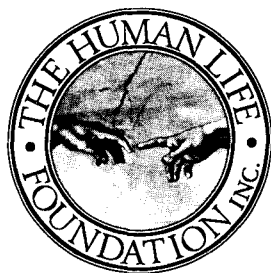


# the HUMAN LIFE REVIEW



SUMMER 2004

*Featured in this issue:*

Sam Brownback on . . . Ronald Reagan's Abortion Essay

William Murchison on . . . . . An Old-fashioned Slugfest

George McKenna on . . . . . Bishops vs. Politicians

Ellen Wilson Fielding on . . . . . Hard Cases, Easy Cases

Patrick J. Mullaney on . . . . . Unborn Life's Protection

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## **30th Anniversary Tribute**

Maria McFadden • Ronald Reagan • John Muggeridge

William P. Clark • Francis J. Beckwith

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*Also featured in this issue:*

## **Justice Blackmun and the Little People**

by Mary Meehan

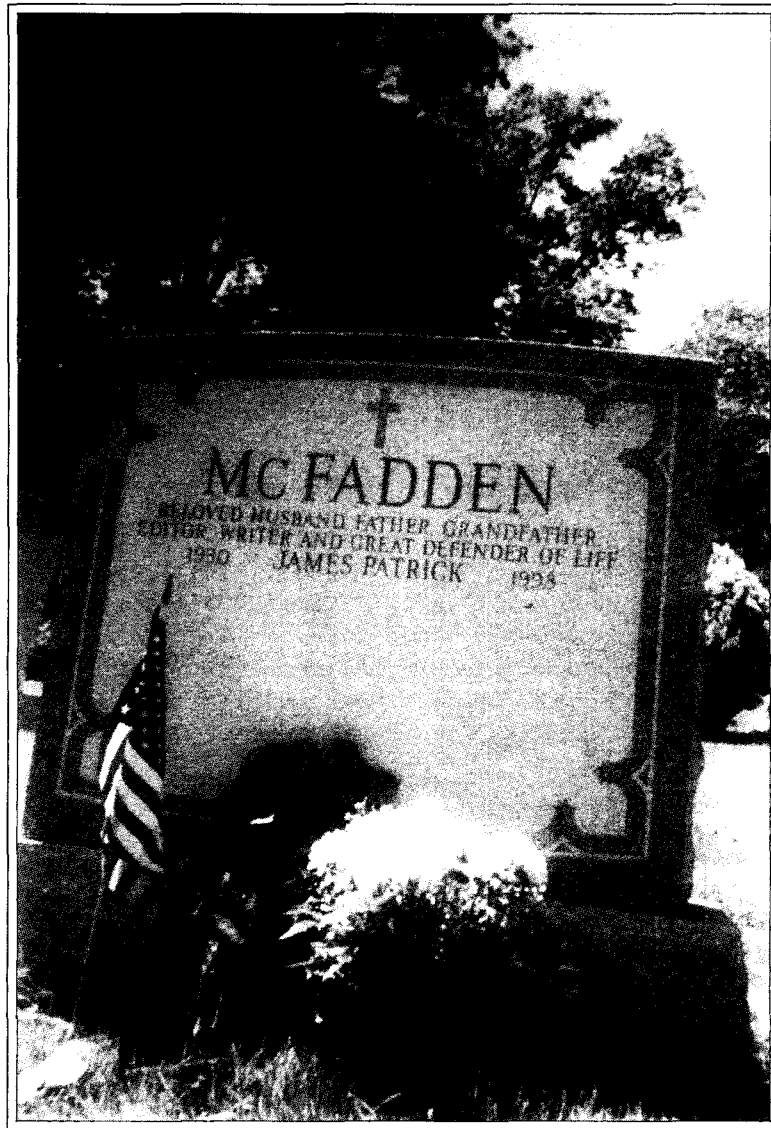
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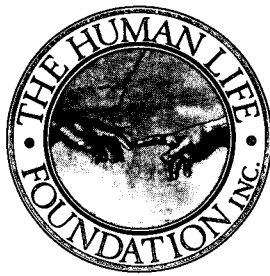
New York, New York

ABOUT THIS ISSUE . . .



*"The great majority of the American people have not yet made their voices heard, and we cannot expect them to—any more than the public voice arose against slavery—until the issue is clearly framed and presented. That is exactly what your review has done so well for a decade. Keep at it, for four more years and beyond."*

—Ronald Reagan, in a note to J.P. McFadden, December 19, 1984



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# the HUMAN LIFE REVIEW

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## INTRODUCTION

“**W**ITHOUT DOUBT, this will be the most widely read article ever published here. We expect that it will be read long after this journal has passed away.” So wrote our founding editor J.P. McFadden, introducing President Ronald Reagan’s groundbreaking essay, “Abortion and the Conscience of the Nation,” in the Spring 1983 issue of this *Review*. As I write 21 years later, my father’s prediction may be more true now than ever before: the death of the President on June 5 of this year has led to a re-awakened interest in his essay (for more on that, see our special section, beginning on page 55); many younger Americans may be reading it for the first time. And as we celebrate our *thirtieth* year of publishing with this special anniversary issue, our journal is alive and quite well (a fact which would most definitely please J.P.).

