Abortion and Public Policy

A Defense of "Naive" Rawlsianism

Nicholas Colgrove

Steven Landsburg argues in this issue that from a legal perspective, "most abortions should be unrestricted." This conclusion, he claims, follows from combining insights from Judith Jarvis Thomson (1971) with a "careful Rawlsian analysis," where "Rawlsianism is the industry-standard approach" for settling conflicts like those that arise in debates over abortion policy. If correct, then "the right approach to policy questions" implies that abortion access should remain relatively open. Here, I argue that Landsburg has drawn from Rawlsian tools the wrong conclusion about abortion. I defend what he terms "naive Rawlsian": the view that as a matter of justice, "many abortions . . . should be prohibited." If correct, then "the industry-standard approach" for settling conflicts (as Landsburg calls it) should lead society to prohibit abortion in most cases. Proponents of abortion who wish to avoid this outcome, therefore, should abandon the "industry standard" approach to conflict resolution.

I begin by tracing ideas from Thomson (1971) and Rawls (1971) upon which Landsburg builds his case. Getting clear on these sources will reveal ways in which Landsburg has misunderstood (or misapplied) them. Specifically, in the first section,

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I describe Thomson's defense of abortion. Then I outline two "Rawlsian" tools upon which Landsburg's argument relies: the "veil of ignorance" thought experiment and the "hypothetical contracts rule." I end both sections by showing that a straightforward application of these tools leads to the conclusion that most abortions should be prohibited. Landsburg rejects this straightforward conclusion, however, terming it "naive Rawlsianism." In the fourth section, I unpack his reasoning. From there, I defend "naive" Rawlsianism against Landsburg's criticisms. I argue that the naive Rawlsian view is correct and so, abortion should be prohibited. I conclude by discussing ways in which abortion opponents may build upon Landsburg's work, by considering ways in which society can better support vulnerable families and, especially, pregnant women.

Thomson's "Defense of Abortion"

Thomson (1971) famously defended the view that abortion is permissible—and should be legal—even if fetuses are fully persons under the law (e.g., individuals with the same right to life enjoyed by the reader).[1] This, Thomson argues, is because "having a right to life does not guarantee having . . . a right to be given the use of . . . another person's body" (56). To illustrate, Thomson advances her "violinist analogy." In this analogy, the reader is to imagine himself or herself suddenly connected via medical tubing to a famous violinist. The violinist's kidneys have ceased functioning and his survival, we are told, depends on his remaining connected to the reader for nine months. Thomson then asks, "Is it morally incumbent on you to accede to this situation?" and answers, "I imagine you would regard this as outrageous" (49).

For Thomson, not only should you be permitted to detach from the violinist—even if he dies shortly thereafter—but also, in detaching, you do not violate the violinist's right to life (55). That someone needs a resource for survival gives them no right to take it (without permission) from another party. In the case of pregnancy, therefore, even supposing that a fetus is fully a person—with a full, robust right to life—the fetus has no right to use his or her mother's body for survival (at least, not without the mother's permission). At this stage, Landsburg invites us to consider Thomson's argument from a "Rawlsian viewpoint." He does so by applying two tools to Thomson's argument: Rawls's "veil of ignorance" thought experiment and the "hypothetical contracts rule." Consider each in turn.

1. Notably, in the now-defunct *Roe v. Wade* (1973) ruling, the U.S. Supreme Court said otherwise: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus's right to life would then be guaranteed specifically by the [14th] Amendment" (156–57). For this reason, Thomson's essay may not be the best candidate to bring forth when discussing law or public policy (in the United States at least).

The "Veil of Ignorance" Thought Experiment

First, in the veil of ignorance thought experiment, Rawls (1971) asks readers to imagine someone who knows nothing about their actual life or situation; they are ignorant concerning their talents, fortunes, "class position or social status, . . . natural assets and abilities, . . . intelligence and strength, and the like" (137). Next, readers should ask: from *that* person's perspective, what kinds of rules or principles would he or she implement to govern society? Whatever those rules or principles turn out to be, they will be an expression of justice.

To borrow an example from Alexander Pruss (2011), behind the veil, "we would forbid racism because under the veil of ignorance we would not know whether we would end up having the role of victim or inflicter of racism, and we would not want to take the risk of being . . . the victim" (179). People under the veil, in other words, will assent only to principles and rules that protect vulnerable individuals since (for all they know) they *are* vulnerable in the real world. Hence, the thought experiment gives us a way to discover principles of justice without the influence of personal bias or undue self-interest.

