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Compromising on Abortion

Daniel O. Conkle

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As Anna Quindlen has written, "Ordinary people know that abortion is something between killing and convenience," something that "is neither murder nor appendectomy."[1] Ordinary people can compromise on abortion. True believers cannot. And true believers seem to dominate the debate in North America—in Canada and the United States alike.

Consider the Canadian experience. In 1988, the Canadian Supreme Court invalidated a long-standing abortion statute, but the Court's split decision and limited rationale effectively "remanded" the issue to the Canadian Parliament.[2] Over the next three years, Parliament debated various legislative proposals, but each aroused the opposition of pro-life advocates, pro-choice advocates, or both. No proposal could muster majority support.

The final Canadian proposal was the most interesting attempt at compromise, and it came within a single vote of passing. Remarkable for its simplicity, this bill would have prohibited abortion except when a woman's doctor determined that her "physical, mental, or psychological health" was "likely to be threatened" if an abortion did not occur.[3] The bill drew no distinctions based on the period of gestation, and it left rape, incest, and fetal deformity as factors that might affect the evaluation of a woman's physical, mental, or psychological health.

Although ordinary Canadians may have viewed this bill as a

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1. Anna Quindlen, *Indictment*, N.Y. Times A25, col. 5 (Mar. 28, 1991).

2. See Daniel O. Conkle, *Canada's* Roe*: The Canadian Abortion Decision and its Implications for American Constitutional Law and Theory*, 6 Const. Comm. 299 (1989).

3. The bill's primary substantive section provided as follows:

> (1) Every person who induces an abortion on a female person is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, unless the abortion is induced by or under the direction of a medical practitioner who is of the opinion that, if the abortion were not induced, the health or life of the female person would be likely to be threatened.
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> (2) For the purposes of this section, "health" includes, for greater certainty, physical, mental and psychological health; "medical practitioner", in respect of an abortion induced in a province, means a person who is entitled to practise medicine under the laws of that province; "opinion" means an opinion formed using generally accepted standards of the medical profession.
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> (3) For the purposes of this section . . ., inducing an abortion does not include using a drug, device or other means on a female person that is likely to prevent implantation of a fertilized ovum.

Federal Abortion Bill Placed on the Table, Ottawa Citizen B5, col. 2 (Nov. 4, 1989).

sensible compromise, the bill provoked the fierce opposition of advocacy groups on both sides of the issue. Pro-life advocates contended that the bill's broadly-worded exception would make its prohibition virtually meaningless. They argued that any woman seeking an abortion could locate a doctor who would find that her "psychological health" was "likely to be threatened" if the abortion were not performed. Thus, they claimed that the bill would authorize "wide open abortion"[4] and would do "absolutely nothing to prevent even a single abortion."[5] "We need a law that's going to protect every human being from the moment of conception," one activist stated. "We can't compromise on this."[6]

Not to be outdone, pro-choice advocates likewise denounced the proposed law, which they regarded as "a degrading and unconscionable assault on women's equality,"[7] "a tremendous insult to physicians,"[8] and a "catastrophic" measure that would lead to "women being aborted by incompetent people, being aborted on kitchen tables."[9] They claimed that the law would generate frivolous civil suits as well as unfounded criminal prosecutions, and that many doctors would simply stop performing abortions if the bill became law. In response to these objections, the Canadian Justice Minister issued an interpretation of the proposed law. She wrote that in considering the state of a woman's physical, mental, and psychological health, a doctor could take account of social and economic factors and the woman's personal aspirations. As long as the doctor's opinion "is based on generally accepted standards of the medical profession and honestly held," she noted, "it is basically unassailable."[10] But the pro-choice advocates were unmoved by this assurance. For them, the only acceptable law would be one that entrenched unqualified abortion rights.[11]

Despite the clamor of the activists on both sides, the bill was

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4. *Decision "Adds Fuel to Fire"*, Ottawa Citizen A3, col. 1 (Nov. 4, 1989) (quoting Joe Borowski).

5. Peter Hum, *Doctors Happy Law is Lost*, Ottawa Citizen A6, col. 2 (Feb. 1, 1991) (quoting Dr. André Lafrance).

6. *Anti-Abortionists Hold Protest*, Ottawa Citizen A4, col. 1 (Jan. 27, 1991) (quoting Sister Lucille Durocher).

7. Sharon Kirkey, *Federal Abortion Bill Degrading, Ontario Cabinet Ministers Claim*, Ottawa Citizen A5, col. 1 (Jan. 16, 1991).

8. Jane Wilson, *Doctor Calls Bill "An Insult"*, Ottawa Citizen A3, col. 1 (Nov. 4, 1989) (quoting Dr. Norman Barwin).

9. *Abortion Bill Open Season on Doctors, Senate Told*, Ottawa Citizen A16, col. 1 (Oct. 31, 1990) (quoting Dr. Henry Morgentaler).

10. *MDs Have Fears Eased on Abortion Bill*, Ottawa Citizen A4, col. 4 (Nov. 4, 1990) (quoting Justice Minister Kim Campbell).

