**IRONIC FREEDOM AND FEMINIST POST-LIBERALISM**

This paper is based on the last chapter of my forthcoming book, *Ironic Freedom: Personal Choice, Public Policy, and the Paradox of Reform* (Palgrave, forthcoming, 2013.) An ironic freedom critique is a response to a liberal and/or feminist reform predicting that allowing people to make choices previously denied them (for example, avoid military service, marry one’s partner, or get an abortion) may also facilitate people’s being forced to do them. These critiques need not oppose the reform at issue; they may carry messages like “hold on,” “wait a minute,” “think it through, ”etc.. This is the paradox of reform.

In Chapter 1, I identified six ironic freedom critiques as the subjects of this inquiry and posed two sets of questions about them. This concluding chapter is devoted to both sets of questions. I now take up the first set: “What are we talking about when we make these predictions? Are they subject to verification, and, if so, how? What would count as evidence for or against them?” My examinations of assisted suicide, military service, military service, sex work, same-sex marriage, and reproductive choice have shown that this kind of coercion has occurred throughout history and continues even in the absence of legalization. “May” and “can” have become “must” and “should.” This paper asks whether, how, and when freedoms may be increased without becoming mandates.

My first chapter began with assisted suicide. My last chapter begins with military service. A few days into President Obama’s second term, Secretary of Defense Leon Panetta announced that military women will no longer be barred from serving in combat.[[1]](#endnote-1) This change has been greeted as a progressive reform both in the Armed Forces and in the civilian population. However, support has not been unanimous. Some Americans are asking, “Who benefits?” One commentator wrote, “I suspect this has less to do with empowering women or gender equality and more to do with an increasing shortage of male bodies to throw into the quagmires we’ve created…I can’t help thinking that the boys’ club is suddenly happy to ‘allow’ women to serve on the front lines.”[[2]](#endnote-2)

Women have, in fact, been serving in combat positions for some time, in violation of the letter of military law.[[3]](#endnote-3). Allowing this practice is not, then, a necessary condition for it to exist. A front-page article in *The New York Times* featured a soldier who did the grunt work of combat had been denied admission to an elite unit, information that will surprise no student of women’s history.[[4]](#endnote-4). Women get assignments the way most military personnel get assignments: by commands they are obligated to obey. Giving official sanction creates a virtual certainty that “may” will become “must.” Does this situation create one more ironic freedom problem? Hierarchal organizations can compel obedience, but no one gets into the Armed Forces who does not volunteer—although proponents of reinstating the draft do not perceive this occupational choice as voluntary.

**Ironic Freedom Critiques: Summary and Assessment**

Assisted suicide → non-voluntary death. (AS)

Legalized sex work → forced prostitution (SW)

Legalizing same-sex marriage → compulsory marriage (SSM)

No military draft → compulsory service by the poor (DRAFT)

Reproductive freedom→ 1. unwanted sex. (RC1)

 2. Compulsory birth control, abortion, or sterilization. (RC2)

 3. Compulsory surrogacy (RC3)

Each ironic freedom critique contains multiple arguments, some of which are more valid than others. For example, the SSM argument that employers will grant partner benefits only to married workers has been vindicated. But several arguments rely on long-run possibilities that would require changes in entrenched social and political norms. The argument that social pressure will force same-sex couples to marry is plausible only if the trend of fewer marriages that has developed in the late 20th and early 21st centuries in the United States are reversed.[[5]](#endnote-5) With respect to abortion, RC 2 depends on the equally far-fetched possibility that the federal government will abandon its preference for childbirth. The possibility that any of the states which now refuse to fund elective abortions will change their policies may be less remote. None of these changes is likely to happen without counter-speech, in which at least “everything worth saying shall be said.”[[6]](#endnote-6)

Some ironic freedom arguments are mutually contradictory. This problem is evident in arguments that stress economic considerations. For example, ironic freedom critique RC2 declares both that poverty and lack of health care encourage abortion and that government-funded health care may increase the incidence of abortion. But the incidence of abortion is no higher in the United States than in Sweden.[[7]](#endnote-7) The similarity between American data and Swedish data indicates that both hypotheses cannot be true, though both can be false. Even when economic arguments are internally consistent, they are not well supported by evidence. The “choice” of sex work, military service, or abortion can be and has been linked to poverty. But sex work and military service exist in welfare states, too,