What would someone behind the veil say about abortion? Well, Landsburg argues, consider Thomson's violinist analogy. In that case,

> the calculus appears simple: You might someday find yourself on either side of a tether. If so, and if cord-cutting is prohibited, there's a 50-50 chance you'll be at least partially immobilized for nine months. Or, if cord-cutting is legal, there's a 50-50 chance you'll die. It seems clear that most of us would prefer to take our chances with the former.

Assuming that the violinist case is analogous to pregnancy, then this means that as a matter of justice, abortion should be prohibited.[2] Pruss (2011) also makes this point explicitly: "Whether I am a fetus or not is something that must fall under the veil of ignorance, and hence the killing of fetuses will end up being prohibited. . . . Hence, justice requires a prohibition on killing fetuses" (180). Thus, Rawls's veil of ignorance thought experiment (seemingly) implies that abortion is unjust (at least generally).[3]

2. For an explanation of why the violinist case is not analogous to pregnancy, see Beckwith (2014).

3. "Seemingly" because Landsburg claims this view is "naive." I disagree, as discussed below. Also, I add "generally" to leave room for the possibility someone behind the veil may judge abortion to be permissible in cases where a fetus is not viable and continued pregnancy will result in the death of both the fetus and his or her mother. In *those* cases, permitting abortion may be consistent with justice since the deliberator would, effectively, be giving themselves a 50 percent chance of survival rather than no chance of survival. That said, in real-world cases of maternal-fetal conflict, Toni Saad (2022) has argued that abortion is never medically necessary (e.g., as opposed to induced delivery).

The Hypothetical Contracts Rule

Next, Landsburg applies to Thomson's view another Rawlsian tool: the "hypothetical contracts rule." This rule applies in cases where parties cannot "negotiate" with one another, as is the case with a fetus and his or her mother. Specifically, Landsburg writes, "mainstream Rawlsian policy analysis demands that when negotiations are impossible, the law ought to enforce the terms of contracts that we are confident people *would* have signed onto, if only they could have." To illustrate, he continues, were your boat sinking—such that it could be saved only by tying it to an absent stranger's dock—"common law enforces the agreement that [both parties] presumably *would* have reached, by allowing you to tie up your boat." Contra Thomson, therefore, it seems that common law *does* permit the use of someone else's resources without their permission (at least in some cases).[4]

Applied to pregnancy, Landsburg claims, "it's easy to imagine that a fetus, if it were possible, would surely offer, say, 40 percent of its lifetime earnings in exchange for being carried to term. If so, and if we accept the hypothetical contracts rule, then the apparent implication is that a great many abortions . . . should be prohibited." Once again, a straightforward application of Rawlsian tools to the question of abortion indicates that society should restrict abortion access. In other words, both the veil of ignorance thought experiment and the hypothetical contracts rule (seemingly) imply that abortion should be prohibited. According to Landsburg, however, this is the wrong conclusion to draw. Rather, he says this conclusion rests upon a misunderstanding of Rawlsian reasoning (hence, he terms the mistaken view the "naive Rawlsian conclusion"). Here, then, is Landsburg's primary argument against "naive" Rawlsianism.

Landsburg's Argument against the "Naive" View

In rejecting the "naive" view, Landsburg reasons as follows: "If the hypothetical contracts rule calls for penalizing or prohibiting abortion, then it seems to call just as strongly for penalizing or prohibiting any decision to remain childless (or for that matter to limit one's family size)." Why think this? Well, there are two hypothetical contracts worth considering here. First, we could imagine a fetus who makes some offer (e.g., pledges 40 percent "of its lifetime earnings") in exchange for not being aborted. Second, we can imagine a "disembodied soul" that would offer "a

4. Here, Landsburg claims that had Thomson (1971) considered the hypothetical contracts rule, "she might have been forced to different conclusions" about the permissibility of abortion. As I read Thomson, however, it seems she explicitly rejects the kind of reasoning encapsulated in the hypothetical contracts rule (rather than overlooking it). Either way, insofar as Thomson's view conflicts with—what Landsburg calls—"a long tradition in law and economics . . . that the common law . . . *should* enforce such hypothetical contracts," so much the worse for Thomson.

substantial fraction of [its] future earnings in exchange" for being conceived in the first place.

