American Life League: Anti-Abortion "Personhood" Measures *Really* Will Hurt All Pregnant Women

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NAPW's video How Personhood USA & The Bills They Support Will Hurt ALL Pregnant Women[1] and an earlier version making similar points[2] are attracting the attention of anti-abortion organizations who advance Personhood Measures across the country. [3] These measures would grant "unborn" life from the moment of fertilizations full personhood status under state constitutional law. Such measures would not only be used as a basis for ending the right to choose an abortion, they would also provide a basis for depriving pregnant women going to term of their rights to liberty, bodily integrity, medical decision-making and even life

Judie Brown, president and founder of the American Life League (ALL), claims in a commentary entitled *Life of the Mother or Lies of Big Brother*,[4] that our video is a "fairy tale," and ALL's glitzy video response, *Laws, Lies and Videotape*[5] purports to "point out half truths and outright lies" in our work. Through these efforts ALL intends to provide a defense of Personhood Measures. Instead, what ALL provides is a defense of court orders forcing pregnant women to have cesarean surgery against their will, and the arrest of pregnant women who are not compliant with their doctor's wishes.

In our video we give four examples of cases in which fetal rights arguments (the kind that would become law if so-called Personhood Measures passed) were used to hurt pregnant women who had no intention of ending their pregnancies. ALL begins by challenging our use of the Marlowe case as an example of how fetal personhood arguments have been used to hurt all pregnant women. In this case, John and Amber Marlowe fled a hospital that sought and was granted a court order[6] to force Amber to submit to unnecessary cesarean surgery. ALL focuses on the use of the word "fled." "Fled the hospital?" ALL spokesperson Michael Hichborn says in a skeptical and disparaging tone: "Not quite…Amber simply checked herself out and went to deliver the baby somewhere else." Actually, **the Marlowes themselves** used **the word "fled"** in an essay to describe their experience leaving a hospital while Ms. Marlowe was in active labor.[7]

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[1] http://www.rhrealitycheck.org/commonground/2009/07/06/should-people-who-oppose-abortion-also-oppose-%E2%80%9Cpersonhood%E2%80%9D-measures; http://www.huffingtonpost.com/lynn-m-paltrow/how-personhoodusa-and-the_b_176530.html

[2] http://www.huffingtonpost.com/lynn-m-paltrow/video-how-anti-abortion-m_b_139556.html

[3] The Traditional Values Coalition is one such group: http://www.andrealafferty.org/2009/03/pro-abortion-group-attacks-personhood.html; http://www.huffingtonpost.com/lynn-m-paltrow/do-people-who-support-tra_b_180946.html

[4] http://americanlifeleague.org/newsroom_judieblog.php?id=2621

[5] http://www.youtube.com/watch?v=myo0F1jpv4Q

[6] *See S*pecial Injunction Order and Appointment of Guardian, WVHCS-Hospital, Inc. and Baby Doe v. Jane Doe and John Doe, No. 3-E 2004 (Court of Common Pleas, Luzerne Co. PA) (Jan. 14, 2004) Available at http://advocatesforpregnantwomen.org/WVHCSBabyDoevJaneandJohnDoe.pdf

[7] Amber and John Marlowe, "Why We Marched," John & Amber Marlowe, April 26, 2004 first appeared as an insert to National Advocates for Pregnant Women's 2004 annual report. The essay is available at

ALL then claims that "the problem" Ms. Marlowe "faced had nothing to do with personhood" but rather was just a matter of the hospital "fearing a lawsuit." Really? Whatever the hospital's motivation, it is clear that the legal arguments the hospital used had everything to do with fetal personhood.

In seeking the court order the hospital argued: "**Baby Doe, a full term viable fetus, has certain rights**, including the right to have decisions made for it, independent of its parents, regarding its health and survival."[8] The court decision granting the hospital the power to force Ms. Marlowe to have unnecessary surgery made the hospital "legal guardian for **Baby Doe, the unborn fetus**…. to preserve and protect **the rights of Baby Doe** regarding its health and survival **before**, during and after **delivery**."[9] It is obvious that both the hospital's action and the Court's decision were based explicitly on protecting the independent "rights of Baby Doe," an "unborn fetus," exactly the rights that would be established under a Personhood Measure.

