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## Infant Safe Haven Laws: Legislating in the Culture of Life

Carol Sanger  
Columbia Law School, [csanger@law.columbia.edu](mailto:csanger@law.columbia.edu)

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## ARTICLES

### INFANT SAFE HAVEN LAWS: LEGISLATING IN THE CULTURE OF LIFE

*Carol Sanger\**

*This Article analyzes the politics, implementation, and influence of Infant Safe Haven laws. These laws, enacted across the states in the early 2000s in response to much-publicized discoveries of dead and abandoned infants, provide for the legal abandonment of newborns. They offer new mothers immunity and anonymity in exchange for leaving their babies at designated Safe Havens. Yet despite widespread enactment, the laws have had relatively little impact on the phenomenon of infant abandonment. This Article explains why this is so, focusing particularly on a disconnect between the legislative scheme and the characteristics of neonaticidal mothers that makes the use of Safe Havens less likely.*

*The heart of the argument, however, focuses not on what Safe Haven laws fail to accomplish, but on what they achieve. This Article argues that these laws are properly understood within a larger political culture, one increasingly organized around the protection of unborn life, and that identifies itself as the "culture of life." By connecting infant life to unborn life and infanticide to abortion, Safe Haven laws work subtly to promote the political goal of the culture of life: the reversal of *Roe v. Wade*. The laws' primary achievements may therefore be less criminological than cultural. Through an investigation of state legislative histories, this Article suggests that the rhetoric and politics of abortion set the stage for the quick enactment of Safe Haven laws nationwide. It also examines the legislative and social mechanisms by which unwed pregnancy and abortion have been taken off the table, creating a psychological crisis that leads some young women to fatally abandon their newborns.*

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\* Barbara Aronstein Black Professor of Law, Columbia Law School. I have benefited tremendously from the thoughtful comments of Susan Bandes, Richard Briffault, Erin Dougherty, Ariela Dubler, Robert Ferguson, Katherine Franke, Jill Hasday, Joan Hollinger, Mae Kuykendall, and Jeremy Waldron, and from friends and colleagues at faculty workshops at Columbia Law School, University of Colorado School of Law, George Washington University Law School, Vanderbilt University Law School, University of Minnesota Law School, Michigan State University College of Law, and the 8th Annual Law, Culture and Humanities Conference. I thank Samantha Harper, Vivian Lehrer, Margo Blair, Shawn Campbell, and Kathy Applegate for excellent research assistance, and Kate Kaufmann Shih for her fine editing.

## INTRODUCTION

The discovery of dead and discarded newborn infants seems to have become a regular aspect of life across the United States. It is certainly a familiar feature of newspaper crime beats. Some cases are newsworthy, sensational, or sad enough to make the front page. Many will remember Melissa Drexler, the infamously dubbed “prom mom” from New Jersey, who had her baby in a ladies’ room stall and returned to the dance floor to finish the evening, or Amy Grossberg, the college girl who delivered her baby in a Delaware motel room, then with her boyfriend killed it and dumped the body. There are also more ordinary, below-the-fold cases from all over the country: *Newborn Found Dead in Car Trunk*;<sup>1</sup> *Evanston Cops Seek Dead Baby’s Mother*;<sup>2</sup> *Funeral Set Friday for Abandoned Baby*.<sup>3</sup> The headlines and the stories they announce continue to sting, but they may no longer shock. A weary shaking of the head, the reluctant thought that something about young women has gone terribly wrong, and one turns the page.

But while there may be a despairing sense of individual acceptance about these cases, the phenomenon of dead and discarded newborns has triggered a swift, widespread, and confident response at the legislative level. Since 1999, in reaction to grim, repeated reports of neonaticide—defined as the murder of an infant on its first day of life<sup>4</sup>—forty-six states have enacted infant Safe Haven legislation.<sup>5</sup> These laws offer mothers

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1. Melanie Markley, *Newborn Found Dead in Car Trunk*, *Houston Chron.*, Sept. 8, 2004, at B3.

2. Lisa Black, *Evanston Cops Seek Dead Baby’s Mother*, *Chi. Trib.*, Oct. 23, 2004, at 18 (describing newborn’s body found in basket of soiled linens in hospital laundry room).

3. *Funeral Set Friday for Abandoned Baby*, *Denver Post*, Sept. 25, 2002, at B02 (describing newborn found near front door of auto shop).

4. Philip J. Resnick, *Murder of the Newborn: A Psychiatric Review of Neonaticide*, 126 *Am. J. Psychiatry* 1414, 1414 (1970).

5. See Ala. Code §§ 26-25-1 to -5 (LexisNexis Supp. 2004); Ariz. Rev. Stat. Ann. § 13-3623.01 (Supp. 2005); Ark. Code Ann. §§ 5-27-203 (Supp. 2005), 9-34-201 to -203 (2002); Cal. Health & Safety Code § 1255.7 (West Supp. 2005); Cal. Penal Code § 271.5 (West Supp. 2005); Colo. Rev. Stat. Ann. § 18-6-401(9) (West Supp. 2005); Conn. Gen. Stat. Ann. §§ 17a-57 to -61 (West Supp. 2005), 53-23 (West 2001); Del. Code Ann. tit. 11, § 1102A (2001), 16, § 907A (2003); Fla. Stat. Ann. §§ 63.0423 (West 2005), 383.50–51 (West 2002 & Supp. 2006); Ga. Code Ann. §§ 19-10A-1 to -7 (2004); Idaho Code Ann. §§ 39-8201 to -8207 (2002); 325 Ill. Comp. Stat. Ann. 2/1 to /999 (West Supp. 2005); Ind. Code Ann. §§ 31-34-2.5-1 to -4 (LexisNexis 2003), 35-46-1-4(c) (LexisNexis 2004); Iowa Code Ann. §§ 233.1–6, 726.3, 726.6(2) (West Supp. 2005); Kan. Stat. Ann. §§ 21-3604(b) (Supp. 2004), 38-15,100 (2000); Ky. Rev. Stat. Ann. §§ 405.075, 620.350 (LexisNexis Supp. 2004); La. Child. Code Ann. arts. 1149–60 (2004); Me. Rev. Stat. Ann. tit. 17-A, § 553(3) (Supp. 2005), 22, § 4018 (2004); Md. Code Ann., Cts. & Jud. Proc. § 5-641 (LexisNexis 2002); Mass. Ann. Laws ch. 119, § 39 1/2 (LexisNexis Supp. 2005); Mich. Comp. Laws Ann. §§ 712.1–20 (West 2002 & Supp. 2005), 750.135(2) (West 2004); Minn. Stat. Ann. §§ 145.902 (West 2005), 260C.217 (West 2003); Miss. Code Ann. §§ 43-15-201 to -209 (2004); Mo. Ann. Stat. § 210.950 (West 2004); Mont. Code Ann. §§ 40-6-401 to -417 (2005); Nev. Rev. Stat. §§ 432B.020(2)(a), 432B.630 (2002); N.H. Rev. Stat. Ann. §§ 132-A:1 to :5, 639:3(VI) (Supp. 2004); N.J. Stat. Ann. §§ 30:4C-15.5 to -15.10 (West Supp. 2005); N.M.

who might otherwise kill or recklessly abandon their newborns an alternative: Bring your newborn to a designated location and then leave, no questions asked. Details vary from state to state, but the statutes follow a basic scheme. They specify who can relinquish the baby (a parent or sometimes the parent's agent),<sup>6</sup> where it can be left (typically a hospital or police or fire station),<sup>7</sup> and how old the baby can be (commonly either 72 hours or 30 days).<sup>8</sup> They also specify what the Safe Haven is supposed to do with the baby (give it a checkup and call social services).<sup>9</sup>

The central idea behind the legislation is that young women will be discouraged from killing their newborns if only they are offered the right incentives. Legislators seem to have accepted the anthropological insight that "mothers don't set out to commit infanticide . . . [but that it] occurs when circumstances (including fear of discovery) prevent a mother from abandoning it."<sup>10</sup> The two incentives thought most likely to succeed are anonymity and immunity from prosecution. Mothers who leave an infant at a Safe Haven may provide information about the baby or themselves, but they cannot be required to do so.<sup>11</sup> This means that a young woman who has managed to conceal both her pregnancy and the fact of childbirth can now conceal the disposition of her baby as well. In addition, mothers who comply with Safe Haven requirements will not be charged

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Stat. Ann. §§ 24-22-1 to -8 (LexisNexis Supp. 2003); N.Y. Penal Law §§ 260.03, .15(2) (McKinney Supp. 2005); N.C. Gen. Stat. §§ 7B-500, -1111(a)(7) (2003); N.D. Cent. Code §§ 27-20-02, 50-25.1-15 (Supp. 2005); Ohio Rev. Code Ann. §§ 2151.3515-.3530 (West 2005); Okla. Stat. Ann. tit. 10, § 7115.1 (West Supp. 2006); Or. Rev. Stat. §§ 163.535, 418.017-.018 (2003); 23 Pa. Cons. Stat. Ann. §§ 6501-6509 (West Supp. 2005); R.I. Gen. Laws §§ 23-13.1-1 to -8 (2001); S.C. Code Ann. § 20-7-85 (Supp. 2004); S.D. Codified Laws §§ 25-5A-27 to -36 (2004); Tenn. Code Ann. §§ 36-1-142 (2001), 68-11-255 (Supp. 2004); Tex. Fam. Code Ann. §§ 262.301-.307 (Vernon 2002); Utah Code Ann. §§ 62A-4a-801 to -802 (Supp. 2005); Va. Code Ann. §§ 8.01-226.5:2 (Supp. 2005), 18.2-371, 18.2-371.1 (2004), 40.1-103, 63.2-910.1 (Supp. 2005); Wash. Rev. Code Ann. § 13.34.360 (West 2004); W. Va. Code Ann. §§ 49-6E-1 to -5 (LexisNexis 2004); Wis. Stat. Ann. § 48.195 (West 2003); Wyo. Stat. Ann. §§ 14-2-309(a)(vii), 14-3-202(a)(ii), 14-11-101 to -109 (2005). Safe Haven legislation has been introduced in Vermont, Nebraska, and Alaska. See H.R. 41, 2005-2006 Gen. Assem., Reg. Sess. (Vt. 2005) (unenacted); Leg. 933, 98th Leg., 2d Sess. (Neb. 2004) (unenacted and indefinitely postponed); H.R. 29, 22d Leg., 1st Sess. (Alaska 2001) (unenacted). Nebraska has set up a task force to study the problem. See Leg. 307, 99th Leg., 1st Sess. (Neb. 2005), available at [http://www.unicam.state.ne.us/pdf/INTRO\\_LB307.pdf](http://www.unicam.state.ne.us/pdf/INTRO_LB307.pdf) (on file with the *Columbia Law Review*). Hawaii's 2003 legislation was vetoed by the governor, see Albert R. Hunt, No Safe Haven, *Wall St. J.*, Aug. 21, 2003, at A11, but has since been reintroduced, H.R. 540, 23d Leg., Reg. Sess. (Haw. 2005), available at [http://www.capitol.hawaii.gov/sessioncurrent/commreports/hb540\\_hd2\\_hscr845\\_.htm](http://www.capitol.hawaii.gov/sessioncurrent/commreports/hb540_hd2_hscr845_.htm) (on file with the *Columbia Law Review*).

6. See *infra* notes 51-54 and accompanying text.

7. See *infra* notes 82-92 and accompanying text.

8. See *infra* notes 73-78 and accompanying text.

9. See *infra* notes 93-98 and accompanying text.

10. Sarah Blaffer Hrdy, *Mother Nature: A History of Mothers, Infants, and Natural Selection* 297 (1999).

11. See *infra* notes 95-101 and accompanying text.

with criminal abandonment.<sup>12</sup> What was once a crime becomes a form of legal relinquishment, and the twin guarantees of anonymity and immunity are understood to make the whole scheme work. The tag line for New Jersey's Safe Haven law captures the program's content and its sell: "No Shame. No Blame. No Names."<sup>13</sup>

Safe Haven laws have enormous appeal. Almost from start to finish, they make practical, emotional, and political sense. Newborns at risk are spared physical harm and provided a loving adoptive home. Young women are rescued from criminality while still able to secure the childless outcome they seek. Politicians can be seen as affirmatively combating a sordid social problem, and citizens can take pride in the knowledge that their society has acted with compassion. In short, Safe Haven laws make everyone better off. Even their titles convey their generic goodness: Safe Arms for Babies;<sup>14</sup> Abandoned Newborn Infant Protection Act;<sup>15</sup> Safe Place for Newborns;<sup>16</sup> Safe-Surrender Site;<sup>17</sup> and Safe Haven Infant Protection Act.<sup>18</sup>

Safe Haven statutes are also popularly referred to in the press (and semi-officially in Texas) as "Baby Moses Laws."<sup>19</sup> One sees the rhetorical attraction: A loving mother wafts her well-tended infant downstream

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12. See *infra* notes 102–108 and accompanying text. Of course, if an abandoned baby is found dead, the mother may be charged with murder or manslaughter. See generally Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 *Am. Crim. L. Rev.* 1 (1996); Christine A. Fazio & Jennifer L. Comito, Note, *Rethinking the Tough Sentencing of Teenage Neonaticide Offenders in the United States*, 67 *Fordham L. Rev.* 3109 (1998).

13. See N.J. Dep't of Human Servs., *New Jersey Safe Haven Brochure*, available at [http://www.njsafehaven.org/docs/sb\\_brochure.pdf](http://www.njsafehaven.org/docs/sb_brochure.pdf) (last visited Mar. 7, 2006) (on file with the *Columbia Law Review*).

14. Del. Code Ann. tit. 16, § 907A (2003).

15. 325 Ill. Comp. Stat. Ann. 2/1 (West Supp. 2005); cf. Newborn Protection Act, 23 Pa. Cons. Stat. Ann. § 6501 (West Supp. 2005).

16. Ga. Code Ann. § 19-10A-1 (2004); Minn. Stat. Ann. § 145.902 (West 2005); Mo. Ann. Stat. § 210.950 (West 2004).

17. Cal. Health & Safety Code § 1255.7 (West Supp. 2005).

18. N.J. Stat. Ann. § 30:4C-15.5 (West Supp. 2005); cf. Safe Haven Newborn Protection Act, Mont. Code Ann. § 40-6-401 (2005). Because the legislation is meant to appeal to potential perpetrators rather than threaten them, these statute titles are typically designed to sound uplifting, in some cases almost cuddly, as with Delaware's Safe Arms for Babies, Del. Code Ann. tit. 16, § 907A.

19. Abandoned boy babies are often named Baby Moses by police or hospital staff. See, e.g., Thomas Crampton, 3 Abandoned Newborns Saved in a Day of Luck and Kindness, *N.Y. Times*, Feb. 25, 2004, at B1 ("We wanted to give him a dignified name, so we decided on Moses.") (internal quotation marks omitted) (quoting Hamidah S. Sharif, woman who first discovered abandoned boy). Girls are often named Angel. See, e.g., Lindsey Collom, 'Angel' Buried with Dignity After Outhouse Birth, Death, *Ariz. Rep.*, July 25, 2005, at 5B. On the other hand, one baby was nicknamed Willie, because he was found in the parking lot of Coconut Willie's Cocktail Lounge. Alan Gathright, *Woman Admits She Abandoned Newborn*, *S.F. Chron.*, June 15, 2004, at B4.

where he is rescued by a princess.<sup>20</sup> But here things get a bit more complicated, for there is a disquieting problem with the biblical comparison. Baby Moses was not set among the bulrushes because his mother was going to kill him. The threat to his life came from enemies in the larger dangerous world. In contrast, Safe Haven legislation focuses on a far more intimate source of danger. It is the brutal or reckless action of mothers themselves from which infants now need to be saved. Thus New Jersey's imperative to pregnant women—"Don't Abandon Your Baby,"<sup>21</sup> set out in stark black type against a pastel baby blanket and plastered on billboards and buses throughout the state—is not quite accurate. What New Jersey really means is don't *kill* your baby, please *do* abandon it, and the state will in turn make that as easy and legal as possible.

Of course, there should be nothing too surprising about *some* infant abandonment. The predicament of what to do with unwanted children—what anthropologists call "excess or inopportunistly born infants"<sup>22</sup>—is an enduring human experience. Across time and cultures, parents who cannot or will not raise children because the economic or social cost of doing so is too high succeed in disposing of them by some means or other. "[F]rom antiquity until the mid-nineteenth century, children were variously exposed in forests and market places, sold into slavery or servitude, given to monasteries, left with churches, deposited in foundling homes, sent to wet nurses, and placed out as apprentices."<sup>23</sup> Infant abandonment may seem like an evil fitted to a modern, corrupt

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20. Exodus 2:1–10. Although it is perhaps difficult to understand in any subjective way what it might be like for a mother to abandon her baby, literature sometimes supplies the empathic account that is otherwise hard to imagine. Doris Lessing provides a short story account of a watchful abandoning mother. Doris Lessing, *Debbie and Julie*, in *The Real Thing 1* (1992). Debbie has just delivered a baby girl alone in a shed and left the swaddled baby in a phone booth near a pub, where she goes to wait:

[S]he went to stand near a small window that overlooked the telephone box. She could see the bundle, a small pathetic thing, like folded newspapers or a dropped jersey, on the floor of the box. . . .

She stood by the window for only five minutes or so. Then she saw a young man and a girl go into the telephone box. Through the window glass streaked again with sleet, she saw the girl pick up the bundle from the floor, while the young man telephoned. . . . The ambulance came in no time. Two ambulance men. The girl came out of the telephone box with the bundle, and the young man was behind her. The ambulance men took the bundle, first one, then the other, then handed it back to the girl, who got into the ambulance. . . . So the baby was safe. It was done. She had done it. As she went out into the sleety rain she saw the ambulance lights vanish, and her heart plunged into loss and became empty and bitter, in the way she had been determined would not happen.

Id. at 10.

21. N.J. Dep't of Human Servs., Safe Haven Infant Protection Act Home, at <http://www.njsafehaven.org> (last visited Mar. 6, 2006) (on file with the *Columbia Law Review*).

22. Hrdy, *supra* note 10, at 297.

23. Carol Sanger, *Separating from Children*, 96 *Colum. L. Rev.* 375, 389 (1996) [hereinafter Sanger, *Separating*]; see also *id.* at 380 (noting that throughout last century and into present, children have been sent to orphanages, placed in foster care, given to kin, and surrendered for adoption).

culture, but, as we see from these historical examples, it has long been a common, somewhat ordinary social practice. On this account, modern Safe Havens are simply the latest in an array of options offered to or taken by parents to solve the problem of unwanted children.

Still, the need for anonymous abandonment in 2006 puzzles and disturbs. After all, subsistence levels in the United States are satisfactory, contraception is generally available, and abortion is legal. Single motherhood is less stigmatized, and the institutions of adoption and foster care are well established. How is it then that against a menu of medical, social, and legal alternatives, concealed pregnancy and infanticide have made such a comeback? What explains the apparent reemergence of abandonment as a maternal practice?<sup>24</sup> And what is it about our present politics and values that has focused attention on preventing this form of infant death and on Safe Haven laws as the premier solution?

To explore these questions, this Article proceeds in six Parts. I begin in Part I by situating the phenomenon of anonymous abandonment in historical context. An overview of the European foundling home system, similarly established as an “antidote to infanticide,”<sup>25</sup> provides a useful, sometimes uncanny comparison with modern Safe Havens. I then give a more detailed picture of how Safe Haven laws are structured, focusing especially on the duties of each participant and on the place of anonymity and immunity in the scheme.

Part II moves from the content of Safe Haven legislation to an analysis of its success. The initial question is simple: Do Safe Haven laws work? Do they prevent harm to newborns through the mechanism of anonymous abandonment? Recognizing that the legislation is at a relatively early stage of implementation, the answer appears to be at best “possibly,” or “only a little.” Some infants are delivered to Safe Havens, but dead

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24. Although infant abandonment certainly falls at the rough end of the spectrum, it is important to understand abandonment within the framework of maternal separation practices. Decisions by mothers to separate from their children in one form or another are a common feature of mothering. Some separations—leaving a child with a babysitter, for example—are familiar, ordinary, and go unremarked. Other forms of separation, such as placing a child in foster care, are more sustained and therefore more regulated. The degree of regulation typically reflects the quality of the separation: its duration, the mother’s motivation, and an assessment of any harm to the child that might result. I have developed these ideas in a variety of contexts. See Sanger, *Separating*, *supra* note 23, at 438–83; Carol Sanger, *Mother from Child: Perspectives on Separation and Abandonment*, in *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* 27, 31–39 (Martha Albertson Fineman & Isabel Karpin eds., 1995); Carol Sanger, *Leaving Children for Work*, in *Mother Troubles: Rethinking Contemporary Maternal Dilemmas* 97, 101–02 (Julia E. Hanigsberg & Sara Ruddick eds., 1999); Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 *U. Mich. J.L. Reform* 239, 314 (1992); Carol Sanger, *Placing the Adoptive Self*, in *NOMOS XLIV: Child, Family, and State* 58, 64–75 (Stephen Macedo & Iris Marion Young eds., 2003).

25. David I. Kertzer, *Sacrificed for Honor: Italian Infant Abandonment and the Politics of Reproductive Control* 104 (1993).

newborns turn up with unhappy regularity in all the usual places.<sup>26</sup> Indeed, news stories now regularly report that a baby has been discarded despite the availability, and sometimes the proximity, of a Safe Haven.

At first glance, it may seem bewildering that any mother, even a confused young mother, would *not* take the state up on its offer to leave an unwanted baby with impunity. But several aspects of state legislative schemes make the use of Safe Havens less likely. Part II examines four of these: the problem of inadequate publicity; the practical problems of getting to a Safe Haven with a concealed infant; concerns about Safe Havens' fine print; and the possibility of a serious disconnect between Safe Havens' incentives and the characteristics of women the laws seek to attract. As we shall see, mothers who have concealed their pregnancies (the most common characteristic of neonaticidal mothers) may be particularly unlikely to take the state up on its offer.

But if Safe Haven laws are not working to prevent infant deaths, or are not working as well as imagined, then we should ask: What is going on? What explains the zest and confidence in their enactment nationwide despite the poor returns from early Safe Haven states? Part III.A takes up these questions by looking at the process and politics of enactment: the emergence of grassroots campaigns; coalitions of unusual bedfellows; and the political lure of what appears to be a neat solution to a messy problem.

Certainly part of the legislative impetus is an abiding respect for life—especially children's lives. The New Jersey legislature put the point directly: "This legislation is worthwhile if it saves even one infant's life."<sup>27</sup> Yet the value of infant life does not entirely explain legislative enthusiasm. Infants in the United States are endangered by all sorts of life-threatening conditions, starting with the two greatest killers, congenital defects and low birth weight.<sup>28</sup> Why, then, have political energies focused so intensely on infanticide, given the many more prevalent and perhaps more preventable causes of infant mortality?

One explanation may be our ongoing fascination with mothers who kill. Grisly infant death is something a society attracted to violence can get worked up over, and murdering mothers add something special to the mix. Maternal infanticide breaches a deep sense of order and security. It is an incomparable betrayal, and even a little infanticide shakes our collective confidence.

I suggest, however, that something more is going on with Safe Haven laws and the moral enterprise they encompass than concern over infant

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26. See, e.g., Collom, *supra* note 19; Melanie Lefkowitz, *Dead Baby Found in a Bronx Lot*, *Newsday* (N.Y.), Mar. 27, 2001, at A28; Patrick Wilson, *Infant Found Dead in Bag Was Born Alive*, *Official Says*, *Winston-Salem J.*, Feb. 26, 2005, at B1.

27. N.J. Stat. Ann. § 30:4C-15.6(e) (West Supp. 2005).

28. Kenneth D. Kochanek et al., U.S. Dep't of Health & Human Servs., *Deaths: Final Data for 2002*, *Nat'l Vital Stat. Rep.*, Oct. 12, 2004, at 1, 13 (listing congenital defects and low birth weight as top two killers of newborns, respectively).



abandonment and death. In Part III.B, I argue that there is a snug and interesting fit between Safe Haven legislation and a culture whose politics are increasingly organized around the protection of unborn life.

Part III.B therefore suggests that the speedy enactment of Safe Haven legislation can be explained within the sociological framework of a "moral panic," as sparked by cultural resonances linking newborn death with moral concerns about abortion. After all, the discovery of dead and discarded newborns is for some no surprise at all. The phenomenon simply proves what pro-life advocates had been predicting all along: Women have crossed over a moral divide and abortion has paved the way. My argument is not that Safe Haven laws are *really* about abortion. They are about abandonment and neonaticide. But although Safe Haven legislation may have been enacted as an antidote to infanticide, the politics of abortion—a practice that for some deeply threatens the moral order—slipstream right behind.

This slipstreaming is made easier in light of several decades of pro-life rhetorical achievements that have muddied distinctions between pregnancy and motherhood, fetus and child, and abortion and infanticide. These achievements, all aimed at the recriminalization of abortion, have now consolidated under a new rubric: the culture of life, a belief system that starts at conception and ends at Terri Schiavo<sup>29</sup> (with something of a detour around the death penalty). The culture of life has become a significant feature of policy formation. It is the umbrella concept under which all regulated aspects of sex and reproduction—from adoption to zygote—are now lodged. Part IV examines the phrase: its religious origins, its rhetorical charms, and its (somewhat) secular adaptation into American politics.

The culture of life is, however, more than an interesting rhetorical move. As Clifford Geertz reminds us, even "so rudimentary a stylistic device as the slogan" can operate as a formulation, a semantic expression of ideology.<sup>30</sup> Culture of life proponents mean to operationalize the ideology by producing a set of practices and laws that protect unborn life all the way down. Thus, in Part V, I argue that whether or not Safe Haven laws accomplish much in the way of preventing infant death, they succeed in quite a different way by doing serious work for the culture of life. Part V.A explores the significance of this for law, as Safe Haven laws are offered up as proof that a culture of life exists and that the values it encompasses should be further embraced in abortion jurisprudence.

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29. See Press Release, White House, President's Statement on Terri Schiavo (Mar. 17, 2005), available at <http://www.whitehouse.gov/news/releases/2005/03/20050317-7.html> (on file with the *Columbia Law Review*) [hereinafter President's Statement on Terri Schiavo] ("It should be our goal as a nation to build a culture of life . . . and that culture of life must extend to individuals with disabilities.").

30. See Clifford Geertz, Ideology as a Cultural System, in *The Interpretation of Cultures* 193, 211 (1973) [hereinafter Geertz, *Interpretation of Cultures*].

Part V.B argues that Safe Haven laws shape social understandings of women as untrustworthy persons by reinforcing the proposition that women who abort and mothers who abandon newborns are the same: Both kill babies. In this way, Safe Haven laws influence attitudes not only toward murderous mothers, but toward women more generally by creating a subtle but extensive system of suspicion. Because the legislation is premised on concealed pregnancies, it casts doubt not only on women who are pregnant, but on any woman who might be.

Finally, I consider the possibility of a dismal feedback loop between the culture of life and the problem of infant abandonment. Many young women have absorbed the culture of life message that sex before marriage and abortion at any time are wrong. The result is that a small number of pregnant women become immobilized in a dilemma where both pregnancy and abortion have become impossible choices. Legislature after legislature has accepted that this predicament sometimes results in the fatal abandonment of newborns.

Part VI examines two mechanisms that contribute to this decisional immobility. The first is the current campaign for sexual abstinence, a movement which intensifies the stigmatization of unwed pregnancy while denying sexually active teenagers important contraceptive information. The second is the increasing role of the fetus in political and social life. There is a new intimacy between ordinary citizens and the "friendly fetus," and this cultivated attachment operates to put abortion further off limits.

My claim here is not that pro-life politicians have promoted either Safe Haven laws or the background phenomenon of abandonment in order to bring all this about. No one wants newborns killed, however politically powerful infant death often proves to be.<sup>31</sup> But what *has* been patiently and painstakingly put into place is an extensive matrix of concerns that identifies itself as the culture of life. A number of different dramas selectively play out against this backdrop and are then used to reinforce the essential culture of life value: the absolute impermissibility of abortion. Late-term abortions offered one such opportunity;<sup>32</sup> murdered Laci Peterson another;<sup>33</sup> Terri Schiavo still another; and surely there will be

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31. Recall, for example, that before the first Gulf War President George H.W. Bush made much of Iraqi soldiers unplugging infant incubators. See Remarks at a Republican Fundraising Breakfast in Des Moines, Iowa, 2 Pub. Papers 1414, 1418 (Oct. 16, 1990).

32. Press Release, George W. Bush, President Applauds Congress for Partial Birth Abortion Bill (Oct. 21, 2003), available at <http://www.whitehouse.gov/news/releases/2003/10/20031021-16.html> (on file with the *Columbia Law Review*) ("I applaud the Senate for joining the House in passing the ban on partial-birth abortion. This is very important legislation that will end an abhorrent practice and continue to build a culture of life in America.").

33. Remarks on Signing the Unborn Victims of Violence Act of 2004, 40 Weekly Comp. Pres. Doc. 514, 515 (Apr. 1, 2004) ("The moral concern of humanity extends to those unborn children who are harmed or killed in crimes against their mothers. . . . With

more. This Article focuses on how Safe Haven laws fit into this larger picture.

## I. SAFE HAVEN LAWS

Although the details of Safe Haven statutes differ from state to state, they all share a common purpose and premise. The purpose is “to prevent injuries to and deaths of newborn children that are caused by a mother who abandons the newborn.”<sup>34</sup> The premise is that the availability of lawful and anonymous abandonment “may encourage the parent to leave an infant safely and save the life of the infant.”<sup>35</sup>

Although Safe Haven legislation may seem an innovative policy response, anonymous abandonment was well established throughout Catholic Europe by the eighteenth century. To situate the Safe Haven movement within this larger history and to draw lessons from the past, I review the European foundling home system, noting commonalities and differences with the present scheme along the way. I then turn to the particulars of the current state regimes.

### A. *The Foundling Home System*

As historians of European abandonment have explained, beginning in the thirteenth century, the predicaments of poverty and shame resulted in infanticide on a massive scale.<sup>36</sup> The formalization of marriage by the Church produced a severe crisis for pregnant women and their families. Unwed motherhood, once deemed a sin, became an intolerable status. Because abortion was an illegal, dangerous, and often unreliable method of ending a pregnancy, many young women turned to infanticide. By the eighteenth century, “the sight of infant corpses lying in ditches, on garbage heaps, and in sewer drains was familiar throughout Europe.”<sup>37</sup>

To save infant souls and infant lives (and in that order), the Catholic Church introduced a novel institution: the foundling home.<sup>38</sup> A revolving wheel or cradle (the *tour* in France, the *ruota* in Italy) was set into the side of churches. During the night, mothers placed their babies in the

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this action, we widen the circle of compassion and inclusion in our society, and we reaffirm that the United States of America is building a culture of life.”).