As Landsburg puts things, "negotiating before you're conceived is quite impossible, but no more so than negotiating during the nine months thereafter" and so, "if we're bound to respect the results of one hypothetical negotiation, how can we ignore the results of another?" This means that "if our argument proves that we should discourage abortion, it also proves that we should discourage any failure to reproduce."

Landsburg rightly recognizes that this outcome will strike many readers as "absurd." Identifying this absurdity will be easier if we split his original conditional into two forms (one that centers on "prohibition" language and one that centers on "penalty" language, respectively):

Prohibition conditional: If the hypothetical contracts rule calls for . . . *prohibiting* abortion, then it seems to call just as strongly for . . . *prohibiting* any decision to remain childless (or for that matter to limit one's family size).

Penalty conditional: If the hypothetical contracts rule calls for *penalizing* . . . abortion, then it seems to call just as strongly for *penalizing* . . . any decision to remain childless (or for that matter to limit one's family size).

A law that *prohibits* "any decision to remain childless" is an insane law. Were it true that the prohibition of abortion requires endorsing such a law, therefore, then we would have excellent reason to reject laws that prohibit abortion. Perhaps this is why Landsburg later writes, "What we *can't* conclude is that abortion should be prohibited" since—given the prohibition conditional—prohibiting abortion would imply that society must make conception "mandatory."

The penalty conditional, on the other hand, leaves significant room to discuss the nature (and degree) of relevant penalties. Thus, it is unsurprising that Landsburg spends much of his essay outlining what these penalties might be, eventually settling on a system of "taxes and subsidies" (which are designed both to discourage abortion and promote procreation). Ultimately, he argues, "abortion should be discouraged, if at all, by a tax that is no greater than the amount needed to subsidize one additional birth." Although the discussion concerning which penalties or subsidies should be written into policy is interesting, I will argue that Landsburg fails to motivate the need for such a conversation in the first place. This is because the challenge presented by "naive Rawlsianism" has not really been addressed.[5]

5. For clarity, in my response, I largely set aside the penalty conditional, arguing (in effect) that the prohibition conditional is false: the prohibition of abortion does *not* imply that society must make conception mandatory.

Revisiting the Veil: Abortion Is Unjust

Recall that when running Rawls's thought experiment, the "naive" view implies that abortion is unjust (at least generally). This is because behind the veil, the deliberator does not know whether or not she is a fetus. Thus, the story goes, the deliberator will prohibit abortion to eliminate the risk of being killed arbitrarily. If correct, then there is no need to apply the hypothetical contracts rule to cases of pregnancy and abortion. Yet, Landsburg proposes we do just that, asking the reader to imagine a fetus offering 40 percent of his or her lifetime earnings in exchange for not being aborted. If we have already determined that abortion is a kind of unjust killing, however, then Landsburg's hypothetical contract is a simple case of extortion. One person (the mother) is offering not to kill unjustly (i.e., murder) another person (the fetus) in exchange for money. To require that someone pay a fee in exchange for not being murdered is about as unjust as things can get. From behind the veil, no impartial deliberator would permit such extortion.

Further, on the "naive" Rawlsian view, it is not that abortion is impermissible given that some hypothetical contract could reasonably be worked out between mother and child; abortion is impermissible because it is unjust. So, if a Rawlsian wants to argue that abortion is to be permitted—especially in the "unrestricted" way that Landsburg favors—we need some compelling reason to think that the deliberator (behind the veil) would permit abortion. Landsburg never provides a reason to think this. Instead, he moves quickly from discussions of the veil of ignorance to discussions of the hypothetical contracts rule.

Landsburg does raise an interesting question along the way, however: how will the deliberator structure society if, for all she knows, she is a "disembodied soul" awaiting conception? Let us consider this suggestion.

Existential Questions from behind the Veil

Imagine that from behind the veil, our deliberator has already concluded that abortion should be prohibited (which seems reasonable, given the above discussion). She then asks, "What if I turn out to be a soul waiting to be conceived? To maximize my chances of becoming incarnate, should I require that everyone who can conceive does so?" Answering these questions will depend, in part, upon what remaining "disembodied" would entail and, more importantly, whether it is even possible. In other words, we can agree that being killed—i.e., being eliminated from existence—is bad for a person. Hence, killing (including abortion) should not be permitted. But what about never being conceived? Is that as bad as being killed? The answers are not at all clear.

