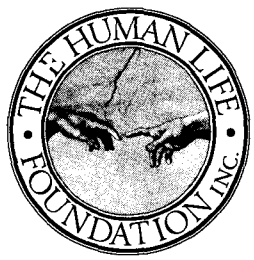
the HUMAN LIFE REVIEW



FALL 1979

Featured in this issue:

Published by:

The Human Life Foundation, Inc.

New York, N.Y.

Vol. V, No. 4 $3.00 a copy

. . . about THE HUMAN LIFE REVIEW

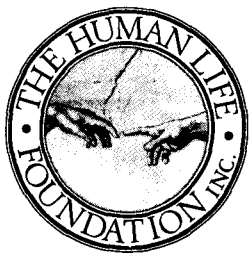
Herewith our 20th issue, completing our first five years of publication.

A minor accomplishment, perhaps, but one we are proud of, especially because we have good reason to believe (because of the steady demand for *all* issues, even the earliest) that this journal has supplied useful information not available elsewhere. We have tried to keep it both balanced and informative, and to publish only that which *will* retain more than immediate or topical interest. So that, even after five years, each issue contains much that remains relevant to the present state of the important questions with which we are concerned.

We think our readers will find the excerpt from Professor Walter Berns' new book, "For Capital Punishment," of special interest; should you want to get the book itself, it may be ordered (if it is not in your bookstore) direct from the publishers. Address *Basic Books*, Inc., 10 East 53 St., New York City 10022 (the price is $10.95). Two reviews published here first appeared in *National Review* magazine (150 East 35th St., New York City 10016).

We have noted that many people continue to order previous issues of this review: all are still available (as are bound volumes of the first four years —the 1979 volume will also be available early next year). For full information on how to order copies, see the inside back cover of this issue.

THE HUMAN LIFE REVIEW



FALL 1979

Published by THE HUMAN LIFE FOUNDATION, INC. Editorial Office, Room 540, 150 East 35th St., New York, N.Y. 10016. The editors will consider all manuscripts submitted, but assume no responsibility for unsolicited material. All editorial and subscription inquiries (and all requests for reprints and permission) should be sent directly to the editorial office. Subscription price: $12 per year; single copy, $3. Bulk prices on request.

Vol, V. No 4 © 1979 by THE HUMAN LIFE FOUNDATION, INC. Printed in the U.S.A.

INTRODUCTION

THE CONCEPTION of this journal, five years ago, was unplanned. When, in January 1973, the Supreme Court unexpectedly legalized abortion, relatively few Americans had yet seriously deliberated all that was or might be involved in so drastic and sudden a departure from accustomed morality. Like many others, we waited for those "concerned Americans" celebrated by our pundits (who so often find themselves in agreement with them) to take up the debate. Surely our intellectual leaders, whose trade it is to make the relevant distinctions, would be heard from? But there was mostly silence. And much of what *was* said went unreported, if not unnoticed, by the media. In 1974, even though it was admitted that more than a million babies would fall victim to abortion that year alone (the actual number was probably higher, and has grown steadily year by year since), an article or column on the abortion issue was a rare thing. We thought this situation preposterous: there *must* be many who held strong views and wanted to express them. So we began to look for them, and their works.

In short order we had enough to fill, say, a good-sized quarterly. Well, we said, why not? We discussed the idea with people who know about such things. The *problem*, most agreed, would be to keep up the quality: How much can you say on a single issue? Yes, we agreed — but on an issue so momentous as abortion, perhaps the answer was quite a lot? More important, wasn't the abortion issue itself the proverbial tip of the iceberg, visible sign of much more? There were the obvious things: euthanasia, infanticide, experimentation on "human subjects" — all these questions were not only interrelated but also extended outward into . . . almost anything that affects human life. And so we began.

Mr. M. J. Sobran is an example of the kind of writers we have been fortunate enough to attract to these pages. A brilliant young writer, he contributed his first major article to our first issue; if he was not widely known then, he is now (as a nationally-syndicated columnist, Senior Editor of *National Review*, etc.). He has contributed his inimitable essays to almost every one of our twenty issues to date, at first writing mainly about abortion, but lately (again, the pattern) treating those "related issues." In this one he is at his very best and most expansive, we think, discussing an intricate variety of things, always keeping in mind that prime concern of civilized society, the family. Certainly he is by no means alone in thinking that that vital institution is in special danger here and now, but few have focused more sharply than he does here on the reasons why. He contends: "Because the home itself has lost its sacredness, we have lost much of our freedom in commerce, education, and even religion. The process will be complete when the family is reduced to a mere subdivision of the state, and parents are no more than minor civil servants." Read for yourself how he arrives at that sad conclusion.

We mentioned that all this began with an unexpected action by the High Court. Miss Vicki Marani argues that the "assumptions that made it possible" were already there, and that what the Court did *re* abortion was no more than a logical extension of what the Court had been doing for quite a while. We think she argues her case very well. And she herself illustrates several points we're partial to. First, she is a very recent law school graduate who is not only deeply interested in the Abortion Cases but also strongly opposed to the Court's position — more and impressive evidence of our contention that the *Roe* and *Doe* decisions have failed to win acceptance where they *must* win it, if they are to survive. Then too, Miss Marani is obviously another talented young writer; we are happy to publish her first major article, and hope for more of them.

We next move on to the vexed question of *in vitro* fertilization, which had scarely been heard of when the Court made abortion a national concern, but which is now intimately related to it, due to one stark and awful truth: the "test-tube baby" procedure demands that life deliberately begun will be as deliberately destroyed. Even worse, there are already proposals for *in vitro*-related experimentation the *sole* purpose of which would be create-to-kill, for the "knowledge" to be gained, no sweet little Louise Brown even a prospect. We hear first from Professor Albert Studdard (another newcomer to our pages), who is by no means flatly opposed to all *in vitro* efforts. His point is, there are many *moral* issues involved, and the promoters (to put it mildly) of the "process" are refusing to *face* these issues. "I am open to the possibility," he writes, "that when the answers are in the verdict may fall either way," but he is disturbed that *in vitro* advocates "choose not to try to argue the moral case in their favor. Rather, they refuse to acknowledge the existence of the questions."

Which brings our own Ellen Wilson into the fray, with her usual lucidity. (Regular readers will recall that we published *her* first article just two years ago.) She makes the point that opposition to *in vitro* fertilization is *unavoidable* for anti-abortionists; not just because of the "up front" destruction of life, but because it intends abortion as a "backup" as well. But that necessary opposition requires that we say No to women who *want* their own children (in the "ordinary" abortion situation, of course, it is the other way around).Thus loveable little Louise Brown shouldn't . . . well, Ellen says it all herself, much better than we can even indicate here.

Is Capital Punishment also related to abortion? Yes, that too: abortionists make the charge that, if "pro-lifers" were consistent (read *sincere*) they would oppose *any* life-taking. Some indeed do. Others point out that there is a difference between a reluctant resolve to execute the guilty and a wholesale slaughter of innocents. Beyond all this are such questions as: Does the death penalty confirm or deny the basic sanctity of life? And much more. Mr. Walter Berns, a distinguished author and teacher, has

recently published a book on the morality of the death penalty. He is not concerned with the abortion decisions (he mentions them only as an instance in which Mr. Justice Blackmun set aside "constitutional scruples"). He is concerned that we are applying the wrong emphasis: *punishment* is the issue, and the failure and/or unwillingness of a society to apply it — demand it — undermines "the moral order by which alone we can live as human beings." Thus his concern qualifies as one of the "life issues" this journal exists to explore. We reprint here the Introduction to this book (for further information see the inside front cover of this issue).

Then something we think quite unusual: excerpts from a speech delivered in 1972, well before the Court's *fiat* on abortion, by a man possessing very interesting qualifications: professionally, he is doctor, lawyer, and teacher; personally, he was (at that time at least) *not* opposed to all abortions, nor — although the speech was to a Christian church group — was he an adherent of any "organized religion." But we think he *did* see clearly many things that the Mr. Justices *failed* to see a few months later. In any case what he said makes fascinating reading today. We think you will agree that Dr. Jonas Robitscher was, at a minimum, clearsighted: for those few who *had* thought seriously about what was involved, there was no great mystery about what the actual pre-1973 situation was, nor what was likely to happen if the Court did (as it soon did) what then seemed not only unnecessary but also *unthinkable*.

The final article, by your servant, was prompted in part by reviewing what the blurbs describe as "an important new book" on abortion. It undoubtedly *is* important, and provided a framework for more extended ruminations. The review itself you will find in Appendix C.

There is also interesting material in the other appendices. In Appendix A we reprint some testimony on *in vitro* fertilization given in Texas this year by an attorney, Mr. James E. Berry. It provides some useful background for our *in vitro* articles — and also shows once again the strength of the "abortion connection." Appendix B is a review, by our friend Professor Francis Canavan, S. J., of Mr. Berns' book; as always, Father Canavan gets it just right. Appendix D is another review by Professor John T. Noonan, Jr., who is also well-known to our readers. The subject is *Dred Scott*, a case often compared to the Abortion Cases — and rightly so. We are glad to record Noonan's fresh analysis of it: we like to think ours is a kind of "journal of record," and his review belongs in the *corpus* of material which we hope many have found useful.

Our next, God willing, will be a Fifth Anniversary special edition, which we will do our best to make memorable. Watch for it.

J. P. MCFADDEN
Editor

In Loco Parentis

M. J. Sobran

REVIEWING A PERFORMANCE of *Henry V*, Kenneth Tynan once remarked that the play speaks irresistibly to all those ancient sentiments we profess to have outgrown. Something in us responds to Shakespeare's monarchs even though our reason may tell us that they are (in Don Marquis's phrase) "kings talking like kings never had sense enough to talk." We still thrill to stories of rulers like Oedipus, David, and Lear, whose personal virtues and flaws could be so fateful for their subjects. Maybe we haven't outgrown the ancient sentiments after all. And maybe we shouldn't.

By modern standards, a Solomon, ordering with inspired irony that a baby be cut in half, is abusing his power no less than a Herod who actually orders infants put to the sword. But we can't help feeling that life has lost some of its savor when Solomonic wisdom loses its scope for action.

The greatness of the old kings had its source in their being what Aristotle called great-souled men, who claimed much and deserved much. The poet who would represent them must be capable of a proportionable eloquence. And this will seem mere inflated grandiloquence unless we can be convinced that we are beholding men who are confident of their worthiness to wield autocratic power.

But the modern world has denied the legitimacy of such power. Today authority has ceased being traditionary or charismatic, to use Max Weber's terms, and has become more and more rationalized, legalized, bureaucratized. It is our boast that we live under a government of laws, not men; we have checks and balances, due process of law, bills of rights. The king's will was once sovereign, his person sacred; but a modern ruler is a mere office-holder, who may be removed peacefully, without violence, sacrilege, or any formal weakening of the office itself. We are no longer subjects, but citizens, equals, answerable to the same laws as those who govern us. No man is above the law.

So much can be accounted for by republican theory. Madison and

M. J. Sobran is now a syndicated newspaper columnist (as Joseph Sobran), and a regular contributor to this review.

Jefferson would regard the change I have described as perfectly proper, so far as it concerns the relations of the governed and their governors. But the purpose of limiting government is to allow men to be free — autocratic — in the private sphere. And modern government, though limited in theory, tends more and more to hold private men accountable to the authorities of the public sector. That these authorities are impersonal and anonymous, residing in acronymic federal agencies, only seems to diminish the stature of those who are subject to them.

The problem is not so much big government as small men. A Macbeth may be wicked, but he is not contemptible. He is somehow worthy to speak lines we ourselves would not even dare to utter except in irony. We have ceased believing in metaphor, in large eloquence, in what Richard Weaver called "uncontested terms" — terms of large moral import whose meaning and value can be taken for granted, the kind of terms (glory, honor, sacrifice) Ernest Hemingway repealed. Our acts seem to have lost their heroic possibilities, for good or evil. The most we can do is obey or violate trivial "guidelines."

Heroes have departed from our literature as eloquence has disappeared from our language. And once man was diminished in his own imagination, he lost the instinct to resist the encroachments of power. He might resist the tyranny of plain despots, since, doubting that humanity could rise to heroism, he had grounds for denying that any single man could claim personal power over others. But he could not resist the tyranny of rules and laws and superpersonal "forces." Deterministic social philosophies have a way of cowing even those who don't fully accept them. The modern presumption is against human freedom. We know that men *want* to be free; we are less sure that there is any *point* in their being free, and correspondingly less willing to defend and sacrifice for freedom.

By now bureaucratic man has pretty well replaced autocratic man. This may seem a natural result of our form of government; but it is not obviously a necessary result. Perhaps when you abolish autocratic rule at the top you end by producing a bureaucratic society that reaches all the way to the bottom; perhaps you alter man's conception of himself for the worse by de-sacralizing his rulers. But for over a century of republican government America had plenty of heroic figures, in government and private life. Among our presidents Jefferson, Lincoln, and Theodore Roosevelt were strong, challenging the

limits of their formal power. In business, exploration, and military life we abounded in men who undertook huge projects and accepted the risks. We honored our autocrats.

By the middle of this century we were noticing a change that was variously described as a "managerial revolution" and the rise of the "organization man" and the "other-directed personality." Many were even deploring the stultifying conformity of American life while encouraging a bureaucratization of increasing scope that could only stifle, punish, and discourage personal initiative. Government was invited to take the risk out of life, in return for the prerogative of imposing a wide range of standards. Rules supplanted traditions, affection, and sheer will as determining forces in society.

The whole process is no mere shift in power relations. That shift is itself an expression of a deeper change in our self-consciousness. Unless people had lost faith in themselves, they would never have invested undue faith in the state. If they submit to militant bureaucrats, it is because they are already acquiescent bureaucrats.

Modernity, according to one line of thought, consists in a series of related distinctions: public and private, personal and impersonal, *Gemeinschaft* and *Gesellschaft*. These are distinctions unknown to primitive and tribal societies. But we are all, to some extent, primitive and tribal; and even for denizens of the modernized world, keeping the distinctions clear is an enormous effort. No wonder it often breaks down; and it breaks down, as a rule, in either of two basic ways.

One is to destroy the private sphere. The other is to destroy the public sphere. It can be put another way. One error is to model all society, including the state, on the family. Fascist movements usually involve this kind of mass reversion to tribalism, with the myth of a racially united nation threatened by foreign attack from without or corruption by foreign elements (usually Jews) within. The other error is to model all society, including the family, on the state. This is the error to which the bureaucratic mentality is prone.

The fascist heresy has received a good deal of critical attention; the bureaucratic error much less. This is probably because articulate people nowadays tend to share the bureaucratic perspective, and to regard a popular fascist uprising as the essential, in fact the sole, threat to social order. This may also explain why articulate people are so often blind to the evil of communist regimes until it is too late. They see in communism at least a potential approximation of their

own ideals. As Jean-Francois Revel has put it, they judge fascism by its record, but communism by its promises. And they believe its promises because they believe *in* its promises.

Communism offers the hope of a future liberated from tribe and class conflict. Like the liberal bureaucratic dream, communism's dream is internationalist, universalist. Its principal victims — the family, religion, property — are institutions that bureaucratists don't much care for and would themselves reform or abolish if they could. Both communists and bureaucrats deeply believe that all such traditional institutions should be subordinate to the state.

A key difference between the communist and the bureaucratist, of course, is that the bureaucratist believes in a kind of individual freedom. But he shares the communist view that the authority of these institutions is illegitimate. Nothing angers him more than to see the head of such an institution acting autocratically: businessmen, bishops, even parents. That is why he is willing to replace their authority with that of the state, i.e., people like himself. His tolerance for communism, as Lewis Feuer has observed, stems from his instinctive feeling that communism represents the regime of his own kind of rational authoritarians. Believing in communism's forms, he is slow to criticize its actual practice; and when he gets around to it, he attacks not communism itself but its administrators, for "betraying" the revolution. But there will always be a next time, and he will not permit the failure of all previous communist regimes to prejudice him against the next one that comes along. That is why the recent horrors of the Vietnamese and Cambodian governments came as an unpleasant surprise to so many Western liberals who had urged us to give peace a chance.

The bureaucratist mind is always surprised when the destruction of the traditional institutions he dislikes is accompanied by massive individual sufferings. He had thought destroying those old forms would *liberate* individuals, and he cannot comprehend what really happened, beyond a certain inordinate and needless harshness in the new rulers. In order to understand what has happened he would have to abandon his ideology; and that is too much to ask of him.

That ideology derives from the social contract theories of the eighteenth century. Those theories had some political use in limiting the power of the sovereign. But they became disastrous when applied to all social relations whatever.

If man is above all an individual, bound to no social body he has

not voluntarily joined, it is not just the authority of his king that is called in question: so is the authority of his father. Social contract theory, at least in its popular forms, merely limits state power. But it is utterly destructive of any specifically *familial* authority.

In a roundabout way, it has actually enlarged the power of the state. Once private social relations, commercial or kinship, are understood as essentially coercive, then it becomes the responsibility of the state to intervene in them. For the state's whole *raison d'etre* is to protect individual rights; and if the producer is violating the rights of the consumer, or the employer the rights of his hired help, or the father the rights of his child, the state must act, just as it must act when one citizen tries to kill, enslave, or rob another. The son, after all, is an individual too, and therefore a co-equal citizen (at least in principle) with his father.

All this might have remained of merely theoretical interest, as for a long time it did. But today we are seeing what we may call the detonation of John Locke's time-bomb. We are indebted to Locke for his political theory, which clarified the distinction between public and private life. But he may have succeeded too well. His psychology led all too easily to skepticism, and his doctrine of tolerance, though it gives powerful reasons for respecting private conscience, tends seriously to undermine what we may call public conscience. His whole approach, at least as it has influenced us, has reduced moral insight to a merely subjective affair, so that, as long as no direct physical injury is done, no moral view can have the status of public truth. He has given strong reasons for abolishing religious establishments, but he has offered no sufficient reason why religion should have the specially respected (and protected) status conferred in our First Amendment. Locke himself probably took it for granted that the family and religion would maintain their internal strength, and that his reductivism would affect only the monarchy and the established church.

Today it is possible to see the depredations of social contractarian assaults on traditional authority. People can be members of families only in the way they can be citizens of a polity: by consent. The family therefore becomes, by inexorable logic, a mere subdivision of the polity; it ceases to be either a natural or a divinely sanctioned entity. A father can claim no authority over his son: their relations may be voluntary on his side, but they are, from the son's perspective, acci-

dental. As children are fond of pointing out, they didn't ask to be born. Locke would seem to support this handy argument.

Let us pause to consider how people used to regard the family. The shortest way to express it is that the family was sacred. The father was head, with a power that might extend (as with the Roman paterfamilias) to killing other members. He rarely did this; but his power to do it meant that the state had no authority over the family's internal affairs. The only fairly common form of killing in the ancient family was of course infanticide; and this was not regarded as involving a death in the family, since the infant was not formally a member until his father, in a priestly rite, had initiated him.

This priestly role was another sign of the father's position as mediator between the family and the gods. As a citizen he was subordinate to the state; but as head of the family he was subordinate to nobody. His sacred status was a guarantee of the family's autonomy. That is why parricide was the most horrific of crimes. The next worst was incest, another profanation of holy ties.

In the Christian era the father lost some of his prerogatives, but the family was on the whole strengthened. Marriage became a sacrament, indissoluble even by the family's immediate head: man and wife were one flesh, and what God had joined together no man could put asunder. The formal purpose of marriage was procreation, the begetting and education of children. Contraception, abortion, and infanticide all violated this purpose.

In religion and custom the family's unity was assumed. Property belonged more to the family than to the father as an individual, descending to his eldest son along with status and occupation. The state had no right to interfere with the family nor to modify its divinely ordained structure. Its real property was likewise inviolable.

Beyond the vows of marriage, which constituted the family, there was little scope for individual consent. Even marriages might be arranged by parents, with painful sanctions against the refractory child. Once the family came to be, each member was a member for good. Spouses owed each other fidelity and, equally important, conjugal rights, whereby carnal desire became the lawful motor of procreation. It was thus impossible, in law, for a man to "rape" his wife: her consent was implicit in the union, and the question never arose.

A wife owed her husband obedience. If he was cruel to her she had little recourse against him, except perhaps to return to her parents if

this was feasible. The shrew and the cuckold were of course comic figures, symbols of the forms marital breakdown might, and commonly did, take.

Samuel Johnson once explained to Boswell why adultery was wrong: "Confusion of progeny constitutes the essence of the crime; and therefore a woman who breaks her marriage vows is much more criminal than a man who does it. A man, to be sure, is criminal in the sight of God; but he does not do his wife a very material injury, if he does not insult her."

Chastity, as a kind of prospective fidelity, was also important. The sexual organs were to be preserved from any "foul unlawful touch," in Shakespeare's phrase; for Christians especially the body, as temple of the Holy Ghost, was to be consecrated to divinely sanctioned purposes. Traditionally, this applied with special force to women; and when Boswell asked Johnson if it was fair that a young woman could be ruined by a single deviation from chastity, Johnson replied with another blunt defense of the double standard: "Why no, sir; it is the great principle which she is taught. When she has given up that principle, she has given up every notion of female honor and virtue, which are all included in chastity." This answer can be counted on to outrage subscribers to the consenting-adults principle, but it reflects the ancient feeling that there are specifically feminine virtues, and that these have to do with the ideal subordination of wives to their husbands. Even today, in many cultures, a man's "failure" to beat his wife occasionally is looked on as a sign not only that he is shirking his role, but that he doesn't care enough for his wife to assert it. Expedient though this view may be (and it is held not only by men but by mothers consoling tearful daughters), it at least shows how the code of traditional sex roles is moralized even in the brutal aspects of such societies.

Of course the subordination of women was itself less an end than a part of the general system under which kinship ties were simply permanent. If no single member could secede from the family, neither could there be any mutual secession. Divorce was impossible. Unlike most societies, Christian society forbade even the husband to demand the dissolution of the marriage. Man and wife were one flesh, joined by God. They, the Church, and the state lacked power to undo a valid union. Spouses belonged to each other as inescapably as their children belonged to them.

Whatever form the state took, it had to accept the priority of the

family. This was hardly questioned. God had created the family, and it would have been monstrous arrogance for the state to presume to touch its essence: it had no more right to part spouses than to kidnap children.

Modern people, considering these things, are first of all struck by the inconvenience of the old arrangements. But what they should realize is that the family's integrity gave it a notable freedom. Membership in the family gave one an irreducible measure of independence from other orders of society, including the state itself. The principle was so customary, so deeply ingrained in habitual attitude and practice, that it was assumed to be unalterable as a principle. It might of course be violated; but that is a different matter. A thief violates property rights, but he never thinks of abolishing the principle of property rights.

Seen one way, then, the autocracy of the father was a natural check on the autocracy of the king. There have always been bad fathers, but the average of fathers, on the whole, is higher than that of kings: affection is a surer protection than the love of justice. Besides, it is easier to flee a father than an empire. In the era of patriarchy people had much less to fear from state power than they do now.

(Incidentally, Jean-Francois Revel has brilliantly pointed out the parallel between the power of the paterfamilias and that of the modern state. Under the slogan of "self-determination," we are so accustomed to treating national sovereignty as absolute that regimes like those of Idi Amin and Pol Pot can kill untold thousands of their subjects without provoking intervention by professed champions of "human rights." Human rights, practically speaking, are strictly subordinated to the rights of states. In other words, we seem to be agreed that the state is virtually sacred; it is *the* inviolable unit of human society, with total power over other units.)

With the Reformation, marriage ceased being a sacrament in much of Christendom. Still, it retained its sacredness even after its status was made formally uncertain; and divorce continued to be a scandal, the indulgence of a few powerful and shameless people.

But gradually, as individualism got its foothold, conscience came to be thought of as sovereign; morality was no longer held strictly objective; and romance, rather than procreation, became the rationale of marriage. Both marriage and divorce became civil matters, any supernatural meaning attaching to them residing principally in the minds of the parties. So far as the state was concerned, at least,

marriage was a mere contract, subject to breaking. Any further value was left, so to speak, up to those who had signed the contract.

This was due to popular sentiment, not to the state's initiative. The state obliged popular demand, with no aggressive desire to interfere in the family. Once the idea of voluntary dissolution took force, it came to seem more like interference for the state to *refuse* to grant divorce. The grounds for divorce, once narrowly confined to provable adultery, were, with inexorable logic, relaxed, until the recent culmination in no-fault divorce — whereby divorce, like marriage, became a matter of sheer consent.

With the advent of divorce the state has gained (perforce) a new power, that of disposing, of children. If it could modify the nature of marriage, it had to assume at least an umpire's role in deciding where the children of a broken marriage were to go.

Once marriage was reduced to a mere contract between free individuals, a contract whose terms the state could name, the family lost its ancient status as prior, in the social order, to the state. Henceforth the status of the family would be in constant flux, and would depend, in great part, on political ideologies; since, being subordinate to the state, it could and must be altered to conform to this or that conception of the state. New political ideologies — liberal, fascist, feminist, socialist, communist — brought their own notions of how all of society should be organized. Most of them conceived of society as a single unit, identified with the polity, in which the family was a mere subdivision rather than an autonomous social body. The state was to serve man's rights and even his ultimate needs, and this might well entail measures to "reform" — or entirely abolish — the family.

In totalitarian systems the individual and the family are both, of course, wholly subordinate to the state, subject to all its purposes and policies. Communism treats even children as citizens, with the duty of informing on their own parents' antistate activities and opinions. It has also, by turns, legalized and banned abortion, depending on how many more (or fewer) people a given regime desired at a given time. Nazism banned abortion for Aryans but permitted it for Jews. Italian fascism awarded honors to women who bore large families. Liberal systems, on the other hand, have respected the authority of the individual's desires; but they too have been whittling away at the family as such, while edging more and more explicitly toward comprehensive population policies.

Although, in America to date, only a few fanatics have made direct

attacks on the family, its uncertain status has opened it to oblique assaults. The Supreme Court has taken advantage of the situation to impose its own ideology. This is logical enough. If the state can decide on what terms to declare a family dissolved, why can't it declare that, as far as it is concerned, a fetus isn't a person?

The Court has gone further. Having left the personhood of the fetus formally uncertain (while in practice denying it), it has referred the abortion decision to one person alone: the mother. Obvious as this seems, it implies another profound virtual denial, namely of the father's interest in the life of his own unborn child. This means that a husband has no more standing to prevent the abortion of his child than if he were a vagrant lover; indeed, that he is as powerless as a perfect stranger with no relation to either the mother or the child. The woman's right is unqualifed by any right of the child or its father. More important, that right is unaffected by her membership in the family.

This actually gives the mother an anomalous power over the father. Though the abortion decision is entirely hers, part of the consequence of it falls to him. If she decides to bear the child, he will be required to support it. She can decline motherhood; he has no corresponding right to decline fatherhood. In the logic of individualism, "sex" is a purely voluntary activity between consenting adults. It carries no obligation to procreate or form a permanent union. One might expect the courts to find that a man, upon learning that his sexual partner is pregnant by him, has the right to inform her whether, if she chooses to carry the child to term, he will accept the role of father. As long as it is not yet a person, and can become one only by her will, he should be free to reject any share in parental responsibilities created by a choice he is powerless to countermand. If he can't impose an unwanted child on her, it seems unfair to let her impose one on him. But the courts have not so ruled; not yet, at any rate.

The use of the word "sex" to refer to an activity rather than to a gender is, I believe, fairly novel. It is even used to refer to genital activities between members of the same gender. This implies the conception of such activities as ends in themselves, with procreation as a mere possible by-product. Since procreation is extrinsic to sex (and possible in only one of its many variant forms, all of which are of course equally "valid"), contraception and abortion are viewed as rights. Many people think the state should subsidize both in order to insure them as universal rights; and most of the same people also

think the state should actively encourage both as a matter of social policy. This is natural enough. Population control becomes a state concern, since every human being is a member of the polity, however cloudy his membership in nebulous entities like families. The right to purely voluntary sex, regardless of one's formal relation to a partner, has also entailed giving wives the right to charge their husbands with rape. Rape, on this view, is merely compulsory sex on a given occasion, rather than a violation of personal integrity. When rape was conceived as an invasion of chastity, it was held a capital crime; now that chastity has been downgraded as a virtue (to the modern individualist mind it is no virtue at all), the gravity of rape has lessened legally. Feminists speak of its "trauma," but that seems hard to blame on the rapist: the individualist should regard rape as a form of physical assault, and blame any trauma on the victim's exaggerated reaction to it.