We are honored to have as our lead “‘Abortion and the Conscience of the Nation,’ Revisited” by Sam Brownback, the senior United States Senator from Kansas. Soon after Reagan’s death, Senator Brownback spoke eloquently on the Senate floor about “the Reagan Cultural Doctrine”—his testimony echoed that of several other prominent Americans who insisted that the late President would never countenance using his suffering from Alzheimer’s to support the destruction of embryos for stem-cell research. Here, Senator Brownback looks at Reagan’s “soul-stirring policy-essay” as a powerful part of the rich legacy he has left us, one in which “the unifying theme was a tremendous respect for each and every human life—wherever it lived, at whatever stage of development it had reached.” “This sensibility,” writes Brownback, “prompted Reagan to insist that the Soviet Empire was evil, and to demand of a new Soviet leader that he ‘tear down this wall!’; it also led him to proclaim that ‘until and unless someone can establish that the unborn child is not a living human being, then that child is already protected by the Constitution, which guarantees life, liberty and the pursuit of happiness to all of us.’”

Senator Brownback asks whether “Twenty-one years later, and thirty-one since *Roe*,” we are closer to—or further away from—having a culture of life. In the spirit of Reagan himself, Brownback answers with an unflinching look at the truth, joined with a determination to trust in the ultimate goodness of the American people. “The shining city still has a conscience, and to this conscience we must appeal on behalf of those who have no voice: the unborn.”

Matters of conscience this election year have made the reception of Communion for pro-choice Catholics a hot point of contention. Enter Senior Editor William Murchison. Though Episcopalian, Murchison rightly sees that “Americans of every philosophical stamp, or none at all, have a stake in the outcome of ongoing attempts by some Catholics to introduce moral decisiveness to a controversy famous for laxity and evasion. The decisiveness consists in asking pointedly, meaningfully: How can you say you believe what you won’t defend?” John Kerry recently declared

that he believes life begins at conception—and yet he has done everything he can, politically, *not* to defend the unborn. Ought this to affect his standing in the Communion line? It's hard to hear an intelligent discussion about this over the din of the dimwitted media coverage—as Murchison writes: “eucharistic theology isn't the mass media's intellectual long suit”—which makes us all the more pleased to have Murchison's marvelous essay. He insists the Communion question must be one of moral gravity: the Body of Christ is “a single reality; awful, terrible, in the sacred sense of those domesticated adjectives.” Whether or not one thinks it prudent to deny Communion at the altar, it is *long* overdue for the Church to insist there are serious “spiritual consequences that flow from failing to deflect assaults on unborn life.”

Why has the Church been so inadequate in educating and disciplining the faithful *re* abortion? Professor George McKenna gives us answers in a fascinating essay of moral clarity and historical insight. He begins by recalling the time a Catholic archbishop actually *excommunicated* a judge, and was lionized by the press! You're right, it can't be a contemporary story: the time was the 60's, and the issue racism. Then, Catholic Bishops and priests took strong steps to educate their flocks about racial justice. The contrast with the abortion issue today is striking: McKenna argues that too many Catholics have not been educated either about the realities of legal abortion in America post *Roe* or their own Church's teaching. McKenna gives his own view of the Communion debate, and urges the American Bishops to “throw open the windows—again”: to preach and teach about the reality of abortion, and about the alternatives—the assistance available, for example, from crisis pregnancy centers. Again, abortion is not a “Catholic issue”: it is an American moral issue, and Catholics *could* be part of the solution instead of a significant part of the problem.

We are all familiar with the axiom “hard cases make bad law”—those who enter into a debate about abortion, for example, expect to be hit almost immediately with hard cases like rape, incest, or life of the mother, even though these make up a tiny fraction of the millions of abortions performed. But in her graceful essay for this issue, Senior Editor Ellen Wilson Fielding asks if people aren't tempted to use the “easy case” as well to justify overthrowing traditional mores. For example: she cites a child who seems to be thriving in institutionalized day care, despite the fact that countless studies, done “across the ideological spectrum,” have *proven* that such day care has deleterious overall effects on children. Those who want or need to rely on day care will reference the *exception*, not the rule. As Fielding takes us through the negative evidence concerning day care, and then divorce, for children, she builds a strong argument for protecting the traditional structure of marriage, the “basic building block of human society—of all human societies with a track record that we know about”—against both hard *and* easy case arguments.

A “basic building block” of American society is the protection of “life, liberty and the pursuit of happiness.” Whether or not the protections of our Constitution should

## INTRODUCTION

include the unborn is the subject of our next article. Attorney Patrick J. Mullaney became irrevocably caught up in the issue of personhood for the unborn when he was the lawyer for Alex Loce (*New Jersey v. Alexander Loce et. als* 1991-1994), in which a father fought for the right to protect his unborn child's life (see *HLR Spring*, 2001). In this article, Mullaney continues a debate taken up in the pages of *First Things* between Professor Nathan Schlueter and Judge Robert Bork over the personhood of the unborn. He grants Bork's point, that the Constitution does not say anything about abortion, but asks: "Why shouldn't the constitutional status of unborn human life be considered on its own merits . . . after all, unborn life is a class of life, and life, not abortion, is the enumerated due-process interest we are considering."

As Mullaney points out in his conclusion, if the Constitution *were* to be interpreted as guaranteeing the inherent value of human life, it would certainly be a "radical change from the current state of affairs." *Roe v. Wade* discovered a right to abortion in the Constitution, and *Doe v. Bolton*'s interpretation of women's "health" in effect gave women a right to abortion on demand. The private papers of *Roe*'s major architect, Justice Harry Blackmun, were recently made available at the Library of Congress—and our dedicated research journalist Mary Meehan was ready. After countless hours spent pouring over Blackmun's papers, she has written a blockbuster article for us, one which incorporates the previously unrevealed information with a wealth of already published details about Blackmun and the *Roe* court. Meehan's article tells the intriguing story of Blackmun the man and *Roe* the decision. Finding there was "much to like" about Blackmun, and a "good deal to admire," she grapples with a great mystery: How could someone who was dedicated to helping the "little people" of the world become so indifferent to the killing of the littlest people of all? It's a mystery ever present in American culture.

