all eleven states. The gay activists thought they had the best chance to prevail in Oregon, a liberal state, regarded by many as the most "unchurched" state in the union. But the cause of gay marriage lost there as well, with 57 percent of the voters making it clear that even a liberal state would mark limits to the reach of gay rights. The election brought a surge in Republican strength in the Congress, especially in the Senate. Suddenly the means were at hand to overcome the filibuster that had blocked conservative candidates for the bench. Not only were there five more Republicans in the Senate, but they brought a firming of conviction and confidence on the pro-life side.

And so, on the morning after the election, when the clouds lifted, the political landscape that came into view was startling. A cultural drift, seemingly inevitable, had been halted. In fact, the country now seemed at a turning point. The question was whether the political class, or the Republican party, could summon the art or the nerve it needed in order to make a breakthrough of their own in the possibilities that were suddenly open to them.

On the issue of marriage, the deeper meaning of the election was grasped at once by gay activists. The American people had become quite tolerant and accommodating on the matter of homosexuality, willing to avert their eyes and withhold their censure. But they drew the line at marriage, and that line had significance beyond the immediate controversy. Edmund White has been writing about the gay scene since the 1970s; he now teaches creative writing at Princeton. In an interview about a week after the election, he recalled his conversations with gay friends in Princeton as they surveyed the results of the referenda. It seemed jarringly clear to them that the

vote involved more than marriage: their fellow citizens had cast a judgment on their way of life; voters were marking the border of their willingness to withhold judgment. The issue of marriage had claimed an importance even for gays who had no intention of getting married themselves. For it was another step in the recognition of gay and lesbian sex as just another style of sexuality, on the same plane of legitimacy as heterosexual unions. The defeat of gay marriage was a sobering jolt, a sign that ordinary people had come to the limit of their willingness to be badgered into acceptance and to have their children catechized in a new view of the moral world.

President Bush, for one, seemed to grasp the import of these returns and the critical moment at hand. He indicated, soon after the election, that his party would press on again to amend the U.S. Constitution for the sake of securing marriage. Some Republicans may be altogether too ready to declare that the point has been tellingly made in the elections this past November, and so there is no need to go further, by amending the Constitution. But that would be a grave mistake, and a failure to act precisely when the public has been primed to act.

On the matter of abortion, however, the President did not seem to be seized with any comparable sense of moment, or any heightened awareness of possibilities now come into sight. And yet, in the case of abortion, the new possibilities had already been visible for more than two years. The President showed no keen awareness of these possibilities now, just as he had shown no awareness earlier. It was not that the facts were not there to be seen, or that the President had no means of knowing. For at least two years the White House staff, and the President it advises, had ample reason to conclude that America had reached a turning point, and that, with the slightest moves on the part of the administration — moves so slight that they did not require the exertion of an executive order — they could have produced some striking gains for the pro-life cause while fostering a deep crisis in the ranks of their adversaries. With moves modest by any measure, Mr. Bush could have advanced the pro-life cause and propelled the Democrats in Congress into an internecine war that would surely have torn them apart, and left them morally exhausted during the season of the campaign. That the President should have had no interest in inducing such strain among his adversaries, at virtually no cost to himself, must be ranked among the great political mysteries of our time. But apparently more pressing than any desire to sow confusion among his adversaries has been the President's desire to preserve his reticence on the matter of abortion.

To deepen the enigma, this reticence on the part of the President has persisted even while he has assembled an administration filled with pro-lifers at virtually every level, including the White House; an administration that is probably the most pro-life of any that has been constituted since *Roe v. Wade*. None of this can be laid to happenstance. For Mr. Bush, this reluctance to speak on abortion has been part of a policy fixed in his makeup and critical to his political design. In 1999, when he was preparing for his first presidential campaign, Mr. Bush took soundings among prominent conservatives, and the word went out: he was emphatically, decisively, on the side of the pro-lifers. He could be depended on to do the things that President Reagan and his own father had done before him to preserve a coalition that included pro-lifers. But, as the report went, he did not feel that he could "lead" with the issue of abortion. Either it was impolitic to make this question his defining issue, or he did not feel confident of his own facility in making the argument. He would speak on this vexing issue only when it was absolutely necessary for him to do so.

We could not grasp at the time just how strictly he intended to follow this rule. But we grasp it now, for it has become chillingly clear in the experience of the last two years. It was as though the White House had taken an account of the simplest, slightest measures that might be taken, and then come to the judgment that it was not in the interest of the President to do the slightest thing. There is an explanation for all of this. But it must be seen in its clear outline, for it offers a melancholy reflection of the political terrain on which pro-lifers are compelled to work, even with a pro-life president in the White House.