If the family has ceased to be sacred, surely that is partly because sacredness itself is a banished category in modernity. *Nothing* is sacred, we are told; at least it is inappropriate (and unconstitutional) for society to bestow sacred status on anything. The state is to be formally neutral about such matters. But, once again, this formal neutrality is really a practical hostility. Religion becomes another matter for consenting adults in private, its value as subjective as pleasure. It is nothing the state should in any way support or encourage. To most modern intellectuals, of course, religion is a vaguely retrograde force; and religious freedom means principally freedom from, not for, religion. For them the real problem is how to contain it, how to see that it doesn't get endowed with any public status. They have no fear of inhibiting it unduly; they think it is enough to allow people to go through the motions of worship, and no serious notion that religion may be an important principle of social unity ever crosses their minds. Despite their fondness for the First Amendment, they can't justify its special concern for religion as such — in the way, say, they can justify its special concern for the press.

Still less can they justify allowing parents to impose religion on children. They wouldn't dare to interfere in this prerogative even if it occurred to them to do so. Not directly, at any rate. But they have succeeded fairly well in severing religion and education. Today education is well established as a state preserve. At one time education was thought of as essentially religious — bringing up children in the ways of their parents, the most vital of which had to do with faith

—and nobody doubted that the duty and right of educating the child were the parent's. By now, however, education has been desacralized, first to mean skill in reading and mathematics, later to mean just going to school (with perhaps some vague vocational benefits off at the end). Every child had the right to a basic education, and the state had an interest in an educated citizenry; hence the public school system.

That system now enjoys something like the status of an established religion. All must support it, whether or not they benefit personally from it or even approve of it. And only when they have finished paying for its support may they devote their remaining resources to alternatives. Here we may note another telling anomaly. Most liberals consider that a right (as to an abortion or to legal counsel) is effectively denied to the poor unless the state subsidizes it. But those same liberals, while not openly denying a parent's right to choose a private school for his child, are fiercely hostile to any voucher plan that might enable relatively poor parents to exercise that right. I think it is fair to say that this reveals how trivial such liberals consider the *parental* right of education, especially religious education. As the situation of private schools has become more difficult, liberal hostility to them has in fact increased. The harassment of these schools has increased markedly in recent years, usually on the pretext of regulation in the name of "standards" — even when (as is usually the case) they measurably outperform the public schools.

The superiority of the private schools is probably the very reason they are resented. Champions of public education dislike rivalry and desire monopoly. They don't claim any real superiority for the public school system (they wouldn't dare); but, deep down, they think education *should* be public, in principle rather than for any pragmatic reason. Why? Simply because it is more in keeping with their profoundest social attitudes, according to which the state and its professional administrators, rather than the family, should be the organizing principle of society.

Many conservative and libertarian critics have pointed out that education is the one area of our lives in which socialist premises have won unquestioning support. Most people today can hardly imagine another system. That is why so many Americans fail to see half the evil of totalitarian systems in which brainwashing begins with kindergarten. The bureaucratist often admires these systems outright, just

as he jealously regards the formation of young minds as the state's prerogative.

But one reason for the popularity of public schools has been that they are by tradition popularly controlled. In this respect they have been responsive to the pressure of parents in the community. But things are changing. The Federal government is assuming a larger and larger share of authority over the schools, and we may soon have a cabinet level Department of Education dispensing "guidelines" to all.

Meanwhile parents are losing control in another way. High school and college students have more freedom than formerly, if only because they are more mobile and harder to supervise. But this practical condition, hard to cope with anyway, is being dressed up as a "right." Civil libertarians (who somehow never perceive the sheer expansion of state power as a threat to civil liberty) argue that colleges should not establish moral codes for students living on campus. They make similar demands on high schools, protesting (for instance) censorship of materials in school libraries, and in a recent case demanding that a homosexual boy be allowed to bring a male date to the school prom — despite the wishes of the prom's sponsors and the boy's own parents. Thus the public schools, having usurped the place of the parents, are forbidden to act *in loco parentis.*

This shouldn't surprise us, since the same civil libertarians want to forbid parents themselves to act *in loco parentis.* They want children to be able to bring legal actions against parents and to get contraceptives and abortions without parental knowledge or consent. The Supreme Court has now struck down as unconstitutional a Massachusetts law requiring minors seeking abortions to get their parents' approval. The point is not merely whether abortion is wrong, but whether parents have the right and duty to make (or even share in) decisions as to whether their minor children have surgery.

Another recent legal case is illustrative. The American Civil Liberties Union brought suit against Oral Roberts University to make it drop its health code for students, under which overweight could result in expulsion. Whatever one thinks of that code, this was not at all a civil liberties case, since only the state can violate civil liberties; and Oral Roberts University is in no sense a state or an extension of a state. It is private property, supported by private donations, attended voluntarily; above all, perhaps, it is a religious institution. What the ACLU was really demanding was that ORU be made accountable to

the state. In other words, it was attacking the civil liberty of the school itself, and of everyone who chose to contract with it. The ACLU's "civil liberties" are really state-imposed standards.

The ACLU has also sued to force private hospitals to permit abortions on their premises, even when those hospitals are religious in nature. The organization's professed goals are deeply misleading. Despite the rhetoric of civil liberty, it actually seeks the direct subordination of nearly every private institution (with the possible exception of the Communist Party) to the state.

The same tendencies are to be found in the growing movement for "children's rights." The future shape of this cause, if it wins, may be seen in that bureaucrat's paradise, Sweden, where it is now illegal to spank your own children. Every "right" requires a rights-enforcing agency; so it is less true to say that children have gained any real independence, than simply that the state's power now extends into the Swedish home as never before. If children are citizens like their parents, then obviously the home can't be allowed any special exemption from that general policing power whereby the state protects citizens from each other. The more guidelines the state promulgates, the greater must be its power. And the more trivial the activities it claims to regulate, the closer and more minute must its supervision be. The new Swedish law sounds almost comical, until you think of the means necessary to back it up. Only the communist nations have gone further in stifling private freedom. One might have thought that discretionary spanking was a safe, if tiny, redoubt of autocracy.

By now many people have unconsciously accepted the idea that the state is somehow prior to all other social institutions. We can see the influence of this notion in the current status of property.

At one time property was looked on as what Aristotle called a "predicament" of its possessor, that is, something characteristic or individualizing of him. Locke said that property was created when a man took something from its natural state and "mixed his labor" with it. One of the anxieties of our Founding Fathers, Lockeans that they were, was to prevent depredations against property. They felt that ownership tended to qualify a man for the responsible use of the vote, so deeply was property, like a good family background, associated with character. In fact men traditionally took pride in bequeathing and conserving family estates.

Today, of course, property is equated with its cash value, and the value of cash itself is subject to political manipulations. Intellectuals

and politicians have got us into the habit of thinking of wealth in gross national aggregates, as if it were as a matter of course raw material for redistributist schemes. Anything above the survival level is fair game for the state, which seeks tactful ways of confiscating as much as possible of the total cash value. More than forty cents of every dollar earned is now paid to some level of government. Most of this amount is intercepted ("withheld") before the earner gets it, so that he will miss it less.

Among the severest taxes are those on inheritance. The bureaucratic mind is not terribly respectful of earned wealth, but it is vindictively hostile to unearned wealth. Favors bestowed on children it terms "accidents of birth," as indeed they are, from the perspective of a raw individualist ideology that has no sympathy for the consolidation of the family and its possessions. All children and all wealth, on this view, belong to "society." And since all members of society are equal, and entitled to "equal opportunity," the justice of any parentally-conferred benefit is very doubtful. By this logic it follows that to do a special favor to one child (even if he "happens" to be your own, by accident of birth) is to deprive all other children. The parent may think he is being generous, provident, affectionate; but all the bureaucratist sees is that the child is receiving an unwarranted "privilege."

The use of private property has been put under tight state supervision in recent years. Criteria of health, ecological balance, and "social justice" are now imposed to limit the discretion of businessmen, educators, and many others. What this means is simply that private property has become increasingly "public" — not that the general public is given more access to it, but that public officials supervise its use, the main symbol of their power being the myriad forms they require be filled out. Paperwork means submission. The ostensible rationality of the accountings we are called on to give blinds us to the implications of the very fact that we are held accountable at all. Nothing in the Federal government's mandate as laid out in the Constitution justifies Washington's current assumptions of authority. The Ninth and Tenth Amendments, properly understood, would probably require a vast dismantling of Federal bureaucracies.

So-called "civil rights" measures have now made us accountable to Washington for our very motives. It is not enough to ban overt racial discrimination; Washington now makes its own clumsy judgments about "intent" to discriminate. Naturally these judgments are based

on the visibility of minority group members in a given workplace or college. When those members are "underrepresented," the easiest way to prove innocence (and it is innocence, not guilt, that must be proven) is obviously to recruit the kind of people one is suspected of wronging; that is, to recruit on the basis of race. Such measures, far from being the civil rights violations they would seem to be under a literal construction of the law, are called "good faith efforts." In this way, "affirmative action," however repugnant to our sense of fairness, is the natural consequence of bureaucratic motive-hunting.

But there is more to affirmative action than this. Most Americans have understood civil rights laws in a traditional family-based sense. They assumed those laws to mean that the most qualified applicant should get the position; and that it didn't matter *why* he was qualified — whether by ancestral legacy, parental training, or his own individual effort. He was to be taken on his personal merits, without reference to the ultimate source of those merits.

The elimination of direct discrimination, however, has failed to produce the demographic profile of achievement that would satisfy the militant egalitarian. Minorities and women remain "underrepresented." Even in an open market rid of old handicaps, they keep following old patterns. Accordingly, "deprivation" has been redefined to include motivation. And so we are told that centuries of poverty, broken families, cultural bereavement, role stereotypes, and the rest have necessitated more "aggressive" and "positive" state action to overcome them.

Extreme egalitarian philosophers have even argued that "society" must compensate for such irreducible "undeserved" advantages as physical beauty and native intelligence. Even one's self-cultivated talents may be viewed this way, since one may not have deserved the character that moved one to cultivate them!

To people of this outlook it seems nearly impossible to locate desert, but easy to appoint qualified arbiters of desert. The rest of us may suspect that it takes some real insight, not to mention clairvoyance, to distinguish between deservers and non-deservers in so ultimate a sense. But those who assume the supremacy of "society" over individuals, families, and all kinds of institutions and associations are remarkably unworried about the qualifications of the bureaucrats who are to execute the levelling mission of "society."

We are now approaching something like the total bureaucratization of society: the family is to be little more than the lowest adminis-

trative unit of the state, with parents answerable to social workers for their every act. For a while custom will predominate, and we may not feel the force of the change; but the new principle is being established and its legal and practical apparatus is under construction.

The emerging system can't be called popular. It profoundly reverses the principle of a limited government answerable to the governed. Many of us already chafe under the relatively modest changes that have been made so far. How is it, then, that we have acquiesced in it?

Mostly because, in my judgment, articulate opinion has led us on at every step. Intellectuals tend to see man less as a *reasoning* creature than as a reason-*giving* creature. They don't see why people shouldn't be called on to justify all their acts in terms acceptable to rational governing agents. They have a natural affinity, therefore, to bureaucracy: its yoke is easy, its burden light, to anyone who is reasonably glib. And people who aren't glib generally lose arguments to people who are. Today we are up against an organized glibness which passes for reason. We mass-produce half-educated people who are articulate in a baneful way; that is, they are adept at bandying a set of terms which they are unable to criticize. For them such phrases as "social justice," "consenting adults," "civil liberties," and the like have single and rigid meanings and represent the boundaries of any universe of discourse.

People like this are maddeningly hard to argue with, because they are bigoted in a special way, without even suspecting themselves capable of bigotry. But they constitute and supply the whole class of bureaucrats. They account not only for the number of government functionaries, but for the prevalence of that state of mind which defers to the claims of bureaucracy. They dominate the allegedly learned journals, especially in the social sciences; they write the editorials in our leading newspapers; eventually they draft the bureaucratic guidelines for our lives. In short, they monopolize our public discourse.

Though they are glib, they are not eloquent; and they have lost all touch with the eloquence of the past, the philosophy and poetry that give subtlety to perspective and flexibility to reason. They confuse a standardized impersonality of style with perfect objectivity of vision. As long as they sound like each other, they remain confident of their collective fitness to rule others. Perhaps standardization is the key.

They think of reason as something that can be programmed into computers.

But there is another way of looking at reason. John Henry Newman distinguished between two modes, which he called "implicit reason" and "explicit reason." We all live by reason, he explained, but most of our reasoning is informal and unarticulated. Each of us finds his own style of personal judgment, his unique feel for things, hard to explain but good enough to guide him through life. As Newman put it, everyone has a reason, but not everyone can give a reason. Explaining personal decisions, from the choice of a necktie to the choice of a spouse, is a special skill. It means justifying oneself to others in terms they can understand and accept. We live by implicit reason most of the time; now and then we justify and explain ourselves by explicit reason.

For Newman implicit reason is an individual thing. It was his inspiration to see that reason is inseparable from personality. Applying his insight, we may see that personal freedom requires giving the individual scope for the exercise of his own way of reasoning about things. This means leaving him an area of discretion in personal decisions, exempt from the criticism of others.

But it is not enough to distinguish between the private and the public, if we equate the private with the individual and the public with government. Society at every level requires us to converse, to reason with others more or less explicitly.

Every social unit is based on consensus. Not only nations but families have their own customs, constitutions, peculiar codes and languages. All conversation is therefore a mixture of tacit understandings and explicit assertions and arguments. Rhetoric, as Aristotle says, is based on enthymeme — the syllogism whose major premise is taken for granted. Without consensus about such premises we would forever be in the impossible position of having to demonstrate every proposition exhaustively.

Consensus is thus a practical necessity for every social body. What is more, consensus is almost the defining property of any social body. Without tacit understandings, there can be no unity or cohesion of the kind that makes an aggregate of people a society in any real sense.

Every society, large or small, formal or informal, must be allowed its own level of consensus, just as every individual must be allowed his own implicit reason. The kinds of reasons that persuade within one

family may not be persuasive to another, still less to the state; just as Smith's implicit reasons may not carry weight with Brown.

But today, as I have suggested, we are getting into a bad habit of conceiving of "society" as a single massive thing, in which a single set of rigidly explicit reasons must be applied without distinction to every person and association within it. And we are increasingly called on to justify ourselves before the bar of explicit reason — explicit reason, moreover, of a peculiar kind, which rejects out of hand many traditional terms, while smuggling into public discourse its own unexamined premises. What it comes to is that we are forced to justify ourselves to bureaucrats in the arid dialect of their ideology. We fill out ever-increasing numbers of government forms, remodeling all social units on the pattern of the state itself.

Finally the problem is psychological. We have gone far toward internalizing the criteria of bureaucratism. Our morals and manners reflect our deference to the doctrine that we are, first and last, subjects of a "society" that is identical with the polity. Surrendering all claims of autocracy, we lose our autonomy. Because the home itself has lost its sacredness, we have lost much of our freedom in commerce, education, and even religion. The process will be complete when the family is reduced to a mere subdivision of the state, and parents are no more than minor civil servants.

Still Wondering Where It Came From

Vicki Marani

THE SUPREME COURT'S latest pronouncements on the abortion issue, *Colautti* v. *Franklin*[1] 47 U.S.L.W. 4094 (1979) and *Bellotti* v. *Baird*[2] 47 *U.S.L.W. 4969 (1979)* mark an appropriate point for re-examining the line of cases that began with *Roe* v. *Wade*. One comes away from reading *Colautti* and *Baird* with the sense that, in the six years since *Roe*, the Court has not yet come to terms with the fundamental problem that plagued *Roe*: the Court's failure to explain why, as a matter of institutional competence, it was warranted in assuming the role of chief policymaker on abortion.

Perhaps the reason for the Court's failure to justify its sweeping intervention into the abortion area is simply that it did not think it had to. In the two decades prior to *Roe*, the Court became accustomed to exercising extraordinarily broad powers. It must have come as something of a surprise to the *Roe* Court when commentators who had enthusiastically approved — or at least acquiesced in — the Court's exercise of expansive powers in other areas suddenly criticized the Court for overstepping its bounds.

Although the suddenness of the criticism in no way undermines its validity, one may well ask whether it would have been more appropriately directed in the first instance to the Warren Court's decisions on, for example, reapportionment, or the incorporation of the Bill of Rights into the Fourteenth Amendment. Those cases proceed from a common, unarticulated premise: that the Court properly plays a major role in the creation of rights. An examination of *Roe* reveals that it proceeds from the same premise, albeit in more blatant form. When viewed against the backdrop of those cases, *Roe* becomes not so much an anomalous exercise of judicial power as a logical extension of familiar jurisprudential assumptions. If *Roe* deserves criticism, then so do the assumptions that made it possible.

My purpose is not to dissect the analytical difficulties posed by the abortion cases; rather, it is to examine those cases in light of the

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Court's perception of its role in the rights-creation process — a perception that the reapportionment and incorporation cases did much to shape and nourish. I will attempt to describe how this perception has informed both the Court's articulation of the right to an abortion and its attempt to define that right in subsequent cases.

Before attempting to understand the Supreme Court's perception of its role in the rights-creation process, some attention should be given to the Court's perception of its role in our system of government generally.

It is a commonplace that the Court is an anti-majoritarian force in an essentially democratic polity; nevertheless, the implications of this commonplace have an enduring vitality. Precisely because an unelected judiciary is something of an anomaly in a government premised upon political accountability, it bears a heavier burden than the executive and legislative branches in maintaining its institutional legitimacy. The Framers recognized that the American people would accept a Supreme Court only if they could be persuaded that it would possess "neither force nor will, but merely judgment."[3] The Court itself has demonstrated an awareness of this point. Throughout its history, the Court has professed that it exercises power legitimately only when it does so in conformity with a standard external to itself, *i.e.*, with the Constitution. As Robert Bork has noted:

> The Supreme Court regularly insists that its results, and most particularly its controversial results, do not spring from the mere will of the Justices in the majority but are supported, indeed compelled, by a proper understanding of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court. The way an institution advertises tells you what it thinks its customers demand.[4]

The question then arises: How accurate is the advertisement?

The answer, of course, depends on the person asked and on the particular category of cases considered. Two categories of cases that, in academic circles, have come to be regarded as embodying "a proper understanding of the Constitution" are the reapportionment and incorporation decisions of the Warren Court. In both of those areas, the Court fundamentally reworked a body of relatively settled law and sought to justify its results as being fully in accord with the commands of the Constitution.

The Reapportionment Cases

In *Baker* v. *Carr*, 369 U.S. 186 (1962) and *Reynolds* v. *Sims*, 377

U.S. 533 (1964), the Court made unprecedented forays into legislative districting disputes. Prior to *Baker*, the determination of such disputes was one from which the Court had "traditionally remained aloof." (*Cf. Colgrove* v. *Green,* 328 U.S. 549, 553, 1946.)

In *Baker*, a divided Court rejected the claim that equal protection challenges to legislative apportionments were non-justiciable. Writing for the Court, Justice Brennan stressed that the case possessed none of the characteristics common to previous cases that had been held non-justiciable under the political question doctrine. The Court noted that, unlike cases implicating the Constitutional guarantee of a republican form of government, Art. IV, §4, in which the relationship between the judiciary and the coordinate branches of the federal government gave rise to political questions, the case before it involved only the relationship between the federal judiciary and the states. Thus, in *Baker*, the Court was not being asked to "enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar . . . ." Having framed the issue in *Baker* as one involving merely "the consistency of state action with the federal Constitution," the Court was able to satisfy itself that the case was entirely appropriate for judicial determination.

In his concurring opinion, Justice Clark explained that his finding of justiciability did not turn solely on the applicability of the Equal Protection Clause. If a violation of the Equal Protection Clause were all that the case involved, he would not have "consider[ed] intervention into so delicate a field." Rather, what was crucial for Justice Clark was his belief that there was no "other relief available to the people of Tennessee . . . . [They] are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government." This concept of justiciability, which suggests that political exigency can be an appropriate measure of judicial authority, reflects an understanding of the Constitution that contrasts sharply with the understanding expressed in the dissenting opinions of Justices Frankfurter and Harlan.

In his dissenting opinion, Justice Frankfurter advanced a view that sets uneasily with those who assume unquestioningly that the Constitution was intended to provide a remedy for every political ill. Justice Frankfurter recognized that "There is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliber-

ate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal to relief does not belong here . . . Appeal must be to an informed, civically militant electorate . . . ." In finding the case non-justiciable, Justice Frankfurter observed that it involved, "in effect, a Guarantee Clause claim masquerading under a different label." For this reason, the appellants' invocation of the Fourteenth Amendment rather than Art. 4, §4 could not "make the case more fit for judicial action . . . where, in fact, the gist of their complaint is the same — unless it can be found that the Fourteenth Amendment speaks with greater particularity to their situation . . . ." Justice Frankfurter could find nothing in the history of that Amendment suggesting that it did so speak.

In the remainder of his dissent, Justice Frankfurter articulated what appears to be his most fundamental reason for disagreeing with the Court. He thought that, in holding the case justiciable, the Court had arrogated to itself a task that the Constitution did not entrust to it: that of choosing

> among competing bases of representation — ultimately, really, among competing theories of political philosophy — in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union . . . .
>
> The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality . . . that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment . . . is, to put it bluntly, not true. However desirable and however desired by some among the great political thinkers and framers of our government, it has never been generally practiced, today or in the past . . . . Unless judges, the judges of this Court, are to make their private views of political wisdom the measure of the Constitution . . . the Fourteenth Amendment . . . provides no guide for judicial oversight of the representation problem.

This concern over the appropriateness of the Court's establishing itself as the ultimate arbiter of "competing theories of political philosophy" was echoed in the dissenting opinion of Justice Harlan. He anticipated that only those who regard the Court "as the last refuge for the correction of all inequality or injustice, no matter what its nature or source," would applaud the result in *Baker* v. *Carr*.

Two years after *Baker*, the Court held in *Reynolds* v. *Sims* (1964), that the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature be apportioned on a population basis. Writing for the Court, Justice Warren reasoned that

"Modern and viable state government needs, and the Constitution demands, no less."

That it was the Court and not the Constitution that was doing the demanding is the import of Justice Harlan's dissent in *Sims* and of Justice Stewart's dissent in a companion case to *Sims*, *Lucas* v. *Forty-Fourth General Assembly*, 377 U.S. 713 (1964).

After thoroughly canvassing the history of the adoption of the Fourteenth Amendment, Justice Harlan concluded that

> neither those who proposed nor those who ratified the Amendment believed that the Equal Protection Clause limited the power of the states to apportion their legislatures as they saw fit. Moreover, the history demonstrates that the intention to leave this power undisturbed was deliberate and was widely believed to be essential to the adoption of the Amendment.

Of special significance to Justice Harlan was the fact that, when the Fourteenth Amendment was ratified, most of the states were malapportioned. This led him to ask whether it could be "seriously contended that the legislatures of the states, almost two-thirds of those concerned, would have ratified an amendment which might render their own state constitutions unconstitutional." The Court could offer no satisfactory answer to this question.

For Justice Harlan, the Court's entry into the reapportionment area and its adoption of the one-man-one-vote standard involved an exercise of power outside the realm of judicial competence. By excluding "virtually every basis for the formation of electoral districts other than 'indiscriminate districting,'" the Court imposed its particular theory of political representation upon the states. It deprived the states of freedom of choice with respect to modes of political representation — a choice that, as Justice Harlan's discussion of the history of the Fourteenth Amendment's adoption shows, was clearly reserved to them.

Justice Stewart offered his own elaboration of this theme in his dissent in *Lucas* v. *Forty-Fourth General Assembly*. In that case, the Court invalidated Colorado's apportionment scheme even though that scheme had been adopted overwhelmingly in a popular referendum as a state constitutional amendment. Although the Court conceded that Colorado's initiative device constituted "a practicable political remedy to obtain relief against alleged legislative malapportionment," it found "no significance in the fact that a non-judicial, political remedy may be available for the effectuation of asserted rights to equal representation in a state legislature. Courts sit to

adjudicate controversies involving alleged denials of constitutional rights." Justice Stewart observed that

> What the court has done is to convert a particular political philosophy into a constitutional rule, binding upon each of the fifty states .... [N]o one theory [of representation] has ever commanded unanimous assent among political scientists, historians, or others who have considered the problem. But even if it were thought that the rule announced today by the Court is, as a matter of political theory, the most desirable general rule which can be devised, [I] could not join in the fabrication of a constitutional mandate which imports and forever freezes one theory of political thought into our Constitution .... [T]hroughout our history the apportionments of state legislatures have reflected the strongly felt American tradition that the public interest is composed of many diverse interests, and that in the long run it can better be expressed by a medley of component voices than by the majority's monolithic command.

Thus, for Justice Stewart, as for Justices Harlan and Frankfurter, the essential unsatisfactoriness of the reapportionment cases stemmed from the Court's inability to justify its assumption of such broad control over an area of political choice that the Constitution had reserved to the states. However, while the Court may have failed to provide an adequate rationale for the reapportionment cases, it has not lacked supporters willing to try to provide one.

One scholar who has sprung to the Court's defense in the reapportionment area is Paul Freund. In a speech he gave at the University of Virginia Law School on April 12, 1979, Freund offered what he termed a "participation" rationale for the reapportionment cases. This rationale is, in essence, an argument derived from the structure of government. The argument posits that, while constitutional text and history afford little if any support for the results reached in the reapportionment cases, those results may nevertheless be justified on the ground that they are compatible with — and possibly dictated by — the needs of a government that consists of both anti-majoritarian and majoritarian institutions. The degree of deference that the former owes the latter turns on the degree to which the latter do in fact reflect the views of the majority. Only when the Court can be assured that the political process is functioning properly is it required to defer to the results of that process. Applying this theory to the reapportionment cases, Freund argues that the one-man-one-vote standard provides the assurance of full, fair, and open participation that the Court is entitled to receive before it must defer to legislative decisions.

The "participation"rationale suffers from two major weaknesses,

both of which render it as inadequate a justification for the reapportionment cases as those offered by the Court. One weakness stems from the untested conviction that the one-man-one-vote standard in fact insures that the political process will be full, fair, and open. One commentator has noted that, while the one-man-one-vote standard presumably rests upon some theory of equal weight for all votes, "we have no explanation of why it does not call into question other devices that defeat the principle, such as the executive veto, the committee system, the filibuster, the requirement on some issues of two-thirds majorities and the practice of districting."[5] Another commentator has argued along similar lines: the standard "may be of only marginal significance unless all other factors in the equation can be made to remain constant. An asserted constitutional principle that may not be much more useful than one half of a pair of pliers ought to be viewed with some skepticism."[6]

The second weakness from which the "participation" rationale suffers is by far the more serious one. Even if it could be said that the one-man-one-vote standard guarantees the reliability of the political process as an indicator of majority wishes, an argument derived from the structure of government alone cannot justify the Court in imposing it. It is one thing for the Court to resolve a question on the basis of inferences drawn from the structure of government when constitutional text and history are silent or ambiguous; it is quite another for the Court to do so when text and/or history are clear and indeed flatly contradict the inferences drawn. The "participation" rationale provides insufficient justification for the reapportionment cases because, as Justice Harlan's exhaustive inquiry into the legislative history of the Fourteenth Amendment makes clear, the Framers reserved questions of suffrage to the states. They — and not the Court — had the power to choose the mode of political representation that in their view would best accommodate the diverse interests of their people. State control over representation was to be limited only by Art. IV, §4's guarantee of a republican form of government. With respect to the type of government specified by the Guarantee Clause, the writings of James Madison suggest that representative government could take many forms, as long as the forms did not become "aristocratic or monarchical."[7] In the face of such evidence of the original understanding, it is difficult to understand how the "participation" rationale can salvage the Court's holding that the one-man-one-vote standard is constitutionally compelled.