11. See *Abortion Bill Open Season on Doctors, Senate Told*, Ottowa Citizen A16, col. 1 (Oct. 31, 1990) (describing testimony of Dr. Henry Morgentaler).

supported by people in the middle. One supporter in Parliament undoubtedly spoke for many Canadians when he applauded the bill's "reasonable, pragmatic and common sense" approach.[12] With this support from the center, the bill passed by a narrow margin in the House of Commons. In the Senate, however, the bill died on a dramatic 43-to-43 tie vote, with an unlikely alliance of pro-life and pro-choice forces combining to defeat the measure.[13] The compromise thus failed, and the Canadian Parliament now has put the abortion issue aside for the present. But the political debate in Canada—described by one participant as "a civil war"—continues unabated.[14]

What about on this side of the border? As the United States Supreme Court continues to return the issue of abortion to the political process, must the debate be endless? At the level of individual moral judgment, perhaps it must. Abortion raises issues of personal morality that seem to defy resolution. In terms of the law, however, the Canadian example suggests that compromise might be possible. Canadian society is comparable to ours (although not identical), and though the Canadian legislation failed in the end, it came within a whisker of adoption. A similar approach might provide the basis for an abortion compromise in the United States.

True believers, both pro-life and pro-choice, see abortion as an issue of moral principle, an issue on which compromise is morally unacceptable. Any compromise on abortion therefore cannot be based on the views of true believers. The search for compromise and political consensus must focus instead on a more pragmatic sense of morality—call it the ordinary morality of ordinary people.

What is the ordinary morality of ordinary Americans on the question of abortion? Ordinary Americans are neither "pro-life" nor "pro-choice," although they favor both life and choice. On the one hand, a majority of Americans believe that abortion is a matter of public concern and that the law should prohibit at least some abortions—call them "convenience" abortions—even in the early stages of pregnancy. At the same time, however, most Americans believe that abortion decisions generally should be left to women and their doctors.[15] It seems that ordinary Americans would like

12. *Abortion Law No Sure Bet in Senate*, Ottawa Citizen A6, col. 2 (Jan. 25, 1991) (quoting Senator Donald Oliver).

13. See Joan Bryden, *Senate Kills Abortion Bill*, Ottawa Citizen A1, col. 1 (Feb. 1, 1991); Bruce Wallace, *Back to Square 1*, Maclean's 15 (Feb. 11, 1991).

14. Bob Cox, *Activists Vow to Continue "Civil War" Over Abortion*, Ottawa Citizen 7, col. 1 (Feb. 2, 1991) (quoting Ken Campbell).

15. Shortly after the Supreme Court's decision in *Webster*, the results of a New York Times/CBS News Poll suggested that "[m]ost Americans favor some new legal restrictions on abortion but remain generally wary of government interference with a woman's decision

the law to reflect a public morality treating abortion as presumptively evil, if sometimes necessary, but they worry about having the government supplant the process of individual decision-making.

To implement this ordinary morality, why not something like the Canadian approach? Indeed, the Canadian proposal would seem to fit America's ordinary morality like a glove: abortion would be prohibited as presumptively evil, but with an exception that would permit individual women and their doctors to decide when abortions would be necessary nonetheless.

To be sure, this legislation might not be the perfect compromise. To better reflect the ordinary morality favoring life, perhaps the law should be more restrictive for abortions late in pregnancy. To better reflect the ordinary morality favoring choice, perhaps the law's exception should be tied not to the judgment of a woman's doctor, but rather to the reasonable and good-faith certification of the pregnant woman herself, after consultation with her doctor. And perhaps the law should deal with subsidiary issues that the Canadian proposal does not specifically address, such as the question of parental consent.

Although it surely could be improved, the Canadian legislation points in the direction of a viable political compromise, a compromise grounded in America's ordinary morality. Regardless of whether the exception were tied to the woman's certification or that of her doctor, enforcement would be difficult, and probably would occur only in extreme cases. In general, we would be required to trust the good-faith decisions of pregnant women and their doctors. But that is precisely what the ordinary morality favoring choice would seem to demand. At the same time, the law would clearly reflect the ordinary morality favoring life, and pregnant women and their doctors would be forced to confront this reality.

If enacted into law by the various states, or better yet by Congress, this type of compromise might move us beyond the belligerent and polarizing debate in which we are now submerged. Thoughtful minds would continue to address the morality of particular abortion decisions, but the signs, the chants, and the slogans might gradually retreat from the scene. In time, as the religious and philosophical dialogue continued, perhaps the ordinary morality on

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on the matter and regard advocates on one side or the other as 'extremists.' " E.J. Dionne, Jr., *Poll Finds Ambivalence on Abortion Persists in U.S.*, N.Y. Times A18, col. 1 (Aug. 3, 1989). Fifty-six percent of those surveyed, for example, said abortion should be illegal if the woman's only reason is to avoid the interruption of her professional career. But sixty-three percent also said that "if a woman wants to have an abortion and her doctor agrees to it," she generally should be permitted to have the abortion. See id.

abortion might change, and there might then be room for a new political resolution.

If ordinary people controlled the debate, a compromise modeled on the Canadian legislation might be a real possibility in the United States. Instead, the activists continue to push and to pull, fighting for "in your face" legislative victories. Ordinary people stand on the sidelines, and the prospect of compromise seems distressingly remote.

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