Abortion, Neonatal Care, Assisted Dying, and Capital Punishment
Second Edition
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1 A Single Question
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The Single Question

The material covered travels over a varied landscape—eugenics, abortion, neonatal care, assisted suicide, lynching, and capital punishment. The single common theme is assessed social worth. In each case, the focus is upon two deeply important moral imperatives: life is sacred and should be protected. Suffering, once detected, should be alleviated. Comparing these otherwise distinct topics, we ask a single question: How do we go about justifying the violation of these deeply important, perhaps universal, moral imperatives, while holding tightly to their importance? The short answer is this: with empathy and logic, we draw boundaries and we resolve dilemmas. From time to time, science, technology, and crystallizing events disturb, clarify, and inform existing understandings of the implied sense of social worth. New resolutions of dilemmas and definitions of life’s protective boundaries are called for. In this manner, moral systems evolve. They do so along a jagged and often contentious path.

PART I: A Moral System Evolves

2 An Exclusionary Movement is Born
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The foundation of the Eugenics Movement in the United States is reviewed. This movement was grounded in the work of Charles Darwin. It was shaped and advanced by a small, interconnected network of well-regarded intellectuals, philanthropists, and political leaders. It soon reached coast to coast and took on national implications.

3 Legal Reform to Eliminate Defectives
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A major objective of the Eugenics Movement was to develop a model law that would be adopted nationwide. After several attempts, a basic template was agreed upon in the early 1920s. The State of Virginia was a leader. In 1927, the Supreme Court, in Buck v. Bell, legitimized Virginia’s statute following a contrived trial and appeal. Numerous states soon adopted similar statutes. In 1933, the newly formed government of Adolph Hitler took note and adopted a close approximation of the laws passed in the United States. Some three years later, the model law’s author, Harry Laughlin, was given an honorary degree from Heidelberg University in recognition of his work on racial cleansing.

4 Redrawing the Boundaries of Protected Life
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The Decade of Conferences
Flawed Judgment and Sloppy Science
Harvesting for Life
Deference to Doctors
A Harvard Committee Redefines Death
A Paradigm for Protected Life
Following World War II, the soul-searing consequences of policies defining some lives as less worthy of protection and support than others became glaringly evident. At the same time, revolutionary advances were being made in the biological sciences. Together, these scientific, technological, and cultural developments set the stage for a reconsideration of human and civil rights and the protective boundaries life.

5 Crystallizing Events and Ethical Principles
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The Belmont Report and the Georgetown Principles
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As the rethinking of the boundaries of protected life progressed, legislation was proposed to formalize broad ethical principles and strengthen regulations of the medical profession. Early attempts failed. Four crystallizing events, involving medical experiments that reminded many of practices in Nazi Germany, precipitated legislative action and the launching of what came to be known as the bioethics movement.

PART II: The Early Moments and Months of Life

6 A Bolt from the Blue: Abortion is Legalized
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A Bolt from the Blue
An early focus of the bioethics movement was abortion. A rubella pandemic and the widely publicized story of a mother who had taken Thalidomide early in her pregnancy captured the nation’s attention. Existing restrictive abortion laws came under increased criticism. Two Supreme Court cases involving the use of contraception set the stage for Roe v. Wade and a companion case, Doe v. Bolton. In Roe, the court confirmed what the contraception cases had established: there was a right to privacy. The court also established that a fetus was not a fully protected person under the Constitution. For many, this decision came like a “bolt from the blue.”

Following Roe v. Wade, other cases addressed additional issues in seemingly contradictory decisions. Together, they infused a heated political debate that would last decades and reshape the political landscape. Basic questions regarding the legal and moral legitimacy of governmental actions were raised. Protests intensified. They eventually included clinic bombings and the murder of abortion providers.
The issues did not go away with birth. Medical advances made it possible to prolong the lives of young infants in ways previously not possible. Questions were raised about the wisdom of prolonging young lives in the face of birth defects and painful, debilitating conditions. New regulations were proposed and eventually refined. Questions remained. What were the boundaries of privacy for parental choice, and what were the boundaries of a life worth living? Who should decide? What should we do when parents wanted medical care continued, but physicians saw further treatment as futile? Given the uncertainty of prognoses, decisions are most frequently made in a sea of ambiguity.

PART III: The Boundaries of Tolerable Suffering

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The Boundaries of Tolerable Suffering
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The Stages of Suffering
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Like the boundaries of life worth protecting, the boundaries of tolerable suffering are hazy. To make matters more uncertain, tolerance for suffering appears to shift over time. We adjust, even to life’s most difficult moments. Advances in life-prolonging medical technologies in the mid twentieth century accentuated these long-standing issues as never before. Life could be prolonged, even when life had lost all meaning and when suffering was the result.