Baker and *Sims* reveal a disturbing approach to constitutional adjudication. Just as in *Baker* justiciability seems to turn largely on the Court's perception of a political exigency, so in *Sims* what "the Constitution demands" seems to turn on the Court's perception of what "modern and viable state government needs." This approach proceeds quite naturally from the assumption that the Constitution is a tool for solving every political problem, and that the Court may use that tool to fashion results it deems politically desirable. This view of the Constitution and of the Court's role under it transforms the threshold question of constitutional adjudication from *whether* the Court can and should act to redress a perceived evil, to simply *how* the Court can act to redress that evil. It reflects a concern not so much with authority and propriety as with expediency, and it produces decisions that lay the Court open to charges that it has exceeded its institutional competence. This view informs not only the reapportionment cases, but the incorporation cases as well.

The Incorporation Cases

In the reapportionment cases, the Court imposed upon the states its particular theory of political representation — a theory that the Court was hard put to characterize as constitutionally compelled; in the incorporation cases, the Court imposed upon the states its particular concept of a proper criminal code — and with a similar lack of textual or historical justification.

Prior to the passage of the Fourteenth Amendment, it was well settled that the first eight amendments to the Constitution applied only to actions of the federal government and not to those of state governments. (*Cf. Barron* v. *Baltimore*, 32 U.S., 7 Pet., 243, 1833.) With the passage of the Fourteenth Amendment, the question arose as to whether the "privileges and immunities of citizens of the United States" that the Amendment protected against state action included the rights contained in the first eight amendments. The Court held that they did not in *Hurtado* v. *California* (1884), *Maxwell* v. *Dow* (1900), and *Twining* v. *New Jersey* (1908). However, in *Twining*, the Court suggested that the Fourteenth Amendment might nevertheless prohibit the states from abridging certain liberties guaranteed by the first eight amendments, not *because* they were guaranteed by those amendments, but because they were "of such a nature that they are included in the conception of due process of law." In subsequent cases, the Court reaffirmed this position, which crystallized into the

idea that the Due Process Clause required that state criminal procedure afford those protections "implicit in the concept of ordered liberty." (*Palko* v. *Connecticut*, 1937.)

The above cases establish that criminal procedure was traditionally regarded as a matter within the primary control of the states. State control over criminal procedure was to be limited only by due process requirements of fundamental fairness. The Court could properly look to the Bill of Rights for guidance in determining the content of "fundamental fairness"; however, in time it came to treat the Bill of Rights as the definitive word on the subject. Thus, by 1968, the Court could comfortably ensconce its decision that the Fourteenth Amendment incorporated the Sixth Amendment right to a jury in all criminal cases within a string of precedents imposing Bill of Rights provisions on the states. (*Cf. Duncan* v. *Louisiana*, 391 U.S. 145, 1968.) The incorporation process has continued since *Duncan*, so that the states are now required to observe every Bill of Rights provision relevant to criminal procedure except the federal bail guarantee and the right to indictment by a grand jury.

Through incorporation, the Court has fastened "on the states federal notions of criminal justice," despite the fact that

> neither history, nor sense, supports using the Fourteenth Amendment to put the states in a constitutional straightjacket with respect to their own development in the administration of criminal or civil law . . . [T]he Court has chosen to impose upon every state one means of trying criminal cases; it is a good means, but it is not the only fair means, and it is not demonstrably better than the alternatives states might devise . . . .

(*Duncan* v. *Louisiana*, Harlan, J., dissenting.) In *Duncan*, the Court attempted to justify its "determinations that a constitutional provision originally written to bind the Federal Government should bind the states as well" on the ground that each limitation in question was "fundamental to fairness . . . in the context of the criminal processes maintained by the American states." However, as Justice Harlan noted in his dissent, the Court in *Duncan* applied the Sixth Amendment to the states even though it conceded that it found nothing unfair about the procedure by which the appellant had been tried. Thus, the only conceivable rationale for the Court's decision in *Duncan* was an essentially uninformative and circular one: a Bill of Rights provision is to operate against the states when it is "fundamental," but that word "turns out to mean 'old,' 'much praised,' and 'found in the Bill of Rights.' " This rationale is too weak to support

the Court's displacement of a significant element of state criminal procedure.

Like the reapportionment cases, the criminal procedure cases have prompted commentators to offer additional justifications for the Court's reworking of an area traditionally under state control. Speaking at Virginia, Paul Freund observed that criminal procedure, because of the very nature of the issues it involves, is an area in which the Court has "a special responsibility, a special entitlement to act." John Hart Ely has written that the decisions, "including those that have drawn the most fire, at least started from a value singled out by, or fairly inferable from, the Constitution as entitled to special protection . . . . [They] can be *rationalized* in terms of some value highlighted by the Constitution . . . ."[8] Ely referred specifically to *Miranda* v. *Arizona*, 384 U.S. 436 (1966), in which the Court held that the Fifth Amendment protection against self-incrimination required the exclusion of evidence obtained from a person in state custody unless he had been informed of his right to remain silent and to have counsel present at his interrogation. Although, as Justice White pointed out in his dissent in *Miranda*, the decision "is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent," Ely was not unduly disturbed by it. For him, the decision was capable of being "rationalized" on the ground that, "Whatever one may think of the code of conduct laid down in [*Miranda*], the Constitution *does talk about* the right to counsel and the privilege against self-incrimination."[9] Thus, the fact that the Constitution "does talk about" certain freedoms is advanced as a sufficient justification for judicially created rules implementing those freedoms, even though the rules may "impair, if . . . [not wholly] frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it" (Harlan, J., dissenting).

Neither Freund's "special entitlement" theory nor Ely's "rationalization" theory provides a satisfactory justification for the Court's assumption of control over state criminal procedure, or a meaningful definition of the limits of judicial authority. A limitation that is defined solely in terms of the Court's ability to point to values that the Constitution "talks about" is surely not much of a limitation at all. Such a "limitation" leaves the Court free to make expansive reinterpretations of those values in accord with its own perception of what is

socially desirable; the Court need not feel inhibited by any contrary historical understanding of those values that might counsel judicial restraint. It may be too much to say that under the Freund/Ely theories, the degree to which the Justices may revise the Constitution under the guise of interpreting it is limited solely by the lengths to which semantic ingenuity can take them. It is not too much to say that those theories, like the decisions they seek to justify, offer no principled basis for the Court's displacement of state authority over an area traditionally within state control.

The Abortion Cases

Just as the Court imposed upon the states its particular theory of political representation in the reapportionment cases, and its particular concept of a proper criminal code in the incorporation cases, so it imposed upon them its particular theory of life in the abortion cases.

In *Roe* v. *Wade*, 410 U.S. 113 (1973), the Court held that the right of privacy, whether it be grounded in the liberty interests protected by the Fourteenth Amendment or — as the District Court had determined — in the Ninth Amendment's reservation of rights to the people, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." At the outset of its opinion, the Court acknowledged "the sensitive and emotional nature of the abortion controversy," the "vigorous opposing views," and the lack of consensus among doctors, philosophers, and theologians on the subject of "when life begins" — a subject on which the Court rather modestly declared it was in no "position to speculate." Such an acknowledgment would have been perfectly consistent with an exercise of judicial self-restraint. It was not at all consistent with an effort to dictate to the states on a matter of deepest concern to them and long within their control: the degree of protection to be accorded the lives of the unborn.

The irony of *Roe* is that, in prohibiting Texas from "adopting one theory of life," the Court quite unselfconsciously required it to adopt another. The Court relied on a trimester approach to establish the point at which a woman's fundamental right to an abortion must yield to the state's dual interests in protecting life or potential life and in protecting maternal life or health. The Court held that: 1) in the first trimester, neither state interest is compelling, so the state may neither prohibit an abortion nor regulate the conditions under which it is performed; 2) in the second trimester, the state interest in protecting

the fetus is still less than compelling, so the state may not prohibit an abortion, but the state interest in protecting maternal health is compelling, so the state may take reasonable steps to regulate the abortion procedure; 3) in the third trimester, the state interest in protecting the fetus is compelling because the fetus is viable, so the state may prohibit an abortion unless it is necessary to the preservation of maternal life or health. It is clear, however, that this exception to the permissible exercise of state power is broad enough to swallow the rule. The Court declared that it would construe "maternal health" as encompassing psychological as well as physical well-being. Thus, even in the third trimester, the state's admittedly compelling interest in protecting the fetus must give way to the woman's interest in sparing herself the distress associated with an unwanted pregnancy.

The trimester approach is nothing less than a legalistic articulation of the judicially approved theory of life that *Roe* imposed upon the states. As George Will has pointed out, that theory does not deny that the fetus is biologically human; it holds that an unwanted fetus has no value. Given the awesomeness of this judgment, it is no wonder that commentators have raised probing questions as to the Court's authority to make it.

In his speech at the University of Virginia, Paul Freund observed that, as a matter of institutional competence, the Court's "personhood" decisions are more difficult to defend than its "procedure" or "participation" decisions. Placing *Roe* within the "personhood" category (where he also placed *Griswold* v. *Connecticut*, 1965, and the sex discrimination cases), Freund regarded it as embodying an altogether new perception of the judiciary's role in creating rights.

John Hart Ely characterized *Roe* as a "very bad decision .... It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[10] What troubled Ely was not the *creation* of the right to an abortion ("Of course a woman's freedom to choose an abortion is part of the 'liberty' the Fourteenth Amendment says shall not be denied without due process of law"),[11] but rather the unusually high level of *protection* the Court accorded it (a "more stringent protection . . . than the present Court accords the freedom of the press explicitly guaranteed by the First Amendment").[12] Because this "super-protected right .... lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it."[13]

For Ely, *Roe* was an anomalous decision; not since *Lochner* v. *New York* (1905), and the reign of substantive due process had the Court's sense of an obligation to draw inferences "from the values the Constitution marks for special protection . . . been so obviously lacking." [14] From another perspective, however, *Roe* does not seem anomalous at all. It seems consistent with cases of far more recent vintage than *Lochner*.

Roe savors of precisely the same view of the Constitution, and of the Court's role under it, that informed the reapportionment and incorporation cases of the 1960s. According to this view, the Court sits to diagnose social ills that, in its opinion, legislatures are either not remedying or not remedying fast enough; having diagnosed the ill, the Court then discerns — or, if need be, creates — a constitutional remedy. That remedy takes the form of a right — whether it be the right of a citizen to have his vote weighted "equally" with all other votes, the right of a state criminal defendant to have the same procedural protections as a federal criminal defendant, or the right of a woman to have an abortion.

In *Roe*, as in the reapportionment and incorporation cases, the existence of a right seems to turn on the perception of a harm. The Court spoke of a woman's decision whether or not to terminate her pregnancy in terms of the "detriment that the state would impose upon [her] by denying this choice":

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

And again, in *Roe* as in the reapportionment and incorporation cases, the dissenters criticized the Court for making the desirability of a social policy the measure of judicial authority to impose that policy. Justice White could find

> nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests the right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the fifty states are constitutionally disentitled to weigh the relative importance

> of the continued existence and development of the fetus on the one hand against a spectrum of possible impacts on the mother on the other hand .... I find no constitutional warrant for imposing such an order of priorities on the . . . states.

The debate in *Roe* clearly echoes that in the reapportionment and incorporation decisions. In all three areas, the debate was settled in favor of withdrawing issues from the legislative arena and constitutionalizing their resolution. In none of the three areas did the Court offer a constitutionally persuasive demonstration of its institutional competence or the states' institutional *in*competence to decide those issues.

The Court's inability to make such a demonstration has not hindered it from cutting back on what little authority *Roe* had left the states in the abortion area. For example, in *Doe* v. *Bolton*, 410 U.S. 179 (1973), the companion case to *Roe*, the Court invalidated three of Georgia's procedural requirements for an abortion: that the abortion be performed (1) only in an accredited hospital, (2) after approval by the hospital staff abortion committee, and (3) after approval by two Georgia-licensed physicians in addition to the pregnant woman's physician; the Court also invalidated a requirement that abortion patients be Georgia residents. In *Planned Parenthood* v. *Danforth*, 428 U. S. 52 (1976), the Court invalidated Missouri's spousal and parental consent requirements. The two most recent cases, *Colautti* v. *Franklin* (1979) and *Bellotti* v. *Baird* (1979), suggest that the Court's antipathy to state regulation of abortion has become so deep-rooted as to alter the very nature of judicial review in the abortion context. The Court appears to have reversed the presumption of validity that it usually accords state legislation and rendered legislation on abortion presumptively *invalid* until reviewed by the Court and given its *imprimatur*.

In *Bellotti*, the Court struck down, by a vote of eight to one, a statute that the Massachusetts legislature could reasonably have thought would survive the most exacting scrutiny. The statute required parental consent before an abortion could be performed on an unmarried woman under the age of eighteen. The statute provided further that, if one or both parents withheld consent, a judge of the superior court could nevertheless authorize the abortion "for good cause shown."

Justice Powell, in an opinion joined by three of the Justices, expressed the Court's reluctance to intervene into so delicate an area

as the "teaching, guiding, and inspiring" of young people, noting that

> this process, in large part, is beyond the competence of impersonal political institutions . . . . Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children.

The *Bellotti* Court's disclaimer of any special competence to choose among "competing theories" of child-rearing is reminiscent of the *Roe* Court's self-proclaimed inability to evaluate competing "theories of life." If the *Roe* Court went on to do precisely what it professed itself unable to do, the *Bellotti* Court did no less. The Court found the Massachusetts statute infirm on two grounds: it permitted a judge to withhold authorization for an abortion even from minors capable of exercising mature judgment, and it required parental notification or consultation in every instance. By invalidating this statute, the Court put the country on notice that, with respect to abortion, it is prepared not only to displace state authority, but also to forbid even the most perfunctory deference to parental authority.

In *Colautti*, the Court invalidated on vagueness grounds provisions of a Pennsylvania statute that do not seem vague at all. The statute required physicians performing abortions to determine whether a fetus was viable or might be viable. If either condition were found to exist, the physician was then required to use the same standard of care to preserve the life of the fetus as would be applicable if the fetus were intended to be born alive, as long as the mother's *health* would not be endangered thereby. Violation of the statute triggered the civil and criminal penalties applicable when a live birth rather than an abortion had been intended.

Despite the interventionist result in *Colautti*, the case shows signs that the Court is beginning to chafe under its self-assumed role of chief policy-maker in the abortion area. A certain judicial discomfort with the ever-broadening implications of *Roe* has manifested itself in a discrepancy between what the Court purported to be concerned about in *Colautti* and what it seems in fact to have been concerned about. At best, the opinion is confused; at worst, it is less than candid.

The Pennsylvania statute prohibited abortion entirely only when the fetus had attained viability, defined in the statute as "the capabil-

ity to live outside the mother's womb, albeit with artificial aid." The provision also regulated, but did not prohibit, abortion when there was sufficient reason to believe that the fetus "may be viable." The Court professed to find the statutory language ambiguous, noting that "The crucial point is that 'viable' and 'may be viable' apparently refer to distinct conditions, and that one of these conditions differs in some indeterminate way from the definition of viability in *Roe* and *Planned Parenthood*." It is difficult to discern the precise nature of the Court's problem here. The statutory language appears to be fully consistent with *Roe*'s definition of viability as the stage at which the fetus "presumably has the capability of meaningful life outside the mother's womb." As the dissenters in *Colautti* noted:

> Only those with unalterable determination to invalidate the Pennsylvania Act can draw any measurable difference between 'viability' defined as the ability to survive and 'viability' defined as that stage at which the fetus may have the ability to survive .... [T]he Court is tacitly disowning the 'may be' standard of the Missouri law as well as the 'potential ability' component of viability as that concept was described in *Roe*. This is a further constitutionally unwarranted intrusion upon the police powers of the states.

The Court's "unalterable determination" to strike down the statute was further evidenced by its reliance on two additional grounds for decision (an alleged lack of a *scienter* requirement and an allegedly vague standard of care provision), neither of which had been relied on by the court below.

What accounts for the Court's "unalterable determination" to invalidate a statute that was not vague at all? One can only speculate, but it may be that the Court was troubled by a question that, although unarticulated, was almost surely lurking in the background of the case: the question of what is to be done with fetuses that can — and do — survive abortion procedures. The question goes to the heart of the abortion controversy, because its answer turns on what, at bottom, we conceive the purpose of an abortion to be. Is the purpose of an abortion merely to effect the physical separation of woman and fetus before term, or is it to destroy the fetus? The Court may one day be asked to determine whether anything less than destruction of the fetus can vindicate a woman's constitutional right to privacy. It might well feel some institutional uneasiness about eventually having to decide this question. Perhaps, if it can continue to invalidate on vagueness grounds statutes like Pennsylvania's, it will not have to.

In the meantime, a little institutional uneasiness might be a good

thing. In light of the reapportionment and incorporation cases, such uneasiness seems long overdue. Those cases proceeded from the same questionable jurisprudential assumptions that the abortion cases — because of their especially sensitive and controversial nature — now expose in such sharp relief.

All three groups of cases reflect the Court's perception that its role is not merely to discern and articulate constitutional rights, but also to create them in accord with its view of what is socially or politically desirable. The danger in this perception is that

> [I]f the Court's guess concerning the probable and desirable direction of progress is wrong, it will nevertheless have been imposed on all fifty states, and imposed permanently, unless the Court itself should in the future change its mind. Normal legislation, enacted by legislatures rather than judges, is happily not so rigid, and not so presumptuous in its claims to universality and permanence.[15]

When the Court is prepared to take such criticism seriously, it will begin to regain a healthier sense of the limits of its institutional competence. Nowhere is the Court's disregard for those limits more apparent than in the abortion area, and nowhere does that disregard pose a greater threat to judicial integrity.

NOTES

1. 47 U.S.L.W. 4094 (1979).
2. 47 U.S.L.W. 4969 (1979).
3. Alexander Hamilton, John Jay, and James Madison, *The Federalist* (New York: The Modern Library, undated), No. 78, p.504.
4. Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 3-4 (1971).
5. *Id.* at 18-19.
6. Neal, "*Baker* v. *Carr*: Politics in Search of Law," 1962 Sup. Ct. Rev. 252, 278.
7. *The Federalist*, No. 43, p. 282.
8. Ely, "The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*," 82 Yale L.J. 920, 936 n.97 (1973).
9. *Id.* (emphasis mine).
10. *Id.* at 947.
11. *Id.* at 935.
12. *Id.*
13. *Id.* at 935, 949.
14. *Id.* at 937.
15. "Abortion," *The New Republic*, Feb. 10, 1973, p. 9.

The Morality of *In Vitro* Fertilization

Albert Studdard

PUBLIC REACTIONS to the birth of the world's first "test-tube baby," Louise Brown, fell into two predictable categories. On the one hand there were those who viewed *in vitro* conception with alarm. They tended to draw pictures of a brave new world of reproductive technology; host mothers, genetic engineering, artificial wombs and babies made to order. Such uses, and abuses, of reproductive technology are morally significant, and may not be as remote as is commonly believed.

On the other hand there were those who were less alarmist, generally approving, who saw in the procedure of *in vitro* fertilization with subsequent implantation into the mother's womb only an effective technique for circumventing infertility due to occluded oviducts. As such it was technologically important but not morally significant, only doing better what gynecologists ordinarily do. Commentators in this group tended to regard the more exotic uses as the only morally significant ones, and so remote as not to warrant serious discussion. One of the most striking expressions of this latter response was that of Chapel Hill gynecologist, Jaroslav Hulka, who said

> In my mind it's medical therapy to help a woman become pregnant who has damaged tubes. The moral and ethical questions are entertaining to discuss, but put yourself in the shoes of a woman, and then ask yourself what is morally wrong with aiding conception.[1]

Hulka's statement reflects the attitudes of some of the outstanding practitioners of *in vitro* fertilization. Landrum Shettles put it this way, "Just because the bridge may be out or blocked should not prevent the use of the helicopter."[2] Robert G. Edwards claims that "to give a couple their own wanted child obviously needs no justification." He goes on to say that

> Fertilization *in vitro*, followed by implantation of the embryo into the mother, does not pose any moral problems, and the right of couples to have

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> their own children should not be challenged provided there is no conflict with accepted restrictions on marriage, such as incest.[3]

In an interview in July of 1978, Patrick Steptoe told reporters,

> I'm not a wizard or a Frankenstein tampering with nature . . . We are not creating life. We have merely done what many people try to do in all kinds of medicine — to help nature. We found that nature could not put an egg and sperm together, so we did it. We do not see anything immoral in trying to help the patient's problem.[4]

Steptoe and Edwards in an article entitled "Biological Aspects of Embryo Transfer" dismissed as "irrelevant or misleading"[5] the speculations on the wider applications of their technique. They did acknowledge that the possibility of "host mothers" (re-implanting the embryos into the wombs of women other than those who contributed the eggs) was of some concern.

The comments quoted at length above reveal a clear pattern. They tend to dismiss moral questions about the wider uses of *in vitro* fertilization on the grounds that such uses are highly speculative. They assume that the "therapeutic" application of the technique is morally unexceptionable, simply because it is therapeutic. Defining it as "therapy" seems to preclude raising moral questions for them. I do not grant this claim [of theirs] that talk about the wider implications is "irrelevant or misleading," or simply "entertaining to discuss." But I mean to examine some of the moral questions raised by *in vitro* fertilization undertaken to circumvent infertility due to occluded oviducts, since this is the use its *practitioners* defend. It is my claim that they are begging the question. *In vitro* fertilization does not become a moral issue only in its more exotic applications, but is a moral issue in its most limited application. My purpose here is to take the technique as it is defended by its practitioners and to ask Hulka's question, "What is morally wrong with aiding conception?" This immediate and practical question is not, as Hulka suggests, a rhetorical one.

Given this narrower perspective, my use of words requires clarification. Hereafter, "*in vitro* fertilization" will refer to the procedures involved in fertilizing human ova *in vitro*, with the sperm of the egg donor's husband and subsequent re-implantation into the womb of the donor, for the purpose of overcoming infertility due to occluded oviducts.

I make no claim to comprehensiveness, rather I mean to outline only a few major issues of immediate concern. Briefly stated they are:

1) The right to reproduce, an important premise in the defense of *in vitro* fertilization, does not imply the right to use any means necessary to accomplish that end. It has been shown that *in vitro* fertilization is a morally acceptable means to that morally worthy end.

2) The risk of producing a defective fetus by *in vitro* fertilization must be determined to be either minimal or non-existent before the technique may be morally applied to human beings. This has not been established. In the light of this risk factor, the moral questions of informed consent and experimentation on human subjects also arise.

3) At present the practice of *in vitro* fertilization includes the necessary destruction of human embryos, and, contingently, the abortion of certain human fetuses. Thus, all of the moral problems of abortion attend the practice of *in vitro* fertilization.

4) The position being criticized here is that *in vitro* fertilization, viewed as fertility therapy, is morally nonproblematic. Some of the critics of the process think that the term "therapeutic" is improperly applied in this case, and that since it is non-therapeutic it ought not to be done.

5) *In vitro* fertilization, claim some of its critics, is an artificial means of reproduction. Being artificial it is not natural, therefore unhuman. Artificial means of reproduction are, they argue, morally unacceptable.

The basic assumption underlying the justification of *in vitro* fertilization is that there is a right to bear children, "to have one's own children." That right can be granted without granting it as an absolute right. That is to say, the right to bear children does not imply that one has a right to employ any means whatever in order to bear children. We have to ask of any given technique therefore whether it is a morally acceptable means to the morally acceptable end of having one's own children. There are at least some means which are not morally acceptable. R.G. Edwards himself acknowledges one: incest. There are others, including adultery and rape. Edwards seems to assume that the obvious objections are the only ones. One has to *ask* whether *in vitro* fertilization is acceptable. Instead the proponents of the technique *assume* that it is acceptable and thus they beg the question at issue. It may or may not be a moral means to a worthy end; argument is required to establish either case. The morality of *in vitro* fertilization is not guaranteed by the right to reproduce.

Leon Kass argues that given the present problem of overpopulation, we ought to be spending research funds to look for ways to reduce fertility rather than to *promote* it. He claims that the large sums spent on this kind of research are not justified by the relatively few who can be helped by it.[6] Kass' position, taken to its logical extreme, would imply a negative judgment upon any fertility therapy.

On the other hand, Kass is on firm ground when he asks just how much of public resources ought to be committed to relieving a condition which is not itself life-threatening, however distressing it may be to the victims.

Edwards and Sharpe object to the suggestion that the naturally infertile should bear the brunt of the task of coping with overpopulation. They say:

> Our view is that a campaign against over-population should be directed to all parents and not enforced on a selected few; it would scarcely seem a justifiable public policy to prevent such couples from having their own children.[7]

Edwards and Sharpe, it seems to me, are asserting nothing more than fairness, and they are denying the suggestion that it is the natural obligation of a certain group of people to remain childless. On this count their argument is persuasive.

There are other objections, however, to the technique of *in vitro* fertilization as a means to the worthy goal of helping couples to have children. The first of these is that of possible risk to the fetus, and the related questions of informed consent and experimentation on human subjects and/or fetuses.

Prior to the birth of Louise Brown, competent critics were raising significant questions about the risk of producing a defective fetus by *in vitro* fertilization. Dr. Luigi Mastroianni identified as a moral issue the risk that "manipulation of the human ovum in an artificial environment might easily produce a defective product."[8] Marc Lappe claimed that experiments on primates were a moral prerequisite to its use on human beings, and on that ground called for a moratorium on the experiments.[9] The question remains whether the risks of producing a defective fetus were properly ascertained prior to proceeding. It remains to be answered in spite of the apparently successful and normal birth of Louise Brown. Opinion is divided as to the correct answer.

Few specific fetal risks have so far been identified. Steptoe and Edwards acknowledge the possibility of chromosomal abnormalities resulting from *in vitro* fertilization.[10] They advise pre-natal monitoring for these conditions even though their experience with human ova lead them to believe that such risks are very slight. Steptoe says that there is some possibility of chromosomal abnormalities arising from fertilization of the egg by more than one sperm, adding that careful control of the number of sperm allowed to fertilize the egg eliminates

that danger.[11] Moreover, there is some evidence of a link between clomiphene therapy (which induces super-ovulation) and *spina bifida* (open spine).[12] If this proves to be true, then it would raise questions about the use of this drug in other kinds of fertility therapy as well. An additional risk factor would have to be evaluated if a new wrinkle suggested by Steptoe is applied, i.e., the cold storage of the embryo for 26 days to match it with the mother's own reproductive cycle.[13]

Critics of *in vitro* fertilization see this paucity of specific evidence of risk as indication that steps have not been taken to assess the degree of risk in the procedure. Proponents argue that it demonstrates an absence of risk. Some of their evidence, it must be noted, comes from work done on human ova, and a part of our concern here is not only whether future experiments in *in vitro* fertilization are conducted in accordance with the rules of morality, but whether those already done were so conducted.

The major participants in *in vitro* work defend their position on risk by making three claims: 1) long experience in animal work and with human ova indicates that the risks are minimal; 2) inherent properties of the early embryo tend to obviate the question of risk; and 3) there are always the fail-safe devices of prenatal monitoring and selective abortion.

Robert G. Edwards says that work with animal embryo transfers shows little risk of damage,[14] and while trisomy's incidence is not unknown,[15] it also occurs in natural fertilization. So it cannot be said that the risk is increased by *in vitro* fertilization. Landrum Shettles claims that long experience with human ova brings him to agree with Edwards that fetal risk in the procedure is slight."The indiscriminate giving of medicines to patients in the earliest stages of pregnancy," he claims, "presents infinitely greater chances of injury to the conceptus."[16] Shettles' adversaries might well respond by saying, "neither do we advocate the indiscriminate giving of medicine to pregnant women."