In addition to painting a vivid portrait of Blackmun and his fellow justices, Meehan gives us a tremendously valuable analysis of the conditions and pressures that led to the *Roe v. Wade* decision, a decision that even some pro-choice lawyers admit was poorly-reasoned and *wrong*. Yet *Roe* set a precedent that is even being used, as I write, to disallow as "unconstitutional" a ban on the heinous procedure of partial-birth abortion.

It's a world of cruel ironies, and yet, if we are to stay in the fight, we must keep our spirits up. And so we are once again blessed to share with you the cartoons of Nick Downes—wait until you see the surprise on page 55!—which we hope will soothe your spirits with a giggle or two. May you enjoy the issue.

MARIA McFADDEN  
EDITOR

## <sup>66</sup>Abortion and the Conscience of the Nation,<sup>99</sup> Revisited

Sam Brownback

On Saturday, June 5, 2004, President Ronald Reagan was called into eternity. The depth of America's emotional outpouring in tribute to him was testimony to his character, and to the esteem in which his countrymen held him. Sadness naturally accompanies the passing of a loved one, but the time for weeping passes. We will always miss the Gipper, but we needn't look far to see the impact he left on this country. Reagan may have taken leave of this life, but he has left us his legacy.

That legacy was one of bold achievement in domestic, foreign, and social policy. Its unifying theme was a tremendous respect for each and every human life—wherever it lived, at whatever stage of development it had reached. This sensibility prompted Reagan to insist that the Soviet Empire was evil, and to demand of a new Soviet leader that he “tear down this wall”; it also led him to proclaim that “until and unless someone can establish that the unborn child is not a living human being, then that child is already protected by the Constitution, which guarantees life, liberty and the pursuit of happiness to all of us.”

On January 14, 1988, Reagan made a simple yet profound presidential declaration of “the unalienable personhood of every American, from the moment of conception until natural death.” Reagan articulated this principle—the Reagan Cultural Doctrine—throughout his years in the White House. He did so most notably in the spring of 1983 when—in a rare gesture for a sitting U.S. president—he submitted a soul-stirring policy essay to an intellectual journal. The article was “Abortion and the Conscience of the Nation,” and it appeared in the *Human Life Review*.

The essay was typical of Reagan: clear, cogent, and filled with plain common sense. Essentially, Reagan argued that abortion violates human rights, and that it has a harmful effect on all people, not just its immediate victims. He noted that medical science, Western ethics, history, and the opinion of the American public are all on the side of life—as witnessed by their opposition to infanticide, which is closely linked with abortion. He appealed to Americans' support of human rights for all, whether born healthy or handicapped. He urged us to be souls of prayer, to work for

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Sam Brownback is the senior United States Senator from Kansas.

positive change in society, and never to lose heart.

Twenty-one years later, and 31 years after *Roe v. Wade*, we need to revisit “Abortion and the Conscience of the Nation.” We need to reflect on whether we are closer to—or further away from—having a culture of life. Perhaps most important, we need to contemplate what personal and legislative steps we must take to draw out the best in the freedom-loving, life-loving American spirit.

America retains her greatness and her goodness because a tremendous respect for every life continues to undergird our guiding principles. Reagan appealed to this respect for life—this culture of life—and the highest ideals in us all. It is to these ideals that we must urgently appeal today. Certainly, our culture may appear a little shaky right now—from same-sex unions in Massachusetts and San Francisco, to a comeback of eugenics, to abortion providers who give no thought to the pain of an unborn child. In fact, however, we are better than this. America’s culture is better than this.

We have previously waged great cultural battles in America, and in these battles Divine Providence has led the way to tremendous victories, such as the abolition of slavery and deliverance from tyranny. True, victory is not for the faint-hearted—but America has proven herself, time and again, the home of the brave.

Reagan appropriately alluded to the struggle against slavery in his essay. He compared the fight for the civil rights of African Americans with the fight for the rights of the unborn. This analogy is just as relevant today. Reagan wrote: “This is not the first time our country has been divided by a Supreme Court decision that denied the value of certain human lives. The *Dred Scott* decision of 1857 was not overturned in a day, or a year, or even a decade. At first, only a minority of Americans recognized and deplored the moral crisis brought about by denying the full humanity of our black brothers and sisters; but that minority persisted in their vision and finally prevailed. They did it by appealing to the hearts and minds of their countrymen, to the truth of human dignity under God.”

As Reagan so eloquently noted, the Supreme Court is hardly infallible. Because of the sweeping *Roe v. Wade* and *Doe v. Bolton* Supreme Court decisions in 1973, abortion is available for all nine months of pregnancy, for any reason or for no reason at all. In *Roe* and *Doe*, seven justices unjustly dictated that the killing of the unborn is legal. This judicial activism was certainly not the voice of America but those two decisions nonetheless inaugurated an open season on the unborn; as a consequence, around 40 million



babies have been killed in the womb since 1973. This statistic is all the more astonishing when you consider that the number of unborn American children killed in the past 31 years is much higher *than the total number of Americans killed in the entire history of our nation's wars*.