Anti-natalists will argue that nonexistence (specifically, *never existing*) is preferable to existence, even while agreeing that being killed (*ceasing* to exist) is bad for

an individual.[6] If our deliberator is an anti-natalist, therefore, she is free to reject the claim that procreation should be made mandatory, even if she believes that killing—and so, abortion—should be prohibited. Alternatively, it may be that remaining a disembodied soul (i.e., being a soul that is never incarnated) is neither positive nor negative for an individual.[7] On such a view, our deliberator would also be free to maintain that killing (and so, abortion) should be prohibited while denying that procreation should be mandatory. There are thus multiple ways to maintain, from behind the veil, that *killing* an individual should be prohibited even though *bringing them into existence* is not mandatory.

Ultimately, Landsburg's argument depends on two highly controversial assumptions. First, that for all the deliberator knows, she is a preconceived "disembodied soul" awaiting conception. Second, that she has some significant interest in being conceived (i.e., being made incarnate). We have seen that the second assumption is debatable. Those concerns aside, the first assumption is especially problematic for the veil of ignorance thought experiment.

The main question to consider is how much the deliberator behind the veil knows regarding the *type* of thing they are. As Pruss (2011) notes, behind the veil "we had better have an awareness of ourselves as human since otherwise our 'just society' will end up prohibiting all killing of animals" among other things (180). If, from behind the veil, I believed that I might be an oak tree, for example, then I may conclude that a just society requires not cutting down oak trees (or destroying them in any other way). To avoid this problem, Pruss suggests a "simple criterion" for determining how much (and how little) deliberators behind the veil know about the type of thing they are: "Under the veil, we are aware of which social roles it would be logically possible for us to fill, but not aware which of those roles we do in fact fill" (180). Each of us was once a fetus—people typically do not recoil when hearing their mothers talk about "the time I was pregnant with *you*"—and if so, then for all the deliberator knows, she is a fetus. By contrast, it is incredible to believe that each of us was once a disembodied soul awaiting conception. Such a possibility seems widely rejected within professional philosophy (and rejected *in principle*, no less).[8]

All this to say: From behind the veil, the deliberator has good reason to consider the interests of fetuses because *she may be one*. The deliberator has no good reason to entertain the possibility that she is a disembodied soul awaiting conception, however, just as she has no good reason to consider the possibility that she is a door, donkey, or dragon. The "naive" view therefore remains unchallenged: the deliberator will conclude that the killing of fetuses should be prohibited—since, for all she knows, she is

6. See Benatar (2006).

7. For a discussion of existence, nonexistence, and well-being, see Delaney (2023).

8. Pruss, for instance, argues that this kind of dualism is absurd (173). See also McMahan (2002, 7–19).

one—but she has no reason to think that conception should be made mandatory (or even encouraged) to satisfy the imaginary interests of "unconceived" souls.[9]

Objection: What about Obligations to Future Generations?

In fairness, Landsburg considers a similar objection to the one I advance. He writes, "A possible response is that a fetus, by virtue of its existence, commands a sort of respect that a pre-fetus, by virtue of its nonexistence, does not." Against this, Landsburg responds, "That logic seems to require a complete disregard for the interests of anyone who hasn't been conceived yet, and so . . . nearly everything that's been said about climate and environmental policy would have to be drastically rewritten if we chose to deny the interests of the unconceived." Not so. There are at least three problems with Landsburg's response.

First, as far as the veil of ignorance thought experiment is concerned, a fetus's relevance behind the veil is not so much that it exists whereas the "pre-fetus" does not. Rather, on common metaphysical assumptions, the deliberator knows that she may be a fetus, but also knows she is not some preconceived ("*nonexistent*") disembodied soul.[10] Fetuses fall within the scope of her concern because she might be one; imaginary beings fall outside the scope of her concern because she knows that she is not one. Rawls (1971) himself cautions that readers should not imagine "an assembly" of "all actual or possible persons" behind the veil, since thinking in this way would "stretch fantasy too far," resulting in the thought experiment failing "to be a natural guide to intuition" (139). Thinking of oneself as a "nonexistent" "pre-fetus"—or as a preconceived disembodied soul—is to "stretch fantasy too far," rendering Rawls's thought experiment useless as a guide to public policy.[11]