When it comes to the simplest, slightest thing to be done, it is hard to produce anything purer than the measure billed as "the most modest first step" on abortion, a measure that would preserve the life of the child who survived an abortion. Readers of First Things may know that this measure had its origins in some material I had written for the debating kit of the first President Bush when he was preparing for his debates with Michael Dukakis in 1988. An account of the origin of that measure and how it was finally steered to enactment forms a central part of my recent book *Natural Rights & the Right to Choose*. One federal judge had famously opined that even a child who had survived an abortion was not protected by the law: it was a fetus marked for "termination." In other words, the right to abortion meant the right to an "effective" abortion, meaning a dead child.

But even pro-choicers insisted that their support for abortion did not imply an acceptance of infanticide. No one could pretend to argue over the human standing of the child at the point of birth — even if the child had been marked for abortion. We would invite people on the other side to join us at least in establishing this point: that even the surviving child marked for abortion had a claim to the protection of the law, a claim that should not depend on whether anyone *wanted* her. Our object was to plant premises in the law and give the public news that it would find jolting — namely, that the right to abortion extended through the entire period of pregnancy, and could even include the right to kill a child outside of the womb. In practice, the measure promised to save only a handful of lives. But that was nothing to be disdained. Of the 1.3 million abortions performed each year in this country, we might at least manage to stop a few.

This measure was brought forth again in July 2000, just after the Supreme Court struck down the law on partial-birth abortions in Nebraska (and, by implication, in thirty other states) in the case of *Stenberg v. Carhart*. The bill became known as the "Born-Alive Infants' Protection Act," and it was introduced just as the presidential campaign was heating up in the summer of 2000. Apart from its legislative prospects, it seemed an excellent political device for a candidate who was uncomfortable speaking about abortion in public, since it was surely the easiest bill to offer to the public. With this kind of measure, candidate Bush could hope to win the support even of pro-choice Republicans in states such as Connecticut and New Jersey. Such people would be willing to vote Republican were it not for the abortion issue. This bill gave George W. Bush the chance to approach these voters in a disarming way: "I know that we disagree on many things," he might have said, "but whatever the right to abortion means, we can surely agree that it cannot mean the right to kill a child born alive." Whether or not he convinced them, we did not see how he had anything to lose by framing the problem in this way.

But Mr. Bush did not breathe a word about this bill during his campaign. More surprising still, he did not even endorse the bill once he was in office. In the aftermath of September 11, even this

modest bill was put aside, along with everything else not related to the national emergency. The bill was brought to the floor of the Republican House in March 2002, and there it passed. Then, to our astonishment, the Democratic leadership in the Senate allowed the bill to be brought to the floor in July, where it was passed by a "voice vote" without dissent. It was passed precisely because the Democrats, after much straining, took the advice of Congressman Jerry Nadler: they would quietly vote for this modest bill, hoping it would make little change in the law. In that way, they would avoid the embarrassment of having to oppose the bill with public arguments. When the bill had been introduced in July 2000, the National Abortion Rights Action League actually came out in opposition to this measure. Were it not for Jerry Nadler's counsel, between forty and fifty Democrats might have followed the lead of NARAL and torn their party apart. Here as elsewhere, our adversaries understood us better than some of our allies in Congress did, for they grasped the principle that lay at the heart of the bill.

President Bush signed the bill in Pittsburgh, in August 2002, and my friends on the White House staff were generous enough to invite me to the ceremony. In a private conversation, the President described this bill as a first step in changing the culture, and there he was right — if he wished to make a point of it. For the first time since *Roe v. Wade*, Congress had exercised its authority to legislate a limitation on abortion. What Congress had banned was the so-called "live-birth abortion," as practiced most notoriously at Christ Hospital in Oak Lawn, Illinois. In this procedure, the baby would be delivered and then put aside without cover in the refuse room, where it was left to die. This routine practice was first revealed by Jill Stanek, a nurse at the hospital, who joined me in testifying at the hearings on the Born-Alive Act.

Fast-forward two years: Jill Stanek was being interviewed on the radio about her support for a version of this bill offered in Illinois (and opposed by Senator Barack Obama). The interviews elicited calls from nurses all over the country. The nurses testified that these kinds of abortions had been practiced at their hospitals for years. The procedure turned out to be far more common than we had ever imagined. Jill Stanek had one of her aides call the Oak Lawn hospital to find out how they could continue their practice of live-birth abortions in the face of the Born-Alive Infants' Protection Act. A spokesman for the hospital professed not to have heard of the Act.