One of the main reasons behind the confidence of these experimenters is that pre-implantation embryos apparently respond to damage in either one of two ways: they either repair the damage or they spontaneously abort. B.G. Brackett says that "it is presently thought that any significant damage that is done to the ovum, sperm cell or developing embryo leads to embryonic death rather than to abnormalities of offspring that are delivered."[17] Landrum Shettles is even more emphatic, claiming that "in the proper culture medium there is

little likelihood of damaging the human conceptus" in the earliest stages of development. I would say from 20 years work with the human ovum, that the possibilities are nil."[18] It is apparently *only* after the implantation stage that serious danger of abnormalities occurs.[19] Anne McLaren suggests that with the degree of care made possible by *in vitro* fertilization, there may be even less risk for the fetus than in natural fertilization.[20] Edwards, agreeing that abnormalities are possible in the developing embryo (though not likely), recommends prenatal diagnosis and selective abortion as a final safeguard. He says that "almost all non-diploid human embryos fail to survive, and those that do develop can be identified at four months gestation . . . The risks of abnormal offspring following human embryo transfer should thus be very small."[21] Edwards and Fowler claim that "Clinically it should be possible with these procedures to circumvent certain causes of infertility and to *avert* [italics mine] the development of embryos that otherwise could be expected to grow abnormally."[22]

On the other hand, opponents of *in vitro* fertilization argue that "the risks are very much unknown,"[23] and that the minimal requirements of animal testing have not yet been met. Furthermore, the resort to pre-natal monitoring and selective abortion does not solve the problem of risk for two very different reasons. It begs the question of the morality of abortion on the one hand. On the other hand pre-natal diagnosis can at present detect only a limited number of serious defects. The issue of abortion will be addressed later. As for pre-natal diagnosis and selective abortion, it would seem that the defenders of *in vitro* fertilization, to make their position plausible, must endorse infanticide for those genetically abnormal infants whose conditions could not be known pre-natally, and must even endorse destroying older children and adults whose defects become known only after longer periods of development. These things they do not appear to be ready to do. The "failsafe" device upon which so much rests allows one to identify only a limited number of conditions, and does not hold as absolutely as Edwards and Steptoe suppose.

If indeed proper steps have not been taken to insure minimal risk from these procedures then this is a serious breach of received medical ethics. If these risks were not ascertained prior to the first successful *in vitro* fertilization, then *that* fertilization was not done in accordance with accepted standards of medical ethics. Furthermore, Louise Brown's apparent normalcy does not provide any guarantee

that the next attempt will have a happy outcome. There is, then, not only a question of the morality of previous attempts at *in vitro* fertilization, but a question of the morality of all future attempts until these risks have properly been determined to be minimal or non-existent. One hundred successful attempts would not lay to rest the risk issue but it would be impressive.The problem remains that we could not perform that hundred morally without providing other safeguards first. That is, unless we first satisfy ourselves by other means that there is little or no risk to humans in *in vitro* fertilization, we are not morally at liberty to proceed with any more human *in vitro* experiments. As Paul Ramsey points out, the fact that the outcome on the first was fortunate does not mean that it was right to do it.[24]

It is at this point (that is, whether there is a moral way to get to know the risks) that a curious pair of Catch-22 arguments arise in the literature of the morality of *in vitro* fertilization. Ramsey claims that it is not enough that we discover no added risk by *in vitro* fertilization, we must positively show that there are none. Furthermore, his argument runs, there is no moral way that we can go about finding out that there are no risks, since finding out that there are no risks entails experimenting with human embryos. He therefore claims that it follows that *in vitro* fertilization is absolutely prohibited.[25] Joseph Fletcher, on the other hand, agrees with Ramsey only up to the point that we must experiment with *in vitro* fertilization in humans before we can determine what risks there are. Fletcher then concludes that we *must* perform *in vitro* fertilizations.[26] They agree upon a condition for testing the morality of *in vitro* fertilization, and then reach opposed conclusions. It seems to me that both of these extremes are unwarranted and that the way between absolute license and absolute prohibition has already been provided by the traditional standards of medical research.

Fletcher's position cannot be taken seriously. It provides no principle by which to discriminate morally permissible experiments from morally impermissible ones, making the results of the experiment itself normative. A principle which makes experimental results normative is of no help when trying to determine the morality of a particular experiment. On the other hand, while Ramsey is mistaken, his position deserves a more considered response. Unless one has established a prior prohibition against non-traditional modes of human reproduction, there is no reason that research guidelines which apply to medical research in general should not apply to

research in human reproduction. There may be grounds for such a prohibition as Ramsey's, but failure to establish the absolute absence of risk to the resulting fetus is not among them. Such a requirement would prohibit even the giving of an aspirin to a pregnant woman.[27] The requirement to establish the absolute absence of risk in human reproduction would prohibit ordinary sexual reproduction (notoriously risky, but apparently acceptable to Ramsey because it is "natural"), artificial insemination by either donor or husband, and it would most certainly prohibit becoming pregnant by ordinary or by extraordinary means after hormone therapy. It makes no clear sense to require in reproductive medicine guarantees which cannot be given in ordinary reproduction nor in any other area of human medicine. Ramsey clearly has a hidden *a priori* commitment to "natural" reproduction as opposed to "artificial" which makes the question of risk irrelevant.

This brings us back to the *serious* question of the morality of *in vitro* fertilization in terms of assessment of risk to the fetus. As a layman, I am not competent to judge the degree to which proper attention has been given to the normal requirements for establishing risk. When persons who are competent to judge, such as Lappe, Kass and Mastroianni, make the strong objections that they do, I infer that a serious question has been raised, a question which has not been adequately addressed by the proponents of *in vitro* fertilization. No one has even claimed that the preliminary "animal work" has been done. This lack of caution requires defense which has not been offered by anyone engaged in performing *in vitro* fertilization in human beings. Indeed, testimony given before the Ethics Advisory Board of the Department of Health, Education and Welfare in the Fall and Winter of 1978-79, by scientists engaged in reproduction research strongly supports the judgment that proper steps have by no means been taken to ascertain the degree of risk of producing a defective fetus by *in vitro* fertilization. Consequently, the board's recommendations to the secretary included the recommendation that no research projects be funded which proposed the attempt to reimplant *in vitro* embryos into the womb for gestation and subsequent delivery. The board clearly recognized that due to the unknown risk factor, we ought not, at least at present, attempt to produce babies this way.[28]

The reason that the practitioners of *in vitro* fertilization offer no defense on this point seems to be that they choose not to label the

procedure "experimental," but "therapeutic." Though it does not follow, it appears that by so labelling what they do they avoid the restrictions which apply to experimentation on human subjects. I propose that the reason that no defenses for guaranteeing minimal risk in an experimental procedure such as this is shown in the opening citations of this paper, i.e., that those involved in this work choose to label it as "therapeutic," and not "experimental," therefore not subject to the restrictions of experimentation on human subjects.

The well-publicized Del Zio case (settled in favor of the plaintiff in the late summer of 1978) illustrates the conflict between viewing *in vitro* fertilization as fertility *therapy* and as experimentation on human subjects. Dr. Landrum Shettles at Columbia Medical Center had performed *in vitro* fertilization for the Del Zio's in 1974. Dr. Raymond Vander Wiele interrupted the process by contaminating the culture medium in which the embryo was developing on the grounds that the procedure constituted a violation of federal restrictions on experimentation on human subjects.[29] The Del Zios sued and won. What Dr. Shettles was doing may or may not be considered "therapeutic," but unless one wishes to offer a novel definition of "experimental," then it requires no argument to show that it was experimental.

Being experimental, there is a serious problem of informed consent in *in vitro* fertilizations. Ramsey wonders just how well the "mothers" (Edwards' designation of the egg donors) understood the small chances (or nonexistent ones) that they would themselves benefit from the experiments on the eggs that they supplied.[30] Even granting that they were told the odds against their becoming pregnant by this method, they were not told of the risks of producing a defective fetus, since those risks apparently were not known. Assuming, however, that the "mothers" were told of the distant prospect of their becoming pregnant and assuming that the risk of a defective fetus was known and shared with these mothers, and assuming that the egg donors were fully informed and under no duress and consented to the procedure, we still have not had informed consent from all affected parties. The one whose consent could in principle not have been gotten is the person who might have resulted from the experiment.

Ramsey's case against *in vitro* fertilization to the extent that it rests on the risk argument, fails at another significant point. He does not take into account the entirely rational possibility that we might establish that there is less risk to the fetus (see McLaren above) in *in*

vitro fertilization than in fertilization by ordinary means, in which case, following Ramsey's logic, we would then be under obligation to produce children only by *in vitro* fertilization and never by "natural" means. However, until we can establish that there is less risk to the fetus we are under the moral prohibition against *in vitro* fertilization in humans. For the present, whatever the fallacies in Ramsey's argument, he is right in his negative judgment on *in vitro* fertilizations up to now.

The cluster of issues surrounding the undetermined risk to the fetus remains the most important obstacle to determining the morality of *in vitro* fertilization. If this risk has not been properly determined to be minimal, if not non-existent, then these experiments — including the successful ones to date — must be judged to be immoral, no matter how happy their outcomes. However, if we can and do solve the problem of risk, it does not follow that we can never morally perform *in vitro* fertilizations. We could prohibit *in vitro* fertilization absolutely only if we invoked moral considerations which showed the procedure to be intrinsically wrong.

Other grounds for objecting to *in vitro* fertilization as fertility therapy include: 1) *in vitro* fertilization assumes the morality of abortion; 2) it does not pursue the proper end of medicine; and 3) it is an "un-natural" means of reproduction, and as such is dehumanizing. I do not intend to argue at any length for any of these claims save for the first. It is important to note that the first is not a claim about the morality of abortion, but a factual claim that the morality of abortion is assumed in the justification of *in vitro* fertilization.

On their own account the practitioners of *in vitro* fertilization require abortion as an alternative procedure in case things go wrong. One of the safeguards against the risk of a defective fetus is pre-natal diagnosis and selective abortion. Since selective abortion is advocated widely for defective fetuses other than those conceived *in vitro*, it is not a problem for *in vitro* fertilization alone. Abortion is a special problem for *in vitro* fertilization in that as currently practiced, the destruction of human embryos is intended at the very outset.

Usually *in vitro* fertilization involves multiple fertilizations. This is accomplished by hormone therapy which induces superovulation, the same therapy which sometimes results in well-publicized multiple births. Superovulation gives the medical team a choice of embryos to re-implant into the mother's womb, plus several extra developing embryos left over. The excess embryos are mounted on slides, stud-

ied, or flushed down the drain.[31] Thus we have the destruction of human embryos intended from the start, with none of the qualifying factors present which may be used to justify ordinary (*in vivo*) abortions, for example interest of mother's health or the good of the fetus. One may argue that the term "abortion" is properly applied only to the destruction of embryos *in vivo*, but whether *in vivo* or *in vitro* it remains the destruction of human embryos.[32]

Kass, Ramsey and others object to *in vitro* fertilization to bypass occluded ducts on the narrow grounds that the practice is not in keeping with the purpose of medicine. That is, they claim that medicine is supposed to be therapeutic, and that *in vitro* fertilization is not therapeutic. It ministers to *desires*, not diseases.[33] One even adds that the appropriate medical specialty for such a prospective patient of *in vitro* fertilization is psychiatry.[34] It does not, they claim, change the condition of the patient, but helps to circumvent the pain that such a condition causes. Being non-therapeutic, they claim, it constitutes a violation of medical ethics.

But would we be willing to deny the propriety of doctors' ministering to *other* desires of patients which are non-therapeutic in much the same way? Plastic surgery? Do doctors have an obligation to relieve psychic pain too? Again, the critics raise a false issue which obscures an *a priori* judgment about *in vitro* fertilization itself. *In vitro* fertilization may be morally wrong, but the fact that it corrects no pathological condition does not make it so. It is certainly appropriate to ask whether a cost-benefit analysis will support *in vitro* fertilization, but that is different from questioning whether medicine should ever be used to help people who because of physical defects cannot perform normal human functions.[35]

The final objection to *in vitro* fertilization to be addressed involves another fundamental moral issue. The objection, best articulated by Leon Kass, is based upon the claim that this kind of reproduction is artificial rather than natural. It is further claimed that being artificial, the process dehumanizes man. Says Kass:

> There are more and less human ways of bringing a child into the world. I am arguing that the laboratory production of human beings is no longer *human* procreation . . . What has been violated . . . is the distinction between the natural and the artificial, and at its very root, the nature of man himself.[36]

It is laudable to defend our humanity, and to stand against whatever would tend to vitiate it. Objections to technology in the name of humanity are always suspect. Kass' objection is emotionally loaded,

and likely to be persuasive for that reason. Unfortunately, his argument does not demonstrate that *in vitro* fertilization is a technique that will demean human dignity, and proponents of reproductive technology can make an equally strong claim to the contrary. Arno Motulsky, for example, has written that

> The nature of man is to explore and to experiment; to stop exploration and experimentation at this juncture would be to act against those attributes which make us most human . . .
>
> It is difficult to agree with those who suggest that normal procreation is human and fertilization *in vitro* is inhuman. I consider novel reproductive technologies as a more human activity than making babies in the usual way![37]

It is not surprising to find Joseph Fletcher adding his voice to the chorus in praise of reproductive technology. "Man is a maker and a selecter and a designer, and the more rationally contrived and deliberate anything is, the more human it is." He adds, "It seems to me that laboratory reproduction is radically human compared to conception by ordinary heterosexual intercourse. It is willed, chosen, purposed and controlled . . ."[38] It is, after all, the copulation instinct that is common to all animals.[39]

How, then, do we choose between these two starkly opposed positions? If we take Kass' position on these grounds, we run the danger of prohibiting all technology. We may become neo-Luddites. One can include many technological advances in medicine, and specifically in reproductive medicine, which we could certainly label "artificial," e.g., artificial insemination by either donor or husband, and the whole range of tools in the gynecologist's bag of tricks to overcome infertility. Are we to renounce all of them? If not, which ones should we renounce and which ones should we keep? Just labelling a technique "artificial" does not tell us enough to give us any guidance at all. Neither does it follow that because something is natural, it is also good. *Spina Bifida* and Downs' Syndrome occur "naturally," but I know of no one who thinks that they are good.

On the other hand, not all things that come from man's inventive imagination are to be embraced. Thus the pro-technology stance of Motulsky and Fletcher is no more defensible than the position taken by Ramsey and Kass. The problem is that the natural vs. the artificial, and the human vs. the nonhuman distinctions do not provide criteria for making the kinds of decisions that are needed here. These distinctions do label commitments, pre-rational ones, which issue in an absolute prohibition on the one hand and an absolute license on the

other. It is this kind of pre-rational commitment which makes all other moral considerations beside the point.

It may be that *in vitro* fertilization is dehumanizing, and thus immoral, but that has not been shown. It may also be that it is one of the higher manifestations of the creative human spirit. That too remains to be shown. I doubt, however, that a conclusive case can be made for either one. Until it is, our practical decisions will have to be made on other grounds, among them, principles of justice and fairness in the allocation of medical resources, and simple consequentialist principles. The latter will be especially important when the issue of potential defective fetuses is concerned. It is quite certain that these considerations will heavily influence public policy and public law.

I therefore conclude that it is still an open question whether or not *in vitro* fertilization is a moral means to the end of overcoming involuntary infertility. To show this does not require an appeal to any uses of the technique save for that one application. Leaving aside the questions of the abuses of *in vitro* fertilization, I have claimed that serious moral questions arise with its most limited application.

It is my belief that one day we may possibly show *in vitro* fertilization to be a morally correct thing to do. On the basis of the fact that the risk of producing a defective fetus has not been determined, I believe that up to now *in vitro* fertilizations have not been done morally. However, if it is not intrinsically wrong, and that is debatable, it may become right. On strict consequentialist grounds, and on the grounds of traditional medical ethics it has not been morally done up to now. It may become right some day, provided that we can settle among others, the issues of fetal risk and medical priorities.

I have touched on only a few of the moral issues involved in the use of *in vitro* fertilization solely to circumvent involuntary infertility in couples. I have tried to show that there are many outstanding questions to which answers must be found before we can morally proceed with *in vitro* fertilizations. I am open to the possibility that when the answers are in the verdict may fall either way, in favor of, or opposed to, *in vitro* fertilization. What is most disturbing to me now is that the leading experimenters, and other advocates in the field choose not to try to argue the moral case in their favor. Rather, they refuse to acknowledge the existence of the questions.

NOTES

1. "Chapel Hill Doctor Plans Test-Tube Babies for N.C.," Raleigh *News and Observer*, August 3, 1978, p. 45.

2. Landrum Shettles, in Gebhard, F.B. Schumacher *et al*, "*In Vitro* Fertilization of Human Ova and Blastocyst Transfer: An Invitational Symposium," *Journal* of *Reproductive Medicine* 11:200 (1973).

3. R.G. Edwards, "Fertilization of Human Eggs *In Vitro*: Morals, Ethics and the Law," *Quarterly Review of Biology* 49:10, 16 (1974).

4. Associated Press Dispatch, Fayetteville *Times*, July 27, 1978, p. 2.

5. P.C. Steptoe and R.G. Edwards, "Biological Aspects of Embryo Transfer," *Law and Ethics of A.I.D. and Embryo Transfer*, ed. by G.E.W. Wolstenholme, Ciba Foundation Symposium, No. 17, New Series (New York: Associated Scientific Publishers, 1973), p. 16.

6. Cited by Jean L. Marx, "*In Vitro* Fertilization of Human Eggs: Bioethical and Legal Considerations," *Science* 182: 812 (1973). *Cf.* Leon Kass, "Babies by Means of *In Vitro* Fertilization: Unethical Experiments on the Unborn?" *New England Journal of Medicine* 285: 1174-1179 (1971). *Cf.* also R.G. Edwards, "Fertilization of Human Eggs *In Vitro*," p. 11.

7. R.G. Edwards and D.J. Sharpe, "Social Values and Research in Human Embryology," *Nature* 231: 87 (1971).

8. L. Mastroianni, in Gebhard, F.B. Schumacher, *et al*, "*In Vitro* Fertilization of Human Ova and Blastocyst Transfer," p. 196. On page 199 Dr. Mastroianni claims that there is a "moral issue surrounding the uncertainty that the product being transferred will develop normally."

9. Cited by Jean L. Marx, *op. cit.*, p. 812. *Cf.* these several articles by Lappe: "Risk-taking for the Unborn," *Journal of the American Medical Association* 286: 49 (1972); *The Hastings Center Report* 2: 1-3 (1972). Leon Kass, "Making Babies — the New Biology and the 'Old' Morality," *Public Interest* 26:21 (1972), says, "The ability regularly to produce normal monkeys by this method would seem to be a minimal prerequisite for using the procedure in humans." R.G. Edwards, "Fertilization of Human Eggs *In Vitro*," p. 8, argues against waiting for the results of non-human primate research on the grounds that "the cleaving embryos of non-human primates are similar to those of subprimates in resisting the teratogenic effects of agents applied *in vitro* . . . . Many infertile couples and others with different problems would forfeit their chance of a cure if medical progress depended on verification in non-human primates." Leon Kass, on the other hand, fears that human embryos may be so different from non-human primate embryos that even if we wait for the results from primate work we may not be certain that the result will hold for humans. See Kass, "Making Babies," p. 21.

10. P.C. Steptoe and R.G. Edwards, *op. cit.*, pp. 14-15.

11. Cited by Miranda Robertson, "These Babies Still Pose Problems," *Nature* 250: 368 (1974).

12. B. Field and C. Kerr, "Ovulation Stimulation and Defects of Neural Tube Closure," *Lancet* 2:1511 (1974).

13. P.C. Steptoe, "Storing Embryo May Overcome Implantation Problem," *Ob Gyn News* 12: 34 (1977).

14. R.G. Edwards, "Fertilization of Human Eggs *In Vitro*," p. 5. It is important to note that he is referring *only* to embryo transfer, not to *in vitro* fertilization.

15. *Ibid.*, p. 9.

16. Shettles, *op. cit.*, p. 196.

17. B.G. Brackett, in Schumacher *et al*, "*In Vitro* Fertilization of Human Ova," p. 196. *Cf.* Edwards, "Fertilization of Human Eggs *In Vitro*," p. 5, who states that maximum susceptibility to malformating agents immediately follows implantation. *Cf.* also R.G. Edwards, "Problems of Artificial Fertilization," *Nature* 233: 25 (1971). He claims that agents known to be teratogenic in later stages of pregnancy are lethal to pre-implantation embryos.

18. Shettles, *op. cit.*, p. 7.

19. Robertson, *op. cit.*, p. 368.

20. P. Wright, "'Less Risk of Test-Tube Baby Being Born with Brain Damage,' Doctor Says," London *Times*, Sept. 7, 1974, p. 4.

21. R.G. Edwards, "Fertilization of Human Eggs *In Vitro*," p. 5. *Cf.* Edwards, "Problems of Artificial Fertilization," p. 25.

22. R.G. Edwards and R.E. Fowler, "Human Embryos in the Laboratory," *Scientific American* 223: 45 (1970).

23. Kass, "Making Babies," p. 28.

24. Paul Ramsey, "Shall We Reproduce? I: The Medical Ethical Ethics of *In Vitro* Fertilization," *Journal of the American Medical Association* 220: 1349 (1972). "It does not become moral because it happens to produce good results."

25. *Ibid.*, p. 1347.

26. Joseph Fletcher in Schumacher *et al*, "*In Vitro* Fertilization of Human Ova," pp. 198-199.

27. E.F. Kal, "Genetic Engineering," *Journal of the American Medical Association* 221: 1409 (1972).

28. Office of the Secretary, Dept. of Health, Education and Welfare, "Protection of Human Subjects, HEW Support of Human *in Vitro* Fertilization and Embryo Transfer," Report of the Ethics Advisory Board, *Federal Register*, Monday, June 18, 1979.

29. "Fetal Research, Pulling the Stopper," *Medical World News* 15:4 (1974).

30. Ramsey, *op. cit.*, p. 1347.

31. R.G. Edwards, P.C. Steptoe and J.M. Purdy, "Fertilization and Cleavage *In Vitro* of Preovulatory Human Oocytes," *Nature* 223: 1307-1309 (1970). *Cf.* Edwards and Fowler, *op. cit.*, p. 45. "Since there would be several blastocepts from each couple, a degree of selection could be exercised in deciding which one to return to the mother." While it has not been confirmed, there is some indication that Steptoe and Edwards fertilized only one egg in the Brown case. See W. Sullivan, "Implants of Monkeys May Explain Success with Human Embryo," the New York *Times*, July 25, 1978, pp. A-1, B-10; and W. Sullivan, "Doctors' Success in Conception in the Laboratory Intensifies the Debate over Reproductive Control," the New York *Times*, July 26, 1978, pp. A-1, A-16.

32. Marx, *op. cit.*, pp. 812, 813, discusses this distinction. *Cf.* Kass, "Making Babies," p. 33. It is significant to note that proposals presently before the NIH for research in *in vitro* fertilization do not include attempts to re-introduce the embryos into the womb for gestation and delivery. They are limited to the study of the pre-implantation embryo. The Ethics Advisory Board recommended precisely that limitation. What this means in the context of the intended destruction of human embryos is that *all* of them are intended for destruction from the very outset. *Cf.* note 28 above.

33. Kass, "Babies by Means of *In Vitro* Fertilization," pp. 1174-1179; Kass, "Making Babies," p. 20. "Is the Inability to Conceive a Disease?" *Cf.* Paul Ramsey, "Shall We Reproduce?: II Rejoinders and Future Forecast," *Journal of The American Medical Association* 220: 1481 (1972). "Is the Clinical Defect of Infertility Remedied?" *Cf.* M. Revillard, "Legal Aspects of Artificial Insemination and Embryo Transfer in French Law," *International and Comparative Law Quarterly* 23: 385 (1974). "Medically, is sterility a physical handicap or an illness? . . . In our opinion sterility should be considered as a physical disability and can be regarded as an illness when it causes psychiatric disturbances."

34. J.H. Ford, "Genetic Engineering," *Journal of The American Medical Association* 221: 1408 (1972).

35. See Edwards, "Fertilization of Human Eggs *In Vitro*," p. 11, for an extended response of this kind to the criticism that *in vitro* fertilization does not constitute "therapy."

36. Kass, "Making Babies," p. 49.

37. A. Motulsky, "'Brave New World'? Current Approaches to Prevention, Treatment and Research of Genetic Diseases Raise Ethical Issues," *Science* 185: 654, 661 (1974).

38. J. Fletcher, "Ethical Aspects of Genetic Controls," *New England Journal of Medicine* 285: 780-781 (1971).

39. L.R. Howard, "Genetic Engineering," *Journal of The American Medical Association* 221: 1410 (1972).

Seeing through the Glass

Ellen Wilson

LOUISE BROWN celebrated her first birthday a few months ago. We saw her image beamed across the evening news broadcast, and on the front page of the newspaper. That plump, slightly pouty one-year-old's face was even more winning than the shots of the newborn in the nursery a year ago, and with hindsight we could laugh at the fears of a test-tube "monster" that circulated before her birth. Louise, it now goes without saying, is one of *us* — no mistaking the wondering eyes, the hands balled into small fists, the cries and kicks and cooings and assorted other manifestations of human infant behavior. It seems, at this date, as hard to contemplate her *non*existence as, a few years ago, it would have been to contemplate her birth. Whatever baby image sustained Edwards and Steptoe through their long period of research has long since been replaced by reality, and a scientific success story unfolds before us as we see three lives — mother, father, baby — apparently blessed by their laboratory efforts. That is all we see, unless we look closely. But there is more to be seen.

We know, of course, if we pay attention to such things, that in both the experimental stages and the current "practical" conjoinings of sperm and egg, extra matches are made, to increase the chances of a "normal" fertilization. And we know — or could, if we wished to — that only one fertilized egg graduates to implantation and thence, with luck, to birth. And therefore we know that the remainder are . . . terminated, as the abortionists put it.

In other words, *in vitro* fertilization *requires* "abortion" of conceptuses as a backup. This alone (if we were governed only by the logic of the case) should have rallied the opposition of everyone who draws the line this side of unrestricted abortion-on-demand. After all, this does not fall into the category of hardship cases: rape, incest, the health of the mother, teenage pregnancy, financial hardship. We are not even speaking of an unwanted pregnancy (this one was wanted very badly indeed, as witness the Browns' protracted efforts to conceive, and their willingness to participate in an experi-

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mental procedure). In fact, not one of the ordinary excuses for an abortion applies — not even, it appears from reports of other cases, the sure knowledge that all rejected conceptuses suffered from genetic defects. We know, for example, that Dr. Pierre Soupart's grant proposal for federal funding expressly stipulates the "abortion" of *all* conceptuses brought to life in his laboratory. The killing of defective or merely superfluous conceptuses can only be categorized as abortion-on-demand, the flip side of the couple's claim to conception-on-demand.

But most people, brushing logic aside, seem to have embraced *in vitro* fertilization as warmly as they would the newborn that is its object. To reject one would be to reject the other. And so the same magazines which, though pro-abortion, have recently been assigning space to the "right-to-life" political threat (complete with demographic breakdowns, and profiles of typical activists) keep silence on the *in vitro* abortion angle. Articles on Baby Louise or the Del Zio case or the future of genetic engineering in general usually develop and dismiss the anti-abortion argument in a sentence or two of the penultimate paragraph. Many of the expert witnesses called by the Ethics Advisory Board to testify on government subsidizing of such research shied away from the abortion question. And this includes some who *oppose* such funding; they preferred to concentrate the bulk of their arguments on what might be called sociological objections — the effect upon the family structure, the unnatural, sci-fi feel of the whole business, the potential for misuse (particularly in unidentified totalitarian societies). Some who did risk objections to the abortion of conceptuses confined themselves to decrying the divisive effect of government subsidies at a time when the abortion controversy has already polarized the country. Why escalate this decade's moral Vietnam?