Opponents of assisted suicide fear the impact of “a profit-driven healthcare system.”[[8]](#endnote-8) If assisted suicide is less expensive than palliative care, will the former be preferred? If PPACA makes the system less profit-driven; might government prefer assisted suicide in order to save money? Not necessarily; the fact that the federal government and most state governments fund childbirth but not abortion shows that bottom-line concerns do not necessarily dictate public policy. The comparatively low abortion rates in Belgium and the Netherlands, two European countries with large Roman Catholic population, suggests that economics may not drive policy in welfare states, either.[[9]](#endnote-9)

Some ironic freedom situations may involve not force but persuasion (or manipulation, depending on one’s point of view.) Consider the following example from mystery fiction:

 “I’ve given her all the information I can, but I don’t like to say, do this or do that. It’s her mother’s role to give advice but Joanna doesn’t even know about the rape, let alone the pregnancy.”

“Hmmm,” grunted Cooper…”[I]f you’ll forgive the impertinence, Dr. Blakeney, you must take your responsibilities as her adopted mother, temporary or otherwise, a great deal more seriously. It’s no good giving her information and leaving it up to her to decide, without making it very clear that it’s in her best interests to have an abortion... [P]arenting is not about patting oneself on the back for being understanding and liberal, it’s about guidance, education and training to help the child you love become a man or women you can respect.”[[10]](#endnote-10)

Detective Sergeant Cooper has just solved a murder. Sarah Blakeney is a local physician. They are discussing Ruth, the victim’s 17-year-old granddaughter. Blakeney and her husband are *in loco parentis* because Ruth is staying with them. Blakeney does not have to ponder Cooper’s advice because Ruth overhears the conversation. The girl’s situation is much like that of the imaginary Aunt Mandy in Chapter 2. Mandy’s niece or nephew promises to help her move to a nursing home or commit suicide, whichever she prefers.[[11]](#endnote-11) Here again, the reader will want to know more about what the advisors’ interests are. Observers might suggest that Cooper’s “guidance” amounts to bullying. Opponents of abortion might protest that Cooper is wrong or that Ruth should not give priority to her own interests. But there is no secular *a priori* reason to prefer childbirth to abortion.

Unlike the people discussed in Chapters 2 and 5, Ruth is a minor. But if she were a year older, and legally an adult, “It’s your decision” might still be the last thing she needed or wanted to hear. Her situation is extreme, but not rare in fact or fiction. Ben Mattlin and his wife, Terrie Lincoln and her family, Bill Pearce, Martha Beck, and Rachel Adams’s acquaintance were not forced to choose death or abortion, but urged to do so. No one suggests forcing Ruth to terminate her pregnancy. But Mattlin wrote about “how thin and porous the border between coercion and free choice is, how easy it is for someone to inadvertently influence you to feel devalued and hopeless — to pressure you ever so slightly but decidedly into being ‘reasonable.’”[[12]](#endnote-12). He was being diplomatic; the pressure was seldom either inadvertent or slight.

The real people I just mentioned resisted the pressure, but those who write about their experiences may be better able to withstand verbal bullying than those who do not. Hospitalized quadriplegics, dying patients, and parents who just learned that their unborn child has a serious defect are vulnerable to the influence of professionals who know more than they do and intimates who are not disabled, terminally ill, or pregnant. But some people in these situations may want and seek guidance. If we presume that choices are not really voluntary, how often are pregnant women persuaded to have the baby, or dying patients urged to let nature take its course? And what happens to the patient’s classic question, “What would you do in my place?”