Not heard of it? There had been a meeting at the White House in spring of 2003 at which it was agreed that the first thing to do was to inform the country's hospitals and clinics that the Act was now law in the United States. For the sake of making the Act a "teaching" Act — one designed, above all, to plant premises — no penalties had been specified in the bill. All of that could wait until a later moment. In the meantime, though, the Secretary of Health and Human Services, Tommy Thompson, could issue a directive to every hospital and clinic that came to the attention of the government. He could inform these institutions of the new law and ask them whether anything resembling a "live-birth abortion" was being practiced under their auspices. No hospital or clinic, of course, would admit that it was permitting these procedures, but the point would have been made. And even though the bill contained no penalties, criminal or civil, the very posing of the question to people in charge of hospitals and clinics was, as one lawyer said, a move that would "tighten sphincter muscles" within these circles. For the administrators would be forced to wonder about the consequences of violating federal law. Would it lead to the loss of federal funds or of tax exemptions?

President Bush described the bill as a "first step in changing the culture." And yet, at the time of this writing, the Department of Health and Human Services has not yet taken even the most modest second step: to make the law known in the places where abortions are performed.

But why should the President have been so reluctant to speak on a measure so modest that it commands almost universal support across party lines? After all, during the presidential campaign he was willing to affirm publicly his support for the bill that banned "partial-birth abortion." In that grisly procedure, about 70 percent of the body of a living child is dangling from the birth canal; the head of the child is punctured, the brains suctioned out; and the dead child is removed intact. The bill banning the procedure was supported widely throughout the country, but Bill Clinton managed to get away with vetoing it twice, and the Supreme Court struck down the comparable bills that were passed in the states. This, then, was a matter of considerable controversy. And yet President Bush was willing to endorse the bill on partial-birth abortion. He signed it in a public ceremony when the bill was finally passed in 2004. Why was he willing to speak in support of this bill when he had been unwilling to endorse the Born-Alive Infants' Protection Act?

The most economical answer may be the most plausible: the bill on partial-birth abortion had already been taken up by Republicans in Congress and passed twice. For President Bush to take no notice of that bill and offer no endorsement would have been an omission too glaring to go unnoticed. But for President Bush to talk about something new, a measure that had come as a surprise, even a disarming surprise, to many Republicans otherwise favorable to abortion — well, that would betray a willingness to *talk* about abortion. And in the President's world, a willingness to talk about abortion is seen as tacky and unseemly. One recalls Robert P. George's deft line about the first President Bush — that when it came to pro-life issues, he was "all action and no talk." But what we needed was the talk: talk that frames the issue, plants premises, and opens the conversation.

By the time President Bush signed the bill on partial-birth abortion, it had all of the earmarks of a "planned failure," a bill not likely to go into effect or make any impression on our laws. It was understood that the bill would be challenged in the courts on the day that it was passed. The same doctors who had claimed to be "chilled" by the bills on partial-birth abortion within the states would claim to be chilled by the same bill passed as a federal law. They would go into the same federal court, before the same friendly federal judge, and elicit the same result. That, in fact, is what they did, and the government was enjoined from enforcing the new law. President Bush's Department of Justice is preparing to defend the bill, and the appeals are wending their way through the courts even now. If there is no change on the Supreme Court by the time the act arrives there on appeal, we can expect that the same group of judges who struck down the act in Nebraska will strike down the new federal law. If that occurs, it is virtually inconceivable that even a Republican Congress would try to pass the same bill for a fourth time, or that the administration would draw down any political capital in order to rescue the new law. In that case, President Bush would never have to speak about partial-birth abortion again.

All of this has been evident for two years now, as people in the White House know. And yet the problems afflicting the bill on partial-birth abortion have opened up new paths to the President, and not all of them would require either new legislation or executive orders. While the bill on

partial-birth is blocked in the courts, attention may be drawn back, yet again, to that "most modest" measure of all. The law that protects the lives of children who survive abortion could still be the most powerful tool for a pro-life administration — if only the President had any interest in making use of it. The tool could be used in the following way.