This is just one example of the tentative handling *in vitro* seems to have inspired, even among anti-abortionists. While some have recognized the point early and reacted with incisive criticism (Professor Paul Ramsey comes to mind), others seem to have been won over to silence by Louise Brown's baby pictures. As a result, the record so far suggests that the abortion battle cannot be won on this issue; more "traditional" varieties of abortion remain more effective targets. After all, it doesn't make much sense to accept every excuse for abortion, and then issue a bill of attainder for this one alone. On what grounds would a government whose highest court abdicated

responsibility for fetal life six years ago (reserving only the responsibility for denying *legislatures* responsibility) recoil in moral outrage from the termination of a few blastocysts? And if moral twinges are the sole obstacle to federal funding of *in vitro* and the consequent manufacture of American-bred Baby Louise's, then how much easier to assent. How much easier to say yes than to explain why the answer must be no, especially since *Roe* and *Doe* and their litigious offspring lie in the background to claim their due. Why not abortion-on-demand for doctors too?

That is why *in vitro*, like most of the great "human life" issues of our time, must be argued and won on the wider issue of abortion-on-demand. Logically, the case against *in vitro* "abortions" is as good as that for just about any other kind. But it is a logical *extreme*, accepted by those who accept the cause of the unborn in general; rejected by those who do not. And the latter group includes not only militant pro-abortionists, but the luke-warm, the indifferent, and those who stipulate numerous exceptions to an anti-abortion rule. And so the polls register the information that most people are not morally offended by *in vitro* fertilization (though of course the polls stress the lives *gained*, and ignore the lives lost). After all, the conceptuses being destroyed are not appealing Louise Brown's, but small congresses of cells too undeveloped to respond to pain, and seemingly incapable of any sensation at all. This is where we reach the central problem of persuading people that *in vitro* is destructive, as well as creative. Opponents of the procedure contend with an almost insurmountable image problem — one which is certainly familiar to the rest of the anti-abortion movement, but on a smaller scale. Once a student has mastered elementary theorems and achieved the rarified atmosphere of theoretical mathematics, he can no longer expect a theorem or formula to be intuitively obvious to a casual observer. Similarly, the case against the destruction of an anonymous blastocyst — a blastocyst which bears even less resemblance to a human baby than the "hunk of protoplasm" the pro-abortionists see in early abortions — depends psychologically, if not logically, upon the case against the destruction of a six-month fetus. And the Supreme Court hasn't even progressed *that* far. Denying state and national legislators the right to determine the parameters of human life, the Court has publicly enshrined its own agnosticism on the question of the unborn's status. Given this precedent, the decision of the Ethics Advisory Board does not appear revolution-

ary. The Board dutifully continued along the Court's trajectory.

But if the *in vitro* fertilization question is dependent upon a prior question (what are the outer limits of the rights of the unborn?), it also suggests the reason why so many have responded wrongly in the past. For the abortion problem is largely an image problem, and it hinges on the Invisible Victim.

Pro-abortionists are forever accusing their opponents of cheap sympathy tactics, of clouding reason with a haze of irrelevant feeling. Such accusations draw attention away from the fact that pro-abortionists don't *need* to stress the reality of their "victim" — they have a large and readily-available applicant pool. The mother-to-be is an easily-exploitable victim, not only because she is larger and her features are visible, but because she is *vocal.* She verbalizes her dissatisfaction with her pregnant condition. In fact, it could be argued that pro-abortionists can wait until a child is born before considering it human largely because only then can it make audible cries. (So the novelist Thomas Keneally, writing a thriller about a fetus whose father is plotting his death, tells the story in the first person from the fetus' point of view. How much more difficult it would be to engage our sympathies if all we could see was the mother's extended abdomen.) Once a baby is howling in a hospital nursery it, too, has the potential for victim status. Before then, it must defer to the mother.

Pro-abortionists would not be able to arouse such sympathy for women who abort their babies if there were never any cause for sympathy. Though some of the people who fought for legalization of abortion ten or twenty years ago were propelled by venal motives, others merely employed selective vision: they focused on the most readily-available suffering image. And they enlarged that image, and printed it in vibrant colors, the better to enlist the sympathies of less sensitive souls. They circulated stories of back-alley butchery, hideous infections, tragic deaths. And for those who chose to have their babies, other stories were available: bright teenagers with futures ruined by "one mistake"; families of twelve trapped in poverty. The reason these stories were effective is that they told a part of the truth. The instances were not as numerous as pro-abortionists claimed; the women were not always as free of responsibility for their situations as the stories implied; and the child's birth not the unmitigated misfortune anticipated. Still, at bottom real people were the sources for the images pro-abortionists projected. *They* adopted image mongering first, however; anti-abortionists did not yet have reason to begin.

But if we are to be the rational, clear-thinking people the pro-abortionists think *they* are — the sort of people who do not rely upon grisly photographs to horrify philosophical opponents into capitulation — we must not rest content with the first, obvious victim. That would literally be a superficial reaction, for the other potential victim in the case of abortion is the child living within the mother. As pro-abortionists see it, the central question between anti- and pro-abortionists is whether anti-abortionists do an accurate reporting job on what is in the womb, or whether the image they project is a distorted one. Clearly there is *something* lodged within the womb — even the woman seeking the abortion admits to that, since she wants whatever it is cleaned out. What separates non-victim from victim? Why is a piece of protoplasm — for that is the term settled upon by those who do *not* award victim status to the unborn — not a victim?

Because victim status is not dependent upon a *situation*, a circumstance, but upon an attitude, or more correctly — since it must be awarded by someone other than the victim — an attitude *perceived* by others. A pregnant woman qualifies if she feels victimized and conveys these feelings to others. But because the condition depends upon malleable impressions and not objective circumstance (I hear the chorus now: what is objective circumstance?), the judgment can be manipulated even further. A pregnant woman can convince others (perhaps even herself) of her victim status even if circumstances seem to belie her words. Even if she knowingly opened herself to the possibility of conceiving an unwanted child; even if she has loving, supportive family and friends, and the ability to provide financially for a child, still, because she does not want the baby, and makes this known to others, she can create an image of herself as "victim," and so "earn" her abortion. And that is the meaning of abortion-on-demand, and the reason why the easing of abortion restrictions leads so surely to it. Once we focus on the image of the pregnant woman as the sole potential victim, and examine her attitudes, her feelings, to decide whether she qualifies, we have dismissed circumstances as hard evidence, and left ourselves with no set of circumstances good enough to disbar a woman from the right to abort. (But a curious inconsistency should be noted: certain circumstances are believed by many abortion proponents to ratify almost automatically the woman's right — at that point almost a duty — to abort. Teenage pregnancies, those which would interrupt education or a

career, etc., attract advice, sometimes insistent, to abort the child. The woman in these cases receives victim status without applying for it, because she *is seen* by others as someone who will suffer as a result of the child's birth. There is still another anomalous case which involves, in a limited and perverse sense, a view of the baby as victim. This is the case of the genetically-handicapped child. He *is seen* by others as a potential victim of life, fated for limitations which do not hamper "normal" people, and denied modes of fulfillment available to others. Of course, the mother and the rest of the unborn's family are also seen as potential victims. It is only under these circumstances — or when the child is considered "societally handicapped" — that the child may merit a kind of victim status, and this only to deny him any future status whatever, by killing him.) As the criteria for victim status shift from objective to subjective, questions of life and death diminish. Even the question of the mother's life or death, the motive of saving (women's) lives, occupies a peripheral position once restrictions on abortions are lifted and abortion-on-demand is a reality. Victims are preeminently people who suffer, and we can be sure that someone is suffering only if he is alive at the time. This is the complication concealed in columnist M. J. Sobran's suggestion that fetuses be anesthetized before they are aborted, to spare them the pain of the process. On the other hand, pro-abortionists shrink from any action which presupposes a discrete being in the womb. On the other hand, if they were ever forced to confront the abortus' suffering, anesthetizing the fetus might prove sufficient to quiet consciences: a comatose fetus would no longer compete with the mother for the role of victim. Meanwhile, though, pro-abortionists remain sceptical of statistics documenting the fetus' sensitivity to heat, cold, pressure, noise, etc. Why introduce umecessary complications?

The image problem I have been describing affects the whole anti-abortion movement: how to deflect attention from the mother, even if only for a moment, in order to focus upon the growing life within the womb. But an analogous image problem also complicates the euthanasia debate. Proponents of "mercy-killing" do not see their potential victims as living human beings, but as inert masses like Karen Ann Quinlan, or senile minds trapped in decomposing bodies. Such people "are not really alive," the argument goes. They feel nothing, think nothing. They themselves would be ashamed and crave death if they were aware of their present condition. (Or, they

are people suffering terribly with no relief in sight: you cannot call *that* a life worth living.) All depends upon the picture painted, the way the photograph is touched up. Clearly euthanasia proponents cannot label all lives bad, or all living conditions unacceptable. So in order to condemn *certain* lives, they must somehow isolate them from the rest. They must de-humanize them, as fetal lives are de-humanized because of their size or location or emotional immaturity or insensitivity to Shakespeare; as fertilized eggs floating in petri dishes are reduced to bits of protoplasm.

Yes, *this* kind of image problem afflicts all human life issues, though perhaps it is hardest to fight in the case of *in vitro* fertilization. But still another is chiefly confined to *in vitro* fertilization and the cluster of genetic engineering issues surrounding it. That is the exalted image of the life sciences — their reputation for problem-solving and fate-conquering, for expanding the mind's limits and exploring the frontiers of knowledge. It is true that science provokes negative as well as positive reactions, and that certain sciences enjoy greater trust than others. Fear of mad scientists surely dates farther back than *Frankenstein*: it is as old as the recognition of the enormous powers science plays with. The physical sciences, in particular, have received mixed reviews throughout the whole second half of this century, with Hiroshima raising the curtain. The 60's-born ecology movement aggravated these fears and identified their objective correlatives in the form of DDT scares, threatened ozone layers, and more recently, nuclear power.

But even sciences with "bad" reputations have a "good" reputation for reaching the goals they set themselves. Scientists are respected for their *power* — for their ability to split atoms and construct space ships, to "develop alternatives" to unsatisfactory conditions. And they are respected for doing so (here the myth takes full charge) single-mindedly, purely, untainted by venal motives. Theirs is a lonely quest for truth amid test tubes, beakers, and Bunsen burners.

This is a common and not unlovely picture of scientists — even scientists whose investigations frighten and ends appal the ordinary man on the street. But once we move from the physical to the life sciences the image improves drastically. The chemist or biologist is not only dedicated and powerful but well-intentioned. He is a wonder-worker, inventing artificial hearts, manufacturing miracle drugs, tempting us with the prospect of cures for old age. Merlin-like, he works White Magic, not Black. As witches were said to be able to

make cows and pigs barren, present-day magicians render the sterile fertile. Ancient formulas sacrificed lesser for greater ends: eye of newt and toe of frog. Why cavil when the price of a test-tube baby is a few human blastocysts?

Put this way, the argument for *in vitro* fertilization sounds ridiculous. But that is not the way other people see the issue, or the vocabulary with which they explain it. To begin with, modern man is confident of the distinction between magic and science. Magic is "superstition," a belief that power can be obtained through formulas whose precise relationship to their objects is unclear. Magic is power exercised through someone else's sufferance — devils or nature gods or whatever preternatural beings the magician serves. Though the magician, Faustlike, may feel superior to most mortals, he acknowledges subordinate status to the powers he invokes.

Science, on the other hand, aspires to knowledge. And public myth — not often even challenged — upholds the belief in scientists' control over their materials (that means, over nature and nature's forces). Supposedly they know not only what they are doing but why — or at least, why what they do works: why a certain vaccine prevents disease; why a certain element catalyzes a chemical reaction; why two chemicals combined create an explosion. It is this practical knowledge which persuades many people to confide mankind's hopes in them; which makes us trust their intimations of immortality. For unlike magicians, they are not servants or vassals of a greater power, but masters of knowledge they have labored to achieve. Modern man laughs at the old myths of alliances between men and spirits for dominion over nature (even in Shakespeare's time Prospero and Ariel could only cohabit on a desert isle), but he ingenuously swallows more up-to-date myths which claim that comparable control may be obtained without a middleman.

But this confidence is misplaced. Whether or not scientists are servants of a greater power, they are not the masters of lesser ones that people assume. And to their credit, they do not claim to be. The work of the scientist is both theoretical and practical. On the theoretical side, he wishes to understand how things work, what laws govern the universe and the "reasons" for them, what conditions could "change" these laws or alter phenomena. In this ambition scientists often fail, or else they enjoy apparent success only to discover a generation or two later that they were mistaken. So at some times scientists have thought the universe finite, and at other times

they have found it useful to assume its infinity. The movements of atoms have sometimes been described as random, and sometimes predictable. Extraterrestial life has appeared impossible and probable.

These are all questions which occupied good minds during the past century or so, and they can be matched by others throughout the history of science. The important point for our purposes is not that scientists have sometimes been wrong in their understanding of the world, but that such misunderstandings had astonishingly little effect upon the magnitude of practical, laboratory results. Men of science busily discover and invent whether or not they are operating on a proper understanding of the phenomena upon which they work. And in fact, though some scientific models catalyze greater practical results than others (atomic physics, after all, produced the atomic bomb as well as nuclear power — both pretty spectacular "results"), it is hard to imagine a theory which wouldn't produce something that could be called "scientific progress."

And there is a reason for this. Scientific investigation is primarily inductive, and trustworthy results depend upon the quantity and quality of the data collected. The scientist "makes sense of" the data by a method we can roughly describe as trial and error. He tests the fit of one explanation and then another, trying to match information and explanation like square peg and square hole.

But the procedure is not that chronological: first information, then explanation. For if the field of operation from which data are extracted was never narrowed down to begin with, no experiment would ever have an end. And so scientific theories serve a dual purpose: not only may they be tested by experimentation, but they themselves provide a system for sorting relevant from irrelevant information before the testing begins. Though some theories are less valid than others, and some more productive than others, most any theory will accomplish the essential task of limiting the scientist's work to a finite and not-too-cumbersome body of material. Once that has been done, he can settle down to making theoretical or practical breakthroughs, or running into blind alleys. Educated trial-and-error can take over.

And that is why we have no special obligation to heed the voices of Edwards and Steptoe when they presume to tell us what procedures are ethical and what not (as we have no special obligation to accede to the opinions of judges and lawyers when they pass judgment on the unborn's right to life). The image of the omniscient

scientist — like the image of the fetus as a blob of tissue, or the image of the pregnant woman as sole potential victim — is false. Though Edwards and Steptoe hit upon a seemingly successful formula for baby-making *ex utero*, they are no better equipped than we to judge the value of the life they midwive. In fact, doctors and scientists may often be *less* equipped than other people to make such judgments, since they are accustomed to "lying" to themselves about the pain and suffering they must inflict in order to heal and help. They are used to inventing neutral, clean-sounding terms for the things they do, and so the images *they* see almost necessarily differ from ours.

The solution — so far as there is one — is to reject the false images, to repent our worship of science and scientists and rescind an unbalanced confidence in their capabilities (a confidence which places too heavy a burden on their shoulders). But the solution also demands a close examination of our own ways of perceiving and methods of evaluating perceptions. Real objects project images, but our own desires and preferences — and shortcomings — will alter our perceptions of those objects, will interfere with our reception of the images. The fact that we can *see* the woman seeking an abortion, and create a life for her, and imagine her unhappiness, and desire to relieve it, does not permit us to ignore the life which is harder to perceive, and more difficult to sympathize with, and less visibly suffering, and more mysterious in its way of existing. We are, after all, only second-hand image-makers, and a little humility becomes us.

Capital *Punishment*

Walter Berns

IT MUST BE one of the oldest jokes in circulation. In the dark of a wild night a ship strikes a rock and sinks, but one of its sailors clings desperately to a piece of wreckage and is eventually cast up exhausted on an unknown and deserted beach. In the morning he struggles to his feet and, rubbing his salt-encrusted eyes, looks around to learn where he is. The only human thing he sees is a gallows. "Thank God," he exclaims, "civilization." There cannot be many of us who have not heard this story or, when we first heard it, laughed at it. The sailor's reaction was, we think, absurd. Yet, however old the story, the fact is that the gallows has not been abolished in the United States even yet, and we count ourselves among the civilized peoples of the world. Moreover, the attempt to have it abolished by the U.S. Supreme Court may only have succeeded in strengthening its structure.

I do not know whether the intellectual world was surprised when, only two days before the nation's two hundredth birthday, the Supreme Court held that capital punishment is not, under all circumstances, a violation of the Eighth and Fourteenth Amendments. I do know, or at least have very good reason to believe, that the Court's decision came as a bitter blow, not only to the hundreds of persons on death row who now faced the very real prospect of being executed, but to the equally large number of persons who had devoted their time, talent, and, in some cases, their professional careers to the cause of abolishing this penalty.

They had been making progress toward this end. Only four years earlier, the Court had held that the manner in which death sentences were being imposed by judges and juries — discriminatorily or capriciously — constituted cruel and unusual punishment, and this decision seemed to be an inevitable step along the path described by still earlier decisions, a path that would lead ultimately, and sooner

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rather than later, to the goal of complete and final abolition. True, there were four dissenters in the 1972 cases, and Justice William O. Douglas, one of the five justices in the majority, had since retired; but the abolitionists had reason to hope that some of the 1972 dissenters would reconsider their positions. Chief Justice Warren E. Burger, for example, had indicated his sympathy for the abolition cause, saying that if he were a legislator making a political judgment rather than a judge making a constitutional judgment, he would either vote to abolish the penalty altogether or restrict its use "to a small category of the most heinous crimes."[1] And in a poignant opinion, Justice Harry A. Blackmun had spoken of the "excruciating agony" of having to vote to uphold death sentences, and of the depth of his abhorrence of the penalty, "with all its aspects of physical distress and fear and of moral judgment exercised by finite minds."[2] Perhaps he could be prevailed upon to set aside his constitutional scruples; after all, one year later he wrote the Court's opinion invalidating the abortion laws,[3] and that opinion was at least as bold in its disregard of constitutional scruples as anything the abolitionists were asking of him.

Besides, judges are not immune to popular opinion or able to isolate themselves completely from the trend of the times, and the trend was clearly in the direction of abolition. Juries seemed increasingly unwilling to impose the sentence of death, in other countries as well as in America. Whatever the case in the Soviet Union and Saudi Arabia, civilized countries were abolishing the penalty, whether in practice, as in France, or by statute, as in Britain. Less than two weeks after the Supreme Court held it to be not unconstitutional, the Canadian House of Commons voted to abolish it for all crimes, thus bringing to a successful conclusion a campaign that had engaged the passions of many of that country's most dedicated intellectuals. Rather than to doubt the outcome, abolitionists had cause to wonder why it had taken — and in America was taking — so long. It must have seemed to them that every decent and thoughtful person supported their cause — Albert Camus, for example, and Arthur Koestler — and the public had long since demonstrated its opposition to punishments considered by them to be less barbarous than the death penalty. This generation of Americans, unlike their forebears, would not, it is said, support the branding of convicted criminals or "ear-cropping." Public opinion was, as the Court had

said as early as 1915, becoming more enlightened on these matters, and the cause of this enlightenment was a growing appreciation of "a humane justice."[4] This growing enlightenment had constitutional significance because the meaning of "cruel and unusual" varies with the times. As the Warren Court said in 1958, this Eighth Amendment term derives "its meaning from the evolving standards of decency that mark the progress of a maturing society."[5] There was, therefore, good reason to believe, and certainly good reason to hope, that by 1976 society would have matured still further and that the Court would acknowledge this officially by declaring the death penalty to be "cruel and unusual" according to the standards then governing. It was this hope that was cruelly dashed by the decision in *Gregg* v. *Georgia*, the leading 1976 case.[6]

Perhaps the Court began to doubt its premise that a "maturing society" is an ever more gentle society; the evidence on this is surely not reassuring. The steady moderating of the criminal law has not been accompanied by a parallel moderating of the ways of criminals or by a steadily evolving decency in the conditions under which men around the world must live their lives. In the short period during which the first draft of this book was written, two attempts were made on the life of the U.S. president; a former president of the Teamsters Union was abducted and probably murdered; a famous heiress was indicted, then convicted for her part in an armed bank robbery; two Turkish ambassadors were gunned down; a daughter of a former president, himself the victim of an assassin, narrowly escaped death from a bomb exploded in a London street; a Puerto Rican separatist group claimed credit for simultaneous bombings in New York, Washington, and Chicago; a Dutch businessman was held captive by Irish Republican Army gunmen who threatened to chop off his head if the police made any attempt to rescue him; three or four other IRA gunmen held an innocent husband and wife hostage in their London flat, while their associates tossed bombs into London restaurants; Portuguese mobs sacked the Spanish embassy; two American diplomats were kidnapped; Lebanese private armies fought a civil war in the streets of the formerly peaceful Beirut; the American ambassador to the country was murdered; the usual handful of political murders were committed in Argentina, and the usual number of Palestine Liberation Organization bombs went off in Jerusalem; eleven persons lost their lives when a terrorist bomb exploded in La Guardia airport; South Moluccan terrorists took

possession of a Dutch train and of the Indonesian embassy, shooting some of the many innocent hostages they held; and, to skip over a few months and more than a few similar outrages, the newly appointed British Ambassador to Ireland was blown up, and Palestinian terrorists seized an Air France plane and held its hundreds of passengers hostage at Entebbe airport. A person could be excused for thinking not only that the world was becoming a more savage place, but that the Israeli raid on that airport and rescue of those hostages was almost the only happy event to make the news during this period. For once a liberal democracy was seen to possess the moral strength required to defend itself. That has not often happened lately, which is why it was so exhilarating.

And it is moral strength, or the strength that derives from the conviction that one's cause is just, that is required not only to mount operations against foreign terrorists but to respond in an appropriate manner (which may mean severely) to domestic criminals. Those who lack it will capitulate — in the one case by paying the ransom demanded and in the other by refusing to impose the punishments prescribed by the laws — but will conceal the fact of that capitulation behind a cloak of pious sentiments. I witnessed this phenomenon at first hand in 1969 when armed students forced Cornell University to set aside punishments duly and fairly imposed on a handful of students who had deliberately broken its laws and flouted its authority. To justify its capitulation, the administration pointed to the guns the students had pointed at it; to justify its acceptance of the administration's capitulation, the faculty, the next day, pointed to student opinion and the presumed necessity to act only in accord with it. But the popularity of the capitulation could not conceal the fact that Cornell had proved to be an institution incapable of defending itself because, as it turned out, it had nothing to defend. An institution that lacks strength of purpose will readily be what its most committed constituents want it to be. Those who maintain our criminal justice institutions do not speak of deferring to public opinion but of the need to "rehabilitate criminals" — another pious sentiment. The effect, however, is the same. They impose punishments only as a last resort and with the greatest reluctance, as if they were embarrassed or ashamed, and they avoid executing even our Charles Mansons. It would appear that Albert Camus was right when he said that "our civilization has lost the only values that, in a certain way, can justify [the death] penalty."[7] It is beyond

doubt that our intellectuals are of this opinion. The idea that the presence of a gallows could indicate the presence of a civilized people is, as I indicated at the outset, a joke. I certainly thought so the first time I heard the story; it was only a few years ago that I began to suspect that that sailor may have been right. What led me to change my mind was the phenomenon of Simon Wiesenthal.

Like most Americans, my business did not require me to think about criminals or, more precisely, the punishment of criminals. In a vague way, I was aware that there was some disagreement concerning the purpose of punishment — deterrence, rehabilitation, or retribution — but I had no reason then to decide which was right or to what extent they may all have been right. I did know that retribution was held in ill repute among criminologists. Then I began to reflect on the work of Simon Wiesenthal, who, from a tiny, one-man office in Vienna, has devoted himself since 1945 exclusively to the task of hunting down the Nazis who survived the war and escaped into the world. Why did he hunt them, and what did he hope to accomplish by finding them? And why did I respect him for devoting his life to this singular task? He says that his conscience forces him "to bring the guilty ones to trial."[8] And if they are convicted, then what? Punish them, of course. But why? To rehabilitate them? The very idea is absurd. To incapacitate them? But they represent no present danger. To deter others from doing what they did? That is a hope too extravagant to be indulged. The answer — to me and, I suspect, everyone else who agrees that they should be punished —was clear: *to pay them back.* And how do you pay back SS Obersturmfuhrer Franz Stangl, SS Untersturmfuhrer Wilhelm Rosenbaum, SS Obersturmbannfuhrer Adolf Eichmann, or someday —who knows? — Reichsleiter Martin Bormann? As the world knows, Eichmann was executed, and I suspect that most of the decent, *civilized* world agrees that this was the only way he could be paid back.

This, then, is a book in support of capital punishment. It could be entitled "the morality of capital punishment" because, as I see it, the argument about it does not turn on the answer to the utilitarian question of whether the death penalty is a deterrent; as I show in the third chapter, the evidence on this is unclear and, besides, as it is usually understood, deterrence is irrelevant. The real issue is whether justice permits or even requires the death penalty. I am aware that it is a terrible punishment, but there are terrible crimes and terrible

criminals: Richard Speck, killer of eight Chicago nursing students; Charles Manson and his "family," killers of actress Sharon Tate and others; and Elmer Wayne Henley and the man for whom he "worked" (and whom he eventually murdered), Dean Allen Corll, the leader of the Houston, Texas, homosexual torture ring, killers of some twenty-seven young men. Henley was sentenced to 594 years in prison, but it is questionable whether even that sentence is appropriate repayment for what he did. I am also aware that "retribution has been condemned by scholars for centuries," as Justice Thurgood Marshall remarked in the 1972 death penalty cases, and that he also said, and said with some authority, that "punishment for the sake of retribution is not permissible under the Eighth Amendment";[9] but I am not persuaded (nor, as it turned out in 1976, was a majority of the Supreme Court).

I am, finally, aware that genuinely honorable men have argued powerfully and passionately against capital punishment — the first chapter of this book presents a review of their arguments, and I have made every effort to present them honestly — but, obviously, I disagree with them. I disagree most of all with the misguided, and occasionally even absurd, sentimentality that characterizes their position. Consider the reaction of the American Civil Liberties Union to the scheduled execution of Gary Gilmore, the first person (and, as I write, the only person) to be executed in America since the Court's 1976 decisions. The ACLU had recently insisted that Karen Quinlan had a "right to die," although, of course, there was no way to ascertain whether *she* wanted to exercise that right, and that a court of law had the authority to order the removal of the various life-support devices that (it was then thought) were alone keeping her alive. Now, with equal passion, it insisted that Gilmore, a convicted murderer who wanted to be executed, did not have a "right to die" and that no court had the authority to order his death.

I must also point out that I learned soon enough that it was impossible to discuss capital punishment without discussing punishment in general; our penal system, so inadequate and increasingly seen to be so, is in large part the result of our attempt to avoid punishing criminals and, above all, to avoid executing them.

NOTES

1. *Furman* v. *Georgia*, 408 U.S. 238, 375 (1972). Dissenting opinion.
2. *Ibid.*, at 405. Dissenting opinion.
3. *Roe* v. *Wade*, 410 U.S. 113 (1973).

4. *Weems* v. *United States*, 217 U.S. 349, 378 (1915).
5. *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958).
6. *Gregg* v. *Georgia*, 96 S.Ct. 2909 (1976).
7. Albert Camus, "Reflections on the Guillotine," in *Resistance, Rebellion, and Death*, trans. Justin O'Brien (New York: Knopf, 1961), p. 220.
8. Simon Wiesenthal, *The Murderers among Us*, ed. and with an introductory profile by Joseph Wechsberg (New York: McGraw-Hill, 1967), p. 178.
9. *Furman* v. *Georgia*, at 344, 345.

How It Looked Then

Jonas Robitscher

I THINK MY REMARKS have particular meaning because my position stems not from participation in any organized religion, although I generally adhere to the Judaeo-Christian tradition, but from a non-denominational humanistic and legalistic position.

The central issue in abortion is not whether women do or do not have a right to determine their own destiny or whether unwanted children should or should not be brought into this world but the much more basic question of whether an abortion is the taking of life. If it is not the taking of life, we do not have to deal seriously with the problem; if it is the taking of life, the proponents of abortion are then advocating a kind of killing. Then we have to deal with abortion as a serious act affecting a fetus, its mother, and the operator who performs the procedure and also as an act affecting a whole network of individuals involved in the decision for abortion and the abortion process.