Ironic freedom arguments may but need not posit causal connections between permission and coercion. The causal arguments are relatively weak. To infer that making something legal will lead to more people being forced to do it is reasonable. It makes sense that permitting suicide, sex work or abortion would lead to more coercion, or, as Katha Pollitt once speculated, that allowing surrogate motherhood might lead to reluctant participation in it.[[13]](#endnote-13) But to *conclude* that this coercion will happen, or that legalization causes it, is to reason in the absence of supportive evidence. Ironic freedom arguments may but need not regard legalization as a necessary condition for coercion. This is true in only one case: SSM. Since marriage is a legal relationship, same-sex couples cannot be forced into marriage unless they are allowed to do it. Legalization is apparently a sufficient condition as well, since it was quickly followed by employers’ decisions to require employees to marry as a condition of partner benefits. But homicide disguised as euthanasia, forced prostitution, compulsory sexual activity, and fertility control have a long, global, and shameful history. Forced sterilization was legitimized after the fact, not before. Forced prostitution and sexual slavery are no less prevalent where sex work is forbidden than where it is permitted.

*Munoz v. Haro,* discussed in Chapter 1, is a concrete instance of a woman coerced into surrogate motherhood.[[14]](#endnote-14) Although surrogacy is outside the scope of my inquiry, *Munoz* provides a significant cautionary tale. Margaret Battin’s study of legalized assisted suicide, cited in Chapter 2, found that the predicted targets of coercion—the poor, the old, the disabled, minorities, and women—are not disproportionately represented among those who commit assisted suicide.[[15]](#endnote-15) The statistic that comes closest to indicating that coercion follows permission is the 90 percent abortion rate for fetuses with Down syndrome in the United States, Britain, and Western Europe. These data arouse suspicion that the decision to terminate pregnancy is not, or not entirely, a product of the pregnant woman’s free will. But it might be. Predictions that legalization will lead to coercion are hypotheses, not conclusions. Nevertheless, we can expect the formulation and testing of hypotheses to remain a staple of both ironic freedom critiques and efforts to refute them.

This sort of ironic freedom argument is similar in structure to the argument that capital punishment is a general deterrent to murder. It makes as much sense to think that the death penalty will discourage the commission of capital crimes as it does to think that legalizing assisted suicide or abortion will make it easier to force people into them. The “deterrence hypothesis” is subject to testing and is often tested; widespread disagreement exists among experts about the results. It is still true, as it was when the Supreme Court upheld a death penalty statute in 1976, that “there is no convincing empirical evidence either supporting or refuting this view.” But, Justice Potter Stewart continued, often “the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.”[[16]](#endnote-16)

I invite the reader to compare this passage with Ben Mattlin’s arguments against assisted suicide quoted here and in Chapter 1.[[17]](#endnote-17) Statements like these will not go away any time soon. Just as supporters of the death penalty strive to prove that it is a general deterrent and opponents to prove it is not, opponents of legalizing assisted suicide, abortion, and sex work will try to prove that making these activities legal has encouraged or will encourage abuse and supporters to prove that it is not. Supporters of all of these policies have done and will continue to do the same. The resulting deadlock is well illustrated by the studies of sex work in Nevada by Barbara Brents and Melissa Farley.[[18]](#endnote-18). Proponents of the death penalty have found that emphasizing retribution does not invite the response, “Prove it.” Proponents of ironic freedom critiques might also choose to stress arguments that are not subject to proof or disproof.

Much of the empirical evidence used in ironic freedom critiques. AS, SW, SSM, and RC (both 1 and 2) consists not of controlled experiments, statistical analysis, or meta-analysis but of anecdotes: personal accounts, third-party observations, and the like. The studies on sex work, in particular, are reminiscent of the Brandeis briefs I had occasion to read 40 years ago.[[19]](#endnote-19) Brandeis briefs include both empirical evidence and legal arguments. Louis Brandeis and his sister-in-law, Josephine Goldmark of the National Consumers League, compiled the first of these briefs for *Muller v. Oregon* in 1908, in which Brandeis represented the state.[[20]](#endnote-20) The brief persuaded the Supreme Court to uphold protective labor legislation for women. Brandeis and Goldmark prepared several similar briefs in later cases until Brandeis joined the Supreme Court in 1916.