11 Alleviating Suffering and Protecting Life
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The Gift of Death

As life-prolonging technologies were perfected, life could be maintained even in the face of severe suffering and even when life approximated that of a vegetable. The protection of life and the alleviation of suffering were seen as frequently competitive. How was the resulting dilemma resolved? Patient autonomy had been affirmed many times over many years. Still, if a patient chose to end their life, no longer seen as worth living, there were competing, collective interests to prevent them.

12 God, Duty, and Life Worth Living
Belief in an Efficacious, Caring God
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Death With Dignity

Religious beliefs are central to how one approaches the end of life. Belief in an efficacious, caring god, a god who can be reached through prayer, is particularly important. For those who pray often, god should be trusted. Active intervention to hasten the end of life was far more likely to be opposed. Beyond religious beliefs, the practicalities of allocating health care entered the picture. What are the appropriate criteria for rationing health care. Age? Ability to pay? Are there lives less worthy of prolonging than others? When life reaches a certain point, are we simply prolonging
death rather than protecting life. How do we best maintain the dignity of life that remains?

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A Suicide Machine and a Cookbook of Death
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The right to die and death with dignity became phrases of political art. As so often happens, dramatic events crystallized thinking and clarified issues. A physician wrote an article about how he helped a patient die. Vigorous debate followed. How-to books were written, death machines were devised, and carefully crafted questions were posed. When life becomes unbearable, should we provide assistance to those who want to leave life? What form should such assistance take? If persons are unable to end their life, do they have a right to assistance? Voters went to the polls. Cases were taken to court. Conflicting opinions were issued. Much ambivalence remains as the debate continues.

PART IV: Taking Life and Inflicting Suffering

14 Removing the Protective Boundaries of Life
Lynching and the Margins of Life
Crystallizing Events on the Road to Reform
Evolving Protections for Those on the Margins
Another Crystallizing Event
Stark Inhumanity Energizes a Movement
Reform Efforts Coalesce
Justifying the intentional infliction of suffering and the taking of life involves not only the removal of the otherwise protective boundaries of life, but also the demonization of a perceived threat. Lynchings following the Civil War in the United States provide one tragic example. Those already on the margins of life were most vulnerable. As blatant injustices became evident, new protections were devised. They were slow incoming. Additional egregious examples further energized reform efforts. In one instance, it took 40 years to exonerate nine young men who had been riding a train during the Depression, charged with rape, and sentenced to die. In another instance, two men were acquitted of the brutal torture and murder of a young teenager, a crime they admitted committing.

15 A Campaign to Stop the Executions
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Remaining Legacy of a Misguided Chivalry
A Campaign is Launched
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Justifications for Taking Life Are Clarified
Reform efforts were grounded in a deep sense of injustice and a consequent withdrawal of legitimacy for practices then in place. The close linkage between contemporary patterns of capital punishment and lynching as a legacy of slavery was hard to miss and
even harder to deny. It was most evident in cases involving a black offender, charged with raping or attempting to rape a white woman. A campaign to reform and then abolish existing capital-punishment practices was launched. Success was achieved when capital punishment, as then practiced, was declared unconstitutional. It was only a partial victory. Executions could continue if existing procedures were modified.

16 The Pendulum Swings, the Debate Continues
The Pendulum Swings
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Shifting Standards
Newly crafted, now quite lengthy legal procedures yielded increased executions. Concerns remained. Once again, science and technology provided an important impetus for rethinking moral issues. Strong evidence became available that many persons were being wrongly convicted of capital offenses. In addition, the new procedures, in one sense clarifying, had become messy and meaningless for even some who had devised them. As this book goes to press, the standards and procedures are shifting, and the debate continues.

17 Lessons Learned
The protective boundaries of life and the associated sense of social worth are structured and rearranged through exclusionary logic and the power of empathy. Moral evolution rarely progresses along a straight path. Instead, it winds along a jagged and often contentious route. Existing moral principles, judicial decisions, and legislated statutes are frequently not well fashioned to address new scientific findings and technologies. What has been called cultural lag ensues. To address this cultural lag, metaphors are built, analogies are drawn, empathy-generating images are fashioned, and stories are told. In the process, the legitimacy of existing understandings and practices is reassessed. Given the fundamental nature of the moral dilemmas in question, tension remains. From this tension, social movements are spawned. A general proposition emerges: dilemmas, especially ones involving competing and deeply important moral principles, produce cyclical social change. When the need to identify the protective boundaries of life is coupled with the need to establish the boundaries of tolerable suffering, unavoidable dilemmas emerge. Such dilemmas are, by definition, not resolvable. In an important sense, both sides are right. If so, tension will always remain. Perhaps this is the final lesson learned.