But bright days are ahead for our country, if we will only embrace its higher ideals. We caught a brief glimpse of what this looks like in the aftermath of 9/11. While mourning the loss of those murdered in the heinous terrorist attacks, Americans paused to reflect on the most important things—giving thanks for their lives and the lives of their loved ones. Our foremost principle, enshrined in our Declaration of Independence, remains as true as ever: “We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life . . .” Life is beautiful, and Americans do cherish it. After 9/11, churches and memorial services were packed, as Americans recognized the continuing operation of Divine Providence within our vast world and universe.

Americans' spiritual reaction to 9/11 also manifested itself in selfless behavior. In the first few difficult days after the attacks, our nation's transportation infrastructure ground to a standstill; I heard many stories about perfect strangers driving to airports to take stranded travelers into their own homes. People turned off their televisions and spent a little more time with their families. The culture of death and its lies were spurned, because our conscience had been pricked.

This is profound evidence that the “shining city on a hill” still stands, even amidst the lashing storm of a culture of death. The shining city still has a conscience, and to this conscience we must appeal, on behalf of those who have no voice: the unborn. It is this kind of appeal that succeeded in delivering rights and freedom to African Americans; it will succeed again, in establishing protection for the unborn in their right to life, liberty, and the pursuit of happiness.

We are armed in this appeal with the best evidence that medical science has to offer. Science is about the pursuit of truth in the service of mankind, and science tells us that the unborn child, from the moment of conception, is a human life. When those of us in the pro-life movement say that human life begins at conception, we are speaking about biology—not ideology, not belief, not ethics. Part of the difficulty in the current debate is caused by the (sometimes willful) confusion between science and ethics. Some engage in demagoguery against those who believe that all human life deserves protection, labeling them religious zealots who are trumpeting purely personal

beliefs and seeking to impose those beliefs on others.

Ironically, though, it is these self-proclaimed defenders of science who are guilty of trampling on scientific truth. Nowhere is this more evident than in the debate over embryonic stem-cell research. A human embryo, unborn child, or human fetus is, biologically speaking, a young human life. To assert that it is not a life, or that it is merely a “potential life,” is not a scientific statement. To assert that a human embryo is not a human life is to make an assertion of a personal belief completely unsupported by the facts of science; it is comparable to asserting that the sun revolves around the earth. Science unambiguously declares that the young human embryo is a human life.

Unfortunately, not everyone in this debate is looking at biology. But once both sides acknowledge the scientific truth—that the young human embryo or unborn child is a human life—then we can start to address what Reagan posited as the real question: “What is the *value* of a human life?” This is where the issue moves from biology, pure and simple, to ethics.

And for Reagan—as for all those in the pro-life movement—the ethical answer is just as clear as the scientific one: *The value of a human life is truly priceless*. America was built upon the founding principle that every human being is endowed by its Creator with an inalienable right to life. And this founding principle was far from arbitrary. For the Founders, the inalienable right to life, granted by Divine Providence, was the linchpin that held everything together. In a letter on slavery, written in 1782, Thomas Jefferson went so far as to ask: “Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep forever.”

Jefferson was writing about slaves. But his statement is equally applicable to unborn children, because they, too, are undeniably human. Every human life—from the moment of conception until natural death—is sacred because, as our Founders believed, every human being has been created in the image of a living and holy God. Human beings are an end unto themselves, not a means to an end—even a good end, such as the advance of scientific knowledge.

In a passionate plea at the National Prayer Breakfast in 1994, Blessed Mother Teresa of Calcutta said: “I feel that the greatest destroyer of peace today is abortion, because it is a war against the child, a direct killing of the innocent child, murder by the mother herself. And if we accept that a mother

can kill even her own child, how can we tell other people not to kill one another?" On the value of human life, there was no greater authority in the 20th century than Mother Teresa. She was an incredibly beautiful woman; I have never met a person with a more beautiful soul. My meeting with her was brief, but I will be forever affected by her words and the love and fire that I saw in her eyes when I helped her into her car as she departed from the U.S. Capitol in the spring of 1997. This was a woman who loved everyone. Her authoritative words should be reflected upon by every abortion provider: "Please don't kill the child. I want the child. Please give me the child. I am willing to accept any child who would be aborted and to give that child to a married couple who will love the child and be loved by the child."

Mother Teresa may be gone, but her sisters continue to live that spirit of charity every single day. As a society, we must do the same: We must cherish *every* life. If we abandon respect for the life of the one-hour-old human embryo or the one-month-old fetus, we are truly on the slippery slope that leads to the abandonment of the positive law against murder—which is, after all, based on the premise that life is a gift of God.

**B**uilding on this insight, Reagan set a clear choice before us—a choice that is perhaps even more pertinent today. He wrote that "as a nation, we must choose between the sanctity of life ethic and the 'quality of life' ethic." In his 1983 essay, Reagan lamented the case of Baby Doe, who was legally starved to death because he was mentally handicapped; an Indiana court permitted him to be starved because he would not have been able to enjoy a normal "quality of life." This was a travesty, and Reagan was correct to abhor this instance of raw judicial activism. The very same issue is posed by the recent case of Terri Schiavo. As of this writing, Schiavo has been rescued from starvation because the American public (along with Florida Governor Jeb Bush) raised their voices in a proclamation that life is worth living, that life—even if its "quality" is below that considered acceptable by some—still has incredible value. In her case, millions of people made it clear that the value of every human being must be defended, without exception.