The early Brandeis briefs were not models of social science research. They include instance after instance of women workers being harmed by long hours and bad conditions and quite a few expert opinions from physicians, officials, and employers.. What these briefs did not do was to show that women suffered more than men who worked the same number of hours, that women who worked fewer hours suffered less than women who worked longer, or that illness and injury became less frequent when hours were reduced or more frequent when they were increased. There were no controls. The evidence in the briefs was anecdotal, not statistical. Similarly, Brents’s and Farley’s studies of the same occupation in the same state consist of story after story and quotation after quotation. Neither scholar compares illegal sex work to legal sex work or sex work to other jobs in the service economy. Ironic freedom critiques AS and RC2 contain account after account about disabled people being urged to end their lives and women being urged to abort fetuses with disabilities, but no reliable data.

Ironic freedom critiques, then, have serious defects. They contain some or all of the following errors: they conflate long-run and short-run results; they contradict one another; they make *a priori* assumptions; they beg normative questions; and they rely on inadequate evidence. They imitate the errors of slippery-slope arguments and add a few of their own. Again like slippery slope arguments, they are not strong enough to convince people who are skeptics, who demand scientific rigor, or both.

But most of the arguments that shape public opinion and influence public officials do not prove anything, except perhaps the existence of intense preferences. The Supreme Court did not demand proof in the protective legislation cases, and neither did the Massachusetts voters who defeated Question 2. The characteristic errors of ironic freedom critiques do not vitiate their power. Two venerable social-scientific maxims are crucial here: data is not the plural of anecdote, but neither is the absence of evidence the evidence of absence. A demand for scientific rigor is a two-edged sword, cutting against both the defenders of reforms and ironic freedom critics. Like it or not, reformers are stuck with these arguments. They are no more subject to refutation than to proof.

As weak as ironic freedom critiques are, one conclusion is inescapable: the liberal reforms I have examined carry, or increase, a risk of coercion. Chapter 5, in particular, reinforces this point with its long history of forced sex and compulsory fertility control. “May” can lead to “must” and “can” may lead to “should.” We have no idea how often people have been forced to do what liberals want them to be able to do, but we know it has happened. How, then, do we deal with ironic freedom critiques?

**The Future of Ironic Freedom**

My second set of questions about ironic freedom critiques was, “What difference should they make? What conclusions, if any, follow from them? What can we learn from addressing them? What are their implications for law and policy?” We learned in Chapter 1 that ironic freedom arguments may but need not oppose liberal reforms. Instead, these arguments may caution advocates of these reforms, may urge these advocates to stop and think, to consider these arguments before enacting or implementing reforms.

. Giving up on reforms—conceding defeat to the opponents of assisted suicide, occupational choice, and same-sex marriage—is too extreme a solution. Why should Ed Roberts’s fear of being “euthanized” outweigh Kenneth Bergstedt’s wish to end his life, or Susan Sontag’s persistence in treating her incurable cancer outweigh Jo Roman’s desire to let go? If Garrett Keizer and Not Dead Yet are correct in their belief that support for the “right to die” displays contempt for the disabled, should this bigotry negate the claim of a right?[[21]](#endnote-21) Repealing the reforms we have achieved—reinstating the draft or recriminalizing abortion—would be equally extreme and may be impossible. Must the interests of the mother who feared her daughter would be part of the last generation of Down’s Syndrome children override Rayna Rapp’s and Ayelet Waldman’s wish to terminate their pregnancies?[[22]](#endnote-22)

These are intriguing philosophical questions, but concentrating on them to the exclusion of all other possible questions will doom any efforts to change public policy to failure. By demanding yes or no answers, these questions reinforce polarization while frustrating solution. Suppose we ask, instead, “How can we secure these individual rights while reducing, if not eliminating, the risk of abuse?” With respect to abortion, why not consider ”specifically banning forced abortion and/or recognizing a right to go to court to prevent it?”[[23]](#endnote-23) Question 2 and the Oregon and Washington assisted suicide laws took steps in this direction. They demanded participation in the decision by people who are not the patients’ heirs or primary care physicians, insisted that the patient be mentally capable, and excluded age and disability as grounds for assisted suicide.[[24]](#endnote-24) Suppose Question 2 had forbidden direct participation by heirs and PCPs, and/or provided for the appointment of a guardian *ad litem*, as is done in competency proceedings? The second possibility might have aroused opposition from libertarians; neither proposal would have satisfied the Roman Catholic hierarchy. But advocates for the physically and mentally disabled might have rethought their positions.