In fact, it is because the hospital's actions were based on anti-abortion/fetal personhood arguments that the Marlowes, who are profoundly opposed to abortion, nevertheless marched with National Advocates for Pregnant Women in the 2004 March for Women's Lives. The Marlowes understood what ALL apparently does not: that it is one thing to accord the unborn moral, ethical, and religious value, and an entirely separate thing to assign them separate legal rights that can be used to override the decisions of pregnant women and their families.

Finally we must note that there is absolutely no valid reason for hospitals to use fetal rights arguments to override pregnant women's decisions about what is best for them and their babies. Leading medical organizations warn hospitals against seeking such orders as violations of pregnant women's rights and counterproductive to both maternal and fetal health interests. Organizations including the American Medical Association and the American College of Obstetricians and Gynecologists recognize that doctors are not infallible and that threatening women with court action can discourage them from seeking health care that is beneficial to both maternal and fetal health.[10] Courts that have reviewed these kinds of cases on appeal and with the benefit of a full record all have found that such actions violate our existing system of law.[11]

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http://advocatesforpregnantwomen.org/issues/court_ordered_interventions/why_we_marched_john_amber_marlowe_april_26_2004.php

[8] *See* Complaint at 4, WVHCS-Hospital, Inc. and Baby Doe v. Jane Doe and John Doe, No. 3-E 2004 (filed Jan. 14, 2004) (Court of Common Pleas, Luzerne Co., PA) (emphasis added) Available at http://advocatesforpregnantwomen.org/WVHCSBabyDoevJaneandJohnDoe.pdf

[9] *See* Injunction Order at footnote 8 (emphasis added).

[10] American College of Obstetricians and Gynecologists Committee Opinion No. 55, Patient Choice: Maternal-Fetal Conflict (1987) ("Actions); Report of American Medical Association Board of Trustees, Legal Interventions During Pregnancy, 264 JAMA 2663, 267 (1990) ("Judicial intervention is inappropriate when a woman has made an informed refusal of a medical treatment designed to benefit her fetus.") *See also* Veronica E.B. Kolder et al., Court-Ordered Obstetrical Interventions, 316 New Eng. J. Med. 1192, 1195 (1987) (discussing the serious ethical and medical implications of cases of forced, unconsented-to cesarean sections, hospital detention and forced transfusions of pregnant women).

[11] *See* In re A.C., Angela Carder], 573 A.2d 1235, 1253 (D.C. 1990) (en banc) (vacating a court-ordered cesarean section that was listed as a contributing factor to the mother's death on her death certificate); In re Fetus Brown, 689 N.E.2d 397, 400 (Ill. App. Ct. 1997) (overturning a court-ordered blood transfusion of a pregnant woman);

(Something that would change radically if Personhood Measures passed) Lastly, court orders are not necessary to protect hospital interests. A hospital fearing a lawsuit can protect its "self-interest" by getting their patients to sign detailed informed consent forms indicating that they are refusing recommended surgery over doctor recommendations and objections.

ALL also denies the fact that the Angela Carder involves personhood claims. In Ms. Carder's case, a court forced a critically ill pregnant woman to undergo cesarean surgery to give a 25-week-old fetus a chance for life. Both died after the surgery: the fetus, within two hours of the cesarean surgery and Ms. Carder, within two days and with the forced surgery listed as a contributing factor.[12]

In the ALL video, Mr. Hichborn intones: "She didn't just become critically ill; she'd been battling cancer her entire adult life and found that it was terminal once she became pregnant." Indeed, one of the underlying issues in the case is that Ms. Carder had, since she was a teenager, been defying medical opinions that she was terminally ill and about to die. That is one reason why she and her family opposed cesarean surgery that they believed would, and that ultimately did, hasten her death. In other words, they rejected the prediction of imminent death that had been wrong so many times before.