34. Ga. Code Ann. § 19-10A-3 (2004).

35. N.J. Stat. Ann. § 30:4C-15.6(c) (West Supp. 2005).

36. See generally John Boswell, *The Kindness of Strangers: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (1988); Rachel Ginnis Fuchs, *Abandoned Children: Foundlings and Child Welfare in Nineteenth-Century France* (1984); Kertzer, *supra* note 25; David L. Ransel, *Mothers of Misery: Child Abandonment in Russia* (1988); Joan Sherwood, *Poverty in Eighteenth-Century Spain: The Women and Children of the Inclusa* (1988).

37. Ransel, *supra* note 36, at 6.

38. Kertzer, *supra* note 25, at 8.

cradle, rang a bell, and fled.<sup>39</sup> The wheelmaster would then rotate the wheel inward, where the baby would be taken in and immediately baptized. Spared the presence of an illegitimate child, family honor was preserved.<sup>40</sup> Because the child's soul had been saved through baptism, the mother had committed no crime. By the mid-1800s, over 1,200 wheels were in operation in Italy alone, and hundreds of thousands of babies had been abandoned at such institutions throughout western Europe.<sup>41</sup>

And here we are, a hundred years after the last of the European *tours* were closed, reviving a system for anonymous abandonment as an antidote to infanticide. There are, of course, important differences. The first concerns the scope of the problem. By the mid-nineteenth century, "[i]n Madrid, Dublin, and Warsaw, up to a fifth of all babies were being abandoned, while Milan had reached a third, Prague two-fifths, and Vienna a half."<sup>42</sup> In contrast, the number of newborns killed or abandoned in the United States is tiny. A one-year study by the Department of Health and Human Services of cases reported in newspapers—at present the only official nationwide data—found that in 1998, 105 babies had been left in public places.<sup>43</sup> Neonaticide ranks fairly low as a cause of infant mortality in the United States.<sup>44</sup> While these statistics do not di-

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39. An 1819 report from a Sicilian priest describes the operation of the wheel: "Guiseppa Distresano, an upright and honest woman, [is] approved by myself to baptize the children. This woman lives and sleeps every night in the same building in which the wheel is located, and in her own room is the bell, whose cord extends out alongside the wheel." *Id.* at 97.

40. *Id.* at 36–37.

41. *Id.* at 3. Early American states also experienced infanticide and abandonment, though in much smaller numbers. See Peter C. Hoffer & N.E.H. Hull, *Murdering Mothers: Infanticide in England and New England, 1558–1803*, at 33–64 (1981); Roger Lane, *Roots of Violence in Black Philadelphia, 1860–1900*, at 128–30 (1986) (chronicling notorious cases of infanticide in Philadelphia); Elna C. Green, *Infanticide and Infant Abandonment in the New South: Richmond, Virginia, 1865–1915*, 24 *J. Fam. Hist.* 187, 188 (1999) (describing "twin phenomena" of infanticide and foundlings in post-bellum Virginia).

42. Kertzer, *supra* note 25, at 10.

43. See U.S. Dep't of Health & Human Servs., 1998 National Estimates of the Number of Boarder Babies, Abandoned Infants and Discarded Infants 9 (2001). Of these, thirty-three were found dead. *Id.* at 14. This number seems quite small when viewed in light of the 3,941,553 live births in the same year. Nat'l Ctr. for Health Statistics, 1 Vital Statistics of the United States, *Nativity tbl.1-1* (1999), available at <http://www.cdc.gov/nchs/data/statab/t99Ix01.pdf> (on file with the *Columbia Law Review*). A longitudinal study of neonaticide in North Carolina similarly concluded that the percentage of babies abandoned is relatively small. Thirty-four babies were abandoned over sixteen years, or 2.1 such neonaticides per 100,000 births, or 0.002%. See Marcia E. Herman-Giddens et al., *Newborns Killed or Left to Die by a Parent: A Population-Based Study*, 289 *JAMA* 1425, 1425 (2003). To be sure, the reported figures may be low; not all discarded bodies may have been found, and not all discoveries reported.

44. Kochanek, *supra* note 28, at 13 (listing top ten leading causes of infant mortality, which do not include neonaticide). Homicide is the fifteenth leading cause of death during the first year of life. Ctrs. for Disease Control & Prevention (CDC), *Variation in Homicide Risk During Infancy—United States, 1989–1998*, 51 *Morbidity & Mortality Wkly.*

minish the problem of infant abandonment in the United States, they do raise questions about why legislatures have put such emphasis on this particular problem.

The foundling system and modern Safe Havens also differ with regard to their motivating purposes. Safe Haven laws seek to secure the baby's physical well-being. Newborns are spared the life-threatening risks of abandonment; they receive immediate medical care if any is needed; and their long-term security is assured by the expectation of adoption.<sup>45</sup> In contrast, the primary benefit secured by European foundlings was spiritual salvation: All *innocenti* were baptized immediately on arrival.<sup>46</sup> Modern readers may find the focus on baptism rather than death misplaced, but at the time it was "part of a deeply held belief in the eternal soul and the perils facing those who died unbaptized."<sup>47</sup> Foundlings also faced more worldly perils. Most died before the end of their first year and many within their first month from starvation and disease.<sup>48</sup>

Despite these differences, many aspects of the old system are reflected in the new and usefully inform the present discussion. These include the motivating role of maternal shame; the status and availability of abortion; secrecy as an inducement; the participation of public, private, and religious organizations; policy concerns about the moral effects of legal abandonment; and background views regarding the sanctity of life. There are also lessons regarding the unintended consequences of anonymous abandonment as a response to the problem of unwanted children. Over time, the European foundling homes became an increasingly popular destination for the legitimate children of married parents as well.<sup>49</sup> By the end of the nineteenth century, this led to the system's collapse as the homes became financially overwhelmed and their sponsors stunned by the moral effect on married parents.<sup>50</sup> While modern Safe Havens have hardly been overrun, they too have had unintended, perhaps unanticipated, consequences; I will say more about this in Part V. I turn now, however, to the particulars of the current system.

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Rep. 187, 187 (2002) [hereinafter CDC, Homicide Risk During Infancy]. A full 9.1% of these homicides occur during the first week of life, and most in this category occur on the first day. *Id.*

45. Marsha Kranes, *A Home for the Holiday: Abandoned Baby Adopted for Xmas*, N.Y. Post, Dec. 24, 2002, at 1 (describing adoption of Safe Haven baby born in van).

46. Kertzer, *supra* note 25, at 81.

47. *Id.* at 37.

48. *Id.* at 123–53 (discussing chronic shortage of wet nurses and filthy conditions in foundling homes).

49. *Id.* at 80, 82.

50. Opponents argued that the foundling system "increases libertinage, foments sexual passions, destroys the heart's affection, relaxes morals, tramples on nature's most sacred duties, leading at their expense to the triumph of prostitution and vice." *Id.* at 157 (quoting Guiseppe Mason, *La ruota degli esposti e necessita di sua soppressione* 5 (1870)).

## B. *Participants*

1. *Parents*. — Every state specifies who can bring a baby to a Safe Haven and what they must do to qualify for statutory protection. Most states authorize delivery by either parent. But while fathers (or stepfathers or boyfriends) may kill older children, they rarely kill newborns:<sup>51</sup> Neonaticide is a mother's crime. A few states therefore abandon gender neutrality and tailor the statute to post-partum *mothers* for whom an alternative might make a lifesaving difference.<sup>52</sup> Recognizing that a mother who has just given birth in secret and without medical assistance may be physically unable to make the trip, or to do so without detection, a few states authorize her to designate an agent to deliver the baby.<sup>53</sup> In Louisiana, mothers may also call 911 and arrange for the police or emergency medical services to pick up the baby.<sup>54</sup>

The statutes describe the act of abandonment in a number of ways. The baby may be "transfer[red],"<sup>55</sup> "deliver[ed],"<sup>56</sup> "relinquish[ed],"<sup>57</sup> or its "physical custody . . . surrendered."<sup>58</sup> The key feature is that there be a literal handover from the mother to a Safe Haven provider.<sup>59</sup> The requirement of physicality performs several functions. Most crucially, it attempts to ensure that the infant will not be left *near* a Safe Haven, so that relinquishment itself, however well-intentioned, does not put the baby at risk.<sup>60</sup> The requirement may also serve a cautionary function: Because immunity does not attach to "attempted" Safe Haven deliveries, such as a baby who has suffocated en route, mothers might take special care while

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51. Neil S. Kaye et al., *Families, Murder, and Insanity: A Psychiatric Review of Paternal Neonaticide*, 35 J. Forensic Sci. 133, 135 (1990) (noting rarity of paternal neonaticide). In cases of concealed pregnancy, fathers may be unaware of the birth at all.

52. See, e.g., Ga. Code Ann. § 19-10A-3 (2004) (focusing on "a mother who abandons the newborn"); Tenn. Code Ann. § 36-1-142 (2001) (specifying that delivery be by infant's mother).

53. See, e.g., Md. Code Ann., Cts. & Jud. Proc. § 5-641(a)(2) (LexisNexis 2002) ("If the person leaving a newborn . . . is not the mother of the newborn, the person shall have the approval of the mother to do so.").

54. La. Child. Code Ann. art. 1151 (2004).

55. Wash. Rev. Code Ann. § 13.34.360 (West 2004).

56. Ariz. Rev. Stat. Ann. § 13-3623.01 (Supp. 2005).

57. S.D. Codified Laws § 25-5A-29 (2004); Utah Code Ann. § 62A-4a-802(1)(a) (Supp. 2005); Wyo. Stat. Ann. § 14-11-103 (2005).

58. Kan. Stat. Ann. § 38-15,100(b) (2000).

59. In Arizona, the handover is depicted in the official logo with one pair of hands giving, and the other receiving, a swaddled infant. See Tucson Safe Baby Project, at <http://www.tucsonsafebaby.org> (last visited Mar. 8, 2006) (on file with the *Columbia Law Review*).

60. See, e.g., N.Y. Penal Law § 260.03 (McKinney Supp. 2005) (conditioning Safe Haven affirmative defense on newborn being left "with an appropriate person or in a suitable location").

storing or transporting the baby.<sup>61</sup> Delaware puts the case bluntly: The baby must be “surrendered alive” for the statute to apply.<sup>62</sup>

Physical delivery has additional advantages. Contact between mother and provider increases the possibility of obtaining information from the mother about the baby’s (or her own) health and heritage.<sup>63</sup> It also gives the provider an opportunity to assess the mother’s state of mind regarding the voluntariness and intended permanence of the relinquishment. As a Tennessee brochure explains in response to the frequently asked question why only the mother may bring the baby to the hospital:

The mother must leave the baby voluntarily. That way we know this was your decision and you were not pressured to give up your baby. No one has to know that you brought your newborn to A Secret Safe Place for Newborns, but you must be the person to bring her in.<sup>64</sup>

States do not offer the Safe Haven exception to their criminal and child welfare laws lightly. Anonymous abandonment is an alternative to *murder*, not a form of temporary foster care. At the time the baby is handed over, the mother must have “the settled intent to forego all parental responsibilities.”<sup>65</sup> The requirement is expressed statutorily in a number of ways. In Kentucky, the mother must affirmatively “express no intent to return for the infant;”<sup>66</sup> in other states, the standard is flipped: “The parent did *not* express an intent to return for the newborn.”<sup>67</sup> In either formulation, some contact, however brief, provides evidence regarding the mother’s intent.

Of course, as with adoption, a mother may change her mind and want her baby back. Some states have Safe Haven termination procedures that mirror those of adoption. To overcome the problem of reuniting an anonymous mother (in states that permit revocation) with the right anonymous baby, a number of states give the mother an identifying

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61. Editorial, Life Saving Information; Young Mothers Need to Know About Abandoned Infant Protection Act, Buffalo News, Jan. 19, 2004, at B6 (reporting that baby left by sixteen-year-old on neighbor’s front porch died from cold).

62. Del. Code Ann. tit. 11, § 1102A (2001).

63. Although states provide various mechanisms by which mothers can leave information, it appears that few mothers do. See Cal. Dep’t of Soc. Servs., 2005 Safely Surrendered Baby Report to the Legislature 6 (2005), available at <http://www.babysafe.ca.gov/res/pdf/FinalSSBReporttoLeg4.pdf> (on file with the *Columbia Law Review*) [hereinafter 2005 Safely Surrendered Baby Report].

64. Secret Safe Place for Newborns of Tenn., Inc., Frequently Asked Questions, at <http://www.secretsafeplacetn.org/about.aspx#faqs> (last visited Jan. 26, 2006) (on file with the *Columbia Law Review*).

65. La. Child. Code Ann. art. 1150(4) (2004).

66. Ky. Rev. Stat. Ann. § 405.075(2) (LexisNexis Supp. 2004).

67. Ariz. Rev. Stat. Ann. § 13-3623.01(B)(1) (Supp. 2005) (emphasis added); see also Ark. Code Ann. § 9-34-201(2)(a) (2002). In Florida, bringing the infant to a Safe Haven creates a presumption that the mother consents to termination. Fla. Stat. Ann. § 383.50(2) (West 2002).

token that matches her to her baby at the time of relinquishment.<sup>68</sup> These tokens of identification reprise historical abandonment practices where parents often left a bit of cloth, ribbon, or coin tied to the foundling so that he might be retrieved should parental fortunes change.<sup>69</sup> Possession of the matching token does not assure the child's return—it simply creates a presumption of standing to participate in a custody hearing.<sup>70</sup>

The possibility of a hearing raises a further problem. Some states provide Safe Haven termination procedures that mirror those of adoption. In these states, Safe Haven mothers have the same right as any other birth mother to reconsider.<sup>71</sup> Other states, however, have no procedure for reconsideration. By relinquishing the infant to a Safe Haven, the parent has “waive[d] the right to notification required by subsequent court proceedings.”<sup>72</sup>

2. *Infants.* — Safe Haven laws seek to prevent a very specific form of harm: injury or death to *newborns*, rather than the maltreatment of older babies or children. States therefore condition Safe Haven benefits on the infant's age and condition at the time she is brought in. In many states the baby can be no more than seventy-two hours old.<sup>73</sup> Although this may seem a precariously short time for a mother to decide to give up her baby, from a prevention standpoint the period makes sense. Three days correlates with—indeed, exceeds by two—the span for neonaticide.

There are other practical benefits to this short time frame. Anonymity benefits mothers only as long as their maternal status has been concealed. Caring for a baby in secret, even briefly, is almost impossible. To the extent that mothers are aware of the time constraint, the shorter period may work to prevent deaths resulting from passive delay, as when an

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68. Cal. Health & Safety Code § 1255.7(b)(1) (West Supp. 2005) (providing for anklet); Conn. Gen. Stat. Ann. § 17a-58(b) (West Supp. 2005) (providing for bracelet); La. Child. Code Ann. art. 1152(B) (providing for tracking number).

69. Boswell, *supra* note 36, at 126; Kertzer, *supra* note 25, at 113–16.

70. See, e.g., Conn. Gen. Stat. Ann. § 17a-58(b) (“[T]he bracelet shall not be construed to authorize the person who possesses the bracelet to take custody of the infant on demand.”).

71. See, e.g., 325 Ill. Comp. Stat. Ann. 2/50 (West Supp. 2005) (directing that placement of abandoned infants be handled in accordance with Illinois's Adoption Act, 750 Ill. Comp. Stat. Ann. 50/0.01 (West 1992)).

72. Ky. Rev. Stat. Ann. § 405.075(4)(a) (LexisNexis Supp. 2004). The mother's inability to retrieve her child is a crucial ground for opposition to Safe Haven laws by the child welfare and adoption communities. See, e.g., Child Welfare League of Am., *Baby Abandonment: The Role of Child Welfare Systems* 17–19 (2003), available at <http://www.cwla.org/programs/baby/babymonograph.pdf> (on file with the *Columbia Law Review*) [hereinafter *Child Welfare League Statement*]; Evan B. Donaldson Adoption Inst., *Unintended Consequences: 'Safe Haven' Laws Are Causing Problems, Not Solving Them* 7 (2003), at <http://www.adoptioninstitute.org/whowe/Last%20report.pdf> (on file with the *Columbia Law Review*) [hereinafter *Unintended Consequences*].

73. See, e.g., Ky. Rev. Stat. Ann. § 405.075(1); Minn. Stat. Ann. § 145.902(1) (West 2005); Miss. Code Ann. § 43-15-201(1) (2004).



exhausted new mother puts the newborn in a shoe box or closet intending to do something with it *later*.<sup>74</sup> Finally, seventy-two hours underscores the intended exceptionalism of anonymous abandonment. Safe Havens are not receiving stations for unwanted babies generally; the intended beneficiaries are newborns born in secret and therefore at unique risk on the first day of life.<sup>75</sup>

Many states, however, set a roomier thirty day age limit.<sup>76</sup> This sensibly relieves the Safe Haven provider from having to determine the baby's exact age.<sup>77</sup> To be sure, babies who exceed age requirements are not rejected by Safe Havens; the consequence is simply that the Safe Haven Act does not apply. In such cases, police may investigate, parents may be criminally charged, and the standard procedures for terminating parental rights are employed.<sup>78</sup>

Because Safe Haven laws seek to prevent injury as well as death, states further require that a relinquished baby cannot have been abused.<sup>79</sup> If the baby has been harmed at all, all bets are off; there is a limit to legislative generosity. An immediate problem is that in several states, abandonment itself constitutes child abuse. Most, therefore, exempt Safe Haven relinquishments from the regular definition of abuse or endangerment.<sup>80</sup> Again, a baby who shows signs of abuse will not be rejected by the Safe Haven, but the mother loses any claim to immunity.<sup>81</sup>

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74. See, e.g., John Vandiver & Amy Dominello, *Teen Mom Put Baby in Closet, Father Tells 911*, News & Rec. (Greensboro, N.C.), May 27, 2005, at A1.

75. See *supra* note 44 and accompanying text.

76. See, e.g., Ark. Code Ann. § 9-34-202(a) (2002); La. Child. Code Ann. art. 1150(3) (2004); Mo. Ann. Stat. § 210.950.3(2) (West 2004).

77. Some states, like Indiana, require simply that the infant be or *appear to be* "no more than forty-five (45) days of age." Ind. Code Ann. § 31-34-2.5-1 (LexisNexis 2003). Others, however, require that a physician determine the baby's age. Ky. Rev. Stat. Ann. § 405.075(1) (requiring that infant be "medically determined to be less than seventy-two (72) hours old"); Minn. Stat. Ann. § 145.902(1) (requiring that age of seventy-two hours be determined "within a reasonable degree of medical certainty").

78. See, e.g., Me. Rev. Stat. Ann. tit. 17-A, § 553 (Supp. 2005) (treating cases in which child surrendered is more than thirty-one days old as instances of child abandonment); Va. Code Ann. § 18.2-371 (2004) (same, where child surrendered is more than fourteen days old).

79. See, e.g., Del. Code Ann. tit. 16, § 907A(b) (2003) (requiring that baby be "surrendered alive, unharmed and in a safe place therein"); Fla. Stat. Ann. § 383.50(7) (West 2002) (stating that child abuse laws will be invoked if child appears abused or neglected); Kan. Stat. Ann. § 21-3604(b) (Supp. 2004) (requiring that "infant has not suffered bodily harm"); Minn. Stat. Ann. § 145.902.1(a)(2) (requiring that "the infant [be] left in an unharmed condition").

80. See, e.g., Colo. Rev. Stat. Ann. § 19-3-304.5(8) (West Supp. 2005) (providing that parent who leaves baby with Safe Haven "shall not, for that reason alone, have his or her name added to the state central registry of child protection").

81. See, e.g., 325 Ill. Comp. Stat. Ann. 2/25(b) (West Supp. 2005); Mo. Ann. Stat. § 210.950.3(3).

3. *Safe Havens*. — Hospitals, fire stations, and police stations are the most common Safe Haven sites.<sup>82</sup> This makes great sense. All are associated with emergencies and are open and staffed all the time,<sup>83</sup> typically with medically trained personnel. They are also usually located in the community and easily identifiable so that mothers will quickly know where to turn.<sup>84</sup> A few states have designated other intuitive locations, such as adoption agencies or churches (the familiar historical site).<sup>85</sup> Recognizing that infants are found with some regularity near college dorms and housing projects, New Jersey has expanded its definition of “police station” to include campus police, housing police, and community police substations.<sup>86</sup>

Two other Safe Haven designations are worth mentioning. First, New York broadly authorizes parents to leave the baby “with an appropriate person or in a suitable location.”<sup>87</sup> To make sure that discovery is not left to happenstance, if the baby is left in a suitable location, the parent must also notify an appropriate person where it is.<sup>88</sup> Whether this should be read as a generous provision facilitating relinquishment or as offering so little guidance as to prompt maternal anxiety and inaction is unclear. Certainly the burden of guessing wrong is the mother’s; local district attorneys determine on a case-by-case basis whether the child was left in an appropriate location.<sup>89</sup>

Second, a few states, like Louisiana, designate “pregnancy crisis center[s]” as acceptable Safe Havens.<sup>90</sup> This is an odd choice. Crisis pregnancy centers are primarily faith-based, adamantly pro-life organiza-

82. See, e.g., Colo. Rev. Stat. Ann. § 18-6-401(9); 325 Ill. Comp. Stat. Ann. 2/15 (b)(2).

83. See, e.g., N.H. Rev. Stat. Ann. § 132-A:1 (Supp. 2004) (designating only churches and police or fire stations “which [are] attended by a person”). To secure an open and staffed facility, Alabama specifically excludes “offices, clinics, surgeries, or treatment facilities of private physicians or dentists.” Ala. Code § 26-25-4 (LexisNexis Supp. 2004).

84. A few states require that Safe Havens display an approved logo for still easier identification. E.g., Cal. Health & Safety Code § 1255.7(3) (West Supp. 2005).

85. See, e.g., Dave Wischnowsky, *Church Finds Twin Miracle in Vestibule*, Chi. Trib., Dec. 22, 2005, at C1. Although churches may have an emotional appeal, the designation is also problematic: They are rarely open around the clock, and few are regularly staffed. To prevent a mother from claiming she thought a building was a church in order to avoid criminal prosecution, Arizona’s Safe Haven statute defines a church “[as] a building that is erected or converted for use as a church, where services are regularly convened, that is used primarily for religious worship and schooling and that a reasonable person would conclude is a church by reason of design, signs, or architectural or other features.” Ariz. Rev. Stat. Ann. § 13-3623.01G.2(d)(iii) (Supp. 2005).

86. N.J. Admin. Code § 10:133-1.3 (Supp. 2005).

87. N.Y. Penal Law § 260.03 (McKinney Supp. 2005).

88. *Id.*

89. N.Y. Dep’t of Health, *Abandoned Infant Protection Act: Bureau of EMS Policy Statement*, June 1, 2001, available at <http://www.health.state.ny.us/nysdoh/ems/policy/01-05.htm> (on file with the *Columbia Law Review*) [hereinafter N.Y. Abandoned Infant Policy Statement].

90. La. Child. Code Ann. art. 1150 (2004).

tions often linked to Christian adoption agencies.<sup>91</sup> Although many have twenty-four-hour hotlines, few have twenty-four-hour locations, and so they fail to meet basic Safe Haven criteria. Their designation provides an early hint at the confluence between pro-life and Safe Haven advocacy.<sup>92</sup>

The positive duties of Safe Haven providers are straightforward and quite limited in time. Providers must first make sure the baby is physically well, and if not, then provide or arrange for medical care.<sup>93</sup> As discussed, in several states, providers must also “tag” the baby with some form of identification linking him to the relinquishing mother.<sup>94</sup> Finally, all states authorize Safe Haven providers to request nonidentifying health and background information from the mother when she brings in the baby. A number of states urge Safe Havens to do more than request: In Delaware, they may make “every effort” to get information so long as the baby’s safe placement is not put at risk (presumably by aggressive treatment that might scare off the mother).<sup>95</sup> In this regard, Ohio clarifies that providers shall not “coerce or otherwise try to force the parent into revealing the [parent’s] identity”<sup>96</sup> and New York providers may request information only “in a non-judgmental manner.”<sup>97</sup> A few states seek to give information as well as to receive it, offering mothers materials on counseling, adoption, their own post-delivery medical care, and what to do if they change their mind.<sup>98</sup>

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91. See, e.g., Ark-La-Tex Crisis Pregnancy Ctr., Vision Statement, at <http://www.altcpc.com/OurMission.html> (last visited Feb. 5, 2006) (on file with the *Columbia Law Review*) (“[A]ll human life is created by God and is sacred. Our commitment is to dramatically reduce the number of lives lost or changed by abortion.”); cf. Vitoria Lin & Cynthia Dailard, Crisis Pregnancy Centers Seek to Increase Political Clout, Secure Government Subsidy, 5 *Guttmacher Rep. on Pub. Pol’y* 4, 5–6 (2002), available at <http://www.guttmacher.org/pubs/tgr/05/2/gr050204.pdf> (on file with the *Columbia Law Review*) (reporting that crisis pregnancy centers receive state funding as beneficiaries of “Choose Life” license plate revenues and by operating abstinence-only sex education programs); Planned Parenthood, Anti-Abortion Counseling Centers: A Consumer’s Alert to Deception, Harassment, and Medical Malpractice (2002), at <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/abortion/fact-antiabortion-centers.xml> (on file with the *Columbia Law Review*) (“Far from counseling, these centers are designed to misinform and intimidate women some [sic] will go to any lengths necessary to dissuade women from ending their pregnancies.”).

92. See *infra* Part V.A.

93. See, e.g., 325 Ill. Comp. Stat. Ann. 2/20(a) (West Supp. 2005); R.I. Gen. Laws § 23-13.1-5 (2001).

94. See *supra* note 68 and accompanying text.

95. Del. Code Ann. tit. 16, § 907A(a)(i) (2003).

96. Ohio Rev. Code Ann. § 2151.3527(A)(2) (West 2005); cf. Minn. Stat. Ann. § 145.902.1(b) (West 2005) (“The hospital must not inquire as to the identity of the mother . . . or call the police . . . . The hospital may ask the mother . . . about the medical history of the mother or newborn but the mother . . . is not required to provide any information.”).

97. N.Y. Abandoned Infant Policy Statement, *supra* note 89.

98. See, e.g., Ky. Cabinet for Health & Family Servs., Kentucky Safe Infants Act, at <http://chfs.ky.gov/dcb/dpp/Kentucky+Safe+Infants+Act.htm> (last updated July 6, 2005) (on file with the *Columbia Law Review*).

### B. Incentives

Anonymity is the Safe Haven approach's central lure. The secrecy assured by statute substitutes for the cover of night that shielded mothers in earlier times in their efforts to abandon unwanted infants without detection. Anonymity's importance overshadows not only traditional political concerns about parental responsibility but any interest a child may have in knowing its ancestral and medical history as well.<sup>99</sup> It protects the mother from the possibility of arrest and from stigmatization within her community. In this regard, a few states provide for confidentiality as well as anonymity.<sup>100</sup> This is particularly important in smaller communities, where a mother's identity may already be known to those working in the local hospital or fire station. Anonymity also helps to thwart unwanted media attention. As a California court explained in upholding a newspaper's right to publish the name of an abandoning mother: "A person who abandons her newborn cannot complain of the newsworthiness of her act. [She] was not merely the involuntary victim of an event of public interest; her own voluntary and extraordinary actions created the newsworthy event."<sup>101</sup>

Immunity, the other incentive in the Safe Haven scheme, works hand in hand with anonymity: A person entirely unknown to the state cannot be easily prosecuted.<sup>102</sup> But immunity represents more than the state's inability to *find* the parent or its promise not to prosecute. Safe Haven immunity reflects how Safe Haven abandonment is viewed as a policy matter, and here states differ significantly.

Some treat immunity as a formal representation that the mother has done nothing wrong at all—" [N]o shame. [N]o blame. [N]o names."<sup>103</sup>—thus removing Safe Haven relinquishment from the defini-

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99. This is true even in the case of Native American children: Under the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2000), jurisdiction over the custody of Indian children is vested in the tribe. *Id.* at § 1903(12). This jurisdiction cannot be exercised, however, if the child's heritage is unknown. Mindful of this problem, in 2005, New Mexico legislators specifically *declined* to amend their Safe Haven law to require mothers to declare a baby's Native American heritage for fear that this might compromise maternal confidence in anonymity and therefore lead to more abandonment. See N.M. Stat. Ann. § 24-22-5(c) (LexisNexis Supp. 2003) (authorizing Safe Havens to "make reasonable efforts to determine whether the infant is an Indian child").

100. See, e.g., Del. Code Ann. tit. 16, § 907A(c) ("If the identity of the person is known to the hospital, the hospital shall keep the identity confidential."); Idaho Code Ann. § 39-8203(3) (2002) ("[I]f the identity of a parent is known to the safe haven, the safe haven shall keep all information as to the identity confidential.>").

101. *Pasadena Star-News v. Superior Court*, 249 Cal. Rptr. 729, 731 (Ct. App. 1988).

102. A California Safe Haven brochure emphasizes: "Under this law, a person may surrender their baby confidentially without fear of arrest or prosecution for abandonment." Cal. Dep't of Soc. Servs., *Safely Surrendered Baby Brochure*, available at <http://www.babysafe.ca.gov/pdf/pub400L.pdf> (last visited Mar. 8, 2006) (on file with the *Columbia Law Review*).

103. *Id.*

tion of criminal abandonment.<sup>104</sup> Others intentionally leave the essential criminality of the act in place.<sup>105</sup> Delaware's statute reminds citizens that abandoning a baby is "an irresponsible act."<sup>106</sup> South Carolina underscores that immunity does not apply to "the infliction of any harm upon the infant other than *the harm inherent in abandonment*."<sup>107</sup> The clarification is perhaps unnecessary: After all, *all* Safe Haven benefits—including immunity—are off the table if the infant has been abused or neglected.<sup>108</sup> But the proviso serves as a reminder that however lenient the state has been forced to be, everyone knows what kind of mothers these women really are.