How else might we safeguard choice in dying? One policy change might also enhance reproductive freedom while preventing the kind of coercion discussed in Chapter 5. Whether or not “disability is at the heart of the assisted suicide debate,”[[25]](#endnote-25) it is certainly at the heart of the debate over abortion of fetuses diagnosed with defects. Hospitals and hospital chains, professional associations, and government agencies might forbid the aggressive counseling these women received and mandate non-directive counseling. The difficulties of enforcing such rules would be comparable to those of implementing the 1963 school prayer ruling, *Abington v. Schempp*.[[26]](#endnote-26) The workforces involved are as large and as widely distributed as was the population charged with ending prayer in the public schools. It took a generation of protest and feedback to make prayer the exception rather than the rule. It might take a generation of re-educating professionals and socializing students of medicine, nursing, and social work before practices changed. As a result, it may well take another generation until elective abortion is accepted and assisted suicide legalized throughout the United States.

Nevertheless, Ezekiel Emanuel’s warning about assisted suicide applies to other ironic freedom situations. Emanuel predicted that legalizing assisted suicide would help “the top .02 percent” at the expense of “the poor…who pose a burden to their relatives.”[[27]](#endnote-27) There is no reason to presume that the poor will choose to prolong their lives, any more than there is reason to presume that the privileged will choose to expedite death. But it is difficult to dismiss Emanuel’s concern that the poor who do prefer natural death will face coercion or persuasion disguised as permission. This argument feeds the guilt to which both liberals and feminists are susceptible, the worry that they will benefit themselves at the expense of others who are less favorably situated. Emanuel has also reminded us of the tension between individual rights and social equality. [[28]](#endnote-28) How, and to what extent, can liberal reforms enhance the former without threatening the latter?

**Conclusion**

Emanuel’s article is essentially a critique of a liberal position (though not one held by all liberals.). He is the latest in a long series of critics to make a version of this argument. Liberals, we have been told, elevate to the status of universal truths what are in fact the interests of people like themselves: educated, middle-class, usually able-bodied, usually male, and able to earn a living by brains rather than brawn. These are people who emphasize procedural guarantees, freedom of expression, freedom of and from religion, sexual freedom, the separation of law from morality, and the marketplace of ideas and art, while taking food, clothing, shelter, and safety for granted. Liberals and feminists do not always value the same things, and feminist scholars have worked hard to avoid “gender essentialism—the notion that a unitary, ‘essential’ woman’s experience can be isolated and described.”[[29]](#endnote-29) But feminist theory has received similar criticism.

It is true that both liberalism and feminism *originated* in privilege (as did conservatism and most other belief systems). People like John Stuart Mill, whose labor was intellectual, were, and remain, more fortunate than most people. People like Elizabeth Cady Stanton, who didn’t have to support herself or do her own housework, were equally fortunate. Today, they probably qualify for Emanuel’s .02 percent. But to label either group as “privileged” in a material sense ignores present-day realities. Some working-class people hold liberal and feminist views; consider the women blue-collar workers who brought the early Title VII cases.[[30]](#endnote-30) Everyone has access to theory now, and many theorists are supporting themselves as university adjuncts while trying to write and publish. There is even an “Unemployed Philosophers Guild” that earns money by producing coffee mugs, T-shirts, and “Freudian slippers.”[[31]](#endnote-31)

Counter-arguments to feminist and liberal positions are often made by and on behalf of people who lead very different lives from those of the people doing the theorizing. Some of these differences are economic. Arguments about sex work and military service often insist that people are forced into these choices by poverty. As we have seen, these arguments are not without flaws. But, if poverty did not exist, this hypothetical problem would be solved. Many good reasons exist for abolishing poverty in the United States, but it could not happen without the establishment of a welfare state or radical changes in capitalism as we know it. Capitalist entrepreneurs strive to make money, socialist governments strive to cut expenses, and government-subsidized health care in capitalist systems is subject to cross-pressures. Whatever the relative merits of socialism and capitalism, neither system makes ironic freedom problems disappear.