Embryo, fetus, infant, child, and adult are categories of human development; they are all human life. Whether one is physically healthy or ill, emotionally healthy or ill—these, too, are categories of human life, and thus do not make individuals less worthy of protection. As Reagan wrote: "We cannot diminish the value of one category of human life—the unborn—without diminishing the value of all human life." All human life—no matter

how it is categorized, or what its “quality” may be—should be esteemed and valued.

There are, of course, some callous souls in our land. Consider, for example, the lack of reverence for life displayed by the mother who “selectively” aborted two of three healthy children so that she could continue to live the kind of a life she preferred. (Her story was told this past summer in a *New York Times* article headlined “When One Is Enough.”) And consider the abortion providers who testified in the recent partial-birth-abortion-ban trial in New York. In one exchange, the judge asked the abortionist: “Do you tell [the mother] whether or not it will hurt the fetus?” The abortionist responded, “The intent [is] that the fetus will die during the process of uterine evacuation.” The judge persisted, “Ma’am, I didn’t ask you that . . . Do you tell them whether or not that hurts the fetus?” The abortionist flippantly replied: “I have never talked to a fetus about whether or not they experience pain.” Another abortionist, when asked by the judge whether partial-birth abortion hurts the baby, responded, “I don’t know.” The judge pressed, “But you go ahead and do it anyway, is that right?” The abortion provider responded, “Yes, I go ahead and do it.”

**F**ortunately, this chilling extremism does not represent the feelings of most Americans. What Reagan wrote in his essay comes closer to our general attitude: “Anyone who doesn’t feel sure whether we are talking about a second human life should clearly give life the benefit of the doubt. If you don’t know whether a body is alive or dead, you would never bury it. I think this consideration itself should be enough for all of us to insist on protecting the unborn. . . . Obviously, some influential people want to deny that every human life has intrinsic, sacred worth. They insist that a member of the human race must have certain qualities before they accord him or her status as a “human being.” . . . Every legislator, every doctor, and every citizen needs to recognize that the real issue is whether to affirm and protect the sanctity of all human life, or to embrace a social ethic where some human lives are valued and others are not.”

There are brighter days ahead because the public is moving to the side of life, and our national conscience does remain sensitive. We are practical people, but we have a big heart and know right from wrong. We call our shots with our mind, informed by our heart.

Scientific advances have already contributed to this pro-life trend, by increasing our knowledge of life inside the womb. Today’s 4-D Ultrasound technology leaves little doubt that a human being is alive and growing inside her mother’s womb. Consider, too, the testimony of medical

expert Dr. Kanwaljeet Sonny Anand in the Nebraska partial-birth-abortion trial. Dr. Anand testified that “the fetus is very likely extremely sensitive to pain during the gestation of 20 to 30 weeks. And so the procedures associated with the partial-birth abortion . . . would be likely to cause severe pain.”

The public’s understanding of this issue has also been bolstered by the legislative debate over partial-birth abortion, parental notification, the Born-Alive Infants Protection Act, the Unborn Victims of Violence Act, and the Human Cloning Prohibition Act. Upcoming debate over the Unborn Child Pain Awareness Act—and about the adverse impact that abortion has on women—will also reach the hearts and minds of Americans.

There is special cause for optimism in the fact that young people, more than any other demographic, are increasingly pro-life. Perhaps this is because many of their peers—more than 40 million of them—have been aborted. One of these aborted children could have grown up to be one of my own children’s playmates; another could have become one of their future spouses. This is a tragedy, and our young people know it.

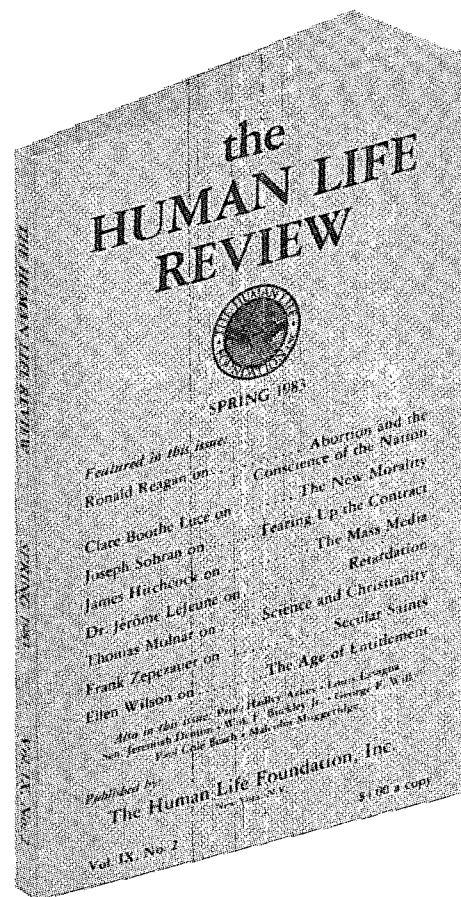
To be an American in the fullest sense is to be a life-loving, freedom-loving soul. Reagan concluded his *Human Life Review* essay with a great appeal for prayer and perseverance in the pro-life struggle that lay ahead. He wrote that “there is no cause more important for preserving that freedom than affirming the transcendent right to life of all human beings, the right without which no other rights have any meaning.” Reagan knew that affirming the sanctity and dignity of every human life would not be an easy or painless task. Accordingly, he urged prayer, diligence, and trust in Divine Providence; and he appealed to the example of William Wilberforce, the great English statesman, whose lifelong crusade for the abolition of slavery in the British Empire was fulfilled on his deathbed. We need the same, if not more, intensity of prayer now.