We see then that the tone of the legislation differs from state to state in ways that affect content. Delaware remains hostile to parents and begrudging with regard to the need for Safe Haven legislation in the first place. The General Assembly underscored in grim detail that:

[T]he abandonment of a baby . . . places the baby at risk of injury or death from exposure, actions by other individuals, and harm from animals. However, the General Assembly does recognize that delivering a live baby to a safe place is far preferable to a baby killed or abandoned by the parent(s).<sup>109</sup>

Suspicious of anyone who might actually use the program, it offers its Safe Arms for Babies Program with a warning: "[I]f this section does not result in the safe placement of such babies or is abused by parent(s) attempting to circumvent the current process of adoption, it should be repealed."<sup>110</sup>

Other states have responded more sympathetically. New Jersey, for example, acknowledges that parents "may be under severe emotional stress and may need a safe haven available to them and their child."<sup>111</sup> Still, it does not soft-pedal the gravity of the underlying problem. Indeed, its Safe Haven statute articulates a deep emotional response: "New Jersey and the nation have experienced sorrow in the knowledge that newborn infants . . . have been harmed or have died as a consequence of their abandonment."<sup>112</sup>

104. N.H. Rev. Stat. Ann. § 639:3(VI) (Supp. 2004) (stating that no one who complies with Safe Haven provisions "shall be guilty of an offense" under Endangering Welfare of Child law, *id.* § 639:3).

105. One of the provisions in the Idaho statute is titled "Emergency custody of certain abandoned children . . ." Idaho Code Ann. § 39-8203; see also *id.* § 726.3 (West Supp. 2005) (showing no criminal penalties for abandonment or child endangerment if parent has "released custody of the newborn infant in accordance with" Safe Haven law).

106. Del. Code Ann. tit. 16, § 907A (2003).

107. S.C. Code Ann. § 20-7-85(G) (Supp. 2004) (*emphasis added*).

108. See, e.g., Ark. Code Ann. § 5-27-203(c)(2) (Supp. 2005) (providing no "defense to any prosecution arising from an act of abuse or neglect committed prior to the delivery of the child").

109. Del. Code Ann. tit. 16, § 907A(a).

110. *Id.*

111. N.J. Stat. Ann. § 30:4C-15.6(b) (West Supp. 2005).

112. *Id.* § 30:4C-15.6(a).

## II. THE POLITICS OF ENACTMENT

The enactment of Safe Haven legislation has been a remarkable exercise in lawmaking. In the two years following Texas's lead in 1999, Safe Haven bills were introduced, debated, and approved in thirty-four states; between 2002 and 2004, thirteen more followed suit.<sup>113</sup> By 2005, only the Alaska, Vermont, and Nebraska legislatures had failed to pass Safe Haven laws.<sup>114</sup> Legislators acted not only with great speed—typically taking no more than a few months, and in some cases only a few weeks<sup>115</sup>—but also with near unanimity. Not one vote was cast against Safe Haven laws in at least ten states, and opposition in the remaining states was scant.<sup>116</sup>

This kind of sweep is unusual. The very structure of lawmaking—bill sponsorship, committee assignment, factfinding, public comment, reconciliation, and so on—is designed to “slow legislative decisionmaking and distance it from the passions and immediacy of the prevailing desires of individual legislators and of various constituencies.”<sup>117</sup> This is not to mention the informal political rough and tumble that poses additional obstacles to legislative initiatives.

The success of Safe Haven laws is all the more unusual because the legislation goes against the grain of a number of existing laws, policies, and trends. The law dispenses with hard-won protections for mothers secured over the years through adoption reform, including such safeguards as mandatory counseling and cooling-off periods.<sup>118</sup> Safe Haven legislation is also an outlier in criminal law, which tends to be more rather than less punitive, especially when sexually active minors, harm to

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113. Nat'l Ctr. for State Courts, Analysis of State's "Safe Haven" Legislation, available at [http://www.ncsconline.org/WC/Publications/KIS\\_AdoptSafeHaven.pdf](http://www.ncsconline.org/WC/Publications/KIS_AdoptSafeHaven.pdf) (last visited Mar. 25, 2006) (on file with the *Columbia Law Review*).

114. See *supra* note 5 and accompanying text. Safe Haven legislation was passed by Hawaii's legislature, but subsequently vetoed by the governor. Hunt, *supra* note 5.

115. In Louisiana, the formal process took just three weeks, see La. State Legislature, at [http://www.legis.state.la.us/leg\\_docs/001ES/CVT5/OUT/0000HIVS.pdf](http://www.legis.state.la.us/leg_docs/001ES/CVT5/OUT/0000HIVS.pdf) (last visited Feb. 23, 2006) (on file with the *Columbia Law Review*) (summarizing the history of H.R. 223, 2000 Leg., 1st Extraordinary Sess. (La. 2000)); in New Jersey, two months, see N.J. Legislature, at <http://www.njleg.state.nj.us> (last visited Feb. 23, 2006) (on file with the *Columbia Law Review*) (summarizing history of Assemb. 6, 209th Leg., Reg. Sess. (N.J. 2000)); in Minnesota, three months, see Minn. State Legislature, at [http://www.revisor.leg.state.mn.us/revisor/pages/search\\_status/status\\_detail.php?b=Senate&f=SF2615&ssn=0&y=2000](http://www.revisor.leg.state.mn.us/revisor/pages/search_status/status_detail.php?b=Senate&f=SF2615&ssn=0&y=2000) (last visited Feb. 23, 2006) (on file with the *Columbia Law Review*) (summarizing history of S. 2615, 2000 Leg., 81st Sess. (Minn. 2000)).

116. Chart of Safe Haven Votes (Dec. 15, 2005) (on file with the *Columbia Law Review*) (compiled using legislative histories of state Safe Haven laws drawn from Westlaw state law databases).

117. Abner J. Mikva & Eric Lane, *Legislative Process* 613 (1995) (describing deliberativeness as “[t]he most unique characteristic of American legislatures” and “an anchor against change, protecting the status quo from precipitous upset”).

118. For a comprehensive treatment of adoption history and consent procedures, see 1 Joan Heifetz Hollinger et al., *Adoption Law & Practice* chs. 1, 2 (1988).

children, and irresponsible mothers are involved. An opponent in New York put the case succinctly:

At a time when we are falling all over ourselves to hold young people accountable for criminal acts, for which we insist they be tried and punished as adults, it is highly inconsistent that we should be undermining the natural bond and the moral obligation that goes with conceiving and giving birth to a child.<sup>119</sup>

To understand how Safe Haven statutes prevailed against these trends, this Part sketches the legislation's unusual political history: what inspired the laws; how they were fast-tracked in a system designed to run slowly; and how opposition was met and overcome. The analysis also situates the legislation within a larger political culture, one increasingly focused on protecting "life," as the word is defined in the culture of life. As we shall see, connections between abortion and abandonment feature in the enactment, implementation, and effect of Safe Haven legislation.

#### A. *The Enactment Process*

In 1998, a year before Texas passed the nation's first Safe Haven law, the district attorney of Mobile, Alabama introduced a discretionary pilot program. As District Attorney John Tyson later explained, the program "was born from tragedy."<sup>120</sup> His office had just convicted a mother and grandmother of drowning an hour-old infant in a toilet; each woman had received a twenty-five-year sentence. In the aftermath of the much publicized prosecution, a local television reporter asked Tyson if he would consider waiving prosecution for mothers who in the future brought unwanted newborns to some safe place, like an emergency room. Tyson agreed, and from this exchange, "the concept for A Secret Safe Place for Newborns was launched."<sup>121</sup> Prosecutorial discretion became countywide policy: anonymity and immunity in exchange for relinquishing the baby unharmed.<sup>122</sup> While a few other discretionary programs were in place here and there,<sup>123</sup> Mobile's received substantial national attention as pol-

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119. Letter from Terry O'Neill, Attorney, to George E. Pataki, Governor of N.Y. (July 18, 2000) (on file with the *Columbia Law Review*).

120. Mobile County Dist. Attorney's Office, A Secret Safe Place for Newborns 2 (2001), available at <http://www.mobile-da.org/secretsafeplacefornewborns/downloads/ssp-manual.pdf> (on file with the *Columbia Law Review*) (statement of John Tyson, Jr.).

121. *Id.* at 3. The program was then publicized by the newly founded organization, Safe Place for Newborns. See Safe Place for Newborns, Links, at <http://www.safeplacefornewborns.com/links.html> (last visited Feb. 5, 2006) (on file with the *Columbia Law Review*).

122. Tyson made clear, however, that his program comprised *two* promises. The first was immunity. However, if any baby was "injured, thrown away or killed" after the policy was announced, Tyson also pledged that "those responsible [would] be targeted for a determined prosecution." Mobile County Dist. Attorney's Office, *supra* note 120, at 2 (statement of John Tyson, Jr.).

123. See, e.g., Letter from Kenneth R. Bruno, Dist. Attorney of Rensselaer County, to George E. Pataki, Governor of N.Y. (June 29, 2000) (on file with the *Columbia Law Review*).

icy schools,<sup>124</sup> state governments,<sup>125</sup> and even Good Morning America<sup>126</sup> all took note.

Texas's Baby Moses Law was similarly born from tragedy, or a bundle of tragedies, in Houston in 1998. In that year, thirteen newborns were discovered in dumpsters or on doorsteps; three were dead.<sup>127</sup> Alarmed by the sheer number of deaths, a Fort Worth pediatrician, John Richardson, sought a formal statewide response.<sup>128</sup> With the support of the local Catholic church and children's hospital, Richardson approached the Juvenile Justice and Family Affairs Committee of the Texas House of Representatives where State Representative Geanie Morrison agreed to sponsor the legislation.<sup>129</sup> Four months later, Texas's Baby Moses Law was signed into law by Governor George W. Bush.<sup>130</sup> To publicize the legislation, Morrison established The Baby Moses Project, which quickly became a resource center for sharing Safe Haven information across state lines.<sup>131</sup> Indiana followed Texas in enacting Safe Haven legislation; Tennessee was influenced by Alabama; Nevada borrowed from Colorado, and so on.<sup>132</sup>

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124. See Press Release, Ash Inst., Mobile's Secret Safe Place for Newborns Program Is a Finalist in Prestigious American Government Award (Aug. 29, 2001), at [http://www.ashinstitute.harvard.edu/Ash/pr\\_2001f\\_safeplace.htm](http://www.ashinstitute.harvard.edu/Ash/pr_2001f_safeplace.htm) (on file with the *Columbia Law Review*) (noting that Mobile's program was honored as finalist for award from Harvard's Kennedy School of Government).

125. See, e.g., John Nagy, Reporters [sic] Query Begets Safe Havens for Abandoned Infants, Stateline.org, June 1, 2001, at <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=14360> (on file with the *Columbia Law Review*) (noting that Mobile program prompted numerous states to consider similar programs).

126. See Bruce Sandlun, Op-Ed., A Way to Save Newborns, Providence J.-Bull., June 11, 2000, at 11E (quoting from Tyson's interview with Diane Sawyer).

127. Jim Yardley, A Flurry of Baby Abandonment Leaves Houston Wondering Why, N.Y. Times, Dec. 26, 1999, § 1, at 14. The Houston "flurry" was not the first. A decade earlier, eight neonaticides were reported in one year in Iowa. Edward Saunders, Neonaticides Following "Secret" Pregnancies: Seven Case Reports, 104 Pub. Health Rep. 368, 369 (1989). Yet the Iowa cases did not prompt a nationwide Safe Haven movement. One explanation may be that Iowa's health and social service professionals responded to these deaths with a call for more sex education, id. at 371, an intervention not suited to the programmatic goals of culture of life supporters.

128. Ann Carey, New Hope for 'Dumpster Babies,' Our Sunday Visitor (Huntington, Ind.), Apr. 2, 2000, available at <http://www.osv.com/periodicals/show-article.asp?pid=278> (on file with the *Columbia Law Review*).

129. Richardson was guided by his niece, a Texas state judge, who knew that a Safe Haven law would require changing Texas family and criminal codes. Id.

130. See Tex. House of Representatives, House Journal, H.R. 76-89, Reg. Sess., at 4408, 4410 (1999), available at <http://www.capitol.state.tx.us/hjrn/76r/pdf/day89.pdf> (on file with the *Columbia Law Review*) (listing H.R. 3423, 76th Leg., Reg. Sess. (Tex. 1999) as signed by the Governor on June 19).

131. As Morrison's aide, Justin Unruh, explained, "[w]e were definitely overwhelmed by the response we got as far as [legislators from] other states coming to us and saying, 'Hey, we've got a big problem, too.'" Carey, supra note 128 (second alteration in original) (internal quotation marks omitted). The Baby Moses Project can be found online, at <http://www.junruh.com/index.htm> (last visited Jan. 26, 2006).

132. See Stephen Beaven, Texas Law to Curb Baby Abandonment Guides Indiana Plan, Indianapolis Star, Feb. 20, 2000, at A1; Nagy, supra note 125 (discussing testimony by



The early examples of Mobile and Texas illustrate the now standard procedure for Safe Haven enactment. First, the media reports the discovery of an abandoned newborn.<sup>133</sup> Concerned citizens take up the cause and organize support. Receptive legislative sponsors are enlisted. Organizers and sponsors receive professional legal, drafting, and public relations assistance (even from Dear Abby),<sup>134</sup> and within a short time, the political process begins to roll. Minnesota provides a good example of the process,<sup>135</sup> though California,<sup>136</sup> Massachusetts,<sup>137</sup> and Illinois<sup>138</sup> do as well.

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supporters of Alabama Safe Haven in Tennessee); see also Hearing on S.B. 191 Before the Assemb. Comm. on Health & Human Servs., 2001 Leg., 71st Sess. (Nev. 2001), available at <http://www.leg.state.nv.us/71st/Minutes/Assembly/HH/Final/1280.html> (on file with the *Columbia Law Review*) [hereinafter Nevada Hearing on S.B. 191] (statement of Assemb. Barbara Cegavske) (describing visiting Colorado legislature during discussion of Safe Haven bill). Information was also shared through professional organizations. See Nat'l Crime Prevention Council, Strategy: Establishing Safe Drop-Off Points for Abandoned Newborns, at [http://www.ncpc.org/topics/Personal\\_Safety/Strategy\\_Establishing\\_Safe\\_Drop-off\\_Points\\_for\\_Abandoned\\_Newborns.php](http://www.ncpc.org/topics/Personal_Safety/Strategy_Establishing_Safe_Drop-off_Points_for_Abandoned_Newborns.php) (last visited Mar. 6, 2006) (on file with the *Columbia Law Review*).

133. The catalyzing infant is often given a special name. See, e.g., Brenna R. Kelly, Bills Offer Lifeline for Unwanted Babies, *Tampa Trib.*, Mar. 29, 2000, at 1 ("Baby Faith" and "Baby Benjamin"); William Petroski, Now 21, Mom of 'Baby Chelsea' Has 'Good Reports,' Gets Parole, *Des Moines Reg.*, May 25, 2005, at 2B; Casey Ross, Unwanted Babies Get 'Safe Haven,' *Boston Herald*, Oct. 24, 2004, at 15 ("Baby Rebecca"); S.C. Dep't of Soc. Servs., Daniel's Law, at <http://www.state.sc.us/dss/daniel/index.html> (last visited Jan. 26, 2006) (on file with the *Columbia Law Review*).

134. See Abigail van Buren, Dear Abby, Concerned in Illinois, *Wash. Post*, Apr. 16, 2003, at C13 (encouraging readers in states without Safe Haven laws to lobby their local legislators).

135. In January 2000, an abandoned baby was rescued from a trash can near Minneapolis. Jim Adams, Baby Girl Dumped in Trash Survives, *Star Trib. (Minneapolis)*, Jan. 13, 2000, at 1A (describing how fifteen-year-old girl concealed her pregnancy, gave birth in bathroom, and discarded baby outside in subfreezing temperatures). In response, Lilly Riordan, a former "stay-at-home mom," became a "full-time lobbyist and activist." She convinced her local church, and eventually the state Attorney General, that a Safe Haven program would save babies' lives. Mary Lynn Smith, Stepping into the Spotlight to Save Newborns, *Star Trib. (Minneapolis)*, Mar. 19, 2000, at 1B.

136. In California, the impetus came from Debi Faris, founder of the Garden of Angels, a cemetery for abandoned babies. See Carl Ingram, Mother Strives to Save Unwanted Babies, *L.A. Times*, Apr. 23, 2000, at A28; see also S. 116, 2005–2006 Leg., Reg. Sess. (Cal. 2005), at 1–2, available at [http://info.sen.ca.gov/pub/bill/sen/sb\\_0101-0150/sb\\_116\\_cfa\\_20050316\\_153453\\_sen\\_comm.html](http://info.sen.ca.gov/pub/bill/sen/sb_0101-0150/sb_116_cfa_20050316_153453_sen_comm.html) (on file with the *Columbia Law Review*) (crediting "a group that retrieved dead abandoned babies from county morgues" as spurring legislation).

137. Patricia Wen, 'Safe Haven' Law Has Doubters but Backers Say It Is Saving Lives, *Boston Globe*, Oct. 31, 2004, at B1 (reporting intensive lobbying efforts of local activists).

138. See Save Abandoned Babies Found., About Us, at <http://www.saveabandonedbabies.org/about.shtml> (last visited Jan. 26, 2006) (on file with the *Columbia Law Review*) [hereinafter Save Abandoned Babies Found., About Us] ("Our grassroots effort began in March of 2000 when one of our members read a newspaper article about a baby found in a Chicago dumpster.").

Organizational support has come from groups created specially to promote Safe Haven programs, such as A Secret Safe Place for Newborns of Tennessee<sup>139</sup> and Save Abandoned Babies Foundation,<sup>140</sup> as well as from existing constituencies. These include law enforcement agencies (who approach Safe Haven laws in terms of crime prevention),<sup>141</sup> hospitals (whose emergency rooms are commonly designated sites),<sup>142</sup> and certain child welfare advocates (who identify abandonment as a form of child abuse).<sup>143</sup> The Catholic Church<sup>144</sup> and secular pro-life organizations have also been actively involved. For example, New Jersey Right to Life helped initiate, secure, and implement the state's legislation.<sup>145</sup> The cast of participants in Illinois is representative: Illinois's A Secret Safe Place for Newborns, the Department of Child and Family Services, the Hospital Association, the Attorney General's Office, the Catholic Conference, and the Judiciary Committee staff were all players.<sup>146</sup>

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139. See Secret Safe Place for Newborns of Tenn., Inc., at <http://www.secretsafeplace tn.org> (last visited Jan. 26, 2006).

140. See Save Abandoned Babies Found., Timeline, at <http://www.saveabandoned babies.org/timeline.shtml> (last visited Feb. 16, 2006) (on file with the *Columbia Law Review*) [hereinafter Save Abandoned Babies Found., Timeline].

141. See Associated Press, Program Offers Safety for Newborns Who Might Have Been Abandoned, Jan. 5, 2000, available at LEXIS, AP File (on file with the *Columbia Law Review*) (quoting Dakota County Attorney James Backstrom on "innovative program to prevent crime" (internal quotation marks omitted)). Of course, one reason Safe Haven laws prevent crime is that they decriminalize abandonment.

142. See Debra O'Connor, Capitol Report, Senate Passes Newborn Bill, St. Paul Pioneer Press, Feb. 29, 2000, at C3 (listing support from Minnesota Hospital Association, Minnesota Association of Pediatrics, Minnesota Public Health Association, Minnesota Nursing Association, and Archdiocese of St. Paul and Minneapolis); Letter from Peter E. Capobianco, President of St. Mary's Hosp., to George E. Pataki, Governor of N.Y. (July 11, 2000) (on file with the *Columbia Law Review*) ("Our mission and New York State's mission are the same[:] to care for those in need with comfort, safety, and life giving sustenance.").

143. See, e.g., Letter from Terry O'Neill, supra note 119 ("I've done a lot of work with crime victims . . . I still think nothing can befall one in life that is worse than to be abandoned by someone you have every right and expectation to be able to depend on for life.").

144. As the director of the Safe Place for Newborns in Minneapolis explained with a nod to the founding home system, "This thing is so profoundly Catholic . . . You look at the history of any country, and the Catholics have founded the schools, provided hospitals to take care of the sick, reached out to the poor . . . This is just a modern way of providing a place for a sick person." Carey, supra note 128 (internal quotation marks omitted) (quoting Laure Krupp).

145. See N.J. Right to Life, NJ Safe Haven Infant Law, at [http://www.njrto.org/core/newsletter\\_details.asp?ArticleID=348](http://www.njrto.org/core/newsletter_details.asp?ArticleID=348) (last visited Jan. 26, 2006) (on file with the *Columbia Law Review*) (detailing New Jersey Right to Life Committee's efforts in researching, securing sponsorship, and testifying before Assembly and Senate Committees). Members of the New Jersey Right to Life Committee attended the bill signing ceremony. *Id.*

146. Ill. Senate, Senate Transcript, S. 92-23, Reg. Sess., at 47-48 (2001), available at <http://www.ilga.gov/senate/transcripts/strans92/pdf/ST040401.pdf> (on file with the *Columbia Law Review*) [hereinafter Illinois Senate Transcript] (thanking organizations for their work on legislation). For a summary of constituency concerns, see Nevada Hearing on S.B. 191, supra note 132.

Opposition to Safe Haven legislation has come primarily from three sources: the child welfare community, adult adoptees, and those concerned with Safe Havens' moral implications. A thoughtful interdisciplinary critique by child welfare experts concluded that Safe Haven laws are a hasty and unproven response to the problem of unwanted pregnancy.<sup>147</sup> Activist organizations of adult adoptees have been more blunt. As Bastard Nation put it, the states have simply "jumped on the Baby Dump Bandwagon by drafting ill-conceived laws" that violate the human rights of adopted children.<sup>148</sup> Moral concerns have been expressed by legislators<sup>149</sup> and citizens,<sup>150</sup> as well as by talk show host Joe Scarborough, who characterized Safe Haven laws as "baby-dumping" legislation that simply "help[s] to normalize disgusting behavior."<sup>151</sup>

Yet critiques of Safe Haven bills only occasionally found their way into committee hearings, floor debates, or vote tallies.<sup>152</sup> Claims about Safe Haven successes were often accepted uncritically,<sup>153</sup> despite the fact that almost every state with Safe Haven laws continued to experience illegal abandonment.<sup>154</sup> The claim that quick passage would result in "one more life saved" was repeatedly invoked as the reason to support the legis-

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147. See Unintended Consequences, *supra* note 72, at 1 (describing evidence of efficacy as inconclusive at best); see also Child Welfare League Statement, *supra* note 72, at 17-19 (stating that although there has been "flurry of activity surrounding baby abandonment," "[s]afe havens are a short-term solution" and their effectiveness is "unclear").

148. See Bastard Nation, Action Alert!, Legal Abandonment Laws Open the Door to Fraud, Don't Save Lives (July 2000), at <http://www.bastards.org/alert/babydump.htm> (on file with the *Columbia Law Review*).

149. See, e.g., Holly Heysler, Bill on Murder of Fetuses Is Defeated, *Virginian-Pilot & Star-Ledger*, Feb. 19, 2001, at B4 (quoting legislator who argued bill "would put in the code . . . that abandoning your baby is an acceptable course in Virginia"); Kathey Pruitt, House OKs Baby Drop-Offs, *Atlanta J.-Const.*, Mar. 4, 2000, at E7 (quoting detractor who called legislation product of "throw-away society").

150. See David A. Dansker, Letter to Editor, Forced Support, *L.A. Daily News*, Aug. 28, 2002, at N20 (calling Safe Haven laws "forced taxpayer support of residual from [sic] abortion ideology from Planned Parenthood").

151. Scarborough Country (MSNBC television broadcast Aug. 25, 2003), available at LEXIS Transcript No. 082500cb.471, at \*5-\*6 (on file with the *Columbia Law Review*) (interviewing Hawaii Gov. Laura Lingle); see also Karin Miller, Senate OK's Baby-Dumping Bill, *Memphis Comm. Appeal*, May 24, 2001, at B5.

152. A short-lived exception was Arlington, Massachusetts, where voters defeated a local Safe Haven initiative. See David Desjardins, Approval of Infant Haven Laws No Longer a Safe Bet, *Boston Globe*, July 1, 2004, at NW1 (reporting heated debate between Marley Greiner of Bastard Nation and pro-Safe Haven activist Michael Morrissey).

153. To be sure, two of Florida's 120 state representatives voted against the bill, concerned about the speed of the process and fathers' rights. Thomas B. Pfankuch, House Passes Abandoned Newborn Bill, *Fla. Times-Union*, Apr. 25, 2000, at A-1 (quoting Rep. Lois Frankel, who voted against measure, as arguing that bill ought to have been examined more closely before adoption).

154. The floor discussion in the Illinois Senate is illustrative. Senator Luechtefeld, informed by a constituent that Safe Haven laws enacted in other states had not been effective, mildly inquired of the bill's sponsor if he "had any information with that." The answer was simply, "[t]hat is not the information I have," and the discussion moved on.

lation.<sup>155</sup> As Massachusetts Representative Patricia Haddad explained, "I'm not going to nitpick . . . . Let's get it out there rather than hold it up over foolishness."<sup>156</sup>

Safe Haven legislation produced a show of solidarity not only across party lines, but also across the pro-life/pro-choice divide. In state after state, participants and commentators remarked on the unusual support for Safe Haven laws from both advocates and opponents of legalized abortion. In Rhode Island, both Planned Parenthood and Right to Life supported the legislation, which the bill's sponsor noted "represents the best interests of all of us."<sup>157</sup> In Florida, pro-life sponsor Representative John Grant explained: "This bill isn't pro-life. It isn't pro-choice. It's pro-baby."<sup>158</sup> Pro-life and pro-choice forces regularly overcame standing antagonisms to support Safe Haven proposals.<sup>159</sup>

Yet despite all this apparent harmony, abortion hovers over Safe Haven legislation. Some legislators advocated Safe Haven laws on the theory that they prevent abortion. One Arizona senator argued that they prevent babies "from being aborted and left for dead in dumpsters."<sup>160</sup> Others opposed the legislation for being too close to abortion. As a Georgia pro-life senator explained: "I'm not in favor of abandonment as an alternative to killing them . . . . We've got to have some ideals in soci-

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See Illinois Senate Transcript, *supra* note 146, at 46. Within minutes the vote was taken, and the bill passed 56-0. *Id.* at 48.

155. See, e.g., N.J. Stat. Ann. § 30:4C-15.6(e) (West Supp. 2005) ("[T]his legislation is worthwhile if it saves even one infant's life.").

156. Mark Reynolds, *Mother's Crisis Renews Call for Legislation*, Providence J.-Bull., Nov. 5, 2003, available at [http://www.projo.com/news/content/projo\\_20031105\\_ma5\\_child.c066c.html](http://www.projo.com/news/content/projo_20031105_ma5_child.c066c.html) (on file with the *Columbia Law Review*) (internal quotation marks omitted); see also Illinois Senate Transcript, *supra* note 146, at 44 ("Is [this legislation] perfect? No . . . [but] truly, what it does more importantly, it gives a child, truly our most vulnerable, a chance at life." (statement of Sen. Trotter)).

157. Edward Fitzpatrick, *Assembly OKs Bill to Restrict Cell-Phone Use in Automobiles*, Providence J.-Bull., June 29, 2001, at 1A (internal quotation marks omitted) (quoting Sen. Catherine E. Graziano). In Nevada, Planned Parenthood joined with The Nevada Catholic Conference and the state Pro-Life League. See Nevada Hearing on S.B. 191, *supra* note 132.

158. Shelby Oppel, *Lawmakers Want to Have Safe Places for Abandoned Babies*, St. Petersburg Times, Mar. 10, 2000, at 1B (internal quotation marks omitted).

159. See, e.g., Ariz. Senate Judiciary Comm., *Senate Judiciary Committee Minutes* (Jan. 23, 2001), S. 45, 1st Reg. Sess. (2001), available at [http://www.azleg.state.az.us/legtext/45leg/1r/comm\\_min/senate/0123jud.doc.htm](http://www.azleg.state.az.us/legtext/45leg/1r/comm_min/senate/0123jud.doc.htm) (on file with the *Columbia Law Review*) [hereinafter *Arizona Senate Committee Minutes*] (noting support for S.B. 1076 from both pro-life Center for Arizona Policy and pro-choice Arizona ACLU); Kim Ode, *Where No Business Is Good Business*, Star Trib. (Minneapolis), Oct. 8, 2000, at 6E ("Both the Planned Parenthood people as well as the prolife people supported the bill but agreed to stay off of it and not attach anything, and that was so sweet." (internal quotation marks omitted) (quoting Laure Krupp, executive director of Safe Place for Newborns)).

160. Arizona Senate Committee Minutes, *supra* note 159 (describing testimony of Sen. Burns). Another senator opined, while debating Safe Haven legislation, that "both born and unborn babies should be protected." *Id.* (describing testimony of Sen. Smith).

ety.”<sup>161</sup> Another Georgia legislator described Safe Haven relinquishment in language familiar to those in the abortion debate: “The baby cries, drop it off at the emergency room . . . . The baby is deformed . . . drop it off at the emergency room. The baby’s the wrong gender . . . drop it off. The baby’s an inconvenience, drop it off.”<sup>162</sup> Yet another Georgia lawmaker called Safe Haven legislation “abortion without death.”<sup>163</sup>

Abortion politics sometimes stalled progress on Safe Haven legislation.<sup>164</sup> The vote in the Georgia Senate was twice delayed when a senator added an amendment requiring patients to receive detailed medical information twenty-four hours before an abortion.<sup>165</sup> An opponent of the amendment argued that “[i]t was unfair [to use] this baby-abandonment bill . . . as a political football.”<sup>166</sup> A few states have included provisions in the legislation that reflect a twinning of Safe Haven and pro-life interests. Louisiana permits pro-life pregnancy crisis centers to operate as Safe Havens;<sup>167</sup> the New Jersey legislature recently designated a position for the New Jersey Right to Life on the state’s Safe Haven Task Force;<sup>168</sup> and in several states the proceeds of “Choose Life” license plates<sup>169</sup> help finance Safe Havens.<sup>170</sup>

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161. Greg Rickabaugh, Coroner Supports Baby Bill, *Augusta Chron.*, Apr. 27, 2000, at C8 (internal quotation marks omitted) (quoting Sen. Mike Egan).