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Preface to the Second Edition

It has been three years since this volume was first published. Why the update? The basic argument remains the same. Through laws, religions, and customs we routinely justify the violation of deeply important moral imperatives aimed at protecting life and alleviating suffering, all the while holding tightly to the importance of our moral principles. We do so by drawing boundaries of social worth and setting priorities to resolve dilemmas.

Three events, worthy of note, have taken place since the initial volume appeared. The first is a dramatic increase in legislation aimed at curbing the availability and use of abortion. Between 2011 and 2013 more restrictions on abortion were enacted (205) across the U.S. than in the entire previous decade (189). These restrictions are being appealed and protested, providing excellent illustration yet again of what we have labeled Lesson Six in the final chapter: In many circumstances, unavoidable dilemmas, infused with uncertainty, emerge. The resolution of such dilemmas always leaves, by definition, residual tension. In such circumstances, when one argument prevails, the contrary position is likely to respond. Tension will always remain and cyclical change ensues.

The second set of recent events worthy of note underscores the importance of both logic and empathy when drawing the uncertain boundaries of life worthy of protection. In December 2013 a 13-year-old girl, Jahi McMath, was declared dead following a seemingly simple operation gone tragically wrong. The criteria used to determine her death were widely accepted, grounded in thorough development and discussion between the late 1960s and the early 1980s. The result being:

An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.

Everyone agreed. Jahi McMath’s brain revealed absolutely no activity. In this sense death had occurred. The problem was that a ventilator and drugs were maintaining her breathing
lungs and beating heart. Seeing these indicators of life, Jahi’s parents, dealing with their
grief over the tragic and unexpected loss of their young daughter, found it hard to let go.
Jahi’s mother noted simply, “I would probably need for my child’s heart to stop to show
me that she was dead. Her heart is still beating, so there’s still life there.” For their part,
the attending physicians were uncomfortable maintaining a beating heart and breathing
lungs in a dead person’s body. When establishing the boundaries of protected life and the
meaning of futility, the power of empathy and promise of hope sometime collide with logic
and science.

The final set of recent events calling for note in this updated volume center on the
uncertainties of removing the protective boundaries of life when we decide to execute
someone. Even in states and regions of the U.S. where capital punishment is most
frequently carried out, there is reluctance to kill persons who might not be accountable for
their actions. We treat young persons different than adults, even when they perform very
similar acts. Likewise, if a person has substantial intellectual disabilities, having the body
of an adult but the mind of a child, adjustments in punishments are made. The question is:
Where do we draw the line? In 2014, these issues came before the Supreme Court in a
case, Hall v. Florida.

Freddie Lee Hall had been on death row just short of 36 years, awaiting execution
for killing a young woman who was pregnant at the time. During his three-and-a-half
decade stay on death row, the Supreme Court had held that it was unconstitutional to
execute a person judged to be mentally retarded. The Court had left it to the States to
determine what level should be used to determine retardation, or what came to be labeled
substantial intellectual disability. In Florida the line was drawn at the score of 70 on the
Wechsler IQ test. Freddie Lee Hall’s test scores indicated he was at or just above this
point. He could be executed. Problem was, the Wechsler IQ test, like all tests, was subject
to variation from one administration to the next, yielding what is referred to as standard error of measurement (SEM). No allowance was made for the SEM in Florida.

In May 2014, the Supreme Court held that this lack of attention to SEM made the Florida law unconstitutional. Freddie Lee Hall’s 36-year stay on death row would be extended further while this flaw was fixed. At this same time, nationwide concern over the use of capital punishment continued to gain momentum over the now widely acknowledged finding that we were deciding to kill innocent persons. Additional, largely unrelated questions also arose over the use and supply of drugs for lethal injections and the occurrence of botched executions.

While support for capital punishment continued at around 60%, in 2014 this was the lowest point it had been in decades, and there was a noticeable trend among States to repeal capital punishment statutes. As this volume goes to press, the debate continues, as some advocates assert the justification of taking life for deeds done while others press for abolishment of what is by many standards a messy and meaningless system.
Preface to the First Edition

This book has been a long time in the making. It flows from interests in the power of assessed social worth. Retrospective autobiographies are always chancy, but in my mind these interests began in the years I spent in law school, where as a student in the late 1960s I was more interested in the dynamics of life than the precedents of law. Although I was attending law school, I had no desire, and even less intention, to become a lawyer. This presented some problems, but more importantly it provided substantial freedom to let my mind wander over terrain others might not travel. In particular, I became interested in reform efforts then being directed at mental and penal institutions, and can still remember a light bulb flashing when the wording of the Thirteenth Amendment was brought to my attention. Slavery had been abolished, my professor noted, except as a punishment for crime. Duly convicted felons remained slaves of the state. From this much followed. By the late 1960s, a century after the passage of the Thirteenth and Fourteenth Amendments, this legacy of slavery was providing the motivating energy behind a broad-based prison reform movement, embedded in even broader based efforts to seek a more inclusive society.