Our Supreme Court’s decision in *Roe* is certainly not the final word on the issue of abortion, just as the Court was not the final word on slavery in *Dred Scott*. Our system gives us the opportunity to rectify past wrongs. It is my fervent hope and prayer for America that we base our laws on what science tells us: namely, that the young human embryo is a human life. I believe that I will live to see the end of the abortion industry, and the sanctity and dignity of every human life affirmed. Until then, abortion will continue to prod the conscience of our nation. Great labors remain before us, but the rights and lives of unborn children are absolutely worth our efforts.

Reagan was our first great pro-life president, and surely others will follow in his footsteps. His legacy endures and the pro-life movement

SAM BROWNBACK

continues to make steady progress. We have come a long way since Reagan's 1983 essay, and we have a long way to go, but we are on the right track. On behalf of the unborn, let us pray and persevere; and may God bless America.



## An Old-fashioned Slugfest

*William Murchison*

All right, all right. Far from sticking his nose into the internal affairs of the Roman Catholic Church, an Episcopalian—the one talking at this moment—probably should undertake to keep lip tightly zipped. Much of the highly publicized stuff that prominent Anglicans dispense these days on matters theological and moral is, I confess, stunningly awful. I am particularly taken with the spacious viewpoint of one of our northeastern bishops, who, queried a few years ago regarding his commitment to scriptural authority, declared: “The church wrote the Bible. The church can rewrite it.” The Bible as Weblog: you have to admit it’s a striking concept.

But enough about us. What about the flowering of the debate this year in Roman Catholic circles concerning the imputed duty of elected Roman Catholics to support and protect, legislatively speaking, unborn life?

It is not that an Anglican would dare try to arbitrate such a scrap or even to kibitz the principals. On the other hand, Americans of every philosophical stamp, or none at all, have a stake in the outcome of ongoing attempts by some Catholics to introduce moral decisiveness to a controversy famous for laxity and evasion. The decisiveness consists in asking pointedly, meaningfully: How can you say you believe what you won’t defend?

Large considerations push their way forward: religious freedom, religious duty, the premise of America as a land committed to the sovereignty of God, the relevance of that commitment amid the fast-growing taste for some gauzy fragment called “pluralism.”

The bare bones of the matter have long been visible: Particular Catholic politicians who “personally” oppose abortion but decline to get in the way of women wanting them; particular Catholic bishops who have resolved to call these same politicians to account—advising them that a Catholic politician of this sort is a contradiction in terms.

Among these politicians is the Democratic nominee for president of the United States, John Forbes Kerry. This elevates the matter to some prominence. So do statements by particular Catholic prelates—Archbishop Raymond L. Burke of St. Louis led the way months ago—to the effect that Catholic politicians who support abortion rights should not receive, or be allowed to receive, the consecrated Body of Christ. The refusal of communion

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would signify the infidelity of these politicians to a crucial Christian principle, that of respect for life: that very life which the Author of Life restored to His crucified Son, that Son whom catholic Christians receive at the Altar, upon their tongues or outstretched hands.

*Corpus Christi*; “The Body of Christ;” “The Body of our Lord Jesus Christ, which was given for thee . . .” (for so the Anglicans still sometimes say)—various formulas, a single reality; awful, terrible, in the sacred sense of those domesticated adjectives. What comes to pass as bodies of Christian people receive Christ’s Body at the Altar? According to one ancient liturgy, “Christ our God to earth descendeth, our full homage to demand.”

You have to know—no other way of looking at it is possible—that it is serious business, this matter of the Mass, the Eucharist, the Divine Liturgy, the Lord’s Supper. There have to be some rules, some requirements, some stringency in how the invitation list is composed. No less an authority than St. Paul advised, in this spirit, “Wherefore whosoever shall eat this bread, and drink this cup of the Lord, unworthily, shall be guilty of the body and blood of the Lord.” It may be that the apostle was attached to the Vatican in some bureaucratic capacity or other, but I have not heard of it. What we hear from him on this question, as on everything else, qualifies as “mere Christianity,” to apply C. S. Lewis’ characterization.

Notwithstanding that only a few bishops had by summer aligned themselves with Burke’s intentions or program, the controversy was already achieving some legs. Forty-eight Capitol Hill Catholics, including some regarded (at least by the *New York Times*) as anti-abortion, protested in May to the Cardinal Archbishop of Washington, D.C. The letter they wrote called this prospective use of pastoral sanctions “deeply hurtful.” (If modern politics has an overriding purpose, it must be that of ensuring no member of a major constituency ever feels “hurt” about anything.) A month later, the U.S. Conference of Catholic Bishops weighed in. The bishops’ statement, adopted 183-6, was far less yielding than many of us, a decade ago, would automatically have predicted, as coming from bishops. It didn’t lay down a unitary national policy. It did call on “those who formulate law” to work against “morally defective laws,” and it warned Catholics in public life to protect human life and work against legal abortion, “lest they be guilty of cooperating in evil and sinning against the common good.”

It may be inferred that eucharistic theology isn’t the mass media’s intellectual long suit. On the other hand, newspeople recognize and value a good old-fashioned slugfest when they see one shaping up. This was one for sure: bishops vs. politicians, right-wingers vs. women, fundamentalists vs. progressives, all of it against the backdrop of the most bitterly contested



presidential election in decades. It takes the breath away.