162. Pruitt, *supra* note 149 (internal quotation marks omitted) (quoting Rep. Tracy Stallings).

163. *Id.* (internal quotation marks omitted) (quoting unnamed lawmaker).

164. See, e.g., Doug Gross, Baby-Abandonment Law Delayed Again for Fear of Abortion Vote, *Savannah Morning News*, Mar. 19, 2002, available at <http://www.savannahnow.com/stories/031902/LOCbabies.shtml> (on file with the *Columbia Law Review*); Bill McAuliffe, Abortion Rift Snares Baby Drop-Off Bill, *Star Trib.* (Minneapolis), Feb. 9, 2000, at 5B; O’Connor, *supra* note 142 (“It’s the abortion politics which really killed this bill . . . .” (internal quotation marks omitted) (quoting Rep. Luanne Koskinen)).

165. See Gross, *supra* note 164 (describing Women’s Right to Know amendment, introduced by Republican Sen. Beatty, then candidate for lieutenant governor).

166. *Id.* (internal quotation marks omitted) (quoting Democratic Sen. David Scott, chairman of Senate Rules Committee).

167. See La. Child. Code Ann. art. 1150 (2004).

168. See Ana M. Alaya, Hoping to Spread the Word and Save a Child, *Star-Ledger* (Newark, N.J.), Jan. 17, 2006, at 1 (noting that Marie Tasy of New Jersey Right to Life will sit on New Jersey Safe Haven task force).

169. See Guttmacher Inst., State Policies in Brief, ‘Choose Life’ License Plates (Jan. 1, 2006), available at [http://guttmacher.org/statecenter/spibs/spib\\_CLLP.pdf](http://guttmacher.org/statecenter/spibs/spib_CLLP.pdf) (on file with the *Columbia Law Review*). Proceeds from these license plates go to pro-life organizations. *Id.*

170. See Children First Found., Recent Grants, at <http://thechildrenfirst.org/grants.htm> (last visited Jan. 26, 2006) (on file with the *Columbia Law Review*) (reporting that official sponsor of “Choose Life” license plates in Connecticut, New York, and New Jersey donated \$10,000 to Safe Haven programs).

### B. *Moral Panic*

As we have seen, connections between abandonment and abortion in the enactment process are sometimes made directly,<sup>171</sup> and sometimes indirectly.<sup>172</sup> I want to suggest that abortion and abortion politics also operate behind the scrim as a kind of social wallpaper, providing a familiar background into which the phenomenon of abandonment sometimes appears to blend. Enthusiasm for anonymous abandonment may represent something more than genuine support by some and political prudence by others. It may also be a response to the problem to which abandonment is so often tied: abortion. To understand this more subtle relationship between abortion and Safe Haven legislation, I want to consider its political vitality within the sociological framework of moral panic.

1. *Framework.* — Stanley Cohen's classic formulation is the place to start. Cohen observed that "[s]ocieties appear to be subject, every now and then, to periods of moral panic".<sup>173</sup>

A condition, episode, person or group of persons [a "folk devil"] emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or . . . resorted to; the condition then disappears, submerges or deteriorates and becomes more visible.<sup>174</sup>

Cohen based his model on the exaggerated response by media, citizenry, and the state to a series of minor disturbances at English seaside resorts in the mid-1960s involving two teenage groups, the Mods and Rockers.<sup>175</sup> News reports turned the groups into "gangs";<sup>176</sup> police prepared for trouble;<sup>177</sup> the press encouraged the expectation;<sup>178</sup> and Parliament enacted a Malicious Damage Bill.<sup>179</sup> Yet despite the hubbub, within a few years the Mods and Rockers were largely forgotten.<sup>180</sup> What has remained is Cohen's concept of a moral panic, a construct for understanding why at certain moments heightened public reaction (or over-

171. See *supra* notes 160–163 and accompanying text.

172. See *supra* notes 167–170 and accompanying text.

173. Stanley Cohen, *Folk Devils and Moral Panics* 1 (3d ed. 2002).

174. *Id.*; see also Erich Goode & Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* 12 & n.\*, 22–33 (1994) (discussing Cohen's work as foundational to moral panic theory).

175. Cohen, *supra* note 173, at 10 (describing "youths chasing across the beach, brandishing deckchairs over their heads, running along the pavements, riding on scooters or bikes down the streets, sleeping on the beaches and so on").

176. *Id.* at 22 (noting that image of "[g]angs of Mods and Rockers" was largely invented).

177. *Id.* at 122 (describing police preparation, including cancelled police leave).

178. *Id.* at 122 ("Rioting Rockers Plan Raid on Brighton Soon.").

179. *Id.* at 111.

180. *Id.* at xlv. The exception was a Mod fashion craze in the 1980s. *Id.* at xlvii.

reaction) develops in response to deviant behavior that threatens society's moral sense. The concept of moral panic has since been applied to a range of social problems: mugging in Britain,<sup>181</sup> youth violence in the United States,<sup>182</sup> and ritual sex abuse everywhere.<sup>183</sup>

The moral panic framework has been subject to various critiques. For example, as the phrase was used with increasing gusto outside the academy<sup>184</sup>—particularly by the press to describe events even as they were unfolding—the theory was disparaged by some as nothing more than “1960s sociologese to refer to public concerns sociologists would rather brush under the carpet.”<sup>185</sup> Yet despite such critiques, moral panic remains a valuable framework for inquiry,<sup>186</sup> offering a “kind of narrative structure” for understanding exaggerated collective responses by providing a coherent chronological and cultural context.<sup>187</sup> In applying the concept of moral panic to infant abandonment, my interest is neither to sweep infanticide under the carpet nor to come out swinging against the mothers who commit it. My aim is simply to make better sense of the puzzling phenomenon that abandonment and Safe Haven laws present.

2. *The Safe Haven Phenomenon.* — In considering infant abandonment within this framework, I focus on three specific indicia of a moral

181. See generally Stuart Hall et al., *Policing the Crisis: Mugging, the State, and Law and Order* (1978).

182. See generally Michael Welch et al., *Moral Panic over Youth Violence: Wilding and the Manufacture of Menace in the Media*, 34 *Youth & Soc'y* 3 (2002).

183. See generally Joel Best, *Threatened Children: Rhetoric and Concern About Child-Victims* (1990); Philip Jenkins, *Intimate Enemies: Moral Panics in Contemporary Great Britain* (1992); Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (1993); Jeffrey S. Victor, *Moral Panics and the Social Construction of Deviant Behavior: A Theory and Application to the Case of Ritual Child Abuse*, 41 *Soc. Persp.* 541 (1998).

184. Cohen, *supra* note 173, at vii (“[T]he same public and media discourse that provides the raw evidence of moral panic, uses the concept as first-order description, reflexive comment or criticism.”).

185. Arnold Hunt, “Moral Panic” and Moral Language in the Media, 48 *Brit. J. Soc.* 629, 638 (1997) (internal quotation marks omitted) (quoting unnamed 1985 newspaper article); see also P.A.J. Waddington, *Mugging as a Moral Panic: A Question of Proportion*, 37 *Brit. J. Soc.* 245, 246 (1986) (arguing that notion of “moral panic” is missing “any criteria of proportionality” and is therefore applied without regard to whether reaction is “justified or not”). By the mid-1980s, sentiments regarding the positive value of concern over deviant behavior had emerged. If public horror over violent crime was a “moral panic,” as some in the press declared it to be, then “moral panic” was a good thing and nothing for ordinary people to feel ashamed of. See Hunt, *supra*, at 638.

186. See Goode & Ben-Yehuda, *supra* note 174, at 42–43 (observing that despite select critiques, “much of the field regards the concept as viable”).

187. Susan Bandes, *The Lessons of Capturing the Friedmans: Moral Panic, Institutional Denial and Due Process*, 2 *Law, Culture & Human.* (forthcoming 2006) (on file with the *Columbia Law Review*).

panic: the nature of the deviance, the qualities of the “folk devil,” and the heightened nature of the response.<sup>188</sup>

Sociologists stress that the deviance sparking a moral panic is real, not imagined; there is a rational basis for the initial response, however magnified it may later become.<sup>189</sup> The deviance at the heart of Safe Haven concerns is bitterly concrete: an infant’s death at the hands of its mother. The incidents occur and recur; real bodies are found in real dumpsters. Killing one’s child may be understood anthropologically, diagnosed medically, and sometimes excused as a matter of law, but in modern times it is always considered deviant.<sup>190</sup> As I have explored elsewhere, simply *leaving* one’s child—let alone killing it—is often viewed as (almost) the worst thing a mother can do.<sup>191</sup> It is a profound act of betrayal that is often punished and rarely forgiven.<sup>192</sup>

It is therefore not much of a stretch to find a “folk devil” in the context of abandonment and infanticide. Mothers who kill are perhaps the Platonic form of Cohen’s folk devil: “visible reminders of what we should not be.”<sup>193</sup> Our outrage is intensified by the sheer callousness of aban-

188. The distillation of moral panic into concrete components underscores that the concept is not simply some vague and elaborate fuss but rather a structured phenomenon that can be “located and measured in a fairly unbiased fashion.” Goode & Ben-Yehuda, *supra* note 174, at 33–38, 41 (identifying five defining characteristics as heightened concern, increased hostility, consensus regarding threat, disproportionality between concern and threat, and inherent volatility).

189. Cohen was interested (some thirty years before Fox News) in the media’s role in amplifying social problems. Several techniques, such as exaggeration and symbolism, see Cohen, *supra* note 173, at 135–37, are readily found in the abandonment context. The phrases “dumpster babies” and “Prom Mom” are often used as shorthand to describe the victims and perpetrators (symbolism). There is also a tendency to highlight gruesome aspects of the cases. See Collom, *supra* note 19; Shana Gruskin, *Disposing of Babies Mirrors National Trend*, Sun-Sentinel (Fla.), Apr. 16, 2001, at A1 (“They’re called porcelain deliveries.”). The media’s role is particularly acute in reporting abandonments. Unlike events that news crews can cover live, infanticides occur secretly and one by one. News reports are the only source of information; we see nothing with our own eyes but headlines.

190. Even the character of Sethe in *Beloved*, perhaps literature’s most admired child killer, who slit her daughter’s throat to prevent the child’s return to slavery, was ostracized by her community. Toni Morrison, *Beloved* (1998). Unlike Sethe, modern mothers, with their array of alternatives, have no claim to noble cause or sympathy.

191. See generally Sanger, *Separating*, *supra* note 23.

192. Consider the case of Andrea Yates, who drowned her five young children in 2002. Despite her serious mental illness (suicide attempt following fourth pregnancy, two psychotic hospitalizations), Yates was charged with capital murder, convicted in three hours, and sentenced to life imprisonment. See Jim Yardley, *Mother Who Drowned 5 Children in Tub Avoids a Death Sentence*, N.Y. Times, Mar. 16, 2002, at A1. But see *Ruling Backs Mother Who Drowned Five*, N.Y. Times, Nov. 10, 2005, at A6 (reporting that Yates’s conviction had been overturned due to false testimony by an expert witness; a new trial is pending). Certain countries, like Great Britain, may have enacted a more sympathetic infanticide statute; the United States has not. See *Infanticide Act, 1938*, 1 & 2 Geo. 6, c. 36, § 1 (Eng.) (creating special category of manslaughter for infanticide).

193. Cohen, *supra* note 173, at 2. For a discussion of the implications of their actual invisibility, see *infra* Part V.B.



donment: the victim entirely helpless, the corpse rudely discarded. The mother's anonymity enhances her status as folk devil. *Someone* in the community has committed a terrible act, but we don't know who she is or what she looks like. We only know that someone this wicked—someone who killed and trashed her newborn—is among us and continues to pass by unnoticed. This is a folk devil of high order indeed.

I turn now from folk devils to the “heightened” response their behavior prompts. Recognizing that collective behavior is hard to quantify, sociologists have employed the concept of disproportionality: If the attention paid to one problem is “vastly greater” than the response to a similar threat, or if the threat itself is exaggerated, the reaction is properly considered disproportionate, prompting further inquiry.<sup>194</sup>

Recall that the number of public infant abandonments (particularly abandonments resulting in death) is a minuscule portion of total live births.<sup>195</sup> Further, public abandonment is dwarfed by the practice of “hospital abandonments”—babies are delivered in hospitals but not taken home, often because the mother has drug problems.<sup>196</sup> While in 1997, 105 babies were left in public places, 30,800 babies were left in hospitals.<sup>197</sup> Neonaticide ranks only fifteenth as a cause of infant *death*.<sup>198</sup> Many higher-ranked causes, such as lack of prenatal care and maternal smoking, are considered amenable to policy interventions, yet do not receive the same level of attention as abandonment. These comparisons—to birth rates, to other forms of abandonment, to other causes of death—are not intended to minimize the significance of harm brought about by public abandonment and infanticide. They do, however, establish a comparative baseline for assessing the magnitude of each problem and the political energies devoted to solving each.<sup>199</sup>

Of course, one could argue that there can never be anything disproportionate about a response to infant death or abandonment; the magnitude of reaction is based on the *nature* of the act, not its frequency. Here I want to be clear: Assessing proportionality does not excuse deviant behavior. It simply suggests the possibility of a perplexing disconnect between act and reaction. Not *all* infant deaths command public attention. Low birth weight deaths are rarely memorialized on billboards or station

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194. Goode & Ben-Yehuda, *supra* note 174, at 43–45.

195. See *supra* note 43 and accompanying text.

196. See Nat'l AIA Res. Ctr., Fact Sheet: Boarder Babies, Abandoned Infants and Discarded Infants 1 (Dec. 2005), available at [http://ist-socrates.berkeley.edu/~aiarc/media/pdf/abandoned\\_infant\\_fact\\_sheet\\_2005.pdf](http://ist-socrates.berkeley.edu/~aiarc/media/pdf/abandoned_infant_fact_sheet_2005.pdf) (on file with the *Columbia Law Review*).

197. *Id.* at 1–2.

198. CDC, Homicide Risk During Infancy, *supra* note 44.

199. Robert Mnookin observed a similar pattern of disproportional response to the relatively few cases of withholding care from severely disabled newborns in hospitals in the 1980s. Robert Mnookin, Two Puzzles, 1984 *Ariz. St. L.J.* 667, 668 (“[T]he scope, breadth, and passion of the political debate seems disproportionate to the dimensions of the policy issue.”).

kiosks;<sup>200</sup> they are not the subject of expedited legislation. Politicians do not appear before cameras proclaiming that if just one premature baby's life is saved, the costs and compromises have all been worth it.

The moral panic framework helps explain this disproportionality by contextualizing the phenomenon. Moral panics emerge in particular places at particular times. Mods and Rockers became symbols of a deviant youth culture because, as Cohen suggested, they touched "the delicate and ambivalent nerves" of post-war Britain.<sup>201</sup> "What everyone had grimly prophesied had come true . . . [T]he emergence of a commercial youth culture 'pandering' to young people's needs, . . . the 'coddling by the Welfare State'—all this had produced its inevitable results."<sup>202</sup>

Infant abandonment also touches a nerve—not about teenage ruffians, but rather about the politically contested practice of abortion.<sup>203</sup> Safe Haven legislation provides a clever conceptual bridge between abandonment and abortion. It announces as a matter of public policy that it is all right to give up your baby and walk away. Worse, it *bribes* mothers to do so by promising them immunity: "Bring your baby in and you can go home. You can even go back to the prom." Implicit in this offer, however, is a powerful moral refrain: "Is this too much to ask? No one is asking the mother to *raise* the baby, just not to destroy it. All she has to do is find a fire station." This is the tone—the double tone—of Safe Haven legislation: "Here's the opportunity but everyone take note: This is how we have to deal with mothers these days. Just how selfish and immoral can these young women be?" Pro-life rhetoric has, however, primed us for the answer. Many Americans now associate immorality, selfishness, and the destruction of babies with abortion. On some level, then, public abandonment and neonaticide sound a familiar chord.<sup>204</sup> The argument that infanticide is the inevitable result of legal abortion is found repeatedly in popular commentary, legislative and legal arguments, as well as in a welter of pro-life websites.<sup>205</sup>

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200. One exception might be public health campaigns against smoking during pregnancy. See, e.g., Ctrs. for Disease Control & Prevention, Smoking During Pregnancy—United States, 1999–2002, 53 *Morbidity & Mortality Wkly. Rep.* 911, 911–15 (2004) ("[The] widespread public health message to abstain from smoking during pregnancy has helped decrease maternal smoking.").

201. Cohen, *supra* note 173, at 161.

202. *Id.*

203. *Id.*

204. Cf. Mnookin, *supra* note 199, at 675–76 (concluding, after assessing firestorm surrounding practice of withholding treatment from severely disabled newborns in 1980s, that key factor was participation by right-to-life groups for whom issue served "important political ends by connecting abortion rights to children's rights").

205. The profusion of blogs and websites by advocates for every cause complicates research on any. Throughout this paper I have declined to support arguments with material posted by individuals.

Consider George Will's 1997 op. ed. piece, *Bummed Out at the Prom*, about Melissa Drexler, who killed her baby in a bathroom stall.<sup>206</sup> Pondering a list of reasons as to how she could ever have done it—a dysfunctional family, a hedonistic society—Will concludes that “foremost among the moral tutors who prepared Ms. Drexler to act as she did is the Supreme Court. By pretending in *Roe v. Wade* not to know when life begins, the court” made possible “today’s abortion culture, with its casual creation and destruction of life.”<sup>207</sup> Consider similarly an amicus brief submitted on behalf of twenty-six members of the House of Representatives in defense of the Partial-Birth Abortion Ban Act of 2003: “The frequency of abortions *throughout pregnancy*, the grotesque and barbaric methods of destruction of children in the womb, and the consequent cheapening of human life in the eyes of society, [are] reflected in the widespread phenomena of ‘dumpster babies’ . . . .”<sup>208</sup>

Connections between abortion and infanticide frequently triangulate through Columbine. As one pro-life activist explained, “[c]hildren are shooting children now. Why? Well, because of abortion. We’re teaching them that they can kill their innocent children.”<sup>209</sup> Another asserted that “[abortion] is really the foundation of it all. . . . I think about that tragedy in Colorado. But what are these kids seeing? They’re seeing these kids give birth to babies and wrapping them in garbage bags and getting rid of them . . . .”<sup>210</sup> On this account, infant bodies in dumpsters are no different from the murders that pro-life advocates proclaim legal abortions to be.<sup>211</sup>

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206. George F. Will, *Op-Ed.*, *Bummed Out at the Prom*, *Wash. Post*, June 15, 1997, at C9.

207. *Id.*

208. Brief for American Center for Law & Justice et al. as Amici Curiae Supporting Defendant-Appellant at 2, *Carhart v. Ashcroft*, sub nom. *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005) (No. 04-3379), available at [http://www.aclj.org/media/pdf/041209\\_Carhart\\_v\\_Ashcroft\\_8th\\_Cir\\_Amicus\\_Brief.pdf](http://www.aclj.org/media/pdf/041209_Carhart_v_Ashcroft_8th_Cir_Amicus_Brief.pdf) (on file with the *Columbia Law Review*) (emphasis added). The brief features the phrase “postnatal life.” *Id.* at 1–3. This is a new linguistic move. Instead of contrasting “prenatal life” with “life,” the term posits a continuum on which all life (unmodified) falls. Birth no longer serves as a bright line event because all life is either “pre-” or “post-” natal.

209. Ziad Munson, *God, Abortion, and Democracy in the Pro-Life Movement*, in *Taking Faith Seriously* 277, 288 (Mary Jo Bane et al. eds., 2005) (internal quotation marks omitted) (describing interview with pro-life activists). A Google search on “abortion and Columbine” produces scores of hits, mostly personal websites which hold abortion directly responsible for the shootings at Columbine and more. See also *Marketing Violence to Children: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 106th Cong. 27 (1999) (statement of Charles J. Cbaput, Archbishop of Denver) (linking Columbine to abortion and calling it a “killing we enshrine as [a] right[ ]”).

210. Munson, *supra* note 209, at 288 (internal quotation marks omitted) (describing interview with pro-life activists).

211. See Human Life Int’l, *Online Catalog, Dumpster Babies* (added Dec. 16, 2004), at [http://www.hli.org/catalog/product\\_info.php?cPatb=22\\_69&products\\_id=444&osCsid=963a5b789fb946cd24ccd28afc517875](http://www.hli.org/catalog/product_info.php?cPatb=22_69&products_id=444&osCsid=963a5b789fb946cd24ccd28afc517875) (on file with the *Columbia Law Review*) (“Graphic photos. Babies found in the trash. Text. Show to those favoring legal abortion.”); see also

I suggest then that the heightened response to infanticide is also about abortion, a practice that is more present, more available, more legal—and therefore, more threatening. Resonances between abortion and unborn life explain why *this* form of infant death and not others, this crime and not others, has sent “editors, bishops, politicians and other right-thinking people”<sup>212</sup> to the Safe Haven barricades.

Does it matter if Safe Haven laws have been enacted in response to a moral panic over abandonment provoked by abortion? After all, the harm to be prevented is infanticide. But as we see from action taken in other contexts, legislation enacted amidst a moral panic often has a shoot-from-the-hip quality. The demand to do *something*—to enact now and ask questions later—may produce solutions that fix little and often make things worse.

Overreaction to the 1980s day care child abuse panic, for example, wrought injustice to those falsely accused,<sup>213</sup> and brought significant changes in the provision of child care, as all providers became wary of physical contact with children.<sup>214</sup> “Zero tolerance policies” (ZTPs) enacted in the aftermath of Columbine offer another example.<sup>215</sup> Fueled by exaggerated parental fears that another Columbine could happen in any school at any time, ZTPs quickly expanded beyond weapon possession. All sorts of teenage behavior—like scuffling or eating a french fry in a Washington Metro station—became grounds for expulsion and arrest.<sup>216</sup> Critics argue that ZTPs disproportionately affect minority youth,<sup>217</sup> encourage a cul-

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Joseph Scheidler, *Closed: 99 Ways to Stop Abortion 183–90* (1985) (recommending use of “documented photos of ‘Abortion Holocaust’”).

212. Cohen, *supra* note 173, at 1.

213. See Mary deYoung, *The Devil Goes to Day Care: McMartin and the Making of a Moral Panic*, 20 *J. Am. Culture* 19 *passim* (1997) (detailing origins and spread of “moral panic” about “satanic day care centers” leading to unjust convictions).

214. *Id.* at 24 (noting that male providers “left the profession in droves,” meaning that primary responsibility for children was once again “placed on the shoulders of low-paid women”).

215. See Ronald Burns & Charles Crawford, *School Shootings, the Media, and Public Fear: Ingredients for a Moral Panic*, 32 *Crime L. & Soc. Change* 147, 162–63 (1999) (“[S]ocial problems should be addressed through broad assessments of each individual situation, not emotionally-charged reactions to isolated incidents.”); see also *Gun-Free Schools Act of 1994*, 20 U.S.C. § 8921(b)(1) (2000) (requiring schools in states receiving federal education funding to expel for at least one year students who carry weapons).

216. See *Hedgepeth v. Wash. Metro. Transit Auth.*, 386 F.3d 1148, 1150 (D.C. Cir. 2004) (describing twelve-year-old girl arrested for eating in Metro station, pursuant to ZTP); Henry A. Giroux, *Zero Tolerance: Creating a Generation of Suspects*, *Tikkun*, Mar./Apr. 2001, at 29, 30–32 (surveying ZTPs nationwide).

217. See Johanna Wald, *The Failure of Zero Tolerance*, *Salon.com*, Aug. 29, 2001, at [http://dir.salon.com/mwt/feature/2001/08/29/zero\\_tolerance/index.html](http://dir.salon.com/mwt/feature/2001/08/29/zero_tolerance/index.html) (on file with the *Columbia Law Review*) (“[Z]ero tolerance has become a convenient tool for disposing of more and more children of increasingly young ages [who are] disproportionately poor and minority . . .”).

ture of fear, and make schools a “conduit to [or adjunct of] the penal system.”<sup>218</sup>

In short, the impulse to do *something*—arrest, expel, fire, fine—impedes considered action. In the context of abandonment, it distracts attention from interventions that may be less politically appealing if perhaps more efficacious.<sup>219</sup> These might include educating adults about neonaticide so that signs of pregnancy concealment might be detected, or encouraging pediatricians to talk to teenagers outside the presence of parents.<sup>220</sup> Safe Haven laws not only obscure these possibilities, but they encourage—indeed, they count on—the disturbing absence of medical care services during pregnancy and labor. I will later suggest additional consequences of the legislation. For now, however, it is enough to note that Safe Haven laws keep the apparent ruthlessness of pregnant women quite dramatically in the public eye. In the politics of abortion, these images work in only one direction.

### III. MEASURING UP

Do Safe Haven laws work? The question is more complicated than may first appear, for it requires defining what counts as “success” in the realm of baby-saving. But if we agree for the moment that Safe Haven laws aspire to prevent, or at least to significantly reduce, fatal infant abandonments, then the early returns have been disappointing. In almost every state, mothers have continued to abandon and to kill newborns in spite of the Safe Haven alternative. Although some babies have been relinquished, the legislation has simply not curtailed the practice of abandonment in the way that supporters had hoped.

I want to explore four reasons why this may be so: inadequate publicity; practical difficulties inherent in Safe Haven relinquishment; doubts about the attractiveness of the terms of the deal; and the possibility of a fundamental disconnect between the incentives offered and the target population—essentially, is anonymous abandonment likely to appeal to women who have been concealing their pregnancies? Before turning to these issues, I want to address the more abstract and contentious matter of measuring success.

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218. Giroux, *supra* note 216, at 32. Information in opposition to zero tolerance school disciplinary policies can be found at End Zero Tolerance, at <http://endzero.tolerance.com> (last visited Jan. 26, 2006).

219. As critics have pointed out, no empirical research or findings demonstrate that anonymous abandonment prevents neonaticide. See Unintended Consequences, *supra* note 72, at 6–7 (describing evidence of efficacy as “inconclusive at best”).

220. See Oberman, *supra* note 12, at 68–69 (detailing “coherent approach to infanticide”).

### A. *Defining Success*

Safe Haven supporters often contend that Safe Haven legislation succeeds if one infant life is saved.<sup>221</sup> On this account, the laws have not failed. Newborns have been left at Safe Havens nationwide: three in Alabama,<sup>222</sup> eighteen in Illinois,<sup>223</sup> three in South Carolina,<sup>224</sup> and so on. Supporters perhaps rightly claim that but for Safe Haven programs these infants would have turned up dead.<sup>225</sup> The problem, however, lies with the verification of “would have.” Like any counterfactual, we simply do not know what the fate of the babies would have been had the laws not been in place. By design, we know almost nothing about the anonymous mothers who relinquish their newborns to Safe Havens: Almost none provide the medical or genealogical data sought,<sup>226</sup> let alone whatever subjective information might be necessary to understand what they “would have done” in the absence of a Safe Haven program. Apart from sparse testimony that suggests the availability of anonymous abandonment would not have mattered,<sup>227</sup> there is no way to know if Safe Haven babies would have been abandoned or killed, been discovered or died, kept by their families or placed for adoption.

Let us assume that some babies brought to Safe Havens would have been illegally abandoned and that some would have died. At first glance, their diversion to a Safe Haven would seem an unambiguously good thing. But before declaring a victory for life-saving, there might be more we need to know. It is unclear, for example, if Safe Havens produce a *net* gain in infant life. For mothers to benefit from the anonymity incentive of Safe Haven laws, they must conceal their pregnancies from conception

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221. See *supra* notes 155–156 and accompanying text.

222. Emily Kern, *Few Mothers Use Safe Haven for Newborns*, Associated Press, Apr. 30, 2005, available at Westlaw, AP Alert File (on file with the *Columbia Law Review*) (noting, however, that twenty-two babies were abandoned illegally in same time frame).

223. *Save Abandoned Babies Found.*, Timeline, *supra* note 140. But see *id.* (noting that seventeen live and twenty dead newborns had been *illegally* abandoned in same time frame).

224. Sula Pettibon, *Poster’s Advice Gives Baby Better Start to Life*, Herald (Rock Hill, S.C.), May 24, 2005, at A1. But see also *id.* (noting that thirteen had been abandoned illegally in same time frame).

225. See, e.g., 325 Ill. Comp. Stat. Ann. 2/5 (West Supp. 2005) (citing Safe Haven as alternative to illegal abandonment that may cause “injury and death to newborn infants”).

226. See 2005 Safely Surrendered Baby Report, *supra* note 63, at 6 (reporting that out of sixty-four babies surrendered, social workers recorded only three completed medical questionnaires and eight with “sparse medical information”).

227. Lorna Collier, *Havens for Abandoned Babies Occupy Tricky Terrain*, Chi. Trib., Feb. 18, 2001, at C1 (stating that teen mother was unlikely to have used program because “[s]he could not have driven anywhere, and she had nobody with her to help her”); see also Hunt, *supra* note 5 (quoting mother who put baby in dumpster: “The law doesn’t work” because it requires both “premeditation and the presence of mind” that unwilling mothers lack); Wen, *supra* note 137 (noting that convicted twenty-one-year-old would probably not have taken advantage of Safe Haven laws because she “barely acknowledges she was pregnant and has only faint memories of the night when she gave birth and then abandoned her son”).

to childbirth, foregoing both prenatal and obstetric care. Lack of prenatal care increases the risk of infant death,<sup>228</sup> and medically unassisted births are recognized as a serious public health problem worldwide.<sup>229</sup> Mothers who labor and deliver alone are rarely qualified to administer even basic medical care to their newborns.<sup>230</sup> Measuring Safe Havens' success by counting infant bodies is therefore complicated by considerations about which bodies are counted and which are not.<sup>231</sup>

Safe Haven laws may impact mortality rates in another respect as well. While always an attractive political choice, they may divert resources and attention from other means of addressing neonaticide, or from other more common causes of infant mortality, such as low birth weight, which may be more difficult or costly to solve and therefore have less political payoff.<sup>232</sup> My point is not to advance one prevention effort over another

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228. Kochanek, *supra* note 28, at 13 (correlating absence of prenatal care to infant mortality).

229. See World Health Org., *The World Health Report 2005—Make Every Mother and Child Count* 61–65 (2005), available at [http://www.who.int/whr/2005/whr2005\\_en.pdf](http://www.who.int/whr/2005/whr2005_en.pdf) (on file with the *Columbia Law Review*). I distinguish “unassisted births” from “home births.” The latter refers to low-tech or no-tech births chosen and prepared for by highly motivated women who can call upon a full array of medical care should anything go awry. See Am. Pregnancy Ass’n, *Home Birth*, at <http://www.americanpregnancy.org/labornbirth/homebirth.html> (last visited Jan. 26, 2006) (on file with the *Columbia Law Review*) (reporting that home births are increasingly popular alternative for low-risk women with reasonably healthy pregnancies).