That ALL focuses so heavily on Ms. Carder's illness raises some important questions. ALL states on its web site that it is "our duty to protect and defend" all persons whether he or she "is disabled, elderly or infirm."[13] ALL's defense of the forced surgery in the Angela Carder case raises the question: If the "disabled" or "infirm person" happens to be a pregnant woman, is there no longer a duty to protect and defend her? Does it become acceptable to use fetal personhood arguments to justify forced surgery that could hastens her death?

Ms. Brown insists, however, that the question of "personhood of the pre-born" had nothing to do with the decision in Ms. Carder's case. Rather, ALL asserts it was a case about "complex medical ethics questions about whether or not physicians should take action to save at least one of their patients." That of course is another way of saying what we said; if fetuses are recognized as separate legal persons – or "patients" – courts will be empowered to weigh the rights of both "patients," and choose to force pregnant women to procedures the court deems best for the fetal patient.

The ALL video also asserts that the only reason Ms. Carder wanted to stay alive was "to give the baby the best chance of survival." According to ALL, this means that the court ordered surgery that deprived her of her right to life was somehow, actually consistent with her wishes. Even if

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In re Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994) (holding that courts may not balance whatever rights a fetus may have against the rights of a competent woman, whose choice to refuse medical treatment as invasive as a cesarean section must be honored even if the choice may be harmful to the fetus). Cf. Stallman v. Youngquist, 531 N.E.2d 355, 359-61 (Ill. 1988) (refusing to recognize the tort of maternal prenatal negligence, holding that granting fetuses legal rights in this manner "would involve an unprecedented intrusion into the privacy and autonomy of the [state's female] citizens").

[12] See George Annas, *Foreclosing the Use of Force: A.C. Reversed*, HASTINGS CTR. REP., July/Aug. 1990, at 27.

[13] American Life League, *Issues*, http://www.all.org/issues.php (last visited August 4, 2009).

this were an accurate portrayal of Ms. Carder's motivation (and it is not),[14] a woman's desire for what is best for her baby does not provide a justification for doing all the things Personhood Measures would do: allowing courts to appoint lawyers for the "unborn," forcing pregnant women and their families to participate in emergency court hearings, and then deciding for them what is best for the baby.

Many pregnant women, including Ms Pemberton discussed next, oppose unnecessary cesarean surgery exactly because they "want to give their babies the best chance of survival." If Personhood Measures pass, however, courts will be empowered to privilege the opinions of hospitals and doctors who say that surgery will give the "baby the best chance of survival" over judgments of the pregnant woman who has concluded that it will do the opposite.

ALL next challenges our use of Laura Pemberton's case as an example of what is likely to happen if Personhood Measures become law. In this case, a sheriff took Ms. Pemberton, who was laboring at home, into custody, forcibly transferred her to a hospital, and then compelled her to undergo cesarean surgery. Ms. Brown claims that this case "has nothing to do with pitting one life against another." ALL states that Ms. Pemberton's earlier encounters at the hospital "posed an extremely serious situation for the hospital because they could be held liable if Laura or the baby were injured or died because she was not discharged. Technically, she was still a patient of the hospital and, again, hospitals fear a law suit."

Again, it appears that ALL is defending the use of fetal personhood arguments against pregnant women as long as those arguments are being used to protect a hospital's self-interest. Indeed, their video seems to express a great deal of sympathy for hospitals and none for pregnant women.

Remarkably though, ALL admits that fetal rights arguments were the grounds for the forced surgery in Ms. Pemberton's case. "Was Laura Pemberton told that fetal rights outweighed hers? Yeah, she was." But, in what ALL apparently believes to be its big "gotcha" moment, Mr. Hichborn points out that the legal case that the court relied on for this ruling is none other than Roe v. Wade. Mr. Hichborn asks, "Is Roe v. Wade now some kind of personhood legislation? Is that what this video is trying to tell us? Come on. Give me a break."