Class differences do not entail conflicts of interest between classes. We cannot infer people’s opinions from their class status. The fact that a person is working-class rather than middle-class does not dictate that person’s opinion on due process or freedom of expression. But class differences create the possibility of conflicts of interest. This problem is increased by the absence of people who are poor, working-class, or have little formal education from public decision-making. Unlike disability rights activists, gays, and opponents of abortion—and, potentially, sex workers--they are not at the table and “cannot get into the pressure system.”[[32]](#endnote-32) Many of the differences between liberal and feminist opinions and other views have little to do with economic considerations. For example, many people, including some feminists, worry more about being victims of crime than about being accused of crime. This prioritization is not based on class, race, or income. The poor are more likely to be victims of crime than the non-poor, and African American and Hispanics are more likely to be poor than Caucasians, but the poor may be cross-pressured. An African American or Hispanic woman living in the inner city is vulnerable to crime, but at the same time her young son is vulnerable to false accusations. it took liberals a long time to understand the fear of crime, This realization led many liberals, in effect, to cave in to majority opinion. They dropped their opposition to long prison sentences and the death penalty and their commitment to procedural guarantees, adopting labels like “neo-liberal” and “centrist” and affiliating with groups like the Democratic Leadership Council.[[33]](#endnote-33) Twenty-five years later, innocent people have been convicted of crimes and even sentenced to death; some have probably been executed. Liberal inaction and acquiescence has had grave consequences.

Crime is not the only issue about which liberal views are controversial. Some people value faith above reason. Some, particularly women, value sex more for procreation than for recreation. Although Chapter 4 has shown that monogamy remains the norm and variety the exception, some people value sexual freedom over fidelity. Some people may regard military service or sex work as the best occupational choice possible for them. They may fear a premature death more than they fear a protracted death. They may reject the self-determination that is crucial to liberalism and prefer to “let go and let God.”[[34]](#endnote-34) They may not be impressed by statistics. These groups include some feminists and possibly some liberals. But from perspectives like the above, feminist and liberal reforms bring threats of ironic freedom.

The people who hold these views are entitled to the respect and consideration of liberals and of feminists who think like liberals. Dividing the country into “we” and “they” will only delay achievement of liberal reforms while intensifying anger and hostility. But advocates of liberal reforms are equally entitled to respect and consideration. Their opinions count. Their positions are not weakened by the existence of class differences that work to their advantage. *Lochner v. New York, Munoz v. Haro*, and the information I gathered for this book teach us that the threat of ironic freedom is real. This danger is no reason to give up working for liberal reforms. It creates a challenge and an opportunity to construct permissions that will not encourage coercion, to separate “can” from “should“ and “may” from “must.”

NOTES TO CHAPTER SIX

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3. See Chapter 3, note 48 and accompanying text. [↑](#endnote-ref-3)
4. Elisabeth Bumiller and James Dao, “For 3 Women, Combat Option Comes a Bit Late,” January 27, 2013. [↑](#endnote-ref-4)
5. See Chapter 4, 15-17. [↑](#endnote-ref-5)
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16. Gregg v. Georgia, 428 U.S. 153, 185-86. [↑](#endnote-ref-16)
17. “Suicide by Choice? Not So Fast.” [↑](#endnote-ref-17)
18. Respectively, *The State of Sex: Tourism, Sex, and Sin in the New American Heartland (*New York: Routledge, 2010); Prostitution and Trafficking in Nevada: Making the Connections (San Francisco: Prostitution Research and Education, 2007.) [↑](#endnote-ref-18)
19. The result was *The Chains of Protection: The Judicial Response to Women’s Labor Legislation* (Westport, CT: Greenwood Press, 1978), especially Chapters 1 and 2. [↑](#endnote-ref-19)
20. 208 U.S. 412. [↑](#endnote-ref-20)
21. Chapter 2, note 46 and accompanying text. [↑](#endnote-ref-21)
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