230. See Julia C. Mead, *Saving Newborns, or Not*, *N.Y. Times*, Mar. 27, 2005, § 14, at 1 (reporting on skill required to resuscitate newborn whose airways need to be cleared). The question of whether a newborn was stillborn, died during delivery, or died later arises repeatedly in prosecutions of neonaticides. See Lita Linzer Schwartz & Natalie K. Isser, *Neonaticide: An Appropriate Application for Therapeutic Jurisprudence?*, 19 *Behav. Sci. & L.* 703, 708 (2001) (describing details of court cases addressing “[t]he problem of determining whether the baby was [born] alive”); see also Erik K. Mitchell & Joseph H. Davis, *Spontaneous Birth into Toilets*, 29 *J. Forensic Sci.* 591, 591 (1984) (“Especially before the time of legalized abortion, but even in the modern day, unattended neonatal deaths have carried with them attendant suspicions of infanticide.”). A mother’s failure to have planned for the baby’s arrival is also sometimes used as evidence that the infant was killed. See Carson Walker, *Prosecution: Baby in Dump Alive at Birth*, *Aberdeen Am. News*, Nov. 15, 2005, at A9 (noting prosecutor’s argument that fact that mother had not bought “crib, clothing, bottles, diapers, toys or other supplies” indicated that mother had “zero intent that her baby boy would survive the bathroom” (quoting prosecutors’ court filing)). This mirrors the historical “defense of linen” used in infanticide cases to show the mother had prepared bedding and clothing during pregnancy and therefore expected to care for her newborn. See Hoffer & Hull, *supra* note 41, at 68–69 (describing acquittal of five women who “pleaded benefit-of-linen”).

231. Harm to infants stands apart from the harms to maternal life and health that result from medically unassisted births. Police are often alerted to a possible abandonment when a bleeding postpartum mother arrives at an emergency room with no baby. See, e.g., Lou Michel, *Mother Charged with Murder in Infant’s Death*, *Buffalo News*, Mar. 16, 2003, at C3.

232. There is a rich literature on cost-benefit analyses of legislation, risk reduction, and death. See, e.g., W. Kip Viscusi, *Risk by Choice* 93–97 (1983); Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 *Yale L.J.* 1981, 2068 (1998) (arguing that allocations necessarily reflect “contestable choices about values”).

but simply to recognize that the legislative preference for one is likely to impact attention and expenditure on another. In sum, there is a complicated relationship between numbers of babies saved and Safe Havens' success. The calculation seems straightforward if we use an infant roll call, but becomes more difficult—and success much less certain—when the number of “saved babies” is balanced against harm to other babies that the scheme may bring about.

There are, of course, other indices of success. Safe Haven laws might be understood as being essentially symbolic in nature<sup>233</sup>—their enactment vindicating the power of a particular interest group, whether or not the laws accomplish very much in fact. Yet the symbolic legislation analysis doesn't quite work. In most states there was little struggle over enactment; everyone lined up in support.<sup>234</sup> Similarly, Safe Haven laws might be understood as essentially *expressive* in nature: The public commitment to infant life is itself a satisfactory outcome. On this account, Safe Haven laws are more like resolutions from the Berkeley City Council declaring Berkeley a nuclear-free zone<sup>235</sup> as a statement of principle, however ineffective the gesture for actual fallout. But this too seems wrong. Whatever their inherent expressive value, Safe Haven laws are meant to influence maternal behavior. Legislators expect results: Sunset clauses<sup>236</sup> and detailed implementation schemes<sup>237</sup> indicate that the laws were not enacted as mere gestures toward lifesaving but as the real thing.

In evaluating whether or not Safe Haven laws succeed on their own terms—whether they prevent harm to newborns through the mechanism of anonymous abandonment—I have set aside the question of whether Safe Haven laws should have *different* terms. Child welfare experts have compared anonymous abandonment with adoption, and concluded that the Safe Haven scheme works to the disadvantage of almost everyone involved: the child who goes through life without the possibility of discovering its origins, the birth mother who is provided neither counseling nor time for reflection, and the birth father who may know nothing about the child or its placement.<sup>238</sup>

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233. See Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* 7–11, 166–67 (2d ed. 1986) (arguing that although prohibition may not have significantly reduced alcohol consumption, its true success was in vindicating continued political vitality of Protestant movement).

234. See *supra* note 116 and accompanying text.

235. Berkeley, Cal., Municipal Code § 12.90 (effective 1986), available at [http://www.ci.berkeley.ca.us/bmc/berkeley\\_municipal\\_code/Title\\_12/90/index.html](http://www.ci.berkeley.ca.us/bmc/berkeley_municipal_code/Title_12/90/index.html) (on file with the *Columbia Law Review*).

236. See, e.g., Cal. Penal Code § 271.5(d) (West Supp. 2005) (setting repeal date at January 1, 2006, unless extended by statutory enactment); 325 Ill. Comp. Stat. Ann. 2/75 (West Supp. 2005) (setting repeal date at July 1, 2007).

237. See, e.g., Cal. Health & Safety Code § 1255.7 (West Supp. 2005) (specifying location of sites, providing for statewide logo, creating ankle bracelet identification system, and detailing procedure for processing abandoned infants).

238. See *Unintended Consequences*, *supra* note 72, at 7–8.



Another, very different, critique argues not that legalized abandonment is *bad* for those who choose it but that it is too good. By providing impunity for the predictable consequences of promiscuous sex, the legislation encourages both immorality *and* irresponsibility.<sup>239</sup> Young women who might have raised their babies with the help of families or the state are enticed to do what they would not have done otherwise and are simply let off the moral, financial, and legal hook. Different constituencies have sought to revise or rescind Safe Haven legislation on these various grounds. My purpose here, however, is not to improve Safe Haven laws but to consider their operation and effect. And it is clear from reports around the country that although some babies are turned in, many are still abandoned or killed. I therefore turn to the task of explaining why this might be, beginning with the problem of publicity.

### B. *Publicity*

Unless pregnant women are aware of the Safe Haven possibility, the enterprise is unlikely to attract many takers. A few states recognized this from the start and included statutory directives for publicity, and sometimes for funding as well.<sup>240</sup> Most, however, enacted the legislation without formal attention to how women who might use it would find out about it. This was not always through inadvertence; many legislatures understood the relation between Safe Haven funding and Safe Haven use.<sup>241</sup> But enactment is more likely when a bill is “resource-free.” In Ohio, for example, the fiscal impact of proposed Safe Haven legislation was assessed at essentially zero.<sup>242</sup>

As postenactment reports of illegal abandonments continued, officials uniformly diagnosed the cause as a problem of publicity.<sup>243</sup> In re-

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239. See *supra* notes 149–151, 161–163 and accompanying text.

240. See, e.g., N.J. Stat. Ann. § 30:4C-15.9 (West Supp. 2005); Or. Rev. Stat. § 418.018 (2003) (authorizing private fundraising).

241. See Letter from John A. Johnson, Comm’r of N.Y. State Office of Children & Family Servs., to James M. McGuire, Counsel to the Governor (July 14, 2000) (on file with the *Columbia Law Review*) (“OCFS notes that there is no appropriation to cover the cost of [the required public information program], which will impact on this agency’s ability to effectively publicize [the Act].”). Even Dear Abby advised her readers to lobby their legislators for Safe Haven financing. See van Buren, *supra* note 134.

242. See Ohio Legislative Budget Office, Fiscal Note & Local Impact Statement, H.R. 123-660, Reg. Sess. (2000), available at <http://www.lbo.state.oh.us/123ga/fiscalnotes/123ga/HB0660H2.HTM> (on file with the *Columbia Law Review*) (stating that adding Safe Haven information to preexisting print materials could be done with “negligible increase in” cost). But see N.J. Stat. Ann. § 30:4C-15.5 note (Assembly Appropriations Committee Statement) (discussing fiscal impact and appropriating “\$500,000 to the Department of Human Services to establish the educational and public information program and a 24 hour, toll free hotline”).

243. See, e.g., Liz Austin, *Baby Moses’ Laws Slow to Succeed: Lack of Publicity Hampers Effort to Save Unwanted Infants*, Wash. Post, Apr. 11, 2004, at A3; Elizabeth Bell, *New Law Saving Unwanted Babies*, S.F. Chron., Aug. 6, 2001, at A15; Nick Coleman, *Desperate Mothers, Tragic Outcomes: Program to Save Abandoned Newborns Struggles to*

sponse, states enlisted the media to run supportive editorials,<sup>244</sup> collaborated with private organizations<sup>245</sup> to fund or produce publicity,<sup>246</sup> and in some instances, increased public funding.<sup>247</sup>

The resulting publicity has taken a variety of shapes. There are now television and radio spots,<sup>248</sup> telephone hotlines (1-800-CHILDREN in Louisiana), billboards,<sup>249</sup> posters outside hospitals and on public transportation,<sup>250</sup> and statewide Safe Haven Weeks.<sup>251</sup> California includes information about Safe Havens in its sex education curricula.<sup>252</sup> Continuing media coverage of the bodies and burials, arrests and convictions, relinquishments and happy follow-up stories also keep the phenomenon of abandonment and the availability of Safe Havens squarely in the public view.

The publicity materials typically feature pictures of pretty young women looking pensive or wide-eyed babies looking adorable.<sup>253</sup> Most are pitched to speak to the heart of teenage terror over an unplanned preg-

Make Its Message Heard, *Star Trib.* (Minneapolis), Dec. 10, 2003, at 2B; Melanie Markley, A Saving Grace for Babies: But Many Mothers Unaware of Safe-Abandonment Law, *Houston Chron.*, June 28, 2004, at A11; Meena Thiruvengadam, Baby Law Has Limited Effect, *Post-Crescent* (Wis.), Apr. 12, 2004, at 1A.

244. See, e.g., van Buren, *supra* note 134.

245. See, e.g., Save Abandoned Babies Found., About Us, *supra* note 138.

246. See, e.g., Press Release, N.J. Dep't of Human Servs., Human Services Grants to Protect Babies (Oct. 7, 2005), available at <http://www.state.nj.us/humanservices/Press-2005/protectbabies.htm> (on file with the *Columbia Law Review*).

247. See, e.g., Press Release, N.J. Dep't of Human Servs., Commissioner Davy Announces \$150,000 in Funding to Save Babies (July 6, 2005), available at <http://www.state.nj.us/humanservices/Press-2005/safeHaven.htm> (on file with the *Columbia Law Review*).

248. Claudia Cowan, Confessed Baby-Killer Could Become California Pitchwoman, *Fox News*, June 1, 2002, at <http://www.foxnews.com/story/0,2933,54190,00.html> (on file with the *Columbia Law Review*) (reporting that mother who smothered her newborn was offered reduced sentence in exchange for making public service announcements for Safe Haven law).

249. See Annette R. Appell, Safe Havens to Abandon Babies, Part III: The Effects, 6 *Adoption Q.* 67, 68 (2002) [hereinafter Appell, Part III].

250. See Annette R. Appell, Safe Havens to Abandon Babies, Part II: The Fit, 6 *Adoption Q.* 61, 65 (2002) ("New Jersey . . . publicize[s] safe haven relinquishments using such media as billboards, television and radio, bus posters, and movie theaters . . .").

251. See, e.g., N.C. Office of the Governor, Proclamation, Safe Haven Week (Mar. 31, 2005), at [http://www.governor.state.nc.us/Proclamation\\_FullStory.asp?id=1943](http://www.governor.state.nc.us/Proclamation_FullStory.asp?id=1943) (on file with the *Columbia Law Review*) (stating that proclamation follows two postenactment cases of abandoned newborns).

252. Cal. Educ. Code § 51933(b)(12) (West Supp. 2005). Evidence from North Carolina, however, indicates that not all neonaticidal or abandoning mothers are teenagers. See Herman-Giddens et al., *supra* note 43, at 1427 tbl.3 (noting, in study of thirty-four abandoned or killed newborns, that over thirty percent of acts were committed by women over age of twenty). This data suggests that publicity more meaningful to older women may also be in order.

253. The New York flyer features a photo of a thirty-something pregnant woman in a leotard who looks like she has just come from her yoga class. See N.Y. State Office of Children & Family Servs., New York Safe Haven Flyer (Jan. 2005), available at <http://www>.

nancy and dread at being found out. “Are you pregnant . . . scared . . . alone?”<sup>254</sup> “Is Your Situation Hopeless?”<sup>255</sup> The pamphlets offer a reassuring response—“There is hope . . . for you *and* your baby!”<sup>256</sup>—and advise her just what to do. “If you’re thinking about abandoning your baby, please don’t do it.”<sup>257</sup> “Don’t throw your baby away. There is a safe place for unwanted newborns.”<sup>258</sup>

The materials vary in approach. Some frame Safe Haven surrender as an act of good mothering, the right thing to do for the baby’s sake. Mothers are reassured they “will have the comfort of knowing their baby will remain in safe hands,”<sup>259</sup> and follow-up news stories on adoption often emphasize the mother’s sacrifice.<sup>260</sup> Other advertisements are more aggressive. South Carolina juxtaposes two images, a bassinet (“You wouldn’t dump your trash here”) and a trash bin (“Don’t Dump Your Baby Here”).<sup>261</sup>

ocfs.state.ny.us/main/publications/Pub4745(AbandInfant).pdf (on file with the *Columbia Law Review*) [hereinafter N.Y. Flyer].

254. *Id.*

255. Ill. Dep’t of Children & Family Servs., Illinois Safe Haven Flyer, available at <http://www.state.il.us/DCFS/docs/abanposr.pdf> (last visited March 8, 2006) (on file with the *Columbia Law Review*) [hereinafter Ill. Flyer].

256. N.Y. Flyer, *supra* note 253.

257. Open Arms, Open Arms Brochure, at <http://www.unitedwaysatx.org/Graphics/2004%20Campaign/Open-Arms-BrochureI.jpg> (last visited Jan. 27, 2006) (on file with the *Columbia Law Review*).

258. La. Dep’t of Soc. Servs., Louisiana Safe Haven Flyer, available at [http://www.dss.state.la.us/Documents/OCS/poster\\_2.pdf](http://www.dss.state.la.us/Documents/OCS/poster_2.pdf) (last visited Mar. 8, 2006) (on file with the *Columbia Law Review*); see also Ill. Flyer, *supra* note 255 (“You will not be breaking any laws.”).

259. Cal. Dep’t of Soc. Servs., Safely Surrendered Baby Campaign FAQ, available at <http://www.babysafe.ca.gov/res/pdf/SSBCampaign.pdf> (last visited Mar. 8, 2006) (on file with the *Columbia Law Review*).

260. See, e.g., Family Shows How Baby Law Works, *Billings Gazette* (Mont.), Mar. 3, 2005, available at <http://www.billingsgazette.com/index/php?id=1&display=rednews/2005/03/03/build/state/35-baby-law.inc> (on file with the *Columbia Law Review*).

“I think of his birth mom as my hero,” [adoptive mother] Pam said, wiping tears from her eyes. “It was a huge sacrifice for her. She really gave him the best thing. I kind of hope she can read the story. I want her to see the redemptive side of her pain . . . that there’s a happy ending.”

*Id.*

261. Pettibon, *supra* note 224. Posters produced by the Save Abandoned Babies Foundation in Illinois feature a color close-up of a toilet stall. Save Abandoned Babies Found., Toilet Poster, available at [http://www.saveabandonedbabies.org/downloads/sab\\_ad2.pdf](http://www.saveabandonedbabies.org/downloads/sab_ad2.pdf) (last visited Mar. 6, 2006) (on file with the *Columbia Law Review*) (“Even More Upsetting Than How Many Babies Are Born Here Is How Many Die Here.”). Another features a dumpster. Save Abandoned Babies Found., Dumpster Poster, available at [http://www.saveabandonedbabies.org/downloads/sab\\_ad1.pdf](http://www.saveabandonedbabies.org/downloads/sab_ad1.pdf) (last visited Mar. 6, 2006) (on file with the *Columbia Law Review*) (“It Smells. It’s Dirty. And Unfortunately, It’s Where Some Women Leave Their Babies.”). These posters seem designed to vilify rather than attract would-be users.

However, it appears that even states with developed publicity efforts continue to experience disturbing rates of infant abandonment. Annette Appell observes, for example, that

New Jersey, which appears to have one of the best safe haven public relation campaigns . . . has had at least half as many babies abandoned in unsafe places as have been relinquished in safe havens. Ironically, one of those babies was abandoned in full view of a billboard advertising safe havens.<sup>262</sup>

### C. *Logistics*

Acting on a Safe Haven decision may not be as easy as the publicity posters suggest. How does a mother get from the locked bathroom in her parents' house to the Safe Haven without being seen or without the infant being heard? Does she take a bus or subway or borrow the family car? What does she use to transport the baby? Gym bags and backpacks sometimes feature in abandonment stories and while they may seem terribly off-hand, these are the kinds of containers teenagers have.<sup>263</sup>

Certainly, some mothers are able to negotiate the trip—babies are, after all, brought to Safe Havens. But there are indications that the period after childbirth may be particularly, sometimes fatally, problematic. One immediate problem is the mother's postpartum fatigue. In a New Hampshire case, a teenage mother delivered a baby in her bedroom, wrapped it in a towel, put it under her bed, and fell asleep. By the time she awoke, the baby was dead.<sup>264</sup>

A few states have taken account of these risks of delay by facilitating the baby's transfer. As we have seen, New York provides that an infant can be left "with an appropriate person or in a suitable location."<sup>265</sup> In Louisiana, the mother can call 911.<sup>266</sup> These sorts of arrangements may make the process safer, especially if the mother has made a plan ahead of time, keeps her wits about her at the time of birth, and is not going into the process entirely alone. In most states, however, there is little that makes implementing a Safe Haven decision particularly manageable. Its successful use may therefore be a matter of luck.

### D. *Terms*

A third reason women may not turn to Safe Havens concerns the statutory fine print. In a number of states it turns out that "No Blame" does not quite mean "No Arrest" but rather "Arrest with Affirmative De-

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262. Appell, Part III, *supra* note 249, at 68 (citations omitted) (noting also that Florida and Louisiana have experienced similar problems).

263. Damien Cave, In New Jersey, Girl, 15, Put Newborn in Trash, Police Say, *N.Y. Times*, Jan. 8, 2006, § 1, at 22 (describing baby found in knapsack).

264. Nancy Meersman, *Canaan Teen Charley Cobb Violates Parole, Sent to Prison, Union Leader* (Manchester, N.H.), July 20, 2000, at A1.

265. N.Y. Penal Law § 260.15(2) (McKinney Supp. 2005).

266. La. Child. Code Ann. art. II51 (2004).

fense.”<sup>267</sup> For pregnant readers who understand the legal concept, the assurance is hardly consoling. Concerned that a good defense may not be the best offense, some state statutes provide full immunity to mothers complying with safe harbor provisions.<sup>268</sup>

Anonymity also poses problems. Despite promised protections, sometimes the mother’s name *is* revealed, exposing her to the very publicity that she sought to avoid. This may come about because people talk even when the law says they should not, or because the media publishes an accumulation of nonidentifying details. In a Texas case, local papers reported the date of the baby’s birth, the baby’s weight, the location of the fire station that took her, the mother’s approximate age, and the fact that the mother had two other children, ages six and seven.<sup>269</sup> When the mother showed up for a hearing, she was greeted by television cameras.<sup>270</sup> The subheadline in the *Houston Chronicle* seemed to get it right: *Public Exposure of Parents Could Undermine Baby Moses Law, Lawmaker Says*.<sup>271</sup> Despite the risk of inadvertent disclosure, only a few states have imposed confidentiality requirements on Safe Haven providers.<sup>272</sup>

The duration of anonymity is another problem. While no questions can be asked while the mother is present at the Safe Haven, in some localities, the guarantee does not last much longer than that. Not all Safe Haven statutes (and not all judges who apply them) accept relinquishment as conclusive proof that a mother has intended to terminate her parental rights. In at least one case in Texas, state officials located the birth mother and required her to appear before a family court judge to confirm that her consent was voluntary.<sup>273</sup> In Massachusetts, Department of Social Services workers may use reasonable efforts to locate mothers and then “gather as much identifying information on the infant’s

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267. See, e.g., N.Y. Penal Law § 260.15(2) (characterizing compliance with Safe Haven law as “affirmative defense” to crime of “[e]ndangering the welfare of a child,” id. § 260.10).

268. See, e.g., Cal. Penal Code § 271.5 (West Supp. 2005) (“No parent or other individual having lawful custody of a minor child 72 hours old or younger may be prosecuted for [child abandonment] if he or she voluntarily surrenders physical custody of the child to personnel on duty at a safe-surrender site.”); 325 Ill. Comp. Stat. Ann. 2/25(a) (West Supp. 2005) (“The act of relinquishing a newborn infant . . . in accordance with this Act does not, by itself, constitute a basis for a finding of abuse, neglect, or abandonment of the infant . . .”).

269. See S.K. Bardwell, *Mom Leaves Baby Girl at Fire Station*, *Houston Chron.*, Mar. 2, 2005, at B5.

270. Melanie Markley, *Law’s Author Says Anonymity Is Key*, *Houston Chron.*, Mar. 11, 2005, at B1.

271. *Id.*

272. See *supra* note 100 and accompanying text.

273. See *Baby Moses: Tracking Down Mothers Who Abandon Babies Under the ‘Baby Moses’ Statute Risks Discouraging Others from Leaving Unwanted Infants in Safe Places*, *Houston Chron.*, Mar. 15, 2005, at B8 (describing how Child Protective Services tracked down relinquishing mother who wished to remain anonymous, sought to interview father, and “hauled [the mother] before a family court judge to respond to questions about why she left her daughter”).

mother, father and kin” as necessary to determine whether the relinquishment was intended to be permanent.<sup>274</sup>

#### E. *Neonaticidal Mothers*

The concerns just highlighted—publicity, practical complexities, and questionable guarantees of anonymity and immunity—assume that potential Safe Haven mothers will be aware of, understand, and consider the benefits of the scheme. But it is uncertain whether this category of pregnant women will give these benefits much thought, if they are thinking clearly at all. This leads to the fourth deficiency. Social science research on neonaticide indicates that there is a conceptual disjuncture between what is known about the characteristics of women who kill newborns at birth and the more contemplative model of maternal decisionmaking imagined by the legislation.

In an important study of thirty-seven cases of neonaticide, Cheryl L. Meyer and Michelle Oberman sketch a portrait of mothers who kill newborns.<sup>275</sup> The authors found that the average age was nineteen, all but one were single, and most were no longer involved with the infant’s father.<sup>276</sup> All of the mothers had concealed their pregnancies, received no prenatal care, and delivered the babies secretly in their own homes.<sup>277</sup> This profile—unmarried young women, living at home, concealing their pregnancies—is consistent throughout the literature on neonaticide.<sup>278</sup> Because this last feature, concealment, distinguishes neonaticide from all other forms of infanticide, it is therefore crucial to understand how pregnancy concealment operates. How is it that the families, friends, teachers, and neighbors of pregnant women do not notice that their daughter, classmate, or student is not only pregnant but about to give birth?

The most consistent explanation involves the phenomenon of clinical “denial,” a concept distinct from, though related to, the more casual use of the term. Almost everyone has been accused of being “in denial” about something, and because the term is used so often to describe friends and relatives who do not kill anyone, its application for something as seemingly undeniable as pregnancy or death is often regarded with skepticism.<sup>279</sup> Clinical denial is defined as “behavior that in-

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274. Mass. Dep’t of Soc. Servs., Safe Haven Act of 2004: Frequently Asked Questions for Safe Havens (Oct. 28, 2004), available at <http://www.masschiefs.org/hottopics/hotpdfs/SafeHavenFAQforsites.doc> (on file with the *Columbia Law Review*).

275. Cheryl L. Meyer & Michelle Oberman, *Mothers Who Kill Their Children* 47–50 (2001) (discussing features of thirty-seven cases of neonaticide from 1990 to 1999).

276. *Id.* at 47–48.

277. *Id.* at 48–49.

278. See, e.g., Margaret G. Spinelli, Neonaticide: A Systematic Investigation of 17 Cases, in *Infanticide: Psychosocial and Legal Perspectives on Mothers Who Kill* 105, 106–07 (Margaret G. Spinelli ed., 2003) [hereinafter Spinelli, *Infanticide*] (describing forensic psychiatric exams conducted on seventeen neonaticidal mothers).

279. In a recent novel about infant abandonment, an Amish teenager conceals her pregnancy, delivers in a barn, and is arrested for murder after her baby is found dead in a

dicates a failure to accept either an obvious fact or its significance,”<sup>280</sup> and this is exactly how some young women experience pregnancy.

Experts explain that pregnancy denial falls along a spectrum of severity.<sup>281</sup> The most benign, and perhaps the most familiar, is affective denial: Women acknowledge intellectually that they are pregnant but “continue to think, feel, and behave as though they were not pregnant.”<sup>282</sup> This form of denial is often short-lived.<sup>283</sup> It permits a useful, temporary distancing from the fact of pregnancy as women get used to the idea, and accept, embrace, or otherwise deal with their circumstance.

A more sustained version is pervasive denial, in which the behavior extends to the very fact of pregnancy.<sup>284</sup> The pregnancy may have been fleetingly recognized, but it remains outside conscious awareness. Women in pervasive pregnancy denial have fewer physical symptoms: They tend not to gain weight and may continue to bleed monthly.<sup>285</sup> This explains, at least in some cases, how people fail to notice that an intimate within their midst is increasingly pregnant. The case study of “Julie,” an academically accomplished college student convicted of murdering her infant, captures the dynamic.<sup>286</sup> Because revelation of the pregnancy would have been “disastrous knowledge for Julie and her mother,” the pregnancy became “unknowable to her”: “[H]er body and mind cooperated in keeping Julie from consciously recognizing that she was pregnant.”<sup>287</sup>

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haystack. Jodi Picoult, *Plain Truth* (2000). The girl displays all the classic characteristics of a neonatal mother: young, unmarried, living at home with parents, pregnancy concealed and denied, and amnesic at time of birth. *Id.* It is interesting that to portray the mother sympathetically (or as anything but a liar), Picoult makes her Amish, disrupting the reader’s instinctual skepticism about the denial story.

280. Laura J. Miller, *Denial of Pregnancy*, in Spinelli, *Infanticide*, supra note 278, at 81, 82 (internal quotation marks omitted) (quoting Yu-Mei Yu Chao, *Denial in Primigravida Whose Pregnancy Terminated with Hydatidiform Mole*, 1 *Maternal-Child Nursing J.* 243, 243 (1973)).

281. See *id.* at 82–86 (describing affective, pervasive, and psychotic denial).

282. *Id.* at 83. Because many readers will have experienced brief versions of affective denial around pregnancy (“It’s just indigestion,” “My period is late”), I suspect this form of denial may not sound unusual or far-fetched.

283. *Id.* (noting that “transient feelings of indifference [or] detachment” are normal).

284. *Id.* at 84–85.

285. *Id.* at 84; see also C. Brezinka et al., *Denial of Pregnancy: Obstetrical Aspects*, 15 *J. Psychosomatic Obstetrics & Gynecology* 1, 1–8 (1994) (describing study of twenty-seven women who “professed they did not know they were pregnant until term or until premature contractions set in”).

286. See *How Could Anyone Do That? A Therapist’s Struggle with Countertransference [hereinafter How Could Anyone Do That?]*, in Spinelli, *Infanticide*, supra note 278, at 201, 202–08 (presenting case study of pregnant twenty-one-year-old whose clothing size never changed and who believed she was menstruating throughout her pregnancy).

287. *Id.* at 205.

Because women in pervasive denial do not believe they are pregnant, they seek no prenatal care and make no preparations for childbirth or subsequent parenting. This distancing from the fetus results in the “complete absence of any healthy psychological and physical bonds between the mother and the child.”<sup>288</sup> Indeed, the effects of denial can extend into childbirth itself. Some women are taken by surprise when they go into labor, often anticipating a bowel movement.<sup>289</sup> Depersonalization (“I am not having a baby”) explains the dulling or absence of pain that make it possible to give birth in silence, often with family members nearby.<sup>290</sup>

Denial at childbirth may produce more devastating results. Researchers suggest that the sight of the infant, who seems to have come from nowhere, reinstates the intolerable reality that had been obscured during pregnancy.<sup>291</sup> This in turn produces a brief disassociative state, “in which the overwhelming shock of a denied and disastrous pregnancy cause[s] a temporary loss of reality testing,”<sup>292</sup> and this is when newborns die. While some may be born dead, others drown as a result of being delivered into a toilet<sup>293</sup> or from skull fractures after dropping onto the floor during birth.<sup>294</sup> Some die from complications of childbirth: a constricting umbilical cord or airways not cleared skillfully or perhaps at all.<sup>295</sup> Some of these deaths result from medical inexperience or from passive neglect; the mother does nothing when something was required.<sup>296</sup> But many infants are actively killed—smothered or suffocated, strangled or stabbed, even though the mother may have no memory of the killing.<sup>297</sup>

In Part VI, I discuss *why* some women might experience pregnancy denial. For now, however, I accept the phenomenon and focus only on its significance for the success of Safe Haven laws. If the central charac-

288. Meyer & Oberman, *supra* note 275, at 54. A third category is psychotic denial, in which the denial of pregnancy becomes delusional. Women in this category, often mentally ill prior to their pregnancy, do not necessarily hide their pregnancies, but they have other explanations (i.e., cancer, indigestion) for the bodily changes they experience. See Miller, *supra* note 280, at 85–86; Robert I. Slayton & Paul H. Soloff, Psychotic Denial of Third-Trimester Pregnancy, 42 *J. Clinical Psychiatry* 417, 417–72 (1981).

289. Miller, *supra* note 280, at 85.

290. See Spinelli, Neonaticide, *supra* note 278, at 109 (reasoning that “[d]epersonalization accounts for the unusually low level of pain” in study).

291. *Id.* at 114.

292. See How Could Anyone Do That, *supra* note 286, at 202.

293. C.M. Green & S.V. Manohar, Neonaticide and Hysterical Denial of Pregnancy, 156 *Brit. J. Psychiatry* 121, 122 (1990).