9. Another line of response to Landsburg is available here. Evers (1978), for example, argues that for Rawls, "only adults are present" behind the veil (110). If so, then contra Pruss, our deliberator cannot be a fetus. This threatens the naive view. But it also undermines Landsburg's argument since our deliberator can safely conclude that she is not an "unconceived" soul either. Two points are worth mentioning. First, Evers shows that "there are reasons to believe that Rawls's position still entails total prohibition of abortion, or at least frequent prohibitions" anyway (111). This both preserves the *outcome* of the naive view and undermines Landsburg's argument. Second, Pruss's Rawlsian approach provides a principled (nonarbitrary) reason for considering the possibility that one is a fetus, while ignoring the possibility that one is an oak tree, a disembodied or "unconceived" soul, etc. Failure to restrict the thought experiment in this way, we saw, renders it uninformative. Pruss's Rawlsian approach is more informative (and more plausible, metaphysically speaking) than Landsburg's alternative. Even if Pruss's approach is not strictly something Rawls would defend, therefore, it still provides a superior *Rawlsian* approach than what Landsburg offers.

10. Note that Landsburg often conflates a presently existing, disembodied soul (who awaits conception) with a nonexistent "pre-fetus." These are two conceptually different sorts of entities. The deliberator *definitely* knows she is not the latter kind of entity since it is "nonexistent" (and the deliberator knows that she exists somewhere within society). And, if the argument in section 6 is correct, the deliberator is quite safe to assume that she is not the former kind of entity either.

11. To be clear, the criticism here is not that Landsburg fails to follow Rawls. Landsburg is careful to distinguish between defending the particular claims Rawls made versus advancing ideas based upon Rawls's work (i.e., advancing Rawlsianism). Landsburg claims only to do the latter. My criticism, however, is that Landsburg uses Rawls's thought experiment in a way that Rawls himself recognized would lead to absurdity.

Second, when it comes to thinking about future generations, there is a difference between positing obligations to *specific* individuals who will exist and obligations to future generations as a general set. For example, I may donate to a scholarship fund at my alma mater with the intent to benefit the lives of future students. I may even be obligated to do so, given what past generations did for me. But as I donate money, I do so without possessing or discharging obligations to any *specific* future students. Indeed, Rawls himself endorses something like this intergenerational "Golden Rule" when talking about our obligations to future generations, claiming that the present generation should follow principles (e.g., of resource saving) that "they would want preceding generations to have followed."[12] Thus, we can make sense of our obligations to future generations without positing the existence of disembodied souls (and without claiming that nonexistent entities—like the mysterious "pre-fetus"—have interests that should be satisfied via mandatory conception). Put differently, given an intergenerational Golden Rule, we have sufficient reason to make the world a better place for future generations. Importantly, if we think about our obligations to future generations in this way, whether or not procreation should be encouraged (or discouraged) remains an open question. That is, the intergenerational Golden Rule does not, by itself, imply that procreation should be mandatory for the sake of future generations (in fact, it may even call for a limit to procreation under certain circumstances).[13]

Third, our obligations toward existing human beings *do* differ in comparison to whatever we owe future generations. I have an obligation not to kill existing human beings. That obligation does not extend to nonexistent beings. In fact, it cannot, because I cannot kill something that does not exist. Of course, as soon as someone begins to exist, then my obligations to existing persons will apply to her. But once she begins to exist, she is no longer part of the set "future generations" either. So, my obligations to future generations differ from my obligations to presently existing people. Importantly, my obligation not to kill existing people bears no necessary (nor any logical) connection to my responsibility (or lack thereof) for bringing more people into existence. Contra Landsburg, therefore, we can maintain that there are important differences between existing and nonexisting entities without ruling out the possibility that we have some obligations to the latter group (e.g., future generations).

Summing Up

Thus far, we have seen that on Thomson's (1971) assumption that fetuses are persons, Rawls's veil of ignorance thought experiment implies that abortion should be prohibited (generally). Landsburg claims that the prohibition of abortion would

12. As quoted by Meyer (2021).

13. This point is consistent with a final point Landsburg makes concerning discussions that remain open, for instance, on whether there are "too many" or "too few" babies being born.

imply that society must make procreation mandatory. This, we are told, is because we should respect the interests of fetuses and the "interests of the unconceived" alike, namely, by prohibiting abortion and requiring procreation, respectively.