This view is in contrast to those who say it is a private affair, of concern only to the mother. Others are involved; the fetus and the physician who performs the procedure, and many, many more. The father is involved, the original physician who consults with the mother and who refers her to an operating physician, the psychiatrist who is often asked to certify there is a mental reason for the procedure, the operating room nurses and other hospital personnel who assist, the minister who may support the decision of the mother to have an abortion and even help her secure an abortion, the hospital administrators and policy-makers who decide if their hospitals can be used for abortion purposes — all these and many more are involved.

Churchmen are involved; they must decide church attitude towards abortion. The future of the life of their church may depend on their decision. Citizens are involved; they are asked to declare their policy on a question which may involve killing, and voters who vote for or against a liberalized abortion policy are making the same kind

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of decision that they make when they vote on issues of war and peace and other great moral issues, and they have the same moral complicity for a mistaken decision.

Legislatures are involved; they pass the legislation which embodies the policy of the electorate. Governors are involved as opinion-molders. And in the recent national election we have seen the interesting instance of presidential candidates lined up on opposite sides of the issue — one candidate who has consistently been opposed to abortion and the other candidate who favored it strongly (although not explicitly during the campaign).

So abortion is a moral issue that has the potential of involving us all, and it is utter stupidity for some adherents of a liberalized abortion policy to say this decision affects only the mother or this decision is the private concern of only the mother and her doctor.

This is a moral issue that has the potential of tainting us all. If I am right and abortion is a killing, a kind of murder, then promoting abortion confers responsibility and guilt. If I am wrong and abortion is not a killing, a kind of murder, then my attitude burdens pregnant women with pregnancies they do not wish to complete and leads to the birth of unwanted children, consequences that also confer responsibility and the possibility of guilt. So the topic of abortion forces us to take a moral stand and to live with the consequences of that stand.

First I would like to clarify my stand on abortion and then I want to demolish some of the myths that have been perpetrated by those who want to promote abortion on demand.

In the first place, I feel abortion is a killing, the taking of a human life, and I think that religious, legal and medical principles command us to be very careful when we abort.

Secondly, I do not think we can take an uncompromising anti-abortion stand and say that abortion is never justified. This is a position which helps relieve some of the ambiguities and complexities that face us when we deal with the question of abortion, but I could never subscribe to an abortion policy that would sacrifice the life of a mother in preference to the life of the child. Just as other homicides are justifiable — if they are in self-defense, if they are part of a just war, possibly if they may deter crime — so sometimes abortion is justifiable. When we say an abortion is justifiable, we do not say we are not killing; we are saying that in rare instances killing may be preferable to its alternative. Whenever the medical condition

of a mother makes her physician feel that continuation of the pregnancy is an unwarranted risk, the pregnancy should be terminated —but with sorrow and a sense of loss, not with a feeling that a protoplasmic mass, as one physician has described the fetus, has been inconsequentially flushed down the drain.

Thirdly, I do not feel that we can be judgmental and throw the first stone at a mother who wishes to abort. The panic at having to go through childbirth, the economic and social pressures caused by unwanted pregnancies cannot be minimized, and although I do not want to be part of a society that permits abortion for non-medical reasons, I also do not want to be part of a society that does not take the plight of the pregnant woman seriously and that does not offer her all the help — short of abortion — that it can muster. As a psychiatrist I have seen many patients who have had abortions; I hope I have not been condemnatory. I can only conjecture the great pressures which induced them to take so serious a step.

At one time in America and the remainder of the Western World, abortions were done only for medical reasons, usually cardiac or kidney problems of the mother. Some state laws specified that abortion could be done only to save the life of the mother, but better and more humane laws said it could also be done to protect her health. From 10,000 to 25,000 abortions were performed yearly under these laws.

At the same time many abortions were being performed illegally, by physicians acting outside the scope of their authority or by non-medical abortionists. Estimates vary—from 200,000 to 1,000,000 of these illegal abortions were performed in the United States each year.

Psychiatrists became involved in the abortion scene because many mental or psychiatric conditions are seen by the law as medical conditions, and a legal abortion can be done for such medical reasons as schizophrenia, psychotic depression, and suicidal depression. As physicians learned to deal with all the medical complications of heart and kidney disease and to be able to almost guarantee a safe delivery, psychiatric health reasons became the chief medical indications for abortion.

This involved a great deal of psychiatric deception and self-deception. Most pregnant women are not psychiatric cases. Even if they are unhappy to be pregnant, studies show that they usually do not commit suicide — less so than non-pregnant women — and pregnancy usually does not worsen their mental conditions. But since psychiatrists were the medical people who could authorize a

legal abortion for mental conditions and since some psychiatrists — a minority but enough to establish policy — were willing to certify the need of an abortion in all unhappy or upset women, the psychiatric certification of abortion became a common practice.

At that point some obstetrician-gynecologists pointed out what seemed to them an inequity. A private patient who insisted she wanted an abortion could often find two psychiatrists who would recommend this procedure; a ward patient often could not get psychiatric authorization for abortion. This inequity stimulated the demand for a more liberal abortion policy. Soon the demand was made that abortions should be done for a variety of reasons: rape, incest, or the threat of genetically-impaired progeny. In England a law was passed authorizing abortions for the socio-economic distress of married women who had an older child. Finally the push was made for abortion on demand, and so the New York statute and some other statutes now provide.

In the course of this development of a liberal attitude towards abortion, the fact that a fetus represents a marvelously complicated living, responding, human being has been minimized and stress has been on the fetus as a protoplasmic mass, an excrescence, a foreign body like a tumor or cancer. A fetus is not a tumor, an excrescence, a foreign body, or a cancer; it is a human baby in its intrauterine stage of development.

Recently the idea of abortion has been further exalted by those who see unplanned pregnancy as detrimental to the right of a woman to find her own methods of self-expression and her own sense of identity and it has also been hailed as a means of population control and a way to reduce the welfare load. Many of the purposes of those who favor abortion are laudable. If abortion were not a killing it could seem like an attractive solution to some of society's problems.

But it would only *seem* like an attractive solution — it would not *be* an attractive solution. Because even if abortion were not morally reprehensible, it would not solve the problems it is supposed to solve.

The first problem that abortion is supposed to solve is illegal abortions which lead to pelvic infections and which cause death and injury to many women. Experience in England and Scandinavia indicates that liberal abortion does not always solve the problem of illegal abortions. The proponents of abortion have neglected the elementary economic and psychological law which states that when abortions are made more available and more socially acceptable,

then the demand for abortions rises sharply, and this increased demand becomes manifest in both increased legal and illegal abortions. Fear of the possibility of pregnancy keeps down the demand for abortion; contraception is practiced and easy sexuality is discouraged when abortions are not readily available. When abortions are readily available, contraception is not practiced. In fact, abortion is considered the primary method of contraception by many people in societies which allow easy abortion. The English and Scandinavian experience with very liberal but not completely *at will* abortion indicates that illegal abortions are not eliminated, that there is increased demand for illegal as well as legal abortions. The illegal abortions are sought by those who do not qualify for legal abortions, by those who do not want the fact of their abortion on their health record, and by those who think they can secure an abortion more expeditiously by illegal rather than legal channels.

Experience in New York where legal abortions are universally available indicates a drop in illegal abortion, but I think here, as in England and Scandinavia, the demand for illegal abortion will eventually be seen to be still present, a result of an increase in unplanned pregnancies.

The second problem that abortion is supposed to solve is pregnancy resulting from rape. But pregnancy resulting from rape is a very rare phenomenon and it can be dealt with very efficiently by gynecologists. Whenever a woman reports a rape and is examined at a hospital, either a dilation and curettage or treatment with diethylstilbesterol will prevent the possibility of pregnancy. There is no real problem of pregnancy following rape that requires abortion as a solution.

Abortion is also supposed to solve the problems of pregnancy resulting from incest. Adoption in some cases; the psychiatric certification of a need for abortion in some cases, since participants in incest may be psychiatrically disturbed, are answers short of a change in abortion policy that can handle this infrequent occurrence.

Abortion to prevent the birth of infants with genetic defects presents a more complicated problem. There are a very few hereditary conditions which result in children invariably affected — Tay-Sachs disease, Niemann-Pick disease, the Lesch-Nyan syndrome are examples. I think abortion should be allowed for these conditions. Many of the conditions for which abortion has been recommended, like German measles, are either well on the road to extinction through vaccines and immunization procedures or produce genetically deform-

ed children in only a small percentage of cases. It does not seem to be a useful solution to kill a majority of healthy or minimally-affected babies in order to guarantee that no deformed baby will be born. The suggestion has been made, usually not entirely seriously but to dramatize the injustice of aborting babies because of a *possibility* of genetic defect, that rather than abort fetuses indiscriminately it would be more sensible and more humane to wait until the child is born to see if genetic defects are really present; fewer children would have to be sacrificed. Whether or not this proposal has merit, the fact remains that a vast majority of fetuses aborted for genetic reasons have no genetic defect. Often the possibility of genetic defect is merely the excuse that allows the abortion to be certified as medically indicated in those jurisdictions which allow abortions for genetic reasons. Mothers are aborted for rubella (German measles) who have never been exposed to rubella.

A letter from a physician that appeared in *Medical Tribune,* July 31, 1967 — only five years ago — supported a liberalization of abortion laws to include rape, incest, and genetic defects with the statement, "I know of no one in the medical profession who advocates indiscriminate freedom to perform an abortion on any woman who seeks it." I wrote a letter in reply, which appeared September 4, 1967, which said that the precise point of the current controversy about liberalizing abortion laws was that many doctors were seeking the freedom to legally abort all women and that suggested changes in the law would permit unlimited or almost unlimited abortion.

> "Several well organized lobbies for the liberalization of abortion laws have emphasized such slogans as 'every baby has a right to be wanted' and such attitudes as the right of every woman to sexual fulfillment without fear of consequences — positions which on analysis mean nothing else than unlimited abortions. These same lobbies call for abortions for socioeconomic reasons" as well as for an unlimited variety of psychological reasons — and this too would mean abortion without limit.
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> "These groups have mobilized much public sentiment for changes in the law relying on such special situations as the rubella baby, the thalidomide baby, the baby born of rape or incestuous relationships. They disregard the limitations of our ability to predict with accuracy which children in the disease-drug group would be born deformed; and recent news items about advances which seem imminent in the control of rubella have not abated their use of this argument to advance their cause.
>
> ". . . .A basic question is whether medicine should enter a field where termination of life is its function rather than preservation of life — and whether this will send medicine in a new direction, towards euthanasia and

genetic selection and other practices inconsistent with a regard for the preservation of life.

"Newspapers of August 10 reported that an international conference will be held in Washington . . . 'to help states considering liberalized abortion laws.' Once again we will be faced with two problems: 1) the organized nature of the pro-abortion groups and the lack of organized support . . . among those who see dangers in changes suggested; 2) the smokescreen of arguments concerning unusual indications for abortion which obscures the real goal of many who favor unlimited abortion."

In September of 1969 for *Medical Opinion and Review* I wrote an article on proposals to liberalize the laws concerning marijuana use and I compared this with the campaign, often carried on by the same individuals, to liberalize the abortion law. Let me quote the beginning of that article:

"The liberalization of the individual from traditional restrictions on sexual freedom, on expression, on drug usage, on responsibility for his actions — is sometimes seen as progressive and dynamic. Such changes carry with them their own stresses and strains. They will certainly be different, but not necessarily better, and quite conceivably they could be worse than the old ones.

"An example is the liberalization of the British abortion law in 1967. It was designed to decrease the number of illegal and dangerous abortions. It permits abortion for substantial risk to the mother's life, health, and mental health; and for risks of handicapped children; [and] if the pregnancy can adversely affect the care given to already existing children. For the first time in the history of Anglo-Saxon law, abortions are allowed for socioeconomic reasons.

"And yet the number of illegal abortions is increasing rather than decreasing. There are at least two very obvious reasons: increased social approval for abortion means that mothers who are denied legal abortions are less amenable to persuasion to carry the pregnancy through; the increased availability of abortion discourages caution and contraception."

The answer to that in some American jurisdictions, such as New York and Hawaii, has been to allow completely *at will* abortions. But the problem of the illegal abortion is still not completely eliminated and hundreds of thousands of pregnancies which could have been prevented by contraception are allowed to take place because of the knowledge that abortion is available as a contraceptive measure. Liberalized abortion availability encourages unwanted pregnancies.

A liberalized abortion policy has other far-reaching social effects. It shapes the character of medicine; medical students who formerly would have been interested in obstetrics-gynecology for a career and nurses who would have wanted to work on the obstetrical floor now are avoiding this kind of medicine, and less thoughtful, less humane, less pro-life people are selectively being utilized in this field.

When the *at will* abortion policy went into effect in Hawaii operating room nurses found themselves nauseated, depressed and made anxious by their participation in these procedures. These reactions, which are normal and which result from the natural human response against killing, were labeled neurotic reactions by the psychiatric consultant called in to deal with this problem, and the nurses were required to become involved in group therapy in which they could learn that their reactions were inappropriate, especially so because in the words of one of the psychiatric consultants the nurses were then led to see that "what is aborted is a *protoplasmic mass*" and not a real live individual. The description of this "helpful" therapy — which seems to me more like the spread of contagion — appeared in the *American Journal of Psychiatry*, February 1972, under the title, "Abortions and Acute Identity Crisis in Nurses." When a letter to the editor in a subsequent issue stated that seeing the fetus as a protoplasmic mass was not objectivity, as the author stated, but the rationalization of a process that would otherwise be unacceptable, the author replied, repeating his original argument (October, 1972):

> ". . . [T]he entire issue of abortion is highly charged with strong emotional factors, conscious and unconscious, relating to sex, aggression, morality, life, and death.
>
> We appreciated the intense, personalized emotional conflicts the nurses were struggling with as they became intimately involved with abortions. As part of the dynamic process of helping them overcome their disabling state of anxiety, we suggested that one useful method was for them to regain an objectivity about abortions — to realize that what was aborted was a protoplasmic mass, not to project onto it all of their fantasies, and not to think of it as a real live, grown-up individual.

So what some psychiatrists would see as a normal and protective anxiety reaction, designed by conscience, nature, or God to prevent participation in killing, becomes labeled as immature and neurotic, and brainwashing the nurses to believe something is inhuman that is in reality the quintessence of humanity becomes the role of the psychiatrist.

Examples of this corrupting process are legion. At Jefferson Hospital in Philadelphia operating room nurses were sickened by the sight of the newly aborted fetus, which in perhaps 99 cases out of 100 showed no abnormality or imperfection. The fetuses often were delivered alive and struggling and then are allowed to die for lack of maternal nurture. To prevent the rapid turnover of operating room personnel, a suction curettage technique was developed so that the baby can be whisked from the uterus into the garbage disposal bag, untouched by human hands and unseen by human eyes.

No one has to feel persoanlly involved; no one has to feel responsible.

I believe one of the main reasons we have seen abortion become more utilized is we have devised a system where no one takes primary responsibility. The mother does not feel responsible because a doctor has certified that the procedure is necessary for her mental health. The psychiatrist does not feel responsible because the referring family doctor has said it would be a favor to the family to authorize the procedure. The gynecologist who performs the procedure is a mere technician, not personally involved; the minister who may have acted as abortion counsellor and promoted the whole proceeding does not have to see a viable baby expire on an operating room table.

The corruption of the abortion process spreads out. In Philadelphia the police and the District Attorney have been called upon to stop the use of abortions in hospitals which automatically certify all applicants as requiring abortions for medical and mental health reasons; there has been no action because law enforcement officials are not prepared to match their belief in the propriety of medical actions against medical authorities, and so the forces of law and order are further weakened.

The corruption spreads further. Those of us who are convinced that abortion represents a killing pay Blue Cross and Blue Shield premiums that are used to pay for abortions; in states like New York and Hawaii taxes paid by pro-life citizens are used to pay for abortions — and some abortionists, not the old-fashioned criminal abortionist but the modern medically-impeccable abortionist — have earned hundreds of thousands of dollars a year by killing their fellow man.

I have no doubt that a fetus is my fellow man, just as his older brother sister is my fellow man. We have been brainwashed in recent years by a pro-abortion press to believe that fetuses are not human.

Samuel Nigro, a psychiatrist at Case Western Reserve University, has pointed out that all the language we use to describe the fetus as non-human has been used in the past to describe the Indian and the Negro. Indians were not persons in the eyes of the law, according to Nigro, "a view then affirmed by many 'wise men' including those in control of the printed page." Nazi Germany defined Jews as unpersons and unhumans.

". . . The process of dehumanization or depersonalization . . . overlooks the common denominator of all the past acts which turned into crimes against humanity: that all these crimes were not crimes at the time. All was legal, socially accepted, and even logically justified by enticing words that 'proved' unhumanness or 'unpersonness.'"

Now, says Nigro, "we treat the fetus as the Indian was treated" but we weep only for the latter. "Have we forgotten that there is little written about fetuses today that does not have its counterpart for the Indians 100 years ago, the Jews in Nazi Germany, or the Negroes in the days of Dred Scott? Is not abortion the Wounded Knee of our time? Was not a *pro-life posture* the only way to have avoided all of humankind's disastrous past?"

In a period when law is extending the rights of the unborn and allowing recovery for damages to the fetus that were not previously allowed and when medical science is treating the unborn as subject for dramatic intrauterine life-saving procedures — indeed, one pediatrician has called the unborn "medicine's newest patient," some individuals and organizations are attempting to define the unborn as nonhuman.

Among those who have fought hardest to liberalize abortion laws are some ministers and some church groups. Ministers very courageously, but also very mistakenly, publicly gave abortion advice in states where this was illegal; they have succeeded in their pro-abortion campaign since abortion has been liberalized everywhere, but they have also incurred tremendous harms to their churches.

Churches as we know them see the family as a chief value, and the family is the nucleus that perpetuates the church. Pro-abortion people in many instances state directly they do not value the family as an institution; some pro-abortionists state specifically that only an unlimited abortion policy can free women from family patterns. Those churches that encourage abortion destroy family structure and hasten their own destruction; thus the pro-abortion position

can be seen for individuals and for groups as the expression of profound self-destructive tendencies.

Says Dr. Harold Blum, "If the family is falling apart, as some people believe, we are in more profound trouble than with Vietnam or the pollution of our basic resources. The family is the only way we know to produce good people. We have no invention to replace it and if it's falling apart, we'd better attend to it."

Pro-abortionists are anti-family. It is worth noting, and it should not be considered coincidental, that many pro-abortionists consistently favor other departures from traditional morality that are also designed to oppose family values — such as trial marriage, open marriage, acceptance of homosexuality as a normal kind of sexuality, and even legalized use of marijuana and hallucinogens. It must be more than coincidence that these positions cluster together. See the writings of Margaret Mead, Mary Calderone and many others for positions that consistently oppose traditional family structure.

Why have organized religious groups listened to these voices and taken the pro-abortion position. Are they bent on self-destruction? Is their appropriate sympathy for women in distress blinding them to their sense of the need for family stability, for reverence for life, for traditional morality? You may know the answers to this better than I do — all I know is that in the past major church groups have not been interested in hearing this side of the question.

In the same way newspapers selectively print pro-abortion articles and play down anti-abortion views. Whenever a victory falls to the pro-abortion forces this is headlined as liberal, progressive and a gain. Whenever a state or a court holds the line on abortion policy, as they have been doing increasingly, the news is played down. My hunch is that most of you are unaware that in the most important electoral vote on abortion, which took place November 9, abortion went down to a resounding defeat although it had been predicted in the press and by pro-abortion leaders that this would be a big victory for abortion. The state was Michigan, the first state to include abortion reform on a statewide ballot proposal. Possibly the news was reported elsewhere, but the only place I read the results — although I looked for it in the Sunday *New York Times* — was in *The Wall Street Journal* on Thursday, November 9:

> Voters passed judgment on a wide variety of controversies in Tuesday's ballot propositions.
>
> One surprise was in Michigan, where voters overwhelmingly rejected a

> proposal to allow abortion on demand, even though three public and two private polls had previously indicated a large and firm majority for the proposal.
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> . . . The decisive defeat of the abortion proposal in Michigan could have major negative impact nationally on the spreading abortion "reform" movement. At a rally early this fall launching the campaign for the liberalized anti-abortion proposal, feminist leader Gloria Steinem said, "The eyes of the world are on Michigan," and "a defeat here will slow our efforts elsewhere." Similarly, abortion opponents considered defeat of the proposal crucial to their hopes for stalling similar moves in other states.

What kind of an abortion policy do I favor? I favor a traditional policy which would allow abortion for major health reasons but would not freely allow abortion for incest, rape, and genetic defects since these have been used in the past almost exclusively to circumvent abortion policy; most of the women who have had abortions for possibility of genetically damaged children have not carried a high probability of risk of having damaged children, and the number of well children who have been killed vastly exceeds the severely damaged children who have been aborted.

Abortion for rape and incest has been a chief means of putting a foot into the door, a chief proposal of pro-abortion supporters as part of their long-range campaign to secure *at will* abortion. Since rape and often incest can be dealt with by postcoital treatment, dilatation and curettage and administration of diethylstilbesterol, no pregnancy need ensue; if it does ensue, the question of the destruction of the innocent, one not responsible for the harmful act but resulting from the act, raises severe moral problems that are not necessarily resolved by abortion. Many, perhaps most, psychiatrists would see a pregnancy resulting from rape or incest as a psychiatric indication for abortion; this relaxation of abortion restrictions may not be entirely consistent with a pro-life position but it does show that abortion laws do not need to be relaxed for these indications.

Although I think we should favor abortion in some circumstances, I think we should never rationalize this as being something less than it is, the taking of a human life.

I think therefore we should generally adhere to the traditional criteria for abortion, danger to the life or health of the mother, with special precautions to ensure that the criterion of danger to mental health will not become the avenue to a liberalized abortion policy.

What the Difference Is

J. P. McFadden

It will soon be seven full years since the United States Supreme Court handed down its decisions in the *Abortion Cases*. It seems clear that the Court intended a final solution to the problems involved: the seven-man majority mandated the most "liberal" abortion laws in the Western world, striking down existing laws in all 50 states. In effect, abortion-on-demand, throughout the full nine months of pregnancy, was made legal for any woman who could find a doctor willing to approve the operation. The power of the several states to interfere in any way was severely restricted. Indeed, in the first three months — when the majority of abortions take place — any restrictions whatever were proscribed. And the lower-courts have seemed to vie with each other in imposing the most rigorous (the layman would say pro-abortion) interpretation of the mandate; in the main, the High Court has sustained such extreme rulings.

In all this, the Court acted in far more radical fashion than anyone had anticipated. True, in the late 1960's there was agitation for "reform," and pro-abortion activists had succeeded in loosening the laws in a handful of states. But nowhere had they won a victory comparable to that presented them on January 22, 1973. In fact, the most publicized instance — New York's 1970 law (narrowly passed after bitter debate) that permitted abortion up to 24 weeks — seemed to indicate that the force of "reform" was spent, and the trend already moving in the other direction, for in 1972, only a few months before the Court's *fiat*, the New York legislature repealed the "reform" (only then-Governor Nelson Rockefeller's veto preserved it until the Court mooted the question). Today, there is even stronger support for this view, e.g., the scholarly survey of opinion studies by Professor Judith Blake and printed in a *pro*-abortion publication in 1977.[1] Blake concluded: "None of our time series on public views regarding abortion indicates that the Supreme Court decisions had an important positive effect on opinion. The longest series — from 1968 through 1977 on elective abortion — shows a

J. P. McFadden is the editor of this review.

leveling off of opinion [favorable to abortion] after 1970 and only a modest increase in approval by 1974 that remained unchanged by 1977. This increase can hardly be said to constitute a sharp rise in a long-term upward trend in approval antedating the Court's decisions." Nor is there any more recent evidence of such a trend. On the contrary, the general public perception is that *anti*-abortion sentiment is growing dramatically.

Why, then, did the Court go so far? To what demand was it responding? What prompted it to do precisely what the late Dr. Alan Guttmacher, then probably the nation's leading pro-abortion spokesman, warned against as late as 1967 when he wrote: "I believe that social progress is better made by evolution than by revolution. Today, complete abortion license would do great violence to the beliefs and sentiments of most Americans. Therefore I doubt that the U.S. is as yet ready to legalize abortion on demand, and I am therefore reluctant to advocate it in the face of all the bitter dissension such a proposal would create."[2]

Some would say that the Court has simply got used to acting in this way; that, since 1954 at least, the majority of the Mr. Justices have been impatient with the evolutionary social progress advocated even by such partisans as Dr. Guttmacher, and have been *legislating* a new social order. (Not a few have said exactly that kind of thing in this journal.) If this is true, it would also seem to be true that, up to the abortion decisions, the Court was not only imposing new social policies but also doing so successfully. Americans have granted the Court *moral* suasion. The argument is no longer: Is the Court properly interpreting the Constitution and the law? — not even the Justices themselves seem to bother much about that nowadays. Rather it has become: Is the Court "right"? Despite strong opposition to desegregation, reapportionment, and busing — to cite the most obvious examples — the Court maintained and/or achieved a consensus, certainly among "opinion makers," that it was doing *good*. (For practical purposes today, such a consensus is reflected in, and largely enforced by, the *media*, e.g., Walter Cronkite always approves, and *he* knows.) Why hasn't this happened with abortion?

Four years ago (1975 in the London *Sunday Times*) Malcolm Muggeridge gave us his opinion.[3] He was of course writing for a British audience; abortion law there was "liberalized" in 1968, so at that time the United Kingdom had had the same seven years' experience with abortion-on-demand that we have now. "Generally,"

wrote Muggeridge, "when some drastic readjustment of accepted moral values, such as is involved by legalized abortion, is under consideration, once the decisive legislative step is taken the consequent change in *mores* soon comes to be more or less accepted, and controversy dies down. This happened, for instance, with the legalization of homosexual practices of consenting adults.

"Why, then, has it not happened with the legalization of abortion? Surely because the abortion issue raises questions of the very destiny and purpose of life itself; of whether our human society is to be seen in Christian terms as a family with a loving father who is God, or as a factory-farm whose primary consideration must be the physical well-being of the livestock and the material well-being of the collectivity.

"This explains why individuals with no very emphatic conscious feelings about abortion one way or the other react very strongly to particular aspects of it. Thus, nurses who are not anti-abortion zealots cannot bring themselves to participate in abortion operations, though perfectly prepared to take their part in what are ostensibly more gruesome medical experiences."

One need not share Muggeridge's Christian viewpoint to agree that he's got it right. Abortion *is* different. The Court's *fiat* has *not* brought about that change in *mores* indispensable to making the new legislation take hold. As noted, the trend is now clearly going in the opposite direction. If we continue to follow the English parallel, the second seven years will be even leaner ones for the pro-abortionists: there, in the face of still-growing opposition (as many as 100,000 anti-abortion demonstrators have turned out in London — proportionally, some five times as many as have yet assembled in Washington), Parliament has been forced to reconsider the original "liberalization" several times, has already "tightened" the present law, and could move further toward at least partial repeal of abortion-on-demand. (Of course, Parliament can overrule itself; here, it is not so simple for the Congress — or the people — to overrule the Supreme Court.)

And if you do share Muggeridge's viewpoint, you see why the pro-abortionists have, from the start, made every possible effort to label all opposition as religiously-inspired, and thus "unconstitutional," in direct violation of the reigning Secularist rendering of the First Amendment as freedom *from* religion. They rightly sensed that, if they could not make that point stick, they *would* fail to

overcome the opposition of the majority, which still derives its moral opinions from Christian roots. It is worth noting that, for the pro-abortionists, it was no doubt the correct strategy — the only chance they had to at least neutralize the majority and smother *organized* opposition which, once inflamed, would predictably burn out of control. Their failure may well have resulted from a *tactical* mistake: making the main thrust anti-Catholicism. The hope of isolating the best-organized minority from the rest of the natural opposition no doubt had the devil's own allure about it. And, a decade or so earlier, it might have succeeded. The "old" Catholic Church could have been counted on to organize monolithic opposition on so clear-cut a moral issue; it might well have been strident enough to scare off allies — thus dooming any broad-based anti-abortion effort. But by the 70's, "Vatican II" (more accurately, how it was perceived, by Catholics and non-Catholics alike) had not only sapped any such Catholic capability but also had enormously lessened traditional Protestant fears of Rome, even — especially — among those who had felt them most, i.e., those now generally called Evangelicals. Thus, while Catholics were no longer able to fill the bogeyman role, the Evangelicals — far and away the largest and most vigorous American religious community today — had become capable of playing precisely the part the pro-abortionists feared. Ironically, it may well be this historically-implausible religious alliance that overturns a new morality that is plausible only in a "post-Christian" society.