For which it may be high time in the case of us all, Catholics or Protestants, Democrats or Republicans. The whole matter of the “personally opposed” politician who publicly supports “abortion rights” is ripe for addressing, or perhaps just owning up to. Particular public figures need detaching from the large screens behind which, Wizard of Oz-like, they pump out noise and smoke. Politesse, weariness, moral ambiguity, fear, a pragmatic weighing of particular politicians’ assets and liabilities—in different degree, these and related factors have over the years allowed self-styled political progressives to serve two masters: the truth and the feminist lobby. Not even to notice, far less care, is to abdicate the moral responsibility inherent in any decision to seek and assume public office.

No election cycle could possibly settle such questions once and for all. What this cycle might achieve is our introduction to the habit of looking at the moral element in politics. Politics as morality? Clearly a divisive, Cromwellian way of looking at things. No, thanks. But then think of politics divested of moral considerations—as with abortion. The will of the majority, or of those with the majority of the guns, is perforce superior to all other considerations.

We need carefully to ponder the bishops’ premises, and those of others, in challenging the right of a Catholic elected official to dismiss the church’s moral guidance as to abortion. By now, of course, we know fairly well how the land lies. Down this trail we have traveled hundreds, thousands, of times. The idea, as we generally receive it, is that the Supreme Court trumps the Vatican. Catholic politicians have for the past couple of decades clucked their tongues helplessly over their inability to rise to the occasion and oppose and resist abortion. We’d-love-to-but . . . is their carefully formulated position.

Then-New York Gov. Mario Cuomo set the tone and tempo in 1984 when he spoke at Notre Dame University on “Religious Belief and Public Morality.” Cuomo affirmed, among other things, that “to assure our freedoms, [Catholics] must allow others the same freedom, even if occasionally it produces conduct by them which we would hold to be sinful.” In other words, though Cuomo might himself “accept the church’s teaching on abortion”—a rather pallid way of putting it, I should think—he wasn’t about to “insist you do,” too, lest by doing so he should imperil fellow Catholics’ “right to be Catholic.” The American scheme of things, as Cuomo depicted it, seems to rest upon religious quietude. The governor wrung cheers and tears with passages designed for the purpose. Not least in his debt were fellow Catholic politicians

glad to see him running interference for them, distributing whys and wherefores ready for the taking. John Kerry has scooped up his own handful of these: voicing to an Iowa newspaper recently his personal opposition to abortion, his belief that “life begins at conception”; elsewhere letting it be known that “I don’t tell church officials what to do, and church officials shouldn’t tell American politicians what to do in the context of our public life.”

The Kerry website, without going into detail about the glories of aborting your unborn child if you jolly well want to (best not to arouse needless fears among the almost-converted?) expresses shock that “women are witnessing an unprecedented erosion of their basic rights,” what with attempts to “gag doctors from even mentioning abortion to their patients, freeze funding for family planning across the world, [take] away their constitutional right to choose, and [ban] medical procedures even when a woman’s health is at stake.”

The rhetoric here is important to note: “erosion of rights”; “take away”; “ban”; “church officials”; “tell American politicians what to do”; “our public life.” Some pretty disturbing stuff must be going on out there on the pro-life front, with the Church providing cover to the perpetrators, who are out there trying to “ban” things. Not only is candidate Kerry going to throttle their efforts, he wants to make quick work of any suspicion he might submit to orders from the Vatican. It’s “church officials” against . . . you. Thus Kerry would put it. He’s on your side, kid. No professionally employed religious authority is going tell President John Forbes Kerry “what to do.” If any telling gets done, he’ll do it himself.

There is a whiff here of John Kennedy’s assurances to Southern Baptist audiences in 1960 that he wasn’t running to become the Vatican’s man in the White House; however, that was a time with religious sensibilities considerably different from ours. The tendency then was to regard religion as a natural player in public affairs: not the principal attraction but a large one certainly. Kerry is addressing different concerns. He seems to want it known that no religious concerns, period, never mind whose, are going to cancel out the American people’s solemn secular will. This is a rather odd thing to be saying in a country proud of its religious commitments and undertakings. An odd thing but maybe also one that reflects where America could be moving—and where it will move faster and more decisively, the longer we pretend not to notice pretense like Kerry’s.

That pretense, I say, is of honest Yankee refusal to kiss any Pope’s solid gold ring. Which is ludicrous. What we witness actually is dishonest refusal to acknowledge the continuing claim on us of the ancient tradition of life’s

sacredness. The Vatican is one important party to that tradition, but not the only party by any means. The tradition is that of the West and East alike, from earliest Christian times.

Legal respect for unborn life—prior to *Roe v. Wade*—was founded on several factors, chief among them the divine origin of life. As the historian W. E. H. Lecky would note more than a century ago, pagan Rome and Greece had scant sympathy with unborn life. The Catholic Church, by contrast, came down strongly on the other side, denouncing abortion (in Lecky's words) "not simply as inhuman, but definitely as murder. In the penitential discipline of the church, abortion was placed in the same category as infanticide."

None of these considerations cut much ice with the *Roe* court, whose majority opinion, in 1973, reduced the religious point of view to little more than an interesting historical footnote. This figured. By 1973, the justices had spent a decade deconstructing the traditional view of public life and religious life as complementary rather than opposed; of church and state as dual pillars of the American experiment; of the religious tradition as foundational in the American concept of freedom. Talk about rewriting Scripture!

The notion foisted on us by the jurisprudence that began with outlawing recitation of a generic classroom prayer is that secular life and religion have relatively little to do with each other. Oh, well, maybe military chaplains, God's name in the national motto, a few things like that we might put up with; but let's not overdo it. To this effect the judicial establishment counsels.