It is true that the very bad trial court decision in Pemberton,[15] concluding that none of Laura's rights had been violated, misused Roe to conclude that after viability, the state's interest in fetal rights becomes a basis for denying to pregnant women all of their civil rights. In using *Roe* this way, the trial court joined many anti-abortion advocates who have made an industry of turning *Roe* on its head, deliberately misusing it to argue that after viability the state may not only outlaw abortion but also do anything it wants to pregnant women if doctors or hospitals claim it will protect the fetus. In fact, National Advocates for Pregnant Women's research reveals that the

[14] *Patients: Carder Case Brings Bold Policy Initiatives*, HEALTHSPAN, Jan. 31, 1991, *available at* http://advocatesforpregnantwomen.org/main/publications/articles_and_reports/the_rights_of_pregnant_patients_carder_case_brings_bold_policy_initiatives.php; Barton Gellman, *Agreement in D.C. Affirms Medical Rights of Pregnant Women,* WASHINGTON POST, Nov. 19, 1990, at A1. Complete sources available upon request.

[15] See Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., 66 F. Supp. 2d 1247 (N.D. Fla. 1999). Unfortunately, this case was never appealed.

Pennsylvania hospital in the Marlowe case similarly misused *Roe*, citing it as support for its fetal personhood argument that "a full term viable fetus, has certain rights, including the right to have decisions made for it, independent of its parents, regarding its health and survival."[16]

The Personhood Measures supported by ALL would go even farther, giving the state power to control pregnant women for the benefit of the "unborn" from the moment of fertilization. Janet Gallagher in her seminal article, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987), does an excellent job of documenting the deliberate misinterpretations of Roe and how those misinterpretations have long been used as an excuse for depriving pregnant women in labor of their medical decision-making and other civil rights.

What Roe actually held was that at no stage of development is a fetus considered a separate legal person. In so doing, the Court protected the Constitutional personhood of women. Thus, while the court in Roe recognized a limited state interest in potential life that permits states to prohibit access to abortion under some circumstances, the decision established that there is no point in pregnancy when women lose their fundamental civil rights – to bodily integrity, informed medical decision-making, due process, liberty, and life itself. That is why Roe stands for much more than the right to terminate a pregnancy.[17] As the Supreme Court explained in later cases, Roe has been "sensibly relied upon to counter" attempts to interfere with a woman's decision to become pregnant or to carry her pregnancy to term.[18]

Ms. Pemberton's own account of being taken into custody and forced to undergo unnecessary surgery is available on National Advocates for Pregnant Women's web site.[19] While Ms. Pemberton, like ALL, opposes abortion, her experiences make clear that claims of fetal rights have and will be used to belittle and disregard the informed medical judgments of pregnant women on behalf of themselves and their future children.

The last example that ALL challenges is that of Ms. Rowland. ALL suggests that because our video doesn't address "inconvenient truths" about the case, such as her alleged drug use, it does not provide a legitimate example of how personhood arguments infringe on the rights of all pregnant women.

In this case, Ms. Rowland gave birth to twins by cesarean section. One of the twins was stillborn; the one who survived allegedly tested positive for cocaine and alcohol at birth. Ms. Rowland was arrested the day after the birth and charged with child endangerment relating to the surviving infant. Two months later, that charge was dropped. Instead, Deputy District Attorney Kent

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[16] Motion for Special Injunction Order and Appointment of Guardian, WVHCS-Hospital, Inc. and Baby Doe v. Jane Doe and John Doe, No. 3-E 2004 (filed Jan. 14, 2004) at 3 (Court of Common Pleas, Luzerne Co., PA) Available at http://advocatesforpregnantwomen.org/WVHCSBabyDoevJaneandJohnDoe.pdf

[17] Letter from National Advocates for Pregnant Women et al, to Senate Judiciary Committee, June 22, 2009 (Letter signed by more than100 leading legal and academic scholars as well as reproductive justice organizations and health experts to the Senate Judiciary Committee concerning the nomination of Judge Sonia Sotomayor and the need to consider the impact any new justice would have not only on "abortion rights" but the civil rights of all pregnant women.) See http://advocatesforpregnantwomen.org/blog/2009/06/sotomayor_confirmation_joint_l.php

[18] Planned Parenthood v. Casey, 505 U.S. 833, 859 (1992).