294. R.J. Kellett, Infanticide and Child Destruction—the Historical, Legal and Pathological Aspects, 53 *Forensic Sci. Int'l* 1, 18 (1992).

295. *Id.*

296. *Id.* at 23 (characterizing cause of death as “inattention at birth”).

297. Margaret G. Spinelli, Neonaticide: A Systematic Investigation of 17 Cases, in Spinelli, *Infanticide*, *supra* note 278, at 105, 109–10 (noting that, in case study of seventeen neonaticidal women, fourteen “experienced amnesia for various aspects of the birth,” and afterwards “could not account for the dead infant”).



teristic of denial is the belief that one is not pregnant, messages targeted to this category of women may fail to register. These women may not comprehend that pamphlets and radio spots touting Safe Havens have anything to do with them. Pregnancy is the very thing they have convinced themselves to reject.

Although Safe Haven laws are organized around the premise of concealment, legislators stop short of connecting concealment with denial. They count on a rational actor, however much they concede her desperation. But many mothers who conceal their pregnancies are not acting rationally at the moment of childbirth. They may not have planned to kill their babies; many appear to have had no plan other than to return to their regular lives as soon as the baby has disappeared.<sup>298</sup>

This is not to say that the availability of Safe Havens has *no* effect on how young women (or their relatives or friends) respond to unwanted pregnancy. Publicity campaigns urging relinquishment may provide pregnant women (or women in general) with all sorts of useful information. Women may learn that unwanted pregnancy is neither unspeakable nor the end of the world, that other women are in the same boat, that a network of adults and other professionals has thought a lot about the problem, and that caring substitute parents are available. Pregnant women and girls may come to understand that one does not have to keep—and certainly one does not have to *kill*—an unwanted baby. As a result, women may investigate alternatives, talk to *someone*, vow (and perhaps take action) never to get in this fix again or in the first place. In this oblique way, Safe Haven publicity may work to break through or dissipate pregnancy denial. Safe Haven campaigns also alert families, classmates, and co-workers that concealed pregnancy is a real phenomenon dangerously linked to neonaticide. This may in turn prompt greater sensitivity and intervention when a friend or daughter's appearance or behavior suggests that something is awry.<sup>299</sup>

But if we take seriously what is known about neonaticidal mothers, Safe Haven intervention comes too late in the game. If the well-being of infants and their mothers is the goal, it seems necessary to take a different measure of the problem.

#### IV. THE CULTURE OF LIFE

In many respects, Safe Haven laws are peculiar pieces of lawmaking. They attempt to regulate a complex psychological phenomenon, but without much attention to relevant behavioral research. They extend a

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298. See Jennifer 8. Lee, *After Her Baby Dies, Girl Only Wants School*, N.Y. Times, Jan. 26, 2005, at B8 (describing how teenager brought her dead baby to hospital on her way to school).

299. Even strangers may advise new mothers. A South Carolina couple who had seen a Safe Haven poster were later stopped by a young woman trying to give them her newborn. They told her about "Daniel's Law" and waited with her until a Safe Haven provider arrived and took the baby. Pettibon, *supra* note 224.

kind hand to women traditionally viewed most unsympathetically, bargaining with them not to cross over into criminality. They do not seem to work very well, yet lawmakers frequently choose to increase funding rather than reconsider the legislation. Given these oddities, how are we to understand their vitality? Are they well-intended, if rushed, responses to a disturbing social phenomenon, or do they fit more coherently into a larger political picture?

I argue that Safe Haven laws are not quite the legislative outlier that they first appear, but rather that they play a beguiling role in the culture of life—a vigorous political program organized around the immorality and inherent criminality of abortion. To fully comprehend Safe Haven legislation's significance in this scheme, it is necessary to understand how the culture of life has transformed opposition to abortion from a single issue campaign into a more encompassing movement. This Part examines why the culture of life works so well to advance the anti-abortion agenda and how its rhetorical value has been captured politically. I then look more specifically at the role Safe Haven laws play in the culture of life: how they advance its goals by providing a vivid cautionary tale regarding the wages of abortion.

#### A. *Origins of the Culture of Life*

The culture of life has been a brilliant addition to the rhetoric of abortion politics. The phrase was formally introduced by Pope John Paul II in his 1995 papal encyclical *Evangelium Vitae*, or the *Gospel of Life*.<sup>300</sup> The Pope explained that the modern world is facing “an enormous and dramatic clash between good and evil, death and life, the ‘culture of death’ and the ‘culture of life.’”<sup>301</sup> He defined the culture of life as “unconditional respect for the right to life of every innocent person—from conception to natural death,”<sup>302</sup> marked by the “inescapable responsibility of choosing to be unconditionally pro-life.”<sup>303</sup> In contrast, the culture of death is “a veritable structure of sin.”<sup>304</sup> It encompasses all activity that kills or threatens to kill human life, including arms trading, tampering with the ecological balance,<sup>305</sup> capital punishment unless absolutely necessary,<sup>306</sup> but above all, the practice of abortion. “Among all the crimes

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300. Pope John Paul II, *Evangelium Vitae*: Encyclical Letter on the Value and Inviolability of Human Life para. 21, Mar. 25, 1995, available at [http://www.newadvent.org/library/docs\\_jp02ev.htm](http://www.newadvent.org/library/docs_jp02ev.htm) (on file with the *Columbia Law Review*) [hereinafter *Evangelium Vitae*]. The Pope had earlier spoken informally about the “culture of life” in 1993. See Conor O’Clery, Pope Ends Visit to U.S. with Call to Support a ‘Culture of Life,’ *Irish Times* (Dublin), Aug. 17, 1993, at 7 (discussing four-day visit to U.S. by Pope, who “chid[ed] the nation for its opposition to ‘life’”).

301. *Evangelium Vitae*, supra note 300, para. 28.

302. *Id.* para. 101.

303. *Id.* para. 28 (emphasis omitted).

304. *Id.* para. 12.

305. *Id.* para. 10.

306. *Id.* para. 27.

which can be committed against life, procured abortion has characteristics making it . . . together with infanticide . . . an unspeakable crime."<sup>307</sup>

While the culture of life has generated significant activity within Roman Catholic and other theological communities,<sup>308</sup> it has also migrated to a (somewhat) more secular setting in American conservative politics. The culture of life's first presidential outing was in 2001, at the dedication of the Pope John Paul II Cultural Center. President George W. Bush put his own flourish on the phrase:

The culture of life is a welcoming culture, never excluding, never dividing, never despairing and always affirming the goodness of life in all its seasons. In the culture of life, we must make room for the stranger. We must comfort the sick. We must care for the aged. We must welcome the immigrant. We must teach our children to be gentle with one another. We must defend in love the innocent child waiting to be born.<sup>309</sup>

This description presents the culture of life as a category of conduct that might be characterized as "all things kindly." But as this early presidential use anticipates, its most insistent meaning in American politics has been as shorthand for the last item on the President's list: protection of the unborn and the broader range of policies that that position has come to encompass.

The culture of life made a national debut during the 2000 presidential debates. Asked about recent FDA approval of the abortion drug RU-486, President Bush expressed concern that "that pill will create more abortion," explaining that "I think what the next president ought to do is to promote a culture of life in America. Life of the elderly and life of

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307. *Id.* para. 58.

308. These include academic symposia, conferences, and the establishment of culture of life organizations. See, e.g., *Culture of Life, Culture of Death: Proceedings of the Linacre Center Conference of the Great Jubilee and the Culture of Life* (Luke Gormally ed., 2001); Family Research Council, *Building a Culture of Life 30 Years After Roe v. Wade* (2003) [hereinafter *Building a Culture of Life*]; Symposium on the Beginning and End of Life, 12 *Notre Dame J.L. Ethics & Pub. Pol'y* 369 (1998); Ariz. *Right to Life, Right to Life Conference: Promoting a Culture of Life Through Education*, at <http://www.azrtl.org/events/conference/2005Conference.html> (last visited Jan. 27, 2005) (on file with the *Columbia Law Review*) (describing September 2005 conference focusing on "Culture of Life"); see also George P. Graham, *Culture of Life, Culture of Death*, 41 *Cath. Law.* 237 (2002); Rick Santorum, *The New Culture of Life: Promoting Responsible and Appropriate Medical Research*, 17 *Notre Dame J.L. Ethics & Pub. Pol'y* 151 (2003). The phrase and its goals have been adopted by the Christian community more generally. See, e.g., Christian Law Ass'n, *Adoption—A Culture of Life*, at <http://www.christianlaw.org/culture-of-life.html> (last visited Feb. 16, 2006) (on file with the *Columbia Law Review*). There is also a Culture of Life Foundation and Culture of Life Institute. See *Culture of Life Found.*, at <http://www.culture-of-life.org> (last visited Feb. 10, 2006).

309. Remarks at the Dedication of the Pope John Paul II Cultural Center, 1 *Pub. Papers* 284 (Mar. 22, 2001) (emphasis added).

those women all across the country. Life of the unborn.”<sup>310</sup> Promoting the culture of life became a steady feature of the campaign and, after his election, President Bush quickly made good on his undertaking.<sup>311</sup>

By 2004, the culture of life had become a plank in the Republican Party Platform.<sup>312</sup> It has since featured in presidential proclamations honoring National Sanctity of Human Life Day<sup>313</sup> and National Hospice Month;<sup>314</sup> in President Bush’s 2005 State of the Union Address;<sup>315</sup> and in the President’s official statement on the Terri Schiavo case.<sup>316</sup> It appears in the Senate’s Resolutions honoring Mother’s Day<sup>317</sup> and Father’s Day.<sup>318</sup> Former majority leader Tom DeLay included it as a priority in

310. The First Gore-Bush Presidential Debate (Oct. 3, 2000) (statement of Gov. George W. Bush), transcript available at <http://www.debates.org/pages/trans2000a.html> (on file with the *Columbia Law Review*).

311. The President’s First Term Record of Achievement includes a special “Promoting a Culture of Life” section detailing his various accomplishments. These include a now familiar list: signing the Partial-Birth Abortion Ban Act, the Born Alive Infants Protection Act, and the Unborn Victims of Violence Act; opposing stem cell research and cloning; cutting all funding to family planning organizations that “perform or promote” abortion; and supporting prenatal health insurance. President George W. Bush: A Remarkable Record of Achievement 38 (2004), available at <http://www.whitehouse.gov/infocus/achievement/Achievement.pdf> (on file with the *Columbia Law Review*) [hereinafter Record of Achievement].

312. See Republican Nat’l Comm., 2004 Republican Party Platform: A Safe World and a More Hopeful America 84 (2004), available at <http://www.gop.com/media/2004platform.pdf> (on file with the *Columbia Law Review*) (“We say the unborn child has a fundamental individual right to life which cannot be infringed.”).

313. Proclamation No. 7863, 70 Fed. Reg. 3273, 3273 (Jan. 14, 2005) [hereinafter Proclamation No. 7863] (noting nation’s “significant progress in recent years toward building a culture of life,” citing promotion of “abstinence education, adoption programs, crisis pregnancy programs, and other efforts to help protect life”).

314. The 2005 Proclamation states that “Americans believe in the worth and dignity of every person, and we are promoting a culture of life in our Nation.” Proclamation No. 7843, 69 Fed. Reg. 65,051, 65,051 (Nov. 9, 2004).

315. “Because a society is measured by how it treats the weak and vulnerable, we must strive to build a culture of life . . . [W]e must also ensure that scientific advances always serve human dignity, not take advantage of some lives for the benefit of others.” George W. Bush, U.S. President, Report on the State of the Union Delivered to a Joint Session of Congress, 151 Cong. Rec. S878, S880 (daily ed. Feb. 2, 2005).

316. President’s Statement on Terri Schiavo, supra note 29 (“Those who live at the mercy of others deserve our special care and concern. It should be our goal as a nation to build a culture of life, where all Americans are valued, welcomed, and protected . . .”).

317. S. Res. 348, 108th Cong., 150 Cong. Rec. S5025 (daily ed. May 6, 2004) (enacted) (“[M]others have an indispensable role in building and transforming society to build a culture of life . . .”).

318. S. Res. 379, 108th Cong., 150 Cong. Rec. S6741 (daily ed. June 14, 2004) (enacted) (same indispensable role as mothers).

the Republican agenda.<sup>319</sup> The State Department,<sup>320</sup> the Vice President,<sup>321</sup> and the Secretary of State have all invoked the culture of life.<sup>322</sup> There has even been some retrofitting of the phrase: Although President Ronald Reagan never mentioned the culture of life, one Republican senator, provoked by Reagan family support for stem cell research, declared the Reagan Cultural Doctrine to be “synonymous with the culture of life.”<sup>323</sup>

The culture of life has become part of American political culture—if not yet ubiquitous, certainly familiar and increasingly accessible.<sup>324</sup> This does not mean that the culture of life has been fully established. As President Bush has acknowledged, “cultures change slowly, and this is still a very—it’s a very heartfelt debate on behalf of—in the political process, on the abortion issue.”<sup>325</sup> But a course has been set and the President has made his role clear: “[M]y attitude is that I’ll sign laws that begin to change people’s perception [sic] of life . . . and, at the same time, speak out for a culture of life, because . . . a society that embraces a culture of life is a much more hospitable, generous, and compassionate society.”<sup>326</sup>

I want to consider why the culture of life has been such a rhetorical success. To begin, the phrase shifts the focus of discussion from the querulous idiom of “rights”—as in the “right to life”—to the mushier realm of “culture.” This is not to diminish the substantial appeal of “rights

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319. 150 Cong. Rec. H7247, H7247 (daily ed. Sept. 21, 2004) (statement of Rep. Tom DeLay) (advocating for Republican agenda “[n]ot just of bandaging over the social wounds inflicted by a culture of death, but of taking up the cause of America’s armies of compassion and our Nation’s emerging culture of life”).

320. Office of Soc. & Humanitarian Affairs, U.S. Dep’t of State, Advancing the Rights of Women: An Overview of Significant Progress Made by the U.S. in the 10 Years Since the Beijing Conference on Women (Aug. 30, 2004), available at <http://www.state.gov/p/io/rls/othr/35882.htm> (on file with the *Columbia Law Review*) (describing United States’s efforts to address women’s issues; titling one section “Protecting the Youngest and Promoting a Culture of Life” (internal quotation marks omitted) (quoting Vice President Dick Cheney)).

321. Catherine Candisky, Vice President Rallies Republican Faithful in Zanesville, Columbus Dispatch (Ohio), Oct. 31, 2004, at 4A (“We stand for a culture of life and we reject the brutal practice of partial birth abortion.”).

322. State Dep’t, Rice Says Recent EU, U.S. Actions Put Spotlight on Iran, Mar. 12, 2005, available at LEXIS, News Library, State Department File (providing transcript of Mar. 11, 2005 interview of Secretary of State Condoleezza Rice with the *Washington Times*) (“[T]he president has been in exactly the right place about [abortion], which is we have to respect the culture of life . . .”).

323. 150 Cong. Rec. S7508, S7508 (daily ed. June 25, 2004) (statement of Sen. Brownback).

324. See, e.g., Building a Culture of Life, supra note 308 (detailing Family Research Council’s continued political commitment to reversal of *Roe v. Wade*); N.J. Right to Life, at <http://www.njrfl.org> (last visited Jan. 27, 2006) (on file with the *Columbia Law Review*) (describing itself as “a non-profit civic advocacy organization that works through legislative, political action, educational and legal means to promote a culture of life”).

325. Remarks in a Discussion in Hudson, Wisconsin, 40 Weekly. Comp. Pres. Doc. 1644, 1658 (Aug. 23, 2004).

326. *Id.*

talk.”<sup>327</sup> Rights are a familiar part of the legal and political landscape. They command respect, convey authority, and establish a claim’s moral status.<sup>328</sup> At the same time, rights can be problematic, often standing in conflict with competing rights—for example, the “right to life” versus the “right to choose.” Rights can make claimants appear self-interested, demanding, or worse. During the 1980s, for example, the “right to life” became associated with clinic bombings, intimidation, and attempts on doctors’ lives by angry right-to-lifers.<sup>329</sup>

Culture, on the other hand, disarms the combativeness of rights talk. If we take culture to refer to “socially established structures of meaning,”<sup>330</sup> then a claim anchored in culture appears more solid and entrenched. Of course, “culture” may not wholly remove the idea of contestation or opposition—there are, after all, “culture wars.” Nonetheless, locating a claim *in* or *as* culture presents it as a given rather than up for grabs, as rights more often are.

Substituting “culture of” for “right to” also liberates the meaning of “life.” Within the vocabulary of abortion politics, everyone understands what the “right to life” stands for. In contrast, “culture” doesn’t refer to one particular issue but to the place of an issue in a network of social meanings. Untethered from abortion, “life” becomes a more capacious concept with room for all sorts of activity and concern. Thus, while President Bush *always* invokes the culture of life when discussing abortion, he also uses the phrase to refer to broader goals such as fighting AIDS, helping troubled teens, and encouraging such basic virtues as hospitality and compassion.<sup>331</sup> No one opposes AIDS research or compassion, yet these concepts sit cheek by jowl with such other culture of life objectives as restricting stem cell research<sup>332</sup> and abstinence-only education,<sup>333</sup> about which there *are* strong differences of opinion. Policies lumped together

327. See generally Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991).

328. Those who want to deflate the status of a claim of right cast it differently. See, e.g., Robert P. George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* 133 (2001) (describing right affirmed in *Casey* as “the abortion license”).

329. See David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 *Alb. L. Rev.* 833, 847 (1999) (describing “the legislative and public relations path by which the right to life movement has regained mainstream respectability,” separating itself from more intimidating and “politically self-destructive personas” involved in Operation Rescue, like Randall Terry).

330. Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in *Geertz, Interpretation of Cultures*, *supra* note 30, at 1, 12.

331. See President’s Radio Address, 41 *Weekly Comp. Pres. Doc.* 183, 184 (Feb. 5, 2005) (emphasizing need to “continue to build a culture of life [and] promote the compassionate character of America [by] pursu[ing] initiatives to fight the scourge of HIV/AIDS, help our at-risk youth reject gangs and violence, and help prevent wrongful convictions in our courts”).

332. See *Record of Achievement*, *supra* note 311, at 38 (citing restriction of stem cell research as step toward “building a culture of life”).

333. See *Proclamation No. 7863*, *supra* note 313 (citing promotion of abstinence education as evidence of “significant progress . . . toward building a culture of life”).

under the culture of life appear united in good purpose. In this way, the culture of life colonizes causes having nothing to do with reproduction. As everything decent becomes part of the culture of life, the culture of life becomes the marker for everything decent in a kind of “culture of life creep.”

But while the culture of life appears to have expanded the scope of the term “life,” its core meaning is very specific indeed. “Life” now refers to unborn life, no longer from the moment of quickening or from the point of viability, but from the first instant of fertilization.<sup>334</sup> This definition and its elevated standing are new. As German historian Barbara Duden points out, reproduction has been refashioned so that “in the course of one generation, . . . pregnancy [has been transformed] into a process to be managed, the expected child into a fetus, the mother into an ecosystem, the unborn into a life, and life into a supreme value.”<sup>335</sup> Thus, the culture of life only *appears* to have liberated the meaning of “life,” as the word has actually become synonymous with “unborn life.”<sup>336</sup>

The valorization of “life” leads to a third rhetorical achievement of the culture of life: the impossibility of aligning with its opposite number. Under the old rhetoric, the right to life was set against the right to choose, pro-life was set against pro-choice, these match-ups something of a draw.<sup>337</sup> Taking on the culture of life is a more difficult rhetorical challenge. With the exception of death penalty supporters and a few goth rock bands, no one wants to tout membership in the culture of death. After all, the culture of death has been associated by President Bush with terrorism,<sup>338</sup> by former Attorney General Ashcroft with September

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334. Although this sense of “life” is often used as though it were longstanding, only in the late twentieth century did “what women have in their bellies for nine months come to be considered a ‘life.’” Barbara Duden, *Disembodying Women: Perspectives on Pregnancy and the Unborn* 51 (1993).

335. *Id.* at 2.

336. See, e.g., John A. Robertson, *Schiavo and Its (In)significance* 24 (Univ. of Tex. Sch. of Law, Pub. Law & Legal Theory Res. Paper Series, Working Paper No. 72, 2005), available at <http://ssrn.com/abstract=692901> (on file with the *Columbia Law Review*) (arguing that right-to-life interests will have greater impact on beginning-of-life issues like embryonic stem cell research than on end-of-life issues).

337. To be sure, as “choice” was tarred with connotations of liberal selfishness, political consultants urged a retreat from the phrase. See William Saletan, *Bearing Right: How Conservatives Won the Abortion War* 46 (2003) (describing polling data showing more support for abortion when framed as issue of big government rather than of women’s right to choose). Nonetheless, “choice” remains an acceptable expression of support for legal abortion.

338. See Remarks to the United Nations General Assembly in New York City, 2 Pub. Papers 1376 (Nov. 10, 2001) (“We choose the dignity of life over a culture of death.”).

11th,<sup>339</sup> and by Speaker of the House Hastert with the school shootings at Columbine.<sup>340</sup>

Opposition to the culture of life tends to focus on questions of scope, as critics note the irony of a “culture of life” that favors the death penalty<sup>341</sup> and disfavors certain social welfare protections for those already born. As Senator Lautenberg remarked after President Bush signed the Partial-Birth Abortion Ban Act:<sup>342</sup>

We also hear about the “culture of life.” What about the woman’s life? . . . This law does not include a health exception. . . . And where is the culture of life when that fetus is born? Where is the culture of life for children who have been born?

Earlier in this Congress, the anti-choice conservatives led the fight against the child tax credit for low-income working families. . . . Where is the culture of life in that?<sup>343</sup>

But even Lautenberg’s ironic challenge implicitly concedes the central premise of the culture of life: that its protections necessarily extend to the unborn.<sup>344</sup>

Finally, while the culture of life sounds secular enough (in contrast to “faith-based initiatives”), its rhetorical value is much enhanced by its association with Christianity.<sup>345</sup> The phrase comes straight from the Vatican and, as one commentator notes, its theological origins are not lost to

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339. See John Ashcroft, Remarks Before the National Religious Broadcasters Convention (Feb. 19, 2002), available at <http://www.usdoj.gov/archive/ag/speeches/2002/021902religiousbroadcasters.htm> (on file with the *Columbia Law Review*) (comparing “way of God” and “way of the terrorists” by saying “[i]t is the difference between . . . a culture of life and a culture of death”).

340. See Dennis Hastert, Statement Regarding the Tragedy at Columbine High School (Apr. 21, 1999), available at <http://speaker.house.gov/library/education/990421speech.asp> (on file with the *Columbia Law Review*) (“We must stop the culture of death that makes vicious killers out of too many of our children.”).

341. See Meagan E. Costello, Note, Smashing the Tragic Illusion of Justice: The Reprehensibility of the Death Penalty in Virginia, 41 *Cath. Law.* 255, 287 (2002) (“As Catholics, we must strive to continue the conversation to put an end to the death penalty. We must raise awareness of the injustice this form of punishment embodies and work toward a culture of life, where all life is sacred and respected.” (footnote omitted)).

342. 18 U.S.C. § 1531 (Supp. II 2003).

343. 149 Cong. Rec. S14261, S14261 (daily ed. Nov. 7, 2003) (statement of Sen. Lautenberg).

344. As John Robertson notes, the Schiavo case is likely to have little effect on well-established laws governing end-of-life decisions. Its achievement is rather to stake out more “life turf” for abortion-related issues such as stem cells. See Robertson, *supra* note 336, at 24.

345. The argument here is not that religious belief should play *no* role in policy formation. For a deeply thoughtful consideration of the complexities of the issue, see generally Kent Greenawalt, *Private Consciences and Public Reasons* (1995). In recent years, however, there has been an infusion into public life of a particular kind of Christian religiosity that many find deeply troubling. See Jimmy Carter, *Our Endangered Values* 3 (2005) (“Narrowly defined theological beliefs have been adopted as the rigid agenda of a political party.”). To the extent religious views are to play a role, it is important to be aware of their subtle and indirect effects as well as their explicit presence.



"churchgoing Roman Catholics, who hear the Pope's words repeated week after week at Sunday Mass."<sup>346</sup>

## V. THE ROLE OF SAFE HAVENS IN THE CULTURE OF LIFE

Safe Haven laws are made to order for culture of life politics. They aim point blank at one of the most terrible manifestations of the culture of death, infanticide, and they seek to protect the most deserving of victims, innocent newborns.<sup>347</sup> Their apparent generosity to would-be baby killers also demonstrates compassion.<sup>348</sup> Short of abolishing the death penalty, there would seem to be no more direct example of law promoting life—certainly old-fashioned "born" life—than Safe Haven legislation.

But it is exactly here that Safe Haven laws do double duty in the culture of life. As we have seen, infant abandonment is often associated with abortion.<sup>349</sup> As a California court explained, stories about discarded newborns are newsworthy "not simply because they titillate the public's curiosity in all things morbid, but rather because they relate to widely debated issues of unplanned pregnancy, children born to single mothers, and adoption, and by implication, contraception and *abortion*."<sup>350</sup> This morbid titillation is now subsumed within an astute cultural politics. Safe Haven legislation serves as one more connecting dot in a larger enterprise that seeks to blur the boundaries between prenatal and postnatal life, contributing powerfully to the pro-life project by keeping what is characterized as the murderousness of abortion in the public eye.

I turn now to the consequences of this connection for law and women generally. First, it facilitates a cultural climate more hospitable to anti-abortion jurisprudence and the eventual reversal of *Roe v. Wade*.<sup>351</sup> Second, it encourages a subtle structure of surveillance over women,

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346. Mary Leonard, *Bush Woos Catholics on Abortion: Nominee Echoes Pope's 'Culture of Life' Phrase*, Boston Globe, Oct. 9, 2000, at A1. Evangelical Christian voters also "recognized the biblical phrasing in many of [President Bush's] speeches." Elisabeth Bumiller, *Turnout Effort and Kerry, Too, Were G.O.P.'s Keys to Victory*, N.Y. Times, Nov. 4, 2004, at A1 (noting that President Bush used code words like "culture of life" and "armies of compassion" to motivate evangelical voters, while Senator Kerry was stuck "preaching the separation of church and state").

347. As Pope John Paul II explained, "If such great care must be taken to respect every life, even that of criminals and unjust aggressors, the commandment 'You shall not kill' has absolute value when it refers to the *innocent person*." *Evangelium Vitae*, supra note 300, para. 57.

348. Record of Achievement, supra note 311, at 38 ("We're asked to honor our own standards, announced on the day of our founding in the Declaration of Independence. We're asked by our convictions and tradition and compassion to build a culture of life . . .").

349. See supra notes 160–163, 203–211 and accompanying text.

350. *Pasadena Star-News v. Superior Court*, 249 Cal. Rptr. 729, 731 (Ct. App. 1988) (emphasis added) (upholding paper's right to publish name of abandoning teenager who left her baby behind high school bleachers).

351. 410 U.S. 113 (1973).

warning society to be alert to mothers who might abandon—or abort—their children.

#### A. *Implications for Jurisprudence*

As I have suggested throughout, Safe Havens' enduring achievement may not be infant rescue so much as the reinforcement of anti-abortion sentiment, by connecting infanticide to abortion. Proponents claim variously that Safe Haven laws prevent abortion, that the need for the laws results from abortion, that abortion produces infanticide, and that abortion *is* infanticide.<sup>352</sup> On this view, differences between the two practices are primarily in timing and not in kind. One may be legal and the other not, but the act—killing life—is the same.

Once this connection begins to feel familiar, ongoing news about the use or disregard of Safe Havens by new mothers serves as a biting reminder of the moral consequences of the culture of death. Each infant body demonstrates the additional price that is paid for legal abortion and underscores just who is paying it: Baby Angelica, Baby Moses, and so on. Pro-life advocates may no longer need to display fetal remains when decomposing newborns are part of the nightly news. Safe Haven laws and the accompanying posters, media spots, and press coverage keep the precarious status of both infant *and* unborn life vividly in public view, provoking for some the question of why only one is criminal.

Safe Haven laws may also contribute to the primary *political* goal of the culture of life: the recriminalization of abortion through the reversal of *Roe*.<sup>353</sup> As we know, law and culture are in constant constitutive interplay with one another. Law influences behavior, which affects law, and so on, in what Naomi Mezey has called the “near-total entanglement of law and culture.”<sup>354</sup> In *Planned Parenthood v. Casey*, for example, the Court declined to overturn *Roe* in part because “for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.”<sup>355</sup> Cultural patterns induced by *Roe* have protected *Roe* (more or less) through the application of *stare decisis*.<sup>356</sup>

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352. See *supra* notes 160–163, 203–211 and accompanying text.

353. See *Building a Culture of Life*, *supra* note 308, at VIII (“Thirty years after *Roe*, the great task is still before us: to abolish abortion and to build a true culture of life. . . . We must rededicate ourselves to this great struggle.”); George, *supra* note 328, at 132 (explaining that Pope John Paul II’s message in *Evangelium Vitae* was that those who oppose abortion must work “to reverse the judicial decisions and legislative and executive acts that have ushered in the ‘culture of death’”).

354. Naomi Mezey, *Law as Culture*, 13 *Yale J.L. & Human.* 35, 56 (2001).

355. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

356. Similarly, in *Dickerson v. United States*, the Supreme Court declined to overturn *Miranda v. Arizona*, 396 U.S. 868 (1969), because the decision “has become embedded in routine police practice to the point where the warnings have become part of our national culture.” 530 U.S. 428, 443 (2000). As Mezey observes, “[t]he legal rule laid down in

This grounding of law in culture takes on new force in the culture of life. If cultural stasis sustains *Roe*, a cultural shift could suggest its reversal. A version of this argument was recently advanced in a concurring opinion by Judge Edith Jones with special reference to Safe Haven laws.<sup>357</sup> In 2004, Norma McCorvey (the actual Jane Roe) sought to reopen *Roe v. Wade*. The district court denied her request on the grounds that the thirty-year delay before her motion to reopen the case was unreasonable;<sup>358</sup> the Fifth Circuit upheld the decision on mootness grounds.<sup>359</sup>

In her concurring opinion, Judge Jones found it ironic that mootness barred the proposed litigation, because McCorvey had presented evidence about the current reproductive landscape that might prompt reversal were *Roe* to be reconsidered: “No longer does the unwed mother face social ostracism, and government programs offer medical care, social services, and even, through ‘Baby Moses’ laws in over three quarters of the states, the option of leaving a newborn directly in the care of the state until it can be adopted.”<sup>360</sup> Jones’s opinion is no doubt inadequate from an empirical perspective. She does not show that women *are* using Safe Havens, only that the option—yet another acceptable alternative to abortion—exists. Nonetheless, her argument confirms the ideological potential of the law-culture entanglement. Whether or not Safe Haven legislation changes cultural practices, the legislation itself becomes an artifact of culture.