At the time, I was working with Stanton Wheeler, a marvelous colleague with a sharp and creative mind. One thing led to another, and after leaving law school I found myself as a young professor of sociology at the University of Texas at Austin, who soon became involved with persons running the prisons in and around Huntsville. Over the ensuing decades, the Texas prison system has become a behemoth spread across a large state, but in the early 1970s it was a small, cloistered community in East Texas. Reforms of existing practices were slowly but surely finding their way behind the walls of institutions run much like plantations.
As prison reforms progressed, administrative control was restructured, long-established practices were declared unconstitutional, and unanticipated consequences began to appear. Most prominent was a rise in prison violence. Prison gangs began to flex their muscle more overtly, inflicting violence up to and including death. The fissured structure of social worth, the sense of Us and Them, was present among the kept as well as the keepers. Contact with cellblock life and prison violence eventually led to death row and the study of capital punishment, where the protective boundaries of life are officially removed.

It is from these experiences that the power of social worth began to occupy my thinking. Serious interest in how the protective boundaries of life are defined, restructured, and removed began to take root. At the same time, given what I was seeing in the prison and capital punishment reform efforts, I developed a more general interest in social movements and the close linkage between a sense of injustice and the withdrawal of legitimacy from governmental practices. As luck would have it, about this time David Snow took a job offered by the University of Texas and was given an office just down the hall. Dave is an energetic soul with a mind that sparkles with ideas. Over the next several years, at lunch and in our offices, we would talk about football and swimming, but also, more relevant here, social movements and the importance of a sense of injustice and assessed legitimacy, the critical role moral entrepreneurs play, the organizing potential of social networks and interlocking organizations, and the power of rhetoric to frame issues.

I take this opportunity to express my appreciation to Dave for these still valued conversations.

As sometimes happens, young professors are asked to develop new courses that will draw students. My mother had recently died from an illness that required my father to make a deeply disturbing decision to terminate treatment. The decision was forced by a lack of health insurance coverage for my mother’s condition. This was not long after Elisabeth
Kübler Ross had released On Death and Dying, which covered the five stages of grief. Related research was just getting off the ground, and, as morbid as it sounded, I decided to develop a course, “On Death and Dying.” I taught this course for several years, and it eventually evolved into an offering titled, somewhat less morbidly, “Life and Death Decisions.” Most recently, I am happy to report, this course was listed by The Daily Beast as one of the 10 Hottest Courses in the Nation. Now, I do not give much credence to such listings, but it brought a “Way to go Dad!” from my daughter, so that was reason enough to celebrate.

It is from this course and the background of experiences with prison life and capital punishment that Who Lives, Who Dies, Who Decides? emerged. While writing the book, I noticed the manuscript taking on a life of its own. What follows is not the book I had originally planned. As topics were covered and compared, insights were modified and reaffirmed, and a single question emerged. How do we, as a community, go about justifying the violation of deeply important moral imperatives? The emerging answer was two-fold. We draw boundaries and resolve dilemmas. It also became quite evident while writing about eugenics, abortion, neo-natal care, assisted suicide, and capital punishment that moral assessments and their associated social movements evolve, not in a straight trajectory, but along a frequently jagged and contentious path. Sporadic advances in science, technology, and equally sporadic occurrences of crystallizing events are of central guiding influence.

I had spent some time with Ogburn’s idea of cultural lag and the link between science and technology and the evolution of moral thinking. What I had not much thought about was the power of crystallizing events to clarify issues and galvanize effort. In each of the following chapters this influence is evident. Among those who study social movements, there is much conceptual common ground in the influence of Buck v. Bell, the Scottsboro Boys, Emmett Till, the invention of the kidney machine, the revelation of questionable
medical experiments in the early 1970s, and the development of DNA fingerprinting in the 1990s. In each case, these widely divergent events provided clarity for the issues at hand and galvanized action leading to change.

Having written this book, I have come to appreciate the importance of one basic proposition. Just as supply and demand are linked in economic affairs, the evolution of moral systems is guided by a sense of injustice, assessed legitimacy, and pressure for change. The greater the sense of injustice, the greater the withdrawal of legitimacy, and the more intense the efforts for change. Rarely does social science reveal such a regular pattern embedded in the conceptual landscapes traveled. Supporting evidence is abundant throughout the following chapters.