The Rediscovery of the Born-Alive Act
By Hadley Arkes
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The Governor of Virginia, Ralph Northam, was artless enough last week to express openly the Democratic position on abortion: that there is no obligation to protect the life of a child who was indecorous enough to survive an abortion when she was obviously not "wanted."

That was enough to stir into action Sen. Ben Sasse of Nebraska, who does not miss a chance to make gestures of high moral passion, even when he is not quite prepared to do the work of following through. Sasse had already introduced in the Senate the "Born-Alive Abortion Survivors Protection Act," and now he moved for a quick vote on Monday evening, to see if the bill could be passed "without objection."

Of course, it could not be. The aim of that bill is to restore the penalties that had been stripped away from the original bill, the "Born-Alive Infants' Protection Act of 2002." That earlier bill sought to plant in the law this key premise: that a child who is born alive, surviving an abortion, has the same claim as any other human being to the protection of the law.

Some readers of these columns will know that I had a hand in framing these bills and making the case for them, in a story going back thirty years. In one notable case in the 1970s, a child survived an abortion for twenty days, underwent surgery, and died. The question was whether there had been an obligation to offer medical help to that child, and the answer tendered by Judge Clement Haynsworth was: No.

He "explained" that once the pregnant woman had decided on abortion, that "the fetus in this case was not a person whose life state law could protect." In other words, the right to an abortion was the right to an "effective abortion" or a dead child.

Some of us thought that we could start there, to test the limits of that "right to abortion." We offered then the "most modest first step": the proposal simply to protect the child who survived the abortion. [The story of that bill, its rationale and passage, is told in my book Natural Rights & the Right to Choose [2].]

But that was an offer that the defenders of abortion could not accept, for they realized that their whole position would come unraveled. If they conceded that the child born alive was nothing less than a human child, with a claim to protection by the law, we would ask what was different about that same child five minutes earlier – then five days, five months earlier?

And that became the source of surprise for our allies when the bill was finally introduced in 2000 and enacted in 2002. The late Henry Hyde was astonished when the National Organization of Women opposed this modest bill to protect the child born alive. The irony was that our adversaries understood the bill better than our friends, because they saw the principle that lay at the heart of the thing.

A decision was made, though, to strip the penalties, civil and criminal, from the bill to avert a veto from President Clinton. We would content ourselves with a "teaching bill," announcing news that the public would find jolting: that the right to abortion, proclaimed in Roe v. Wade, extended through the entire pregnancy, and possibly gave the license to kill the child after birth.

In any case, without the penalties, the bill became almost impossible to enforce. And we came to discover that there was far more of this killing going on than even we had realized in 2002. Nurses began telling stories of babies delivered alive and then put in rooms to die.

But then came the shock of the killings by Kermit Gosnell in Philadelphia. That gave us the right moment to return to the original bill and restore the penalties, civil and criminal, which had been stripped. The bill passed decisively in the House twice, in September 2015, with a vote of 248-177 and in January 2018 with a vote of 241-183.

Every voting Republican supported the bill, and all votes in opposition came from Democrats. This was the vote that revealed the Truth that Dared Not Speak its name: that in the understanding now of the party of the Left in our politics, that right to abortion is not confined to the pregnancy, but entails nothing less than the right to kill the child who survives

That piece of intelligence could have come into play with seismic effect during the presidential election in 2016. But no one seemed to know about it, even Catholics in the media such as Bret Baier, who had the vast resources of their networks available to them.

When we settled years ago for a "teaching bill," we thought we would be breaking out dramatic news to the public. What we truly hadn't anticipated was that the media would simply black out the story, giving it almost no coverage at all.

And so this could be the moment of redemption for Ben Sasse. The energy he expends now would have been expended with larger effect last year in bringing the bill to a vote in the Senate after it had been passed in the House. Either the bill would have been enacted into law, or he could have forced Democrats to take positions on this issue before the mid-term elections.

Those gains were lost through his inattention. The question now is whether, this time, he will follow through: Can he break through the blackout of the media and bring this matter where it belongs – into the center of public argument – and yes, the election of 2020.

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