[19] http://www.vimeo.com/4895023

Morgan charged Ms. Rowland with criminal homicide in the death of the stillborn twin. The charge was based solely on Ms. Rowland's alleged refusal to follow doctors' recommendations and undergo cesarean surgery on an earlier date.[20] District Attorney Morgan explained the homicide charges this way:

"[T]he decision came down to whether the dead child – a viable, if unborn, being as defined by Utah law – died as a result of another person's action or failure to take action. That judgment, he said, is required by Utah's feticide law, which was amended in 2002 to protect the fetus from the moment of conception."[21]

It doesn't get much clearer than that. A woman who suffers a stillbirth can be charged with murder, according to a Utah District Attorney, because the state decided to protect the fetus from the moment of conception – exactly what a Personhood Measure would do.

ALL suggests that because Ms. Rowland was selfish (she didn't want a scar according to a single source), was unattractive (pictures of her taken shortly after her cesarean surgery and around the time of her arrest are less than flattering), and was allegedly addicted to both legal and illegal drugs, she deserved to be arrested for murder. Perhaps ALL's real message is: don't worry – fetal personhood arguments won't be used against you unless you are unattractive, unpopular, and/ or struggling with a health problem like addiction.

Pamela Udy, President of the International Cesarean Awareness Network (ICAN), spoke out against just such arguments at the time of the arrest. Ms. Udy, though very much opposed to abortion, didn't think that any argument – including fetal personhood arguments – should be used to justify the arrest of pregnant women because they had exercised their right to informed medical decision making. According to ICAN e-news:

"You may remember Pam's advocacy work related to admitted drug addict Melissa Rowland's decision to delay a cesarean that resulted in a first-degree murder charge when weeks later her son was delivered stillborn via cesarean. With five children in tow, including one-month old Eliza, Pam interrupted a press conference by Utah's Assistant District Attorney to ask, "Where does it stop? Am I going to be the next mother in jail for not following my doctor's advice?" You see, Pam refused a cesarean against her OB's advice and delivered Eliza vaginally at an out-of-town hospital. Her follow-up editorial, "Legal System Organizing Against Rights of Pregnant Women," raised awareness of the potential impact Rowland's case could have on all pregnant

[20] *See* Case History and Minutes, State v. Rowland, No. 041901649 (Utah Dist. Ct.-3d Apr. 7, 2004); Information, State v. Rowland, No. 041901649 (Utah Dist. Ct.-3d Apr. 7, 2004); Statement of Defendant in Support of Guilty Plea and Certificate of Counsel, State v. Rowland, No. 041901649 (Utah Dist. Ct.-3d Apr. 7, 2004); Richard L. Berkowitz, *Should Refusal to Undergo a Cesarean Delivery Be a Criminal Offense?*, 104 OBSTETRICS & GYNECOLOGY 1220 (2004); Howard Minkoff & Lynn M. Paltrow, *Melissa Rowland and the Rights of Pregnant Women*, 104 OBSTETRICS & GYNECOLOGY 1234 (2004); Monica K. Miller, *Refusal to Undergo a Cesarean Section: A Woman's Right or a Criminal Act?*, 15 HEALTH MATRIX 383, 383 (2005); Matt Canham, *Prosecutors Drop Murder Charge in C-Section Case; Plea Bargain: After Three Months Behind Bars, the Mother of a Stillborn Baby Pleads Guilty to a Lesser Felony, May Leave Jail Soon; Rowland No Longer Faces the Murder Charge,* SALT LAKE TRIB., Apr. 8, 2004, at A1; Ellen Goodman, Editorial, *Eroding the Rights of Pregnant Women*, WASH. POST, Mar. 27, 2004, at A19

[21] Kirk Johnson, *Harm to Fetuses Becomes Issue in Utah and Elsewhere*, NEW YORK TIMES, March 27, 2004.

women."[22]

We hope that ALL is not suggesting that pregnant women who cannot overcome an addiction in the short term of pregnancy deserve to be arrested based on fetal personhood arguments. As both courts and medical groups have recognized, using fetal rights claims as a basis for punishing women who try to carry their pregnancies to term in spite of a drug problem is dangerous and counterproductive. It will create a disincentive for them to get drug treatment and an **in**centive for them to have abortions if they cannot overcome an addiction in the short length of a pregnancy.