This is, admittedly, a rather impressionistic sketch (it could be greatly elaborated upon, as it has been in this journal for the past five years). But the central point is this: on abortion, the Court is *not* perceived as having done "good," as was the case with desegregation. Then, its opponents suffered guilt feelings (even if their rights were being violated, it seemed ignoble to defend them). Now, the bad conscience is all on the other side, and not helped by the language the Court's majority used in the Abortion Cases: going Soloman one better, it callously divided the living unborn into three "trimesters"; breezily deciding that since no one could really agree what rights the baby should have, it should have *none*, and so on, leaving its supporters to defend unrestricted killing of the innocent in the name of nothing more than a newly-discovered constitutional "right to privacy" for presumptively *non*-innocent consenting adults. (If the pro-abortionists had stuck to their original pleas for

abortion in the "hard cases" — innocent victims of rape, incest, etc. — they might have succeeded in slowly eroding anti-abortion laws much as divorce laws have been trivialized; but the Court was impatient, and the Fabian option has undoubtedly been lost.)

On the other hand, anti-abortionists are constantly buoyed by the rewarding feeling that they are fighting the quintessential good fight, motivated not by any selfish concerns whatever but rather a *pure* desire to protect the helpless and the innocent. Thus the amazing effectiveness of the "right to life lobby" in Washington and elsewhere: it has dawned (albeit slowly) on politicians that these people are perfectly willing — even anxious — to spend the rest of their lives fighting on this "single issue," that their numbers are growing (probably into the millions already), and that there is nothing comparable on the other side. More, while they can expect to pacify most pro-abortionists with a vote for, say, ERA, there is only *one* way to prevent the anti-abortionists from making their political lives a nightmare: they must vote against abortion ever and always.

This imbalance of forces could grow much greater. The anti-abortionists love to invoke the slavery analogy, for obvious reasons.[4] And certainly the analogy would seem to hold on the main point: not since slavery has so intractable a *moral* issue been plunged into the political maelstrom. But the comparison tends to *underrate* the potential strength of the "new abolitionists." They are not encumbered by any particular regional, economic, or even political baggage. Nor do the pro-abortionists enjoy anything like the enormous strengths that the Slave Interest once marshalled — all the political, cultural, traditional, even economic (e.g., a shrinking, aging population already bids to stamp "no solution" on the nation's *current* dilemmas) factors would seem to be running *against* them. And all this without even mentioning religion *per se* (surely there can be no long-range compatability between any viable Christianity and a Slaughter of the Innocents?). To be sure, the pro-abortion party *can* claim some powerful allies, for instance the Establishment, and the *Zeitgeist*. There is certainly no doubt that the American Establishment contributed the *sine qua non* for legalized abortion-on-demand; handy symbols are the brothers Rockefeller, their Foundation, and their legion of minions in academia, the media, the Main Line Protestant churches, and so on. Such people financed, propagandized, and made "respectable" what had been a heinous crime. And of course the "times" (not to mention the

Times) were with them. As M. J. Sobran never ceases to remind us, Secularism is the Established Religion in America today, courtesy of the same folks who brought us the Abortion Cases — in which *pagan* "values" were specifically invoked!

The Abortion Interest has another "strength" too: it has been legally established at a time when the nation is harried and distracted as never before by a multitude of other vexed problems. All this at a time, as our President reminds us, that Americans seem to have lost their once-famous confidence that they could solve *any* problem. Add this factor to the difficulty that, unless the Court decides to reverse itself (highly unlikely), the only way to disestablish abortion is the very difficult amendment process, and you probably have the Interest's greatest strength. At a moment in our history when nothing seems to get *done*, holding the legal and political high ground is an enormous advantage.

But then it is a strictly *defensive* advantage, and wars are rarely won by defense alone. Thus time may well be with the anti-abortionists. Consider this point: by now, at *least* 10 million American women must have had abortions (the actual number could well be twice that, or more). A great fear of anti-abortionists was that this would work *against* them; that each aborted woman would thereafter have a powerful personal reason to support legalized abortion. There is little evidence that this is happening. Only a handful of women have publicly flaunted having had abortions; the vast majority are silent. They do not join the "activist" Women's Lib or other pro-abortion groups: indeed, while there are quite a few such organizations — often well organized and financed — they are notoriously short of the foot-soldiers such women were expected to provide, another fact that has not escaped the watchful notice of the politicians. Here again, the trend seems to be *against* the Abortion Interest, e.g., relatively large numbers of once-aborted women are showing up in the ranks of the "right-to-lifers," where they do speak out publicly — their confessions of the "terrible mistake" have become a regular feature of anti-abortion meetings.

If this picture has any truth it, one would expect to see cracks beginning to show in abortion's defenses. As it happens, there is a recent and highly visible one. A "founding father" (by his own estimate, and it is very hard to dispute him on the evidence) of the "abortion rights" movement has now publicly repudiated the movement, his own part in it — again, by his own count, he has been

personally responsible for 75,000 abortion deaths! — and the Supreme Court decisions that made it all possible. True, he is just one man. But his act is loaded with symbolism.

He is Dr. Bernard Nathanson. He was a co-founder of the National Association for the Repeal of Abortion Laws in the 60s. NARAL was the most visible and effective symbol of the early "reform" movement; it inspired much of the agitation, and helped win the most important victories, e.g., the New York high-water mark mentioned above. (It still exists today as the National Abortion Rights Action League.) Nathanson ran the nation's largest abortion clinic; he also performed many himself in his private practice (some 1,500, he estimates, of his total body count). Probably no one else is better qualified to tell the inside story of the pro-abortion movement. Nathanson does his best to spill it all, and seems to enjoy doing so. His erstwhile NARAL friends must find the whole thing painful.

Now if things were going well for the abortionists — going as they used to, when *only* pro-abortion stuff got published or publicized by the media — this book would have been buried in a 500-copy edition by some Vanity Press. Not today: the book (titled *Aborting America*) was published by the nation's *premier* publisher, Doubleday & Co. And Nathanson had the "help" of a *Time* magazine editor in writing it. In short, for the first time, an *anti*-abortion *expose* has been treated as something that will sell — like, say, a Watergate memoir, or the latest sex novel — because the publisher judges that there is a big enough audience for it. Verily, there is symbolism in that!

I am not reviewing the book here (I have reviewed it elsewhere; you will find that review reprinted in the appendices of this issue). But perhaps I should note that Nathanson has by no means become a "right-to-lifer" nor is he, even now, totally against abortion. He thinks the Court should "revise" its present position, and that a great deal can and should be done to limit and control the carnage. Some of his notions are silly, some shallow. He remains substantially unrepentant about those seventy-five thousand "Alphas" (God help him, he still can't call them unborn babies or even "fetuses," so he has invented his own antiseptic terminology). But a great deal of what he says is important as expert-witness testimony against legalized abortion. Certainly anyone involved on either side of the controversy should probably read the thing, and the *un*initiated will learn plenty from doing so — probably a lot more than many want

to know (it requires a strong stomach for the vivid blood-and-gore scenes). The point is, the book is more important than its contents.

Nathanson has dealt a symbolic wound to an already-retreating force, all the more damaging because he *knows*, he was one of *them* (still *is*, really). If it is a fact that the anti-abortion forces are growing — and that seems visibly true — and if Judith Blake is right, i.e., that the *general* opinion has already swung away from approving abortion, then the pro-abortionists must at least hold their own. They have lost Nathanson, and they are likely to lose a great many of those who read his book, which would not be available if they were not also losing their grip on the media. It is a downward spiral.

Yet the *Zeitgeist* remains with the pro-abortionists. Abortion on demand is not an American phenomenon. The whole Western world has now succumbed to the craze, just a single generation after it tried the Nazis for crimes that *included* abortion. (More to the point, how do we distinguish genocide by race from genocide by *class* of humans?) In the Communist world, of course, abortion is turned on and off like a spigot, according to the political calculations of the "leaders." Thus in poor Hungary, which has long had more abortions than births, it is utilized as an escape-valve for a demoralized people. (The Russians themselves have *mis*calculated: they are now a minority in their own empire.) The Japanese seem to abort with the same avidity they bring to taking pictures. *Can* such a massive horror be stopped once unleashed, short of the decline and fall of the civilization which permits it?

Perhaps not. As Nathanson writes (in his own defense), the "errors of history are not recoverable, the lives cannot be retrieved." It will require a massive effort to reverse so strong a tide, for abortion is both symbol and cause of decay, the death-wish of a society that has forgotten its past and fears its future. Without doubt, a society that does not recoil from the willful destruction of its own future generations is doomed. But millions of Americans *are* recoiling from the abortion horror. Whatever other parallels there may be between slavery and abortion, surely one is that not since the Abolitionists has this nation seen anything like the anti-abortionists. If their numbers continue to grow at the current rate, they alone could tip the balance: as students of such "causes" know, if 10-20% of the total population becomes fully committed to a certain political or social objective, it usually achieves it (although rarely on the terms it demanded, or to the extent it hoped for — slavery lingered on, some

would say lingers still, long after it was "ended").

Total abolition of abortion is of course not possible. I know one isn't supposed to put it this way, but it's the best way to explain it: abortion is a sin, and will disappear at the same time, and not before, we do away with sin itself. Or evil, if you prefer. But the worst thing about sin is not its existence, but its *denial.* It is one thing to admit that abortion will always be with us, quite another to make it the official *policy* of our nation, with the support of our laws, the use of our money — to promote and encourage it with all the powers of state and society, at ruinous cost to both.

And yet, as Professor John T. Noonan has made clear, the abortionists are unwilling to compromise their abortion "liberty" in any way whatever.[5] They demand total acceptance, and total support, from our society. It is not conceivable (if they will forgive me the word) that they can maintain such a public franchise for their "private right." It *is* conceivable that anti-abortionists can win majority support for their solution: to recriminalize virtually all abortions. The greater the polarization becomes, the harder it is to imagine what kind of compromise will heal a wound so festered.

But of course that is what the American political system is all about. Our basic presumption is that we all agree on the common good, and can compromise the "points of difference." Surely the most frightening aspect of the slavery-abortion analogy is that the system broke down completely on slavery. I am not predicting an abortion civil war, just reemphasizing the point that compromise on the issue will be hard to achieve. Solomon in his wisdom suggested that each party get half the baby, but that was not the solution to the problem — the solution came from the mother who chose life. The shrill intransigence of the abortionists may force the majority of Americans to do likewise.

NOTES

1. Judith Blake is a professor at the School of Public Health of the University of California (Los Angeles); her study of opinion on abortion first appeared in the March and June (Vol. 3, Nos. 1 and 2) issues of *Population and Development Review,* published by the Population Council, Inc. The entire study was reprinted in *The Human Life Review*, Vol. IV, No. 1, Winter 1978.

2. See *The Case for Legalized Abortion Now*, published by Diablo (sic) Press (Berkeley, California, 1967), pp. 12-13.

3. Mr. Muggeridge's article, "What the Abortion Argument Is About," also appeared in *The Human Life Review*, Vol. I, No. 3, Summer 1975.

4. See the extensive treatment of slavery-abortion analogies by Prof. Patrick Derr in *The Human Life Review*, Vol. V, No. 3, Summer 1979.

5. See especially Prof. Noonan's book *A Private Choice: Abortion in America in the Seventies*, published earlier this year by the Macmillan Co.'s Free Press (New York, N.Y.); two chapters of the book were reprinted in *The Human Life Review*, Vol. V, No. 3, Summer 1979.

APPENDIX A

[The following is the testimony given by Mr. James E. Berry. Esq., before a subcommittee of the Ethics Advisery Board of the Department of Health, Education, and Welfare (HEW) which held hearings in various cities (in Texas and elsewhere) earlier this year on the proposed federal funding of In vitro *fertilization experiments. Mr. Berry is a practicing attorney in Houston and a former Texas assistant attorney general.]*

This small subcommittee of the Ethics Advisory Board is here for the stated purpose of receiving public input and comment on a proposal to formally sanction and perhaps support with public money test-tube baby experimentation in this country. This rush to make critical moral and ethical determinations in the name and on behalf of society when very few of its members have been introduced to the issues involved except by sketchy, sometimes inaccurate, and always sensationalized press accounts, and when the issues involved are inextricably interwoven with the religious, moral and cultural roots of that society's people as is here the case, is itself an arrogant and unethical action.

A public disservice will be performed if any attempt is made to reach conclusions on this matter until there has been adequate time and opportunity for mature public, congressional, administrative and professional consideration of the very important issues involved. Many already suspect — I among them — that the Board has already made a determination in favor of giving free rein to those who would indulge their curiosity and conduct their human manipulations without due regard for the moral and ethical rights and concerns of the victims and the public, and without a full appreciation of the moral dangers to the actors themselves; in short, that the Board considers these hearings to be only bothersome window dressing. I sincerely hope that I am in error.

Thankfully, our society is fast growing out of those naive and lazy attitudes of recent decades which caused it to give automatic assent to any idea or activity which was advanced in the name of medicine or science as if mere association with those types of activity somehow exempted ideas and actions from moral judgment, or as if good and evil and right and wrong were plastic concepts which should and could be molded and remolded so as to best serve medical and scientific whim.

The proper moral and philosophical determinants of medical and scientific ethical standards are found outside the technical limits of those disciplines, and the practitioners of those disciplines lack the necessary objectivity and disinterestedness to alone define and enforce meaningful standards. To reduce the concept of medical and scientific ethics to nothing more than a system designed to relieve individuals of the risk and responsi-

bility for their own actions by collectively blessing those actions is to strip the concept of its commonly understood meaning and thus both defraud the public and delude those who feel they have in fact escaped responsibility.

Ultimately, society will discover the deceit and will find other more effective methods of imposing and enforcing moral and ethical standards on the medical and scientific communities.

The specific point I wish to urge you to consider and my principal reason for being here is this: The medical profession, parts of the scientific community, the government, the very fabric of our social structure, will be seriously, perhaps irreparably, harmed if any fuel is added to the already bright fire of indignation, outrage and disgusted horror that millions of Americans already feel because of the mass extermination of unborn humans which is already under way in this country.

Twenty years ago, no one in our society, and I mean no one who was or wished to be considered an ethically upright or moral person, would have ever considered proclaiming himself or herself to be in favor of abortion at all, much less mass-produced, unregulated, judicially-blessed, tax-subsidized abortion. Already this casual and callous attitude toward innocent human life has opened the door to favorable discussion and open advocacy of extermination medically directed against the physically handicapped, the mentally limited, the emotionally disturbed, the seriously ill or injured and the elderly. No longer can Americans sit back, shake their heads, speculate about defects in natural character and express their amazement at how the Germans could have ever allowed such things to happen. We know how such things can happen, how such attitudes can develop, because we see it happening here in America in the very processes which have occasioned this hearing.

I want to depart from my prepared remarks for a moment in response to some of the testimony. While we can reach out to the obviously deeply emotionally felt sense of deprivation and desire for a child, there is an old truism in the law that says hard cases make bad law. If we respond in our legal principles and our political and social principles to those emotional situations of particular individuals, we lose our objectivity and we can commit a great deal of moral wrong in hopes of alleviating some particular personal need. And I think the thing that we have got to do is not look at those few successful cases which may come along, but at the thousands of innocent human lives which would be terminated in the process.

Now, I have just alluded to Germany, and of course, you know, there were tests in Germany on living subjects in ice water and in high altitude deprivation of oxygen. The purposes of those things were good, to save fliers and sailers and that sort of thing. That didn't justify the end. A little research will quickly show that the mass extermination of Jews, Gypsies, Slavs, outspoken Christians and others carried out by or at the direction of

that weird and ruthless collection of personalities who ruled the Nazi machine was preceded and paralleled by a smaller but no less ruthlessly wicked extermination of mental patients, wounded war veterans, orphans, the unborn and the feeble elderly, conducted by, at the instigation of, and with the enthusiastic approval of many leading members of the German medical, educational, scientific, psychological and non-political bureaucratic communities.

Although not so thoroughly rooted out and punished as they might have been, thses non-Nazi perpetrators of crimes against humanity were clearly subjected to and punished in accordance with the principles enunciated in the Nuremberg trials, which are a precedent for the future punishment of similar crimes.

Many people assumed that Americans would quickly approve of or at least soon acquiesce in the practices of abortion and euthanasia. The opposite has been the case. As education about these practices spreads and understanding increases, the reaction grows. A sleeping giant has been awakened and is gradually becoming aroused. The moral heart of our society, which some thought did not exist, has been touched and is slowly but massively beginning to beat. While most people are still reacting with caution and restraint as they open their eyes to the horrors which surround them in our society, I am convinced that we are on the verge of a white hot explosion of moral outrage. The timidity caused by the shock and confusion of coming face to face for the first time with the hard and horrible facts about what many had assumed to be a near-perfect political, legal and social system is rapidly wearing off and is being replaced by a determination to root such practices out of this society and to ensure that they do not creep back in.

Most still believe that this can be accomplished by education and normal political action alone. An already large and growing number feel that regular political action combined with non-violent protest and civil disobedience is needed. A few are apparently already convinced that only direct and forceful action will be effective.

If the abortion, euthanasia, lethal human experimentation tide is not turned back and quickly, I am convinced that we will soon, within the next handful of years, experience a political and social upheaval of great magnitude. Any consideration of the ethical implications of any aspect of fetal experimentation, including *in vitro* fertilization, is shallow and incomplete as it ignores the devastating impact of that kind of activity on the moral sensibilities and consciences of a very large and rapidly growing segment of our society. It is important to note that we are not here talking about those people who are sometimes thought of as being on the fringes of society and who are frequently and in some cases continuously agitated about a whole range of things.

We are talking about those kinds of stable, peaceful, productive individuals and groups for whom phrases like "the backbone of society" were created. It would be morally wrong and socially irresponsible — and, incidentally, professionally foolish — and therefore in the most profound sense unethical for the medical and scientific communities to give in to the test-tube baby business; and for the same reasons, it would be unethical for the Ethics Advisory Board to attempt to characterize that activity as ethical. Thank you.

MR. DOMMEL: Thank you, Mr. Berry. I would like to note that the Board does not recognize these hearings as mere window dressing. I understand that you hoped you would be in error on that point; and indeed, you are . . .

APPENDIX B

[The following review by Professor Francis Canavan, S. J., was published in the August 17, 1979 issue of* National Review *magazine, and is reprinted here with permission.]*

The Problem of Punishment

by Francis Canavan

My cousin the cop told me some years ago of an armed robber who was shot and wounded while fleeing from the scene of his crime. Later, lying in a hospital bed, he said to the policeman guarding him: "You know that cop who shot me — he's crazy, man, craaazy! You don't shoot people anymore. You used to do that, but now you don't *shoot* people. That cop's crazy!" Having gone on in this vein for some time, he then said: "You know, I've done a lot of things and I've got away with a lot of things, but I don't think I'll try that anymore. I might meet that crazy cop again and he might just blow me right out of here."

I have always found that story instructive, all the more so since reading this book by Walter Berns. The book offers a calm and reasoned case for inflicting the death penalty for certain crimes. But it is an argument not so much for *capital* punishment as for capital *punishment.* Punishment is a more basic issue than the particular form it takes. As Berns says in his Introduction, when he was first getting into the subject he "learned soon enough that it was impossible to discuss capital punishment without discussing punishment in general; our penal system, so inadequate and increasingly seen to be so, is in large part the result of our attempt to avoid punishing criminals and, above all, to avoid executing them."

According to Berns, the real object of the "abolitionists" is to get rid, not merely of the death penalty, but of the idea of punishment. In the words of a writer whom he quotes, "Present-day penology . . . puts its emphasis not on retribution nor even on deterrence, but on rehabilitation. It combats crime by such reformative and essentially non-punitive means as probation and psychiatric help in and out of prisons." The most advanced abolitionists go so far as to hold "that society is unjust and, because it is unjust, has no right to punish or [even] to treat criminals."

Rehabilitation as the goal of penology, however, was first advocated in the late eighteenth century by men who had no doubt about society's right to punish criminals in order to reform them. Reform, on the other hand, was the *only* allowable purpose, and death obviously does not reform

**For Capital Punishment*, by Walter Berns, Basic Books, 214 pp., $10.95.

anyone. Hence we should substitute imprisonment in institutions intended to induce repentance and consequently called penitentiaries. Hence also our habit, even yet, of calling the penal system the "correctional" system.

But this terminology is a mere carry-over from an experiment in reform that failed more than a century ago. Prisons today are custodial operations where the state keeps criminals off the street while they corrupt one another behind bars. So nowadays we hear the argument that, since prisons do not rehabilitate, they should be replaced so far as possible by probationary programs.

Another early-modern penal theory saw the purpose as deterrence. The political theory of Thomas Hobbes in the seventeenth century and the legal theory of Cesare Beccaria in the eighteenth rested on a conception of man as motivated solely by self-interest. Men so motivated could hardly be expected to be restrained by moral considerations from attacking one another's life, liberty, and property while they remained in a "state of nature" without civil government and law. But a government established by consent and enforcing rational laws could enlighten self-interest sufficiently to persuade the mass of men that crime does not pay because it will be punished. Those not deterred by the threat would be persuaded by the actual infliction of the punishment. The link between law and morality could therefore be dispensed with.

Deterrence thus became the sole and adequate justification for the punishment of crime. Since it is the only justification, punishment must never be more severe than is necessary to deter. This premise explains the preoccupation of certain social scientists today with proving that the death penalty does not in fact deter.

Both rehabilitation and deterrence shift the focus of attention from the crime to the criminal: he is to be either reformed, or prevented by fear from committing crimes in the first place. But he is not to be punished. To inflict a penalty on him because the intrinsic character of his crime *merits* punishment reveals a barbaric desire for revenge unworthy of this enlightened age. Yet, as Berns says, "a focus on deterrence instead of on the crime may have the paradoxical consequence of undermining deterrence, or of limiting its effectiveness . . . because the population will lose sight of the immorality of crime."

More significantly, the legal profession will lose sight of it and become reluctant to punish. In Berns's opinion this has happened. After an analysis of crime statistics, he concludes: "Crime in general is not now being deterred because, compared to the amount of crime, almost no one is being punished . . . partly because our judges do not believe in punishment." Thanks especially to the Warren Court, "it became not only respectable but an index of a person's humanity to hold the opinion that criminals are, as a rule, deserving of mercy, not punishment, and that on any

disputed point they, and not the agents of the law, deserve the benefit of the doubt."

But we must come to believe again that punishment, regularly and predictably inflicted, will in fact deter, and, moreover, that crime deserves to be punished. Retribution is not a barbaric reason for punishing, it is the right reason. For only so can the community affirm the moral order on which it is based and can citizens be satisfied that justice is being done. By punishing criminals retributively, the law performs the educative function of blaming their deeds and of praising those who do not commit such deeds. Take that away, and you erode society's faith in itself as a moral community where men are trusted to obey the laws and, if they disobey, are punished as moral agents responsible for their own actions.

"Reinforcing the moral order is especially important in a self-governing community, a community that gives laws to itself," says Berns. Capital punishment, he argues, "serves to remind us of the majesty of the moral order that is embodied in our law and of the terrible consequences of its breach." The most terrible crimes justify and indeed require the most awful penalty. Berns, however, is not bloodthirsty. He believes that "only a relatively few executions are required to enhance the dignity of the criminal law" and would "allow the death penalty only for the most awful crimes: treason, some murders, and some particularly vile rapes." This is compatible with his thesis, because "retribution, unlike deterrence, precisely because it derives from moral sensibilities, recognizes the justice of mercy, the injustice of punishing the irresponsible, and limits to the severity of punishment."

I pass over Berns's very careful treatment of several subordinate questions and will mention instead a couple that he does not deal with. One is whether we can justify capital punishment without also justifying abortion. The argument that the two stand or fall together is usually advanced in terms too inane to be taken seriously, since even the American Civil Liberties Union does not pretend that an unborn child is guilty of anything. Life, like other rights, can be forfeited by crime without its following that it is not a right at all.

Another argument, proposed by philosophers whom I do take seriously, is that it is immoral to attack directly and intentionally the basic human goods that furnish the first principles of all moral reasoning, among which life must surely be numbered. On this point I should like to see further argument, addressed not simply to capital punishment, but to the whole theory of punishment, where Berns has rightly located the issue. In the meantime, I remain persuaded that we shall always have with us a certain number of people who need to be convinced that they might just get blown right out of here.

APPENDIX C

[The following is the original text of a review of Aborting America* *by J. P. McFadden for* National Review *magazine. It is reprinted here with permission.]*

Abortion Reform Revisited

by J. P. McFadden

If you have followed the abortion wars, you know about Bernard Nathanson, the abortionist who made headlines five years ago by publicly announcing that he was "deeply troubled" by having "presided over 60,000 deaths." This book (written "with" Mr. Ostling, a *Time* editor) is touted as "sure to arouse controversy and debate on this serious issue," and it undoubtedly will. It will also tell you a great deal about Nathanson, whose name — on his own evidence alone — may be forever linked with what Malcolm Muggeridge calls our generation's Humane Holocaust.

Son of a Jewish doctor and raised on Manhattan's West Side, Nathanson studied medicine in Canada in the mid-40's. While there, his girlfriend illegally aborted his child. The abortionist wanted $500 — an awful lot of money then. Bernard raised it, but the girl "haggled" the practitioner until she saved Bernard $150, blood money that ended the affair because Bernard came to think of it as an "unpayable mortgage" on himself (a qualm before the storm, you might say).

He came back to New York and became a prominent obstetrician/gynecologist. But abortion was a "continuing problem" in his private practice. Terrified women would come to him "clutching a lab report" indicating pregnancy. He would "dictate" — he never wrote it with his own hand — the name and number of one "Rodriguez," and agree to see the women two weeks later for a "checkup." Sometimes he saw them a lot sooner; "Rodriguez" evidently had spells of heavy-handedness (he caused one woman nine more operations, but he *did* prevent further pregnancies).

In due course Nathanson got into the "abortion rights" movement. He became a founding father of NARAL (originally the National Association for the Repeal of Abortion Laws, now the National Abortion Rights Action League). He was a close friend and neighbor of Lawrence Lader, NARAL's chairman and chief propagandist. This part of the book will likely cause Bernard's erstwhile pro-abortion allies to consider him a Benedict Arnold, for he provides lurid details of their plots and plans, not to mention gems like Lader's considered judgment on the opposition: " . . . and the other thing we've got to do is bring the Catholic hierarchy out

**Aborting America,* by Bernard N. Nathanson, M.D., with Richard N. Ostling, Doubleday & Co., 336 pp., $10.00.

where we can fight them. That's the *real* enemy. The biggest single obstacle to peace and decency throughout all of history." (To Bernard, although "far from an admirer of the church's role in the world chronicle" himself, this "brought to mind the Protocols of the Elders of Zion.") Perhaps because of such deeply-held private convictions, Lader became a brilliant strategist, the architect of NARAL's crucial alliance with Betty Friedan and the Feminists, who were also dedicated to the repeal of all abortion laws.

This was going on in the late 60's, well before the U.S. Supreme Court's 1973 abortion-on-demand *fiat*, but just in time for the "reform" battles in New York, where the state legislature, after bitter debate, legalized abortion up to 24 weeks in 1970. NARAL was in the thick of the fight even though it was often short of money (at one critical moment, the Playboy Foundation came through with a generous grant).