First, the President could express his "disappointment," as he has said, that the courts have enjoined this measure to end the gruesome practice of partial-birth abortion. But in the meantime, while we are deadlocked over partial-birth abortion, the President could turn the nation's attention to the measure that inspired no dissent. Senators and Congressmen of both parties joined together in passing the Born-Alive Infants' Protection Act, and no one has claimed that the Act is unconstitutional. But we never provided penalties for withholding medical care from a child who survives an abortion. If we are serious about condemning the procedure, we must be serious about making sure there is a punishment for it. The President could invite the judiciary committees of the Congress to hold hearings in order to consider what the penalties ought to be. How serious would it be, after all, to withdraw life-saving care from a newborn? But let us take an even more moderate approach: instead of assigning criminal penalties in the form of jail, or civil penalties in the form of substantial fines, the President could simply propose withholding funds from any hospital or clinic that allows the children who survive abortion to die.

Even on the matter of partial-birth abortion, what the courts have blocked is the bill that bans the procedure. Even if we cannot yet forbid the procedure, there is no obligation on the part of the government to make us accomplices in it by committing us, through our taxes, to its funding. As the courts have held, the right to abortion may describe a private liberty, but there is no right to public funding of these private choices. If they are private, let them remain private. If even the father has no standing in the decision to abort a child, then surely the public does not have an "interest" that should make us part of a private decision to end a human life.

The President could then pose one more question: What is a "recipient of federal funds"? Or more pointedly: Would the formulas of the Civil Rights Laws apply here, especially the formulas that became settled after the Civil Rights Restoration Act of 1988? If a student at a private college receives a loan from the federal government, the whole college is now considered a recipient of federal aid, and all relevant regulations of the federal government bear on all parts of the college. The President might simply put this question to the committees of Congress: If any patient, in a clinic or a hospital, is covered by Medicare — or receives a loan from the Veterans' Administration or a check from Social Security — does the whole facility become a recipient of federal aid?

Faced with this challenge, how can the partisans of abortion respond? Would they object to this approach of letting the federal government effectively legislate by the familiar device of withholding federal funds? Or would they now call into serious challenge the whole scheme of "legislating by indirection"? Would they wish, then, to dismantle the very structure by which federal authority has been expanded over the past forty years to further the liberal agenda? If so, we would willingly help them. For the administration, this would be a win-win proposition. Whatever was done to resist this measure would also undercut the constitutional scheme for enacting liberal mores into law. Yet when the issue of abortion is added to the mix, the

Democrats could hardly fail to reconsider their attachment to this scheme: to acquiesce in this measure would be to accept the authority of Congress to legislate in the field of abortion without really legislating. If Congress can withhold funding for live-birth abortions or partial-birth abortions, then Congress could also withdraw funding for abortions late in term or after "viability," or for abortions performed because the child may be afflicted with medical problems. Thus, the party of abortion could not help but resist, but its resistance would set off crippling tensions within the Democratic Party.

Some of these pro-life measures might require new legislation — as in settling on the penalties for live-birth abortions or withholding funding from those institutions that perform them. But the most pronounced effect would come through the questions that these measures would raise — if the President was willing to raise them. The questions are intended to advance the public argument, but they could also be directed to committees in Congress, to the Attorney General — or even to the Commissioner for Internal Revenue.

As it turns out, one of the most powerful levers is the one that was used so effectively twenty years ago to beat up on Bob Jones University. In a case that drew national attention, this fundamentalist school was denied tax exemption under federal law because its internal rules barred dating and marriage across racial lines. The Supreme Court held that the university lost its claim to exemption because it was in violation of the "public policy" of the United States. But no student had been denied admission to the university or any of its programs on the basis of race. The university was comparable to a private association composed of people of different races who preferred to keep their dating and marriage within racial lines. And strictly speaking, there was no public policy of the United States — no statute or executive order — that barred people from discriminating on the basis of race in their private choice of a date or spouse. By dramatic contrast, there is indeed now a statute of the United States, duly enacted, that explicitly forbids the withholding of medical treatment from a child who survives an abortion.

In the end, there may be no need to extract a decision from the IRS: it may be sufficient to alert the likes of Christ Hospital that any facility that performs "live-birth abortions" is in violation of federal law. And while there are no criminal or civil penalties, any such institution could lose its tax exemption. The brute fact is that every hospital receives some kind of federal aid, and virtually all of them depend in one way or another on tax exemptions. Merely to make the matter known — even without an executive order — is a move likely to stir up discussion and, eventually, to change hospital policies in such a way as to make the practice of abortion less common.