In fact, a fetal rights based prosecution in North Dakota (one of the states where a personhood bill has been introduced) compelled a pregnant woman to have an abortion. In 1992 Martina Greywind, who was approximately twelve weeks pregnant, was arrested. She was charged with reckless endangerment based on the claim that by inhaling paint fumes, she was creating a substantial risk of serious bodily injury or death to a "person" – her "unborn child." After her arrest, a lawyer for the anti-abortion group Lambs of Christ filed a petition seeking to have the woman's brother, Ken Greywind, appointed her legal guardian. Mr. Greywind explained in court papers "I believe she is contemplating an abortion in order to have the charge of reckless endangerment dismissed."

Ms. Greywind did obtain an abortion. And indeed, the prosecutor dropped the charges citing the fact that she had "terminated her pregnancy."[23]

National Advocates for Pregnant Women opposes laws, including Personhood Measures, which would result in creating incentives for women to terminate otherwise wanted pregnancies. We would hope that such opposition would provide common ground between our organization and ALL.

Finally, we must address one other complaint that ALL has against our video. ALL says "the filmmakers did not present a single case from a time when all 50 states recognized abortion as the criminal act of murder." Actually while all 50 states at one time did make abortion a crime – generally punishable by 2-10 years in jail, no state that we are aware of made abortion "the

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[22] ICAN eNews, International Cesarean Awareness Network, Inc., Volume 32 (Nov. 7, 2005) *available at* http://www.ican-online.org/news/enews/archive/enews32.pdf, citing, Pam Udy, Legal System Organizing Against Rights of Pregnant Women, Standard Examiner – Utah (May 20, 2004) available at http://www.ican-online.org/news/articles/20040520.pdf.

[23] *See* Complaint, State v. Greywind, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992);Motion to Dismiss With Prejudice, State v. Greywind, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992); Stipulation, State v. Greywind, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992); Gina Kolata, *Nomadic Group of Anti-Abortionist Uses New Tactics to Make Its Mark*, N.Y. TIMES, Mar. 24, 1992, at A12; Gina Kolata, *Street Woman at Center of Abortion Drama*, N.Y. TIMES, Feb. 15, 1992, at 6; Gina Kolata, *Woman in Abortion Dispute Ends Her Pregnancy*, N.Y. TIMES, Feb. 26, 1992, at A10; *Paint Sniffer Greywind Won't Face Fetal Danger Charge*, GRAND FORKS HERALD (N.D.), Apr. 11, 1992, at 1A; *Prosecutor Drops Charges in N.D. Paint Sniffing Case*, ORLANDO SENTINEL, Apr. 12, 1992, at A23; *To Stop Abortion By Addict, Her Brother Steps In*, N.Y. TIMES, Feb. 23, 1992, at 1; Marilynn Wheeler, *Paint-Sniffing Woman Jailed for Risk to Fetus*, GRAND FORKS HERALD (N.D.), Feb. 12, 1992, at 6A.

criminal act of murder." There is a big difference between criminalizing abortion, as many states did pre-Roe, and criminalizing abortion *as murder*. Perhaps though this was just a Freudian slip on ALL's part. If Personhood Measures pass and Roe is overturned, as ALL desires, it is clear that women are not going to be punished for the crime of "illegal abortion" but rather for killing a *person*.[24] This is the crime of murder, generally punishable with a life sentence and under some circumstances, the death penalty.

Ms. Brown claims that all of the cases we discussed are really "not about personhood or abortion; they are about bad ethics within the medical establishment, pure and simple." At least her commentary, as opposed to her organization's video, suggests that we agree at least on one thing – that these cases involve gross violations of patient rights, or what Ms. Brown calls "medical practice run amok." As we have demonstrated, however Ms. Brown is wrong when she claims that they have "nothing to do with [unborn] personhood." That is why we stand behind our video, and why even though we may not agree on the issue of abortion, we hope ALL will join us in opposing Personhood Measures that will in fact hurt *all* pregnant women.

[24] *See* Lynn M. Paltrow, A Post-Roe World With Criminal Penalties Our Mothers Could Not Have Imagined, (Jan. 7, 2006) , http://www.huffingtonpost.com/lynn-m-paltrow/a-postroe-world-with-crim_b_14607.html.