In response, I argue that Landsburg has not addressed the verdict delivered by the veil of ignorance thought experiment: abortion is unjust. Instead, he moves on to an application of the hypothetical contracts rule to cases of pregnancy. If abortion really is unjust killing, however, then application of this rule to pregnancy is inappropriate since it involves simple extortion: an agreement not to murder an individual in exchange for (a lot of) their money. Next, I argue that a person behind the veil need not consider the "interests of the unconceived" in the same way that she considers the interests of fetuses. This is because the deliberator may safely assume that she is not a member of "the unconceived" group, but must acknowledge that she might be a fetus. Put differently, as Pruss (2011) argues, it is (relatively) uncontroversial that *each of us was once a fetus* (and so, the deliberator must consider the possibility that within society, she is a fetus). It is metaphysically dubious to maintain that each of us was once a preconceived (or even "*nonexistent*") disembodied soul. Hence, the deliberator should not consider this possibility (at least, not any more than she considers the possibility that within society, she is a minotaur).

Lastly, I argue that—contra Landsburg—treating the "interests of the unconceived" and the "interests of fetuses" differently is consistent with thinking that we have obligations to future generations. After all, it is trivially true that our obligations to existing persons (including fetuses) differ from our obligations to future generations. We have an obligation not to kill the former, but no such obligation applies (or *can* apply) to the latter. So, where does that leave us?

Looking Ahead: Prohibiting Abortion *and* Protecting Vulnerable Families

Notably, Landsburg spends much of his essay describing various ways of discouraging abortion as opposed to prohibiting it. This is because he mistakenly claims that prohibiting abortion would lead to absurd consequences (namely, that procreation would have to be made legally mandatory). If—as I have argued—prohibiting abortion does not have this absurd consequence, then Landsburg's comments on the penalties for abortion, especially in the form of taxation, are largely irrelevant. A just society prohibits homicide; it does not merely tax killers for killing. Still, there is an entire line of discussion in Landsburg's essay worth considering: How might a just society—namely, one that prohibits abortion—support young families and, especially, pregnant women?

Landsburg's primary suggestion—in terms of supporting pregnant women—is "by subsidizing birth out of general revenues." A society that prohibits abortion is free to embrace such a policy. Indeed, authors like Celia Wolf-Devine (1989),

Erika Bachiochi (2021), and Kate Finley (2022) provide great insight into how such a society might function. That society can (and should) support pregnant women also relates to Landsburg's observation that "the emotional, financial, medical and other costs of a pregnancy vary widely." From this fact—and granting his claim that each pregnant woman is uniquely positioned to assess the costs of continued pregnancy—he concludes that each pregnant woman must be allowed to decide whether or not to continue pregnancy. As Landsburg states, "We have got to trust her to make that decision."

Under a Rawlsian approach—particularly where we have established that abortion is a kind of unjust killing—this is the wrong conclusion to draw. Instead, the deliberator behind the veil must entertain the possibility that she is a pregnant woman in need of "emotional, financial, medical and other" kinds of aid. Given this *very real* possibility, the deliberator must consider how best to structure society. The deliberator may judge, for example, that men should be held accountable, not only to offset the costs of pregnancy (insofar as is possible), but to provide for their children generally.[14] Our deliberator may also judge that society at large should provide safety nets and resources for vulnerable women and young families. If so, then not only will a Rawlsian approach lead us to conclude that abortion is unjust, but it will also lead us to conclude that as a matter of justice, social supports for pregnant women can—and should—be quite extensive.

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14. Thus, any suggestion by Landsburg that women *alone* bear all "costs of pregnancy" is misleading. This need not be so. Men could be required to cover financial costs associated with pregnancy when they have contributed to it. This is consistent with child support requirements broadly. Further, it seems to me that from behind the veil, our deliberator would probably conclude that men who impregnate women should be required to cover the costs of pregnancy in some ways. If so, then justice demands that women should never have to bear the costs of pregnancy alone.

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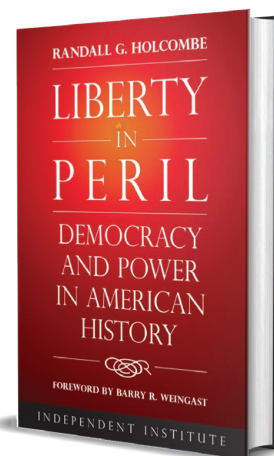

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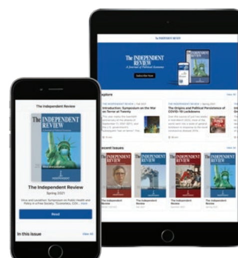

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