From different parts of the country have now come reports of "induced-labor abortions" — the equivalent of the "live-birth abortion," in which a child is delivered and then put aside to die. In New Jersey, Richard Collier, a pro-life lawyer, took a deposition in April 2004 on a child being "terminated" in this way because it was afflicted with "abnormal limbs." Collier relayed his records to the Department of Justice. The case seemed to offer a clear test of the Born Alive Infants' Protection Act, but for the past year lawyers pondered whether the case offered a violation of civil rights, falling to the Department of Justice, or whether it should be pursued by the Department of Health and Human Services. And then there was also some hesitation in taking the lead in an administration that did not wish to take leads in such matters. And so the

word went out: it would be helpful if people outside the government expressed an interest in enforcing the law. Only now, as this article goes to press in mid-February, has the Department of Justice finally acted on Collier's case. A complaint was filed, under the Born-Alive Infants' Protection Act, against the hospital in Morristown, New Jersey, in which the live-birth abortion had taken place.

That such an action should occur at all must be credited to young, pro-life lawyers put in their positions by the Bush administration. Yet one might well ask: In a pro-life administration, why was it necessary for the impetus to come from outside — from members of the Senate or from private entities? Why did it not come from within the executive branch itself, and from the man charged with the "faithful execution of the laws"? And why has it been taken as a given that a pro-life White House is the chief source of drag, the main barrier that must be overcome before pro-life lawyers are free to enforce pro-life laws?

Hence the paradox that afflicts us now: we have the most pro-life administration that has ever been assembled, and at the head of that administration is a good, sympathetic man, who is deeply reluctant to make the pro-life argument in public or to start the kind of discussion that might bring about real change. It has been suggested that the leadership for pro-life initiatives must emanate from the Congress. And from the Congress, in the next year, the measures I've outlined may indeed come forth. But if this President's second term is anything like his first, we can expect that Congressional Republicans will receive little help from the top of the administration. This state of affairs leads to the following melancholy judgment. For pro-lifers Mr. Bush must be counted as a real friend. But by his example, he is establishing what must surely stand as the most corrosive lesson that could be taught in this country right now — that in the judgment of an accomplished political man, it is either impolitic or unrespectable to make the pro-life argument in public. Whatever else may be accomplished by the Bush administration, this implicit teaching can have only debilitating and destructive effects on the pro-life cause.

We will not have long to wait to see the effects of these lessons. They are already playing a part in arguments over who should succeed President Bush and what the Republican Party will look like in the future. The pundits have been quick to point out that many of the "stars" in the Republican Party — Giuliani, Schwarzenegger, Pataki — are "pro-choice." The pundits insist that pro-lifers had better come to terms with that fact. They should be willing to settle for pro-life gestures — say, an emphasis on adoption — instead of insisting on measures that would actually restrict the practice of abortion. But in all of this there is a curious inversion. Jesse Jackson and Richard Gephardt had been committed to pro-life positions in the years immediately after *Roe v. Wade*, yet when they sought to compete for the presidential nomination in the Democratic Party they were compelled to "grow," as they say, by becoming pro-choice. It is curious that there is no comparable expectation on the Republican side. Pro-choice Republicans hoping to rise in a pro-life party are not expected to "grow" by becoming more pro-life, by at least looking for parts of a pro-life program they could incorporate in their own policy proposals. After all, the pro-life community has put forth moderate proposals, beginning with the move to protect children who survive abortions. Almost 70 percent of the public supports the ban on partial-birth abortions, and it figures that even more would support a move to withhold federal funds from hospitals and clinics that perform either that surgery or live-birth abortions. If these measures are acceptable to

most Americans, why should they not be acceptable to the Giulianis and Schwarzeneggers? Is it not time for the so-called moderates to give some evidence of their moderation?

The future of the pro-life movement need not depend on chance, or even the next presidential campaign. It is now in the hands of President Bush. By taking small steps over the next several months, he could insure that the Giulianis and Patakis will have to make their way within the framework of a deeply pro-life party committed to measures that are both clear in principle and gentle in application. All of this is possible precisely because of the campaign that President Bush waged and the career he has crafted for himself. But where he was overly cautious before, there is no need for caution now. He has generated his own political capital, and he is now uniquely placed to expend it. Happily, these measures, so modest in scale, would be virtually costless to him, while they would inevitably stir up conflict within the ranks of his adversaries. What prospect could be more tempting? And what end, in political life, more worthy of the art?

Hadley Arkes *is the Ney Professor of Jurisprudence at Amherst College. His most recent book is* Natural Rights and the Right to Choose *(Cambridge University Press).*