A similar argument suggesting the mutually constitutive relation between law and culture is found in Judge Calabresi’s concurrence in *Quill v. Vacco*,<sup>361</sup> a pre-Schiavo “right to die” case. Judge Calabresi considered whether a state could have an interest in criminalizing assisted suicide when suicide and attempted suicide had already been decriminalized. He suggested that a statute prohibiting assisted suicide might be upheld

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*Miranda* so effectively infiltrated cultural practice that forty years later the cultural embeddedness of *Miranda* warnings provided the justification for recognizing the constitutional status of the rule.” Mezey, *supra* note 354, at 55.

357. See *McCorvey v. Hill*, 385 F.3d 846, 850 (5th Cir. 2004) (Jones, J., concurring).

358. *McCorvey v. Hill*, No. Civ.A. 303CV1340N, 2003 WL 21448388, at \*1 (N.D. Tex. June 19, 2003).

359. 385 F.3d at 849 & n.4 (holding that because Texas abortion laws had been repealed by implication, McCorvey’s claim was moot).

360. *Id.* at 851 (Jones, J., concurring). Other pertinent evidence included testimony by women who suffered long-term psychological damage from abortion and affidavits suggesting that women are routinely “herded through their [abortion] procedures.” *Id.* This new evidence “goes to the heart of the balance struck in *Roe* between the choice of a mother and the life of her unborn child.” *Id.* at 850. No stigma attaches by virtue of having a nonmarital child or of giving one up; women can now deliver their infants into the arms of a Safe Haven. Judge Jones’s reasoning ignores the interest recognized in *Roe* of deciding not to become a mother at all. See *Roe v. Wade*, 410 U.S. 113, 153 (1973).

361. 80 F.3d 716 (2d Cir. 1996), *rev’d*, 521 U.S. 793 (1997).

if, for example, it were part of an “overall approach to the preservation of life.”<sup>362</sup> He concluded, however, that:

[T]here is no sign that such an overall “culture of life” reigns in New York State—quite the contrary.

Well before *Roe v. Wade*, New York enacted one of the most permissive abortion laws in the country. New York recently re-enacted the death penalty. . . . [T]he right to demand to die, as and when one wishes, has been recognized in New York for all those on feeding or hydration tubes or on other life support devices.<sup>363</sup>

While Judge Calabresi *rejected* the existence of a culture of life, at least in New York, his concurrence demonstrates how culture of life language can be used to describe a background culture for the purpose of constitutional analysis. Moreover, under Judge Calabresi’s reasoning, whether a culture of life exists can be determined, in part, by reference to existing laws.

On this view, the culture of life presents itself as more than an indication of an approach. Unborn victims are now protected as a matter of federal law.<sup>364</sup> States may use federal funds to insure unborn children.<sup>365</sup> Indeed, since 1995, over a hundred federal bills mentioning the unborn have been introduced.<sup>366</sup> The Unborn Victims of Violence Act of 2004 (“Laci and Connor’s Law”) is one of the more prominent.<sup>367</sup> But the unborn have been infused into legislation and enactments that on first glance seem quite unconnected to the culture of life. A House Concurrent Resolution condemning attacks on U.S. citizens by Palestinian terrorists notes that “at least 38 United States citizens, including one unborn child, have been murdered by Palestinian terrorists,” presumably because a pregnant woman was killed in an attack.<sup>368</sup> It is as though there has been a global “search and replace” for the word “pregnant,” and wherever it is found, “unborn child” has been substituted in. The more legislation seeks to mention and protect the unborn, the more established the culture of life becomes, as rhetoric morphs into substance.

### B. *Surveilling Women*

Safe Haven laws solidify an ongoing sense of crisis about infanticide and abortion by focusing attention not only on newborn or unborn life,

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362. *Id.* at 740 (Calabresi, J., concurring).

363. *Id.* at 740–41 (citations omitted).

364. 18 U.S.C.A. § 1841 (West Supp. 2005).

365. 42 C.F.R. § 457.10 (2005).

366. Search of CONG-BILLTXT on Westlaw for the term “unborn” (last searched Apr. 6, 2006) (yielding 168 bills).

367. Pub. L. No. 108-212, 118 Stat. 568 (to be codified at 18 U.S.C. § 1841 & 10 U.S.C. § 919a).

368. H.R. Con. Res. 119, 108th Cong. (2003), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_bills&docid=f:hc119ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:hc119ih.txt.pdf) (on file with the *Columbia Law Review*).

but also on the women who take it. Judging mothers is, of course, a familiar and long-accepted form of social regulation.<sup>369</sup> Mothers are the line officers in the enterprise of producing and raising children. Through a finely tuned system of reverence and reward on one hand and surveillance and regulation on the other, women learn what it takes to do their job well.<sup>370</sup>

But motherhood takes on added meaning in the culture of life. As heralded in the Senate's 2004 Resolution, introduced and adopted in honor of Mother's Day, "mothers have an indispensable role in building and transforming society to build a culture of life."<sup>371</sup> Its foundational precept—that life begins at conception—extends maternal obligation backwards in time to include pregnancy at any stage. Maternal status and obligation start with the zygote. A pregnant woman in the culture of life is as much a mother as the mother of the Brady Bunch or the Dionne Quintuplets, her embryo or fetus as cute as any other baby. On these terms, good mothering precludes the possibility of abortion—though it is worth remembering that more than half of all women who abort each year are already mothers.<sup>372</sup> It is against (or in the thick of) this background of maternal duties that Safe Haven laws work to encourage particular views about mothers. While the laws themselves are a standing reminder that some women kill newborns, their structure casts suspicion even on women who do not.

The mechanism by which this happens becomes apparent by comparing the operation of Safe Haven legislation with "Megan's Law,"<sup>373</sup> another piece of populist legislation enacted following intense concern over harm to children. The notion of "governing through crime"—crime, fear of crime, and moral outrage against criminals—has become central to electoral politics in the United States,<sup>374</sup> and Megan's Law cap-

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369. Cf. Carol Sanger, *M Is for the Many Things*, 1 *S. Cal. Rev. L. & Women's Stud.* 15, 15 (1992) ("Educators, historians, jurists, philosophers, physicians, social workers, and theologians have been telling us what mothers are like . . . ." (citations omitted)).

370. See *id.* at 17 (observing that regulation "remind[s] women how to behave in order to stay revered").

371. S. Res. 348, 108th Cong., 150 *Cong. Rec.* S4769 (daily ed. May 3, 2004). In this regard, proponents of the culture of life resurrect something like the notion of Republican Motherhood, the late eighteenth-century proposition that American mothers were uniquely suited to and responsible for the transmission of values on which the well-being of the nation rested. See Ruth H. Bloch, *American Feminine Ideals in Transition: The Rise of the Moral Mother, 1785–1815*, *Feminist Stud.*, June 1978, at 100, 114–16.

372. Rachel K. Jones et al., *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000–2001*, 34 *Persp. on Sexual & Reprod. Health* 226, 230 (2002). This fact underscores that abortion is always a decision about motherhood, as women consider not only when or with whom to have a child but also the impact of another child on existing children.

373. 42 U.S.C. §§ 13701, 14071 (2000).

374. Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, 26 *Crime & Just.* 63, 78–92 (1999) (describing such successful crime initiatives as prison building, "three strikes" laws, and citizen campaigns against drunk drivers).

tures the enterprise. Named for Megan Kanka, a ten-year-old New Jersey girl murdered by a convicted pedophile who had settled unannounced in her neighborhood, the Act's very title focuses on her victimization. Citizens may not know how Megan died, but everyone knows by virtue of there being a "Megan's Law" that it must have been awful. Megan's Law does more than honor her memory; it also makes the *community* responsible for the fate of future Megans.<sup>375</sup> Certain convicted sex offenders must register with local officials, and this information is made available to the public.<sup>376</sup> But it is up to parents and others to check the registries and take action.<sup>377</sup> Megan's Law highlights the role of direct citizen participation not only in lobbying for crime initiatives but in helping to enforce them (although it is not entirely clear just how parents are to get rid of an offender once his identity is revealed).<sup>378</sup>

Safe Haven laws function in many of the same ways. Like Megan's Law, their purpose is to prevent harm to innocent children at the hands of an incomprehensibly bad actor—here, the murdering mother. They too are the product of grassroots efforts. And like Megan's Law, citizens participate not only in their enactment, but in their implementation. As an Illinois activist has urged: "This is something we as individuals can do something about . . . . Tell the person sitting next to you. Even though you don't think she needs to know about it, she might."<sup>379</sup>

Of course, Safe Haven legislation also differs significantly from Megan's Law. Mandatory registration is meant to make things worse for sexual predators. Safe Haven laws are quite the opposite. Rather than exposing mothers, Safe Haven statutes provide for their anonymity. Rather than denying them refuge, they provide a literal haven. By decriminalizing conduct, they appear positively generous toward would-be wrongdoers, substituting anonymous abandonment, an act for which a mother might feel regret, for child endangerment, behavior for which she might do time. Unlike Megan's Law, Safe Haven legislation offers immunity, not persecution, to its targets.

However, Safe Haven statutes are not benign all the way down. They create an atmosphere of suspicion and a structure of surveillance, *not*, as

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375. Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 *Law & Soc. Inquiry* 1111, 1139–42 (2000).

376. 42 U.S.C. § 14071(e).

377. See N.J. Office of the Attorney Gen., Div. of Criminal Justice, *Community Organization Rules of Conduct*, available at <http://www.state.nj.us/lps/dcj/megan/communit.htm> (last visited Jan. 28, 2006) (on file with the *Columbia Law Review*).

378. Simon, *supra* note 375, at 1139–42.

379. Kate Clements, *Blagojevich Makes State Law Permanent*, *News-Gazette* (Champaign, Ill.), July 15, 2005, available at [http://www.news-gazette.com/news/local/2005/07/15/blagojevich\\_makes\\_state\\_law\\_permanent](http://www.news-gazette.com/news/local/2005/07/15/blagojevich_makes_state_law_permanent) (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Dawn Geras of Illinois's Save Abandoned Babies Foundation); see also N.J. Dep't of Human Servs., *Top Ten Tips: Spreading the Word About Safe Haven*, at <http://www.njsafehaven.org/volunteer.html#Tips> (last visited Jan. 28, 2006) (on file with the *Columbia Law Review*).

with Megan's Law, directed at ex-felons but aimed instead at a class of potential felons: all pregnant women. Community policing of women who might be pregnant—and therefore might do away with the child before or just after its birth—echoes practices of nineteenth-century Italy where the surveillance of women for signs of pregnancy by priests, midwives, and family was common.<sup>380</sup> The posters on the sides of buses and alongside the New Jersey Transit tracks are meant to be seen by all passengers and passersby, who are now encouraged to ponder just what the young woman two seats away has been up to.

Like registered sex offenders, women with concealed or unannounced pregnancies are also in our midst.<sup>381</sup> Our attention is now drawn not only to visibly pregnant women who behave badly toward their babies by smoking or by ordering beer with a meal, but to all women of childbearing age. Because there is no pregnancy registry, Safe Haven laws cast doubt on all women. Who knows who is pregnant or who needs to be pulled back from the brink?

Of course, the brink toward which pregnant women tumble is rarely infanticide. Rather, each year, over a million pregnant women in the United States choose abortion.<sup>382</sup> But as abandonment, infanticide, and abortion become linked in the public imagination, publicity campaigns reminding women not to “abandon” their babies turn all women who might be pregnant into potential murderers of fetuses, if not newborns.<sup>383</sup> The merger here is not only between pre- and postnatal life, to use the new vocabulary,<sup>384</sup> but between criminal and noncriminal behavior. Abortion is legal and infanticide is not. But to the extent the two are conflated, the benefits of “governing through crime” are achieved even as *Roe* endures.

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380. Kertzer, *supra* note 25, at 39–56. Of course, the consequences of detection today are less severe. Unmarried women are no longer forced into maternity hospitals or denied their children solely because of the child's illegitimacy. Cf. Ricki Solinger, *Wake-Up Little Susie: Single Pregnancy and Race Before Roe v. Wade* 103–86 (1992) (discussing strong social pressures in 1950s for unwed, pregnant, white women to enter maternity homes and surrender their babies for adoption).

381. There are, of course, always concealed pregnancies in our midst. Many women do not immediately announce a pregnancy, even (or perhaps especially) when it is desired, sometimes out of concerns about miscarrying or about the implications of pregnancy at work. In contrast to such familiar forms of concealment, Safe Haven mothers conceal throughout their pregnancy: this is what jars.

382. Guttmacher Inst., *Facts in Brief: Induced Abortion in the United States* (May 18, 2005), available at [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.pdf](http://www.guttmacher.org/pubs/fb_induced_abortion.pdf) (on file with the *Columbia Law Review*).

383. There is also Robert George's interesting phrase: “abandonment of the unborn to abortion.” George, *supra* note 328, at 130 (describing sentiments expressed by Pope John Paul II in *Evangelium Vitae*, *supra* note 300).

384. See *supra* note 208.

## VI. PRODUCING DENIAL

In this Part I consider how the culture of life, with its absolute devotion to the unborn, may contribute to the very problem that Safe Haven laws seek to prevent. In developing the argument, I direct attention away from the question of how any mother could kill her child—the riveting query that stalks our topic—and direct it instead to a puzzle that arises earlier in the chronology of neonaticide. Why didn't these unhappily pregnant women take some other course of action long before the baby's birth?<sup>385</sup> Accepting the anthropological observation that mothers kill their infants “where other forms of birth control are unavailable” or where there is “no way to delegate care of the unwanted infant to others,”<sup>386</sup> what explains neonaticide today? Contraception, abortion, and many forms of substitute care are available. Why not abort? Why not place the child for adoption?

It is here, amidst deeply personal deliberations about whether or not to become a mother, that the culture of life again makes its presence felt. By reifying abstinence and demonizing abortion, it encourages a value system rigid enough to prompt paralysis. That is, by taking both unwed pregnancy and abortion off the table—making them unavailable as a matter of morality, if not yet as a matter of law—the culture of life compromises the ability of some women to deal with unwanted pregnancy. Their predicament appears to them to be insurmountable. The accumulation of culture of life images, rhetoric, and warnings works to obscure such alternatives as abortion in pregnancy's early stages or adoption at its end. This in turn provokes the phenomenon of denial that sometimes results in newborn death.

I want to examine two aspects of the culture of life that contribute to this paralysis. The first is a heightened fear of sexual exposure, brought about by the intense emphasis on premarital abstinence. The second is an increased affinity with the fetus, the very embodiment of “life” itself.

*A. Fear of Sexual Exposure*

Sexual restraint is important in the culture of life. It serves as a pre-emptive strike against harm to unborn life. Although certain methods of reining in nonprocreative sex—prohibitions on contraception for married couples,<sup>387</sup> for example, or reform school-type maternity homes for

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385. Sociologist Kristen Luker pursued a similar conundrum about why abortion is ever necessary in a contraceptively literate country like the United States. Luker's question was why women who know they do not want children become pregnant. See generally Kristen Luker, *Taking Chances: Abortion and the Decision Not to Contracept* (1975). I want to pursue the question of why pregnant women who do not want a child remain pregnant.

386. Hrby, *supra* note 10, at 296.

387. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (ending Connecticut's prohibition on use of contraceptives).



unwed mothers<sup>388</sup>—may now seem antique,<sup>389</sup> sanctions and disincentives persist. A central ingredient in the current campaign against sex is abstinence-only sex education. Its premise is that sex outside of marriage is a moral wrong, that its consequences produce a moral risk, and that there is only one way to avoid both. Federally funded abstinence-only sex education establishes as a matter of curricular fact that abstinence is “the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems,” and that marital monogamy is “the expected standard of human sexual activity.”<sup>390</sup> The belief is that with enough education, sensible American teenagers will put what is right above peer pressure or sexual gratification and abstain.<sup>391</sup> This is not necessarily bad advice; the problem is that it is the *only* advice.<sup>392</sup>

Sexual restraint is also the only advice of a bevy of new abstinence-promoting extracurricular programs such as the Silver Ring Thing (SRT), a national faith-based program with a jazzy website,<sup>393</sup> an endorsement by Miss America 2003,<sup>394</sup> and over \$700,000 in federal funding.<sup>395</sup> SRT

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388. See Solinger, *supra* note 380, at 103–86.

389. See Mary E. Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885–1920*, at 117–19 (1995); Cheryl Hicks, “In Danger of Becoming Morally Depraved”: Single Black Women, Working-Class Black Families, and New York State’s Wayward Minor Laws, 1917–1928, 151 U. Pa. L. Rev. 2077, 2078 (2003).

390. 42 U.S.C. § 710(b)(2)(C)–(D) (2000).

391. See, e.g., U.S. Dep’t of Health & Human Servs., *Teen Chat: A Guide to Healthy Relationships*, at <http://www.4parents.gov/downloads/teenchat.pdf> (last visited on Jan. 28, 2006) (on file with the *Columbia Law Review*) [hereinafter *Teen Chat*]. The pamphlet’s motto is “Wait. Think. Talk.” and the booklet presents techniques for achieving each: what to say to a sexually desirous partner, what to do while you are not having sex (join the school band; start a neighborhood project, etc.). *Id.* at 1, 10, 14.

392. As Human Rights Watch points out, because federally funded abstinence-only campaigns emphasize that condom use does not completely prevent the transmission of sexually transmitted diseases or pregnancy, sexually active teenagers may be more likely to forgo contraception. Human Rights Watch, Vol. 14, No. 5(G), *Ignorance Only: HIV/AIDS, Human Rights and Federally Funded Abstinence-Only Programs in the United States* 3, 23–25 (2002), available at <http://hrw.org/reports/2002/usa0902/USA0902.pdf> (on file with the *Columbia Law Review*). Moreover, while studies suggest that safe-sex programs (or programs coupling abstinence and safe-sex) produce decreases in teenage sex, pregnancy, and sexually transmitted disease, little such evidence exists for *no-sex* programs. *Id.* at 14–15.

393. See generally *Silver Ring Thing*, at <http://www.silverringthing.com> (last visited Jan. 28, 2006). The SRT offers a presentation “that incorporates music, videos, laser lights, comedy performances, dramas, testimonies and a Gospel presentation.” *Silver Ring Thing, How Do I Get a Ring?*, at [http://www.silverringthing.com/get\\_ring.html](http://www.silverringthing.com/get_ring.html) (last visited Jan. 28, 2006) (on file with the *Columbia Law Review*).

394. See *American Virgins*, BBC News, Jan. 22, 2004, at [http://news.bbc.co.uk/2/hi/programmes/this\\_world/3412783.stm](http://news.bbc.co.uk/2/hi/programmes/this_world/3412783.stm) (on file with the *Columbia Law Review*).

395. Richard Alwyn, *The Power of the Ring Thing*, BBC News, Jan. 22, 2004, at [http://news.bbc.co.uk/2/hi/programmes/this\\_world/3419693.stm](http://news.bbc.co.uk/2/hi/programmes/this_world/3419693.stm) (on file with the *Columbia Law Review*). Following an Establishment Clause suit by the ACLU, the Silver Ring Thing revised its Twelve Step Program by removing references to the Abstinence Study Bible from its website. Press Release, Am. Civil Liberties Union, In Light of ACLU

members wear silver rings<sup>396</sup> and exchange pledges of abstinence with “accountability partner[s].”<sup>397</sup> Studies indicate that about ten percent of American teenagers have signed virginity pledges, and that pledging delays sexual activity by about eighteen months.<sup>398</sup> Studies also show that if there are too many pledgers in a student’s community, the cachet of virginity diminishes: “Pledging works when it embeds kids in a minority community, when it gives them a sense of unique identity.”<sup>399</sup>

But even teens who pledge virginity get pregnant, and the question then becomes how they are going to deal with it. Most pregnant girls talk things over with parents and decide either to have the baby or to terminate the pregnancy.<sup>400</sup> But many young women believe they cannot talk to parents, and some go to great trouble to avoid the discussion. For example, in states requiring parental notification as a condition for minors to obtain an abortion, many pregnant teenagers seek a waiver of the

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Lawsuit Charging the Federal Government with Funding Religious Activities, the Silver Ring Thing Removes Religious Content from Website (May 19, 2005), at <http://www.aclu.org/reproductiverights/gen/12609prs20050519.html> (on file with the *Columbia Law Review*). That same suit resulted in withdrawal of federal funding from SRT in January of 2006. Katie Zezima, National Briefing: Money for Group Is Cut, *N.Y. Times*, Feb. 26, 2006, at A3.

396. See Silver Ring Thing, SRT Vision/Business Plan, at <http://www.silverringthing.com/about.html> (last visited Jan. 28, 2006) (on file with the *Columbia Law Review*). In addition to symbolizing a commitment to abstinence, the ring can also be a symbol of fidelity to future spouses. Members of SHARE, another teen celibacy organization, sign pledge cards: “To honor my future spouse, I pledge to reserve sexual expression for our marriage. I will focus on reaching my goals and building healthy friendships.” Share Program, Teen Central, at <http://www.share-program.com/teen.htm> (last visited Jan. 28, 2006) (on file with the *Columbia Law Review*).

397. See Silver Ring Thing, 10 Step Secular Follow-Up Program, at [http://www.silverringthing.com/follow\\_secular.html](http://www.silverringthing.com/follow_secular.html) (last visited Jan. 28, 2006) (on file with the *Columbia Law Review*).

398. Teen Virginity Pledges Surprisingly Effective, Study Says, *CNN.com*, Jan. 4, 2001, at <http://archives.cnn.com/2001/HEALTH/children/01/04/virginity.study> (on file with the *Columbia Law Review*); see also Peter S. Bearman & Hannah Brückner, Promising the Future: Virginity Pledges and the First Intercourse, 106 *Am. J. Soc.* 859 (2001). A further indication of the increasing popularity of abstinence programs is that sales of chastity rings have moved from Christian gift shops to more mainstream commercial outlets such as Zales and Amazon.com. See Stephanie Rosenbloom, A Ring That Says No, Not Yet, *N.Y. Times*, Dec. 8, 2005, at G1.

399. PBS, Sex and the American Teen (Apr. 13, 2005), at [http://www.pbs.org/pov/pov2005/shelbyknox/special\\_pledges\\_1.html](http://www.pbs.org/pov/pov2005/shelbyknox/special_pledges_1.html) (on file with the *Columbia Law Review*) (interview with Dr. Peter Bearman).

400. See Carol Sanger, Regulating Teenage Abortion in the United States: Politics and Policy, 18 *Int’l J.L. Pol. & Fam.* 305, 306 (2004) [hereinafter Sanger, *Regulating*]; see also Ellie Lee, Young Women, Pregnancy, and Abortion in Britain: A Discussion of Law ‘In Practice,’ 18 *Int’l J.L. Pol. & Fam.* 283, 290, 293 (2004) (observing that most British minors, especially those below age of sixteen, seek advice from parents in deciding whether to seek abortion).

requirement in a confidential judicial bypass hearing.<sup>401</sup> The hearing is a formidable alternative, involving filing papers, talking to lawyers, and appearing in court during school hours.<sup>402</sup> Yet many young women choose it in order to avoid telling their parents not only that they plan to abort but that they have had sex.<sup>403</sup> Pregnancy serves as evidence that they are not the good, trustworthy daughters their parents thought they were.<sup>404</sup>

Many of the neonaticidal mothers about whom we know something (because they were arrested) appear to have been just this kind of “good girl.” To take but one example, “Julie,” a twenty-one year old college junior sentenced to ten years in prison, had been a “former honor student, a state-ranked athlete, and a woman with many solid and stable interpersonal relationships.”<sup>405</sup> Of course, not all abandoning mothers are honor students from happy homes. Some are homeless;<sup>406</sup> others may be drug addicted.<sup>407</sup> Some teenagers conceal pregnancies that have resulted from incest or rape.<sup>408</sup> Revelation under these circumstances is often and accurately perceived as catastrophic.

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401. See Sanger, *Regulating*, supra note 400, at 306–10; see also *Bellotti v. Baird*, 443 U.S. 622, 647 (1979) (“[E]very minor must have the opportunity . . . to go directly to a court without first consulting or notifying her parents.”).

402. See Sanger, *Regulating*, supra note 400, at 310–13.

403. J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 *Berkeley Women’s L.J.* 61, 129–40 (2003) (reporting that minors have multiple reasons for nondisclosure, including fear that parents will force them to have baby).

404. Teenagers may not be entirely wrong about what parents think. See Diana Jean Schemo, *Study Finds Mothers Unaware of Children’s Sexual Activity*, *N.Y. Times*, Sept. 5, 2002, at A20 (reporting that half of mothers with sexually active teenagers incorrectly believe their children are not sexually active). There may also be tacit parental understanding about a child’s sex life; home life is smoother when issues related to sex (sex, sexual orientation, or even pregnancy) are not acknowledged.

405. *How Could Anyone Do That?*, supra note 286, at 203; cf. Doris C. Vallone & Lori M. Hoffman, *Preventing the Tragedy of Neonaticide*, 17 *Holistic Nursing Prac.* 223, 223 (2003) (describing National Honor Society student found “huddled beside the commode” after giving birth); Wen, supra note 137 (describing former college honor student serving one-year sentence for involuntary manslaughter); *Newborn ‘Safe Haven’ Laws Questioned* (NPR radio broadcast July 14, 2003), available at <http://www.npr.org/templates/story/story.php?storyID=1335825> (on file with the *Columbia Law Review*) (interviewing nineteen-year-old straight-A college student who gave birth in dorm and put baby in dumpster); *Safe Place for Newborns, Facts and Statistics*, available at <http://www.safeplacefornewborns.com/factsstats.html> (last visited Mar. 6, 2006) (on file with the *Columbia Law Review*) (providing detective’s account of churchgoing former Girl Scout and North Carolina Senate page sentenced to eight years in prison).

406. See Mike Oliver, *Police: Mom Didn’t Kill Abandoned Baby*, *Orlando Sentinel*, June 21, 1992, at B1 (describing death of child born to homeless mother).

407. Cf. Herman-Giddens et al., supra note 43, at 1428 (“Our study lacked some information about the mothers such as . . . substance abuse . . .”).

408. See *2 Infants Found in Trashed, and a Darker Tale Unfolds*, *N.Y. Times*, Sept. 17, 2005, at B4 (reporting that high school junior tried to kill second baby fathered by her own father after successfully killing first baby fathered by her father); Associated Press, *Girl Removed from Home After Having Stepfather’s Baby*, Oct. 29, 2000, available at LEXIS, AP File (on file with the *Columbia Law Review*) (reporting baby “found dead in a trash bin at

The price of publicity extends beyond the family. The old-fashioned method for hiding a pregnancy—dispatching the girl to a maternity home—is largely unavailable.<sup>409</sup> Once a young woman's pregnancy is visible, her neighbors, friends, and church will know that she had sex, that she was not smart or careful about it, and that no boy has stepped forward to make things right. This potential for ridicule or shame is significant to teenagers, for whom image and popularity matter hugely.<sup>410</sup> If, as columnist David Brooks has announced, "American teenagers have become more sexually abstemious," then social reputation regarding sexual lapses counts.<sup>411</sup> Like teenagers faced with other problems, they hope that *something* will happen to make the whole thing go away. "What would you like to have . . . A boy or a girl?" someone asks the exiled teenage protagonist in Alice McDermott's novel *That Night*. "I'd like to have a miscarriage," she answers.<sup>412</sup>

Adoption is also problematic. It not only anticipates a full-term pregnancy with increasing visibility, but requires discussions with doctors, so-

Muskegon High School"); Jonathan Miller, *Woman Admits She Threw Baby Down Air Shaft*, N.Y. Times, Mar. 29, 2006, at B6 (reporting eighteen-year-old mentally disabled daughter charged with attempted manslaughter of newborn fathered by her own father).

409. See Solinger, *supra* note 380 ("[O]ne result of the rapid 'de-criminalization' of youthful, female sexuality . . . between 1965 and 1973 . . . was that girls would not be forced to go behind the fence [into maternity homes] . . ."). A few organizations, like Project Cuddle, do help find unmarried pregnant women a place to stay. Debbe Magnusen, *From Dumpster to Delivery Room: Does Legalizing Baby Abandonment Really Solve the Problem?*, 22 J. Juv. L. 1 (2001).

410. Cf. Associated Press, *Drop-Off Program for Unwanted Babies Gets No Takers*, Sept. 30, 2000, available at LEXIS, AP File (on file with the *Columbia Law Review*) ("From when I was little, everyone told me that if I ever got pregnant, that it would be the worst mistake that I would ever make in my life, and it would ruin my life." (internal quotation marks omitted) (quoting seventeen year-old Lauren DeSantis, convicted of involuntary manslaughter for the fatal abandonment of her newborn son)).

411. David Brooks, *Op-Ed.*, *Public Hedonism and Private Restraint*, N.Y. Times, Apr. 17, 2005, § 4, at 14. Reputation matters to adult women as well; this may be particularly true within cultures or communities where nonmarital sex and pregnancy are seen as especially disgraceful. See Meyer & Oberman, *supra* note 275, at 44 ("Many girls and women may feel ashamed about having engaged in sexual relations . . .").

412. Alice McDermott, *That Night* 121 (1987) (internal quotation marks omitted). Consider also George Elliot's description of Hetty Sorrel's "hidden dread" in *Adam Bede*. After the first on-coming of her great dread . . . she had waited and waited, in the blind vague hope that something would happen to set her free from her terror; but she could wait no longer. All the force of her nature had been concentrated on the one effort of concealment, and she had shrunk with irresistible dread from every course that could tend towards a betrayal of her miserable secret. . . . [N]othing would shelter her from discovery and scorn among the relatives and neighbours who once more made all her world . . . No, something else would happen—something must happen—to set her free from this dread. In young, childish, ignorant souls there is constantly this blind trust in some unshapen chance: it is as hard to a boy or girl to believe that a great wretchedness will actually befall them, as to believe that they will die.