Now Bernard himself was busily performing abortions, so many that, he says, "I was referred to privately as the 'Abortion King,' 'The Scraper,' and other considerably cruder designations." Such credentials fitted him for the job of Director of the Center for Reproductive and Sexual Health, which, despite its name, became in fact the nation's largest abortion clinic.

It was quite an experience, which the author describes in great detail: blood, gore, filth (when Bernard took command, the place fell well below stockyard standards — but inspectors were sympathetic) and all. He imposed high standards, making things cleaner *and* cheaper. Even so, profits rose. Abortion was a Growth Industry (except for the "fetus" of course) from the start. Soon the daily take zoomed beyond $10,000; once he had to round up $400,000 in stray assets that just got "stashed" into banks and securities before he could invest in a bigger place to accommodate gross business of almost $5 million a year.

And so to the spring of '74. Abortion was perfectly legal from sea to shining sea; business was booming; millions of "mothers" were free of what a HEW official, one Willard Cates, would describe as the "venereal disease" of pregnancy. But suddenly Bernard feels a chill (that old Canadian quease?): "In that late spring I began to be plagued with nagging little doubts and disturbing questions." As the clinic's body-count neared 60,000, Bernard resigned. (He agreed to run the business through the summer, it's true — but after that he would abort only his own private patients.) That fall, he sent an article to the prestigious *New England Journal of Medicine,* which published it in the Nov. 28, 1974 issue.

It caused a considerable stir at the time, mainly because of his "I am deeply troubled by my own increasing certainty that I had in fact presided over 60,000 deaths" statement. Yet his conclusion was no more than this: "We must work together to create a moral climate rich enough to provide for abortion, but sensitive enough to life to accommodate a profound

sense of loss." As you can imagine, this opaque new stance did not please his former comrades, nor make him a hero to the "right-to-life" crowd (whose notions of contrition tend to be extremist). You might say he was in Limbo.

The rest of the book (by no means the least interesting part) contains his ruminations on the state of the Abortion Question. Much of it is pompous philosophizing (and hard to take given all he's told us), but it is encouraging to know that he has finally sat down and *thought* about it all. Some "pro-lifers" may be thrilled that he now opposes abortion in many cases, and thinks the Supreme Court should drastically alter its current legislation on the matter. But the deadly ambiguity remains: he smiles on tougher laws in part because new "do it yourself" abortion kits will make them unenforceable; he suggests that everybody could be pleased by perfecting artificial wombs that would both "free" the woman and spare the child, which could then be hot-housed for eventual adoption by the million couples now wanting babies — then vitiates that benevolent fantasy by reminding us that, at the current abortion-rate (perhaps 1.5 million or more this year) the demand would be satisfied in short order, and then what do we do with all the vegetating kids? And so on.

Despite its often sick-making content and tone, this book is fascinating. I doubt that many readers will long remember Nathanson's shallow thoughts or proposals, but they won't soon forget the horrors he describes so nonchalantly. Certainly *he* deserves to be remembered. If one day there is an Abortion Nuremberg, should he be in the dock? There is evidence aplenty for indictment in this book, not least his own smug summation: "There are 75,000 abortions in my past medical career, those performed under my administration . . . . and the 1,500 that I have performed myself. The vast majority of these fell short of my present standard that only a mother's life, interpreted with appropriate medical sophistication, can justify destroying the life of this being . . ." *Prima facie* admission of genocide against a class (not race) of humans? Ok, but hear the defense: "I now regret this loss of life. I thought the abortions were right at the time; revolutionary ethics are often unrecognizable at some future, more serene date. The errors of history are not recoverable, the lives cannot be retrieved. One can only pledge to adhere to an ethical course in the future." No Himmler would say that. Eichmann, maybe.

APPENDIX D

[The following is the original text of a review by Professor John T. Noonan, Jr., for the Arizona State Law Journal (Volume 1979, No. 1). It is reprinted here with permission of the author (© 1979 by John T. Noonan, Jr.).]*

The Meaning of *Dred Scott*

by John T. Noonan

"We have yet to glimpse the ultimate potential of judicial sovereignty, a theory of power set forth by John Marshall in 1803 but first put to significant use by his successor on March 6, 1857."[1] With these words Professor Fehrenbacher concludes his comprehensive account of the case which stands for the greatest assertion of judicial authority and the most resounding judicial disaster in American constitutional history prior to this decade. *Dred Scott*, said Charles Evans Hughes, was the first of several "self-inflicted wounds" of the Court.[2] "The tragedy of *Dred Scott* remains a ghost of terrifying proportions," Philip Kurland wrote in 1970.[3] It is good at this time in the Supreme Court's life to have from a thoughtful, dispassionate, and meticulous American historian a study in depth of the litigation which is such a salutary lesson in the ways of an imperial judiciary.

Fehrenbacher sets the case in the context of race, slavery, and constitutional law from the Jamestown colony to the decisions of the Taney Court preceding *Dred Scott*. The involvement of American law and American lawyers with the institution of slavery was the subject of convenient amnesia in American law schools from 1865 to 1965. Hurd's *The Law of Freedom and Bondage in the United States* and Cobb's *An Inquiry into the Law of Negro Slavery* both appeared in 1858.[4] Slave law was put aside after the Civil War. The practical learning was obsolete. The moral lesson for lawyers was too painful. Who among them could face the fact that it was lawyers who created and maintained the monstrous social system that the slave system was now seen to be?

Historians, not lawyers, first looked into the relationship. As early as 1896 Du Bois' doctoral dissertation at Harvard documented the failure of the law to suppress the slave trade before 1860.[5] Between 1926 and 1937 Catterall published abstracts of over 5000 appellate opinions involving slavery.[6] This work, however, was only a beginning. Far from being what Fehrenbacher calls "one of the monumental achievements of American scholarship,"[7] it bears a remarkable resemblance to the products of the West Publishing Company, and Catterall's summaries, scarcely more intelligible than West headnotes, have been relied on by historians at their peril. Only in 1956 did the classic work of Kenneth Stampp bring together the institutional elements of the slave system, in which law was such an

**The Dred Scott Case: Its Significance in American Politics*, by Don E. Fehrenbacher, Oxford University Press, pp. 741, $25.00.

important ingredient.[8] Stampp's work was complemented in 1968 by a second modern classic, Winthrop Jordan's study of race and slavery, *White Over Black*.[9] In the last decade there has been specifically legal history: doctoral dissertations like Nash's "Negro Rights and Judicial Behaviour in the Old South," and Flanigan's "The Criminal Law of Slavery and Freedom, 1800-1868"; essays like Wiecek's study of the emancipation of Somerset and this reviewer's analysis of the slave law made in Virginia by Jefferson and Wythe after the Revolution; and books like Cover's sensitive analysis of judicial style in the decisions enforcing the system.[10] Such and similar work affords a solid basis for Fehrenbacher in his initial 200 pages in which he provides the setting in which the case occurred.

The heart of the book follows. In it Fehrenbacher tells of Dred Scott himself, his character, his life and his family and of Dred Scott's various owners. He describes in detail the two Missouri cases — *Scott* v. *Emerson* and *Scott* v. *Sandford* — in which Dred Scott's freedom was litigated. He relates the principal arguments made on both sides in the Supreme Court; and he gives a monumentally complete analysis of the opinions of the Justices themselves. These one hundred and seventy-eight pages constitute an authoritative account of the great case.

Fehrenbacher is neither partisan nor vindictive in his view of the Chief Justice who bears responsibility for the major opinion. But patiently examining his work, he makes an excellent critique of what he finally terms Taney's "multiple errors and logical confusion," his "misstatements of fact and misreadings of documentary evidence," his "internal contradictions," and his "chronic inability to get the facts straight."[11] These mistakes, it might be added, were not the effect of senility, but the kind of misreadings and distortions which bias will inevitably produce. In Fehrenbacher's words, Taney was "the advocate instead of the judge."[12] No sadder or more conclusive judgment could be made on what was supposed to be a judicial opinion.

The most awful of Taney's misstatements were that at the time of the Declaration of Independence, blacks "had for more than a century before been regarded as beings of an inferior order" and that "they had no rights which the white man was bound to respect."[13] As a fair report of legal thinking at a time when Blackstone's attack on slavery was known to every lawyer,[14] Taney was guilty of gross suppression of the evidence. But contemporary Republicans went further: they charged that the sentiments attributed to the Founding Fathers were in fact Taney's own views. Charles Warren, the very institutional historian of the Supreme Court, claimed that the Republicans' interpretation took Taney out of context, and that "by the brazen propaganda of this lie the country was long deceived."[15] Yet, as Fehrenbacher observes, if Taney was right in his analysis, blacks in 1857 "still had no rights under the Constitution that a white man was bound to respect."[16] The Republican editors did use Taney's words out of context;

they "were perhaps not entirely wrong in regarding the clause as a fair representation of the entire decision."[17] According to *Dred Scott*, a black was forever to be less than a citizen, and no descendant of black slaves could ever be a citizen of the United States.[18] Despite the efforts of cavillers to distinguish parts of Taney's opinion as "mere dicta," Fehrenbacher rightly concludes that "none of the major rulings in Taney's opinion can be pushed aside as unauthoritative."[19] The Court committed itself to the proposition that a class of humanity could never be treated as persons.

The final portion of the book is devoted to the impact of the case in American politics of the late 1850's and in the later history of the Supreme Court. As is well known, the Republicans in general and Lincoln in particular made capital of it. The case dramatized what every close student of the subject knew, that the Supreme Court was not a neutral institution but solidly in the control of the pro-slavery party. The case provided a focus for attack on the slave power which dominated the national government. Lincoln's conspiracy charge, although exaggerated, is still worth quoting. In the bold colors of parable, it conveys the realities of judicial politics:

> We cannot absolutely know that these exact adaptations are the result of pre-concert, but when we see a lot of framed timbers, different portions of which we know have been gotten out at different times and places, and by different workmen — Stephen, Franklin, Roger and James, for instance — and when we see these timbers joined together, and see they exactly make the frame of a house or a mill, all the tenons and mortices exactly fitting and all the lengths and proportions of the different pieces exactly adapted to their respective places and not a piece too many or too few — not omitting even the scaffolding — or if a single piece be lacking we see the place in the frame exactly fitted and prepared yet to bring such piece in — in such a case we feel it impossible not to believe that Stephen and Franklin, and Roger and James, all understood one another from the beginning, and all worked upon a common plan or draft drawn before the first blow was struck.[20]

Fehrenbacher thinks Lincoln went beyond the evidence, and in general he is cautious in finding that *Dred Scott* actually worked to the benefit of the Republican vote at election time. But I should say that the impact of the case cannot be measured by elections, where other issues of course were intermixed. The impact must be primarily measured by its galvanic effect on Lincoln and company. For them it was a godsend. Fehrenbacher himself sensibly concludes that the case is "like most relevant antecedent conditions of a historical event" in that, if you isolate it, you cannot prove it was a *sine qua non* cause.[21] Historical causes occur in clusters and, taken singly, seem to be too weak to cause anything. Yet as Fehrenbacher writes, *Dred Scott* "was a conspicuous and perhaps an integral part of a configuration of events" which led to a violent political revolution.[22]

Part of the Republican conspiracy charge was that *Dred Scott* itself was a case set up by the pro-slavery party, that there was no real controversy between the parties, and the defendant had been persuaded to play his role

by the Democrats.[23] After examining these charges, and the counter Democratic claim that the Republicans (!) had set up the case, Fehrenbacher finds the conspiracy "elusive" and concludes the controversy was real.[24] Although this judgment is not unreasonable, I would reach a different conclusion.

The undisputed facts are these: In 1830 Dred Scott was the slave of Peter Blow. At some point in the early 1830's he was sold to John Emerson, who died in 1843 leaving his entire estate to his wife Irene for life, remainder to his daughter.[25] As Scott was personalty, Irene had full power to dispose of him, subject to accounting to the remainderman for the proceeds.[26] In 1846 Scott sued Irene in the state courts of Missouri alleging that he was a free man by virtue of his residence with Emerson on free soil. Pending decision of the case he was put in the custody of the sheriff, who hired out his labor. The trial judge, Hamilton, a Philadelphian, favored Scott in his rulings, and the litigation involved two trials and two appeals to the Supreme Court of Missouri. Finally, in 1852, this court ruled on Scott's main legal claim by holding that Missouri would not recognize the law of a free state conferring freedom on a slave within its borders.[27] The jury verdict for Scott was thereby overturned, and the case was remanded to Hamilton. Apparently Scott could have had one more trial but he seemed to have nothing left to litigate, and the court would have had, in effect, to direct a verdict for the defendant.[28] Meanwhile, she had married Calvin Chaffee and moved to Springfield, Massachusetts.[29]

To this point there is little doubt that the contest had been genuine: there is no other way to account for the legal maneuvers resulting in two trials and two appeals. At this point Scott seemed finally defeated. The defendant, however, was in a jurisdiction where she could not use his services personally and where even ownership of a slave might have been embarrassing to herself or to her husband, who two years later was to run for Congress in a district unfriendly to slavery. The case, not yet famous, had become highly political in Missouri and must have been well known to any Missourian interested in the interplay of law, politics, and slavery. Now began a series of events which give rise to conflicting interpretations:

1. Remanded by the state supreme court, *Scott* v. *Emerson* did not go to trial or judgment in the trial court in 1852. Instead, according to an entry of the court for January 25, 1854, it was "continued by consent, awaiting decision of Supreme Court of the United States."[30]

2. With a new lawyer, Scott in 1853 began a new case in the federal circuit court. His lawyer was now Roswell Field, a Vermonter and convinced anti-slavery man. He sought damages of $9,000 for the assault and false imprisonment of Scott and his family, alleged to be free.[31]

3. The defendant in the new case was not Irene but her brother, John Sanford, a New Yorker, who was served with process while visiting Missouri on business. Sanford's counsel agreed to a Statement of Facts reciting that his client had acquired Scott by purchase from John Emerson.[32]

4. The case was tried on the pleadings and Agreed Statement in May 1854. The defense did raise the jurisdictional objection that Scott was a Negro and so had no standing to sue as a citizen, but it did not raise the more potent jurisdictional objection that Scott was a slave and so had no standing to sue as a citizen. It did not raise the technical but effective objection to the plaintiff's pleading that allegations of trespass against Scott and against his wife Harriett could not be joined and had to be pleaded separately.[33] It did not even plead that the main issue was *res judicata* in that Sanford was in privity with Irene so Scott was bound by the ruling on Missouri law in *Scott* v. *Emerson*.[34] Instead, the defense merely repeated the *reasoning* which had succeeded in this case; and the court adopted this view of the law in charging the jury, which returned a verdict in Sanford's favor.[35]

5. The decision was almost at once appealed to the Supreme Court and docketed in it, December 30, 1854. Montgomery Blair took Scott's case, Henry S. Geyer and Reverdy Johnson, Sanford's. All lawyers were unfeed.[36] Blair was a Missourian in Washington, with connections with the Democratic administration but with Free Soil sympathies. Geyer was United States Senator from Missouri, who had been elected by the pro-slavery party in the Missouri legislature. Johnson was "probably the most respected constitutional lawyer in the country."[37]

6. The case was argued to the Supreme Court in February 1856. In March Sanford became insane and was confined to an asylum until his death in 1857.[38] At no point is he recorded as taking an active part in the direction of the case. Indeed he appears to have been of so little consequence to anyone that his name was misspelled "Sandford" in the official report, and the case has come to us as *Scott* v. *Sandford*.

7. Because of disagreements in the Court and recognition of the case's political implications in a presidential election year, the Court put it over for reargument, and no decision was announced until after Buchanan's inauguration in March 1857.[39] Buchanan had corresponded with two members of the Court about the decision and was assured of a "judicial rescue" which he "desperately desired."[40] He was also shown in advance, Fehrenbacher brilliantly suggests, Taney's opinion or a portion of it.[41] Two days after the inaugural, Taney gave the opinion of the Court, ruling that as Scott was a slave he had no status to sue; and that Congress had no power to exclude any species of property, including slaves, from the territories.

8. Two months later Sanford died, and three weeks after the event, Scott and his family were manumitted. Sanford's estate was not probated until 1858, and no reference was made to him as the owner so recently and so decisively vindicated by the highest judicial authority in the country.[42] Instead, the owner purporting to free Scott was one Taylor Blow, a son of Scott's old owner of 1830; he referred to a title to Scott acquired by quitclaim from Irene and her husband Chaffee.[43]

What is to be made of these facts? The claim for substantial damages has the look of a genuine controversy; so has the appearance of an anti-slavery lawyer for Scott in Missouri. But these indicia of conflict are overshadowed by Scott's almost immediate liberation. Who would take a case to the Supreme Court, win it, and throw the victory away if he were genuinely concerned about the property at stake? If a humanitarian impulse was present, why was it dormant till the case was decided; why was it not exercised in 1850 or 1852? The timing of Scott's manumission is consistent only with a desire to obtain a Supreme Court opinion on the issues his case presented.

If the freeing of Scott points to collusive litigants, one's suspicions are increased when one looks again at what happened in 1852. Irene Emerson had won. All she had to do was to go through the formality of a jury trial where Judge Hamilton would now be bound to give instructions in accordance with the opinion of the Supreme Court of Missouri. Why did she not press her advantage? To say she had lost interest answers nothing. She could have freed Scott if she wanted to. She could have sold or given Scott to her brother and let him stand in her shoes. She neither freed him nor made a profit out of his sale. Why, unless she was persuaded by her brother to let the second case be set up?

Every doubt, I should say, is confirmed when what was done in 1853-1855 is inspected. The continuance in the state court is "*by consent*," i.e. by the agreement of both sides. There could have been only one reason for Irene or John Sanford to consent. It was not to help Scott: that would have been done by freeing him. It was not to keep Scott: that would have been done by moving for a jury trial in the trial court. The only reason is, in fact, given in the trial court's entry, "awaiting decision by Supreme Court of the United States." Already it was planned to take *Dred Scott* to Washington.

This analysis is further borne out by the Agreed Statement of Facts. Sanford agreed to a fiction — that he had his title from John Emerson. Fehrenbacher thinks that his agreement was "a slip of the pen," John being written for Irene, or that it was to save Irene embarrassment, or that it was "to simplify the facts," or finally that "it proves nothing."[44] But even the most mediocre lawyer would not have stipulated away his client's case by a slip of the pen, or to spare Irene, or to simplify the facts. If John Sanford was Scott's owner, his privity with Irene was crucial. If his counsel agreed to a different statement, a lie, it proves a great deal: it proves that the suit was collusive.

Fehrenbacher thinks that the charge of collusion "breaks down completely" when Sanford's defense in the circuit court is examined: none of the big political issues were raised.[45] But of course what the defense did was completely consistent with collusion. The jurisdictional argument was not pressed, and the really decisive procedural argument, *res judicata*, not raised. The defense made sufficient and economical use of *Scott* v. *Emerson*. It saved the big issues for Washington; no one was interested in the circuit court's opinion on these matters.

Finally, the counsel Sanford had in Washington clinches the question. Geyer was at the heart of the pro-slavery party in Missouri. When he steps into the case, there is the clearest evidence of its political significance; and it is legitimate to infer that such a sagacious and informed person was aware of its political potential when the case was framed in 1853 in St. Louis. His co-counsel, Johnson, acted at the request of "a southern gentleman," according to his own account of his involvement.[46] The lawyers

loom far larger than the uninterested and ultimately insane Sanford. It was their case, not his.

Fehrenbacher describes Scott's lawyer Blair as a devoted Free Soiler. But he also sets out several facts which are at least curious. First, Blair was a slaveholder. Second, as a member of Lincoln's cabinet, he showed himself a blatant racist and negrophobe. Third, he received a patronage plum from the Pierce Administration *after* he agreed to take Scott's case.[47] The plum has not been shown to be a *quid pro quo*. But its bestowal does show that the Democratic Administration was not distressed by the part Blair would have in the proceedings before the Supreme Court.

One or two facts still have to be accounted for. Why did Roswell Field agree to bring the suit? Was he suckered into it? I should suppose not, but that like all advocates he had convinced himself and cherished the hope he could even convince the pro-slavery Supreme Court. Moreover, agreeing to the case was the only way to give Scott a chance; otherwise, Irene or John Sanford moved for trial and judgment in *Scott* v. *Emerson*. Why did Sanford risk a suit in which he might be liable for substantial damages? Here there is no direct evidence, but an inference seems justified. If Scott was to be freed at the end, then a deal must have existed: if Scott should win, no damages would be collected.

Fehrenbacher comes to a different conclusion, but at several points he shows an awareness of facts or inferences that militate against him. He wonders why the "Scott forces" began such an unpromising battle in the federal courts: "The Scotts themselves, it appears, would have been far better served if the money and energy expended in further litigation had been directed instead toward purchasing their freedom."[48] Of course, they would have been better served, but the alternative suggested was not open, if Scott's owner had decided to permit the test case. He admits that Sanford's acknowledgment of ownership was "convenient" and that the agreement on the facts had "the appearance of coziness"[49]; but he does not draw the inferences I find irresistible. He admits, after Sanford's insanity, that Geyer and Johnson's "real client" was "the slaveholding South."[50] He even notes that one of Blair's main arguments to the Court was to the actual prejudice of Dred Scott who was "becoming more clearly a pawn in a political game."[51] But on the evidence he has himself presented, Scott was a pawn beginning in 1853, although a pawn granted a special immunity from any disastrous consequences. The real client was "the slaveholding South," and from 1852 on the pro-slavery party stood "awaiting decision by Supreme Court of the United States." The messages to Buchanan from members of the Court in 1857 only capped a long process in which an unreal controversy had been manipulated to a political end.

What the pro-slavery party wanted from the Supreme Court was what they got. In Buchanan's words, it was the "final settlement . . . of the

question of slavery in the Territories."[52] Henceforth, no "human power" would have "authority to annul or impair this vested right." Buchanan's "final settlement" was a curious anticipation of the term's use in Nazi Germany: in each case the desire to deny the humanity of a class of human beings was operative. The final settlement held as long as the Supreme Court's opinion was the last word on the meaning of the American Constitution. It was left to Lincoln, in his First Inaugural Address, to doubt the width of that Court's powers and to question whether the people had "practically resigned their government into the hands of that eminent tribunal."[53]

In the United States today, in a dominantly secular culture, there is a tendency to accept the Supreme Court as a supreme teaching authority. The Constitution functions as the Torah, a divine text designed in another age but made applicable to the present by the voice of its authorized interpreters, the Justices. The Court is credited with a superior wisdom. Reading Fehrenbacher's massive study, one is forcefully reminded that a few elderly males given authority and life tenure by a political process are neither repositories of special wisdom nor immune from the fierce political storms of their day; that indeed they may think themselves peculiarly situated to still them; and that astute politicians will maneuver for political decisions from these wielders of political power. The results are not likely to be less political then *Scott* v. *Sandford*.[55]

NOTES

1. Fehrenbacher, *The Dred Scott Case*, 595.
2. Charles Evans Hughes, *The Supreme Court of the United States* (New York, 1928), 50-51, quoted in Fehrenbacher, 573.
3. Philip B. Kurland, *Politics, The Constitution and the Warren Court* (Chicago, 1970), 200, quoted by Fehrenbacher, 715.
4. Thomas R.R. Cobb, *An Inquiry into the Law of Negro Slavery* (Philadelphia, 1858); John Codman Hurd, *The Law of Freedom and Bondage in the United States* (Boston, 1858).
5. William E. Burghardt Du Bois, *The Suppression of the African Slave Trade to the United States of America, 1638-1870* (New York, 1896).
6. Helen Tunnicliff Catterall, *Judicial Cases Concerning American Slavery and the Negro* (Washington, D.C. 1926-1937).
7. Fehrenbacher, 33.
8. Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (New York, 1956).
9. Winthrop Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Chapel Hill, 1968).
10. See, respectively, A.E. Keir Nash, "Negro Rights and Judicial Behaviour in the Old South," Ph.D. dissertation, Harvard University, 1967; Daniel J. Flanigan, "The Criminal Law of Slavery and Freedom, 1800-1868," Ph.D. dissertation, Rice University, 1973; William M. Wiecek, "*Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World," *University of Chicago Law Review* 42 (1974) 141; John T. Noonan, Jr., "Virginian Liberators," in Noonan, *Persons and Masks of the Law* (New York, 1976); Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, 1975).
11. Fehrenbacher, 359-360.
12. *Ibid.*, 362.
13. *Scott* v. *Sandford* 19 How. 393 (1857) at 407.
14. See William Blackstone, *Commentaries on the Laws of England* (London, 1765) Book I, ch. 14.
15. Charles Warren, *The Supreme Court in United States History*, rev. ed. (Boston, 1932) 2, 303, quoted by Fehrenbacher, 348.

16. Fehrenbacher, 348.
17. *Idem.*
18. *Scott* v. *Sanford* at 410, 423.
19. Fehrenbacher, 533.
20. Abraham Lincoln, "A House Divided," Speech to the Republican State Convention, Springfield, Illinois, June 16, 1858, in Roy P. Basler, ed. *The Collected Works of Abraham Lincoln* (New Brunswick, 1953-1955) 2, 465-466. The names suggested Stephen Douglas, Franklin Pierce, Roger Taney, and James Buchanan.
21. Fehrenbacher, 566.
22. *Ibid.*, 567.
23. *Ibid.*, 275, citing in particular a New York Republican newspaper on the defendant's role.
24. *Ibid.*, 275-276.
25. *Ibid.*, 248.
26. See *Broome v. King* 10 Ala. 819 (1846); cf. A. James Casner, *American Law of Property* (Boston, 1952) sec. 4.108.
27. *Scott* v. *Emerson* 15 Missouri 576 (1852).
28. The printed opinion at 587 simply describes the case as "remanded." As the ground for appeal was error in instructions to the jury, Scott presumably could have had a new trial. Fehrenbacher, 267, without citing any particular document says, "The case was then remanded to the trial court for final action in the form of a judgment implementing the decision." If, in fact, the Supreme Court of Missouri's mandate excluded a retrial, the arguments I shall make as to Sanford's collusion are all the stronger.
29. Fehrenbacher, 256.
30. *Ibid.*, 267.
31. *Ibid.*, 275-276.
32. *Ibid.*, 662.
33. See Fehrenbacher, 276-78.
34. See American Law Institute, *Restatement of Judgments* (St. Paul, 1942) secs. 70 and 89.
35. Fehrenbacher, 279.
36. *Ibid.*, 281 and 665.
37. *Ibid.*, 282.
38. *Ibid.*, 662.
39. The postponement of the case with an eye to the political advantage of the Democrats was part of Lincoln's "conspiracy" charge. While saying Lincoln had "no evidence," Fehrenbacher, 280, admits "that some justices, at least, were reluctant to render such a controversial decision on the eve of a major political campaign." It is, I should think, a question less of evidence, but of how this political reason for postponement should be characterized.
40. Fehrenbacher, 312.
41. *Ibid.*, 314.
42. *Ibid.*, 684.
43. *Ibid.*, 421.
44. *Ibid.*, 662.
45. *Ibid.*, 275.
46. *Ibid.*, 288.
47. *Ibid.*, 281 and 665-666.
48. *Ibid.*, 271.
49. *Ibid.*, 274.
50. *Ibid.*, 288.
51. *Ibid.*, 287.
52. James Buchanan, "Third Annual Message to Congress," *Messages and Papers of the President*, ed. James D. Richardson (Washington, 1913) 4, 3085-86, quoted by Fehrenbacher, 524-525.
53. Abraham Lincoln, "First Inaugural Address," *Collected Works*, ed. Basler, 4, 262 quoted by Fehrenbacher, 555.
54. See e.g., *Roe* v. *Wade* 410 U.S. 111 (1973) and James F. Csank, "The Lords and Givers of Life," *The Human Life Review*, Vol. III, No. 2, Spring 1977, 75-100 and Charles Rice, "Dred Scott Case of the Twentieth Century," *Houston Law Review* 10 (1973) 1059-86.

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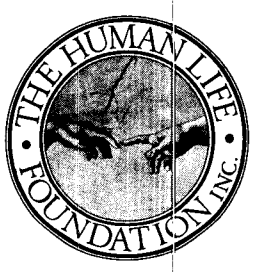
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