George Elliot, *Adam Bede* 365 (Valentine Cunningham ed., Oxford Univ. Press 1996) (1859).

cial workers, lawyers, and judges, and in the case of open adoptions, with the adoptive family as well. Even in closed adoptions, where birth mother and adoptive parents remain strangers to one another, there is the risk of exposure in the future. Anyone who has watched Oprah knows that an adoption may be revealed years later when the adult child comes looking for her mother on national television. But it is less the long-term fear of reunion than the price imagined for pregnancy's immediate revelation that prompts concealment. The crucial thing is that no one find out.<sup>413</sup>

Certainly, premarital sex and out-of-wedlock pregnancies shamed and stigmatized girls well before the advent of the culture of life. But there is a startling aggressiveness to the new chastity. The government's position is clear: Pregnancy, sexually transmitted disease, and maternal death (whether from AIDS or from abortion) are acceptable costs of immoral sex because immoral sex may result in the truly unacceptable—killing unborn life. Pharmacists may refuse to dispense emergency contraception under statutory conscientious objection exceptions,<sup>414</sup> politicians grandstand against the morning after pill,<sup>415</sup> students are told condoms do not prevent STDs,<sup>416</sup> and sex between teenagers is criminalized.<sup>417</sup> These are high stakes indeed.

Those who support abstinence say the campaign is working: The message is getting out and fewer teens are having sex.<sup>418</sup> David Brooks insists that America's teenagers may go around *looking* like little prostitutes, but they are, in fact, chaste.<sup>419</sup> But culture of life advocates can't have it both ways. If the movement takes credit for a decrease in teenage sex, it must also accept responsibility when those who do have sex become immobilized because they have bought into a set of absolute values that privileges fetal life above everything else.

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413. Legislators certainly accept this premise: The expectation of concealment justifies the anonymity of the entire Safe Haven scheme, though legislators fail to take the extra step and connect concealment with *denial*.

414. See Holly Teliska, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 *Berkeley J. Gender L. & Just.* 229, 230 (2005) (“[T]wenty state legislatures have introduced bills that would allow pharmacists to deny contraceptive access to women through the use of refusal clauses.”).

415. See Pam Belluck, *Massachusetts Veto Seeks to Curb Morning-After Pill*, *N.Y. Times*, July 26, 2005, at A10 (reporting Gov. Romney's veto of bill expanding access to morning-after pill).

416. Cf. Teen Chat, *supra* note 391, at 4 (“Not having sex is the only 100% sure way to avoid herpes, syphilis, gonorrhea, chlamydia, and HIV/AIDS.”).

417. Jodi Rudoren, *Trial Opens in Challenge to Law over Teenage Sex*, *N.Y. Times*, Jan. 31, 2006, at A5 (describing court case challenging Kansas law that prohibits sex between minors age sixteen and under).

418. See Brooks, *supra* note 411. But see *National Briefing: Rise in Unwanted Pregnancies*, *N.Y. Times*, Dec. 20, 2005, at A22 (“The national rate of unwanted pregnancy rose sharply from 1995 to 2002 . . . to 14 percent of recent births from 9 percent.”).

419. Brooks, *supra* note 411.

### B. *The Fetus as Life*

While some young women have difficulty revealing themselves as sexually active, others become stuck in deciding what to do about the pregnancy itself. To be sure, fewer young women are choosing to abort, though it is hard to know whether this results from fewer pregnancies (itself the result of less sex or more contraception), from difficulties in obtaining a timely abortion, or from moral opposition.

We do, however, know that there is a growing antipathy to abortion, especially among the young. In a 2002 poll, only fifty-four percent of college freshmen at UCLA thought abortion should be legal, compared to sixty-seven percent the decade before.<sup>420</sup> Several explanations have been suggested to explain this shift in sentiment and practice. One argument is that for many young women, contraception and abortion have been legal for their entire reproductive lives (for some, their entire lives). Neither they nor their friends, the argument goes, have had to confront the trauma, danger, or expense of an illegal abortion.<sup>421</sup> On this view, ambivalence over abortion is simply a “luxury of legality.”<sup>422</sup> But it is too easy to conclude that current opposition to abortion is a product of untested complacency. I take seriously the moral dimension of the pro-life position and venture a different hypothesis. My argument is that familiarity, fondness, and even identification with an increasingly personified fetus contribute significantly to views against abortion.

In focusing on the fetus’s role in the culture of life, I do not discount the many other cues that might lead women in the United States to conclude that abortion is wrong. There must seem something highly suspect about a medical procedure which is treated so differently from all others—whether through its hyperregulation,<sup>423</sup> or its unavailability through Medicare<sup>424</sup> and military hospitals.<sup>425</sup> Further, most women

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420. Elizabeth Hayt, *Surprise, Mom: I’m Against Abortion*, N.Y. Times, Mar. 20, 2003, § 9, at 1.

421. See Susan Dominus, *The Mysterious Disappearance of Pro-Choice Women*, *Glamour*, Aug. 2005, at 200, 201 (“Today’s twentysomethings . . . [have] never lived through the sordid conditions of back-alley abortions, the deaths from botched procedures, the desperation of a woman trapped by her own changing body. It’s ancient history to them, and about as compelling.”).

422. *Id.* at 219 (internal quotation marks omitted) (quoting feminist activist Alix Kates Shulman).

423. See *Greenville Women’s Clinic v. Comm’r, S.C. Dep’t of Health & Envtl. Control*, 317 F.3d 357, 359–71 (4th Cir. 2002) (upholding various state abortion regulations). Dissenting, Judge King described the effect of abortion regulations in other states: “[I]n many places, burdensome regulations have made abortions effectively unavailable, if not technically illegal. It is this type of regulation—micromanaging everything from elevator safety to countertop varnish to the location of the janitors’ closets—that is challenged in this case.” *Id.* at 371 (King, J., dissenting).

424. See *Harris v. McRae*, 448 U.S. 297, 326 (1980) (holding that states are not obligated under Title XIX to fund even medically necessary abortions).

425. See *Doe v. United States*, 419 F.3d 1058, 1064 (9th Cir. 2005) (upholding regulation barring military health services from funding abortions). The court upheld

know that public disclosure of abortion can put a woman's reputation, if not her safety, at risk. As the Seventh Circuit recognized, when denying the Justice Department access to patients' abortion records:

The natural sensitivity that people feel about the disclosure of their medical records . . . is amplified when the records are of a procedure that Congress has now declared to be a crime. . . . These women . . . are also aware that hostility to abortion has at times erupted into violence, including criminal obstruction of entry into abortion clinics, the firebombing of clinics, and the assassination of physicians who perform abortions.<sup>426</sup>

This explains why women rarely discuss their abortions, even among friends,<sup>427</sup> and why "abortion outing," in its various forms, is dangerous indeed.<sup>428</sup>

Although law remains a powerful source of anti-abortion information, I want now to consider a different and more personable informant. This is the fetus itself, the centerpiece of culture of life protection efforts—though as we shall see, the fetus has been getting increasingly skilled at self-defense.<sup>429</sup> But it is no longer only the combative

denial of reimbursement to a sailor's wife who aborted her anencephalic fetus, notwithstanding that this condition is "ultimately and unequivocally fatal." *Id.* at 1060.

426. *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 928–29 (7th Cir. 2004) (holding that probative value of records did not outweigh patients' privacy interests). As Judge Posner noted, "skillful 'Googlers'" would be able to sift through trial records and "put two and two together, 'out' the 45 women, and thereby expose them to threats, humiliation, and obloquy." *Id.*

427. See Barbara Ehrenreich, *Owning Up to Abortion*, *N.Y. Times*, July 22, 2004, at A21 (noting that while "[a]bortion is legal . . . it's just not supposed to be mentioned or acknowledged as an acceptable option," and admitting that she herself has had two abortions). Ehrenreich ultimately urges: "[T]ake your thumbs out of your mouths, ladies, and speak up for your rights." *Id.*

Abortion is also largely invisible in the record of popular culture. The topic remains "prime time television's most persistent taboo." See Kate Aurthur, *Television's Most Persistent Taboo*, *N.Y. Times*, July 18, 2004, § 2, at 27. With the exception of Claire on "Six Feet Under," almost all pregnant characters who have thought about having an abortion—Miranda on "Sex and the City," for instance—change their minds at the last minute and have the baby. *Id.*

428. See, e.g., Alice Clapman, Note, *Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts to Protect Abortion Patients and Staff*, 112 *Yale L.J.* 1545 (2003). Of course, strengthening legal protections around abortion privacy further entrenches the silence.

429. To be clear, the word "fetus" plays no official role in the culture of life; the preferred term is unborn child or innocent life. I use the term fetus here not to be argumentative but because the fetus, in the old-fashioned medical sense, has done considerable work for the pro-life position and credit should be given where credit is due. I have used both terms throughout this Article and proceed without worrying that by sometimes calling a fetus a baby I have given away the feminist farm and endorsed full legal personhood for prenatal life, or that by using fetus I fail to acknowledge that many babies are much loved in utero, even among women who may decide an abortion is the right thing for them to do.

fetus,<sup>430</sup> or even the vulnerable fetus who now meaningfully participates in the culture of life. My claim is that the fetus has had something of a makeover and it is the *friendly* fetus with whom many now feel a comfortable affinity. Emboldened by an improved legal status—defined variously by federal legislation as a victim,<sup>431</sup> a pain sufferer,<sup>432</sup> a patient, an insured, and a child<sup>433</sup>—the fetus has become a vivid social presence.<sup>434</sup>

This results in part from our visual familiarity with the fetus.<sup>435</sup> An early glimpse came in 1965 when *Life* magazine published what seemed at the time miraculous color pictures of the fetus developing in utero.<sup>436</sup> Today the fuss may be hard to understand; the average elementary school student can now identify (if not sketch) a fetus. Then, however, the image was new and astonishing: “the unfinished child looking like an astronaut in its transparent bubble, a bluish-pink figure with protruding veins sucking its thumb, the vaguely human face with closed eyes covered by a tissue veil.”<sup>437</sup>

Still photos were soon overshadowed by images produced through ultrasound. Although first used to detect fetal abnormalities and fetal

430. For a description of images of aborted fetuses in Japan harassing their mothers, see Helen Hardacre, *Marketing the Menacing Fetus in Japan* (1999) (describing sect practice of honoring fetus through shrines).

431. See *supra* note 364 and accompanying text.

432. Unborn Child Pain Awareness Act, S. 51, 109th Cong. (2005), 151 Cong. Rec. S512 (daily ed. Jan. 24, 2005) (statement of Sen. Brownback) (proposing requirement that women seeking late-term abortions be given information about fetal pain and be offered “the opportunity to choose anesthesia for the unborn child in order to lessen its pain”).

433. 42 C.F.R. § 457.10 (2005) (defining “child,” for purposes of federally funded state insurance program, to include “an individual under the age of 19 including the period from conception to birth”).

434. A line has been drawn, however, with regard to the fetus as passenger for purposes of using a high occupancy vehicle lane. See *Judge Says Fetuses Don’t Count as Passengers*, L.A. Times, Jan. 12, 2006, at A9 (reporting that judge rejected pregnant woman’s claim that driving with fetus qualified her for carpool lane, and upheld \$367 fine).

435. As Rosalind Petchesky has explained, beginning in the 1980s, pro-life strategists sought “to make foetal personhood a self-fulfilling prophecy by making the foetus a public presence [in] a visually oriented culture.” Rosalind Pollack Petchesky, *Foetal Images: The Power of Visual Culture in the Politics of Reproduction*, in *Reproductive Technologies: Gender, Motherhood and Medicine* 57, 58 (Michelle Stanworth ed., 1987).

436. In her history of the fetus, Barbara Duden argues that traditionally “[t]he invisibility of the unborn [was] protected by a widespread taboo.” Duden, *supra* note 334, at 32. This invisibility gave way in the late nineteenth century with the stethoscope and discovery of the fetal heartbeat. Modern parents can now listen to their baby’s heartbeat just for fun by purchasing *Tiny Ticklers*, an “advanced sensor technology” that lets parents “hear each heartbeat, kick, and hiccup as early as the 21st week.” *Labor of Love Childbirth Servs., New and Exciting Parent Products* (n.d.) (on file with the *Columbia Law Review*).

437. Duden, *supra* note 334, at 14. Duden argues that the *Life* magazine photos “pander[ed] to the *libido vivendi*, the ravenous urge to extend one’s sight, . . . to see things which have previously been off limits.” *Id.* at 15.



positioning,<sup>438</sup> by the late 1980s ultrasound scanning had become an ordinary feature of obstetric practice.<sup>439</sup> Right to life advocates were quick to recognize the power of the moving fetal image. If, as Rosalind Petchesky observed early on, “a picture of a dead fetus is worth a thousand words,”<sup>440</sup> ultrasound made it possible to show the murder itself, from the perspective of the victim. This was the premise of a 1985 pro-life film, *The Silent Scream*, which purported to show a cowering fetus under attack by an abortionist.<sup>441</sup> Recently, though, tactics have changed. While pictures of aborted fetuses are still available online and are paraded outside clinics by pro-life activists, the focus on gory remains is increasingly downplayed.<sup>442</sup> More often today, the case for life is made by encouraging a positive engagement with “life,” and one important mechanism is through ultrasound.

Ultrasound has developed a loyal fan base for the living fetus, profoundly recasting women’s relationships with fetal life by establishing visual and therefore emotional intimacy. Women now anticipate “meeting” the fetus at the screening,<sup>443</sup> and ultrasound technicians often encourage

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438. See Lisa M. Mitchell, *Baby’s First Picture: Ultrasound and the Politics of Fetal Subjects* 33–36 (2001). See generally Margaret B. McNay & John E.E. Fleming, *Forty Years of Obstetric Ultrasound, 1957–1997*, 25 *Ultrasound Med. & Biology* 3 (1999).

439. See Mitchell, *supra* note 438, at 38–44.

440. Petchesky, *supra* note 435, at 57.

441. Stills from the film can be found at *The Silent Scream*, Script & Photos, at [http://www.silentscream.org/silent\\_e.htm](http://www.silentscream.org/silent_e.htm) (last visited Feb. 12, 2006) (on file with the *Columbia Law Review*). Ultrasound images are also available on pro-life websites such as *Unborn.com* which offers a continuing film loop of a pulsating fetus. Viewers are told that “This ten week old baby . . . is looking right at you and is waving ‘Hi!’” *Sound Wave Images, Ultrasounds*, at <http://www.unborn.com/window/welcome1.htm> (last visited Feb. 16, 2006) (on file with the *Columbia Law Review*).

442. It is interesting how the focus of fetal imagery has flipped. Formerly one could see dead fetuses. See generally Lynn M. Morgan, *Materializing the Fetal Body, or, What Are Those Corpses Doing in Biology’s Basement?*, in *Fetal Subjects, Feminist Positions* 43 (Lynn M. Morgan & Meredith W. Michaels eds., 1999) (discussing author’s discovery of eighty-seven bottled fetuses in basement of Mt. Holyoke’s Biology Department that were on display decades ago, and noting changes in how society views images of dead fetuses). Now pictures of the living fetus are readily available and the corpse is more often left to the imagination.

443. To be clear, not all pregnant women want to look at ultrasound pictures. Women contemplating abortion, for example, stand in a very different position than women who plan to carry to term. Recognizing the impact of seeing an ultrasound image, Focus on the Family and other pro-life organizations have begun stocking crisis pregnancy centers with ultrasound machines. See David Montero, *Abortion Foes Use Ultrasound*, *Rocky Mountain News* (Denver), Apr. 22, 2005, at 36A (discussing Focus on the Family’s goal of distributing 800 ultrasound machines by 2010); see also Neela Banerjee, *Church Groups Turn to Sonogram to Turn Women from Abortion*, *N.Y. Times*, Feb. 2, 2005, at A1 (reporting on religious fundraising for scanners, motivated by evidence that pregnant woman who sees baby’s image on screen is significantly less likely to abort).

While crisis pregnancy centers may urge women to have an ultrasound before consenting to an abortion, a number of states now *require* them to do so. See, e.g., Ala. Code § 26-23A-4(b)(4) (LexisNexis Supp. 2004) (requiring physician performing abortion “to perform an ultrasound” and requiring woman to acknowledge in writing that she

this tendency by personifying fetal movements. As one researcher observed, “[s]onographers may even touch and stroke the on-screen image and create a voice so that the fetus can ‘speak’ and communicate its ‘feelings.’”<sup>444</sup> In sum, *Life* magazine has lost its gloss; mothers can now watch their own lively fetus moving in real time.

Indeed, *everyone* has now seen, and many have admired, the ultrasound image of somebody’s baby, whether on a key chain, refrigerator magnet, or shower invitation. Women who have never been pregnant can picture what lies inside and what lies ahead.<sup>445</sup> Baby’s first picture is no longer taken in an isolette wearing the little knitted cap, but in utero; *this* image takes the place of honor in baby’s first scrapbook. Indeed, the FDA may disapprove of ultrasound screening for the purpose of acquiring “keepsake videos,”<sup>446</sup> but an entire industry has developed to help parents “forever capture the magic of first seeing [their] baby,” now in 3D.<sup>447</sup> Commercial ultrasound studios advise women as to when during their pregnancies to schedule the shoot in order to get “the cutest facial images.”<sup>448</sup> Parents are encouraged to invite their friends “to share the experience in [a] home theater setting” in a sort of prenatal coming-out party.<sup>449</sup> The screening enhances fetal social standing, as the fetus be-

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“either saw the ultrasound image of her unborn child [or] was offered the opportunity and rejected it”); Fla. Stat. Ann. § 390.012(3)(d)(4) (West Supp. 2006) (requiring ultrasound evaluation for all abortions after first trimester). Other states require that ultrasound services at least be made available before abortion. See, e.g., Ind. Code Ann. § 16-34-2-1.1(a)(1)(F) (LexisNexis Supp. 2005) (requiring that pregnant women be informed of availability of ultrasound and fetal heart tone services); Utah Code Ann. § 76-7-305(1)(b)(v) (2003) (stating that woman has “right to view an ultrasound”); Wis. Stat. Ann. § 253.10(3)(c)(1)(g) (West 2004) (requiring that ultrasound be made available).

444. Mitchell, *supra* note 438, at 132–34 (describing her observations of routine Canadian ultrasounds, in which fetus was often “spoken of as an idealized infant”).

445. In seminar discussions, law students have volunteered that rather than thinking about their future babies, as their mothers might have done, they think about their future fetuses instead.

446. See Carol Rados, FDA Cautions Against Ultrasound ‘Keepsake’ Images, *FDA Consumer Mag.*, Jan.–Feb. 2004, at 12, 13 (reporting that technicians may permit “longer exposure times and at higher levels than are usually used in medical situations”); cf. Eric Zorn, For Critics, Bill Is Yet Another Abortion Issue, *Chi. Trib.*, Apr. 14, 2005, at C1 (describing proposed Illinois legislation to “sharply curtail non-medical uses of sonograms during pregnancy”).

447. See, e.g., Baby Insight, Love at First Sight, at <http://www.baby-insight.com> (last visited Jan. 28, 2006) (on file with the *Columbia Law Review*). The company’s \$240 fee includes “video of complete ultrasound with background music of your choice (DVD upgrade available); 15 color 3D ultrasound photos of your baby on CD; 1-8x10, 2-5x7, and 10 wallet sized color photos; 4 announcement cards for friends and family; gender determination, if requested; and report of limited medical ultrasound.” Baby Insight, Packages, at <http://www.baby-insight.com/packages.html> (last visited Jan. 28, 2006) (on file with the *Columbia Law Review*) [hereinafter Baby Insight, Packages].

448. Baby Insight, FAQs, at <http://www.baby-insight.com/faq.html> (last visited Jan. 28, 2006) (on file with the *Columbia Law Review*).

449. Baby Insight, Packages, *supra* note 447.

comes an independent presence, the guest of honor, and a budding consumer with its own gift registry.<sup>450</sup>

In addition to visual and affective connections, there is something new afoot in fetal ideology. This is an increasing psychological identification with the fetus. The phenomenon is revealed in the new concept of “abortion survivor,” a phrase that combines the pathos of victimhood with the accomplishment of survivorship. The term initially referred to rare instances of a live birth occurring during an abortion—a concept formally incorporated into federal law. The Born-Alive Infants Protection Act<sup>451</sup> defines “person” as “every infant member of the species homo sapiens who is born alive at any stage of development, [including during] labor, caesarian section, or induced abortion.”<sup>452</sup>

But the term “abortion survivor” now goes beyond a connection to an actual abortion to include those whose mothers *might* have aborted them.<sup>453</sup> As Kelly Kroll, president of the American Collegians for Life, explains, she is an abortion survivor because she was adopted: “Myself and my classmates have never known a world in which abortion wasn’t legalized . . . . We’ve realized that any one of us could have been aborted.”<sup>454</sup> It is unclear if Kelly’s mother actually thought about having

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450. See Janelle S. Taylor, *Of Sonograms and Baby Prams: Prenatal Diagnosis, Pregnancy, and Consumption*, 26 *Feminist Stud.* 391, 398–401 (2000) (relating ultrasound to parents’ desire to shop for goods for fetus).

451. Born-Alive Infants Protection Act of 2002, Pub. L. No. 107-207, 116 Stat. 926 (codified as amended at 1 U.S.C. § 8 (Supp. II 2004)).

452. *Id.* (defining “born alive” as “the complete expulsion or extraction from [the] mother of that member, at any stage of development [who, afterwards] breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles”). Hearings during previous efforts to pass similar legislation featured testimony of a self-identified born-alive abortion survivor. Born-Alive Infants Protection Act of 2000: Hearing on H.R. 4292 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 106th Cong. 23–26 (2000) (testimony of Gianna Jessen, abortion survivor) (describing experience as subject of saline abortion and resulting cerebral palsy); *Origins and Scope of Roe v. Wade*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. 28–33 (1996) (testimony of Gianna Jessen, abortion survivor) (same).

453. See John C. Sonne, *Abortion Survivors at Columbine*, 15 *J. Prenatal & Perinatal Psychol. & Health* 3, 3 (2000) (defining abortion survivors as persons “born after having prenatally experienced either a direct attempt to physically abort them, or who have survived after having lived in an unwelcoming and ambivalent prenatal environment in which the possibility of their being aborted had been consciously or unconsciously considered by their parent(s) or others”). The same author has offered “prenatal histories” of the world’s “leading tyrants” (Adolph Hitler, Joseph Stalin, Saddam Hussein), concluding that “murderous sibling rivalry, derivative from the threat of being aborted, is a major dynamic in [their] behavior.” John C. Sonne, *On Tyrants as Abortion Survivors*, 19 *J. Prenatal & Perinatal Psychol. & Health* 149, 164 (2004). It is hard to know what to make of this; the journal appears bona fide.

454. Hayt, *supra* note 420. An article on the National Right to Life Committee website offers a further account of the psychological harm:

So, when children hear about what abortion is, they are horrified, not just by the thought of babies being killed—and what other way is there to explain it—but

an abortion; Kelly is a survivor because her mother *could* have aborted her.<sup>455</sup> The new usage thus connects *everyone* to abortion by virtue of their nonaborted birth.<sup>456</sup>

The fetus has even shown up on MTV as its own preborn abortion survivor. In a recent hip-hop video called *Can I Live?*, the singer entreats his mother, who is prepped for an abortion on a clinic examination table: "Mommy, I don't like this clinic/ Hopefully you'll make the right decision/ And don't go through with the knife incision."<sup>457</sup> Anti-abortion websites have called the video "an eloquent statement for the 'Culture of Life,'" encouraging their viewers to request the video on MTV's countdown show.<sup>458</sup> But there is more. Identification with unborn life is recognized even at the embryonic state. As Tom DeLay explained, "We were all at one time embryos ourselves. So was Abraham. So was Muhammad. So was Jesus of Nazareth."<sup>459</sup> One's embryonic history is now a source of identity. In 2005, President Bush surrounded himself with toddlers born as a result of "embryo adoption," the practice of couples donating their unused frozen embryos to infertile couples for implantation.<sup>460</sup>

While abortion survivorship or a hip-hop fetus may seem farfetched, both are now accessible as a matter of culture and as a matter of law. Who knows who else over time will find psychological comfort or company in the designation? Certainly mothers of Safe Haven babies did *not* choose abortion, though whether their choice was made affirmatively enough from the child's perspective, only time will tell. My point is sim-

also by fears about the solidity of their own existence. . . . Are we raising a generation of children who will now be nagged by fears that their lives were in danger when they were in the womb?

Amy Welborn, Nat'l Right to Life Comm., Explaining Abortion to Children, at <http://nrlc.org/news/1998/NRL7.98/amy.html> (last visited Jan. 28, 2006) (on file with the *Columbia Law Review*).

455. Many in the disability community make this same argument, opposing abortion and prenatal testing on the grounds that, depending on the results, they might have been aborted. See, e.g., Erik Parens & Adrienne Asch, Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations, 9 *Mental Retardation & Developmental Disabilities Res. Revs.* 40, 42 (2003) (outlining argument that aborting fetuses with disabling traits sends message that these traits are undesirable in society).

456. In this sense, we are all also celibacy survivors.

457. See Annette John-Hall, Rapper's Abortion-Themed Video Is Striking a Chord, *Phila. Inquirer*, Aug. 2, 2005, at E01; Kelefa Sanneh, An Unborn Fetus with a Message for Mom, *N.Y. Times*, June 26, 2005, § 2, at 1. The song and video are available at <http://www.nickcannonmusic.com> (last visited Feb. 24, 2006).

458. John-Hall, *supra* note 457 (internal quotation marks omitted). For a different fetal voice, see Louis MacNeice, Prayer Before Birth, in *The Collected Poems of Louis MacNeice* 193-94 (E.R. Dodds ed., 1967).

459. Sheryl Gay Stolberg, House Approves a Stem Cell Bill Opposed by Bush, *N.Y. Times*, May 25, 2005, at A1 (internal quotation marks omitted).

460. *Id.* (see photo and caption accompanying text); see also Snowflakes Frozen Embryos, Nightlight Christian Adoptions, at [http://www.nightlight.org/snowflakes\\_description.asp](http://www.nightlight.org/snowflakes_description.asp) (last visited Feb. 10, 2006) (on file with the *Columbia Law Review*) (explaining program for transfer or "adoption" of frozen embryos).

ply that establishing an affinity with the fetus is a clever move in the campaign against abortion. As identifying with the fetus becomes an increasingly intimate proposition, anyone can now sympathize with—or claim—abortion victimhood. This, in turn, further normalizes the idea that the fetus has the same problems, the same preferences, and ought therefore to have the same protections, as any of us.

#### CONCLUSION

I began this project while commuting on New Jersey Transit. Long interested in how law regulates mothers' decisions to separate from their children, I had never before seen billboards *urging* them to do so. Intrigued by "No Blame, No Name, No Shame," I called the 800 number, received my Safe Haven Volunteer's Starter Kit (poster, pamphlet, and DVD talking points), and began investigating what I took to be New Jersey's novel legislation. It soon became clear, however, that while New Jersey may have had the nicest posters, nearly every state had the law.

Because the legislation ran so counter to more typical and more punitive policies regulating deviant mothers, teenage sexuality, and crimes against children, it struck me that more was going on than met the eye. That hunch became stronger as my research revealed that in most states, Safe Haven laws resulted in the surrender of newborns only occasionally. Nonetheless, state after state embraced Safe Haven laws as the cure for infant abandonment. As I have explained, the embrace fit neatly into an existing background of cultivated sympathy for fetal life and strident moral objection by some to the practice of legal abortion. Anxieties about one category of immoral women—those who abort—fueled legislative efforts aimed at another. The disregard for infant life displayed by mothers who abandon their newborns was framed as connected and familiar.

My purpose in analyzing the enactment of Safe Haven laws is not to propose better statutes (though some improvements would make sense), or to suggest the repeal of those we have. It is possible that Safe Havens' failure to save more than a handful of infants may serve to redirect legislative energies to different, perhaps more productive interventions. Nor have I sought to contribute another case study to a general theory of legislation, providing one more example that belies the cheerful simplicity of the civics lesson image of solving social problems through lawmaking.

My aim has been to unravel what may not at the outset have seemed much of a mystery: the great and swift appeal of Safe Haven laws across the states. Of course the legislation was easy to pass; no one wants babies to die. The efficacy of the legislation is another matter. In describing the effects of a moral panic, Stanley Cohen noted that sometimes the panic just "passes over," while at other times its consequences are more serious and may include changes in law, social practices, or even "in the way [a]

society conceives itself.”<sup>461</sup> In considering Safe Haven laws along these various dimensions—legal impact, sticking power, and societal self-definition—some things are immediately clear. Existing law has already changed: Anonymous abandonment is no longer criminal, though it is hard to know whether this reform will catch on and endure as a practice that pregnant women in the twenty-first century regularly choose as they did in droves in the nineteenth century. There is also the matter of sustaining public interest in the Safe Haven project over time. Fire stations may still be collecting infants ten years from now, or public attention may have turned to some new solution or some new problem.<sup>462</sup> Panics are, after all, self-limiting and temporary.<sup>463</sup> The political shelf-life of Safe Haven legislation is at best unpredictable.

I suggest, however, that Safe Haven laws succeed on a different calculus, at the level of what we might think of as stealth symbolism. While their explicit purpose is to save infants from dumpsters, their rhetorical effect encompasses lifesaving as that term is understood within the culture of life: the salvation of *unborn* life. Safe Havens’ more enduring and subtle achievement is therefore less criminological than cultural: the vindication and further extension into public consciousness of the view that abortion is murder.

This outcome may be an unintended consequence of the legislation, even if for some it is a felicitous one. The phenomenon of infant abandonment, like the sad, exploited case of Terri Schiavo, has been an unexpected gift to those who oppose abortion. But in the culture of life, decent goals like preventing neonaticide are put into the subtle service of the movement’s larger cause: protecting the unborn by every means possible. There are, however, reasons to think that this ideology—the absolute impermissibility of abortion—has unintended costs as well as unintended consequences and that these are worth bringing to light when evaluating the deployment of law in women’s lives.

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461. Cohen, *supra* note 173, at 1.

462. Consider the rise and fall of “crack babies,” a social problem of the 1980s. See Laura E. Gómez, *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* 27–33 (1997) (noting that legislative and media interest in “crack baby” problem peaked in mid- to late-1980s, and has fallen off since).

463. Cohen, *supra* note 173, at xxx–xxxi (noting that panics have “a ‘natural history’ which ends” when people become bored, danger fizzles out, or media direct us to new forms of deviance).