The stout statements of founding fathers like Adams and Washington, attesting to the importance of religion in public life, escape judicial notice for the most part. An epistolary metaphor by Thomas Jefferson—"wall of separation between Church & State"—outweighs other testimonies, so far as the high court is persuaded, as to how the fathers meant us to understand church-state interaction. The Ten Commandments, we recently learned, may not be displayed in an Alabama court building. Offering "the Lord thy God" room on state property to advertise his wares might persuade casual onlookers that the State of Alabama attributed to God some special consequence and status. That would never do! Twenty-first-century jurisprudence instructs us (if not in so many words) to treat God as an opinion—a pretty strong but hardly definitive one. Nor does there presently seem much likelihood of reducing the height of that wall of separation the justices apparently have set their hearts on constructing.

What an American is obliged to assume, on Kerry's and Cuomo's joint showing, is that religious witness in our time has been reduced to impotence—for public purposes at least. Oh, well, maybe there's pragmatic value

in the enduringness of the religious conscience. But such a conscience has to fend for itself. We can't have the state taking its cues from the kind of people who want to ban abortion. For that matter, we can't have the state even appearing to agree with what is coming out of an archbishop's mouth. The ancient assumption of a natural law, filling the whole of life with testimony to the wonder and the power of God, would seem an idea seriously past its prime. Can we start to understand now where secularism is getting us?

That barren locality, with its abysses and slippery slopes, does rather detract from the vision that a good Catholic boy like Kerry might be expected to have encountered somewhere along the way—a vision given memorable form in 1960 by the Jesuit priest John Courtney Murray, in his classic work, *We Hold These Truths*. Forty-four years, considering all that has happened in and to America since Fr. Murray wrote, have made clearer than ever before the nature of the relationship he sought to limn between the secular power and the Church.

The founding fathers, he observed, thought “the life of man in society under government is founded on truth, on a certain body of objective truth, universal in its import, accessible to the reason of man, definable, defensible. If this assertion is denied, the American Proposition is, I think, eviscerated at one stroke.” And on from there: “[T]he first article of the American political faith is that the political community, as a form of free and ordered human life, looks to the sovereignty of God as to the first principle of its organization.” As opposed to secularism, which sees “no eternal order of truth and justice . . . no universal verities that require man's assent, no universal moral law that commands his obedience.” It sees instead majority rule as “the highest governing principle of statecraft, from which there is no appeal.” And the churches, what are they under such a dispensation? Merely “private associations organized for particular purposes” and clearly subordinate to the state.

That would not count as a description of the world which Christians traditionally imagined themselves to be inhabiting—a world described in the old hymn as “my Father's,” wherein “the morning light, the lily white declare their Maker's praise.” For knowledge of where that world has gone you might make application to the U.S. Supreme Court: though some sense of the matter, and the accumulating force of the new doctrine, may be gathered on the Kerry website.

Brother to the abortion controversy is the fracas—growing fast now—over the use of fetal stem cells, hypothetically to find a cure for Parkinson's

and other diseases. John Kerry and his team buy into the notion that President Bush, by hemming in the options of researchers (viz., permitting them to use only “old” stem cells) is again dancing to the tune of the professionally religious. And of course we can’t have that, any more than we can have religious-inspired restrictions on the right to abort a pregnancy.

In debate, definition can be all-important. You seek to define a proposition the way that best serves your tactical purposes. Succeeding at that enterprise, you force opponents to fight on your turf. In this manner the stem-cell debate is fast shaping up. This thing is not about dead fetuses, we are assured; it is about science, and the prospective saving of real lives—your father’s, your child’s, your own—from nameless horrors. Religious arguments have to make room for more spacious considerations than just the cavils and carpings of—borrowing from Fr. Murray—“private associations organized for particular purposes.” A creature of God—a fetus—we might once have supposed worthy of some unusual respect in these matters. But God might prove an overbearing participant in the discussion, possibly stopping the whole thing short and certainly interfering with those who entertain different views of His authority. What would happen to “pluralism” in such an environment? That’s right—we wouldn’t have it. And, for reasons the elite media would gladly explain to us, that would be very bad indeed.

Those Catholic bishops warning Catholic politicians of the spiritual consequences that flow from failing to deflect assaults on unborn life—such bishops are acting possibly with a keener sense of the moment than they themselves may sometimes perceive. Their intervention comes not a millisecond too soon, even if it invites the resentment of editorial writers, columnists, and of course Catholic politicians worried both about seeming too religious and not religious enough.

Speaking of such, and laying aside natural law considerations, have any of the objecting parties looked much into the fruitful thought of that old-fashioned Anglican, Edmund Burke, who laid out convincingly, for his time and our own, the strategy for responsible representation?

Burke’s “Speech to Electors of Bristol” has no peer, except in other of his writings, as a guide to the conscientious public servant.

He declared: “To deliver an opinion is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear, and which he ought always most seriously to consider. But authoritative instructions, mandates issued [e.g., you *will* at all times respect *Roe v. Wade*!], which the member is bound blindly and

implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience—these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our Constitution . . .” There was something to be said in other words for conscience—for seeking to serve the people better than the people might imagine themselves at a given moment capable of being served.

Here was Burke on yet another occasion: “No man carries further than I do the policy of making government pleasing to the people. But the widest range of this politic complaisance is confined within the limits of justice . . . I never will act the tyrant for [the people’s] amusement. If they will mix malice in their sports, I shall never consent to throw them any living, sentient creature whatsoever, no, not so much as a kitling, to torment.”

To take in that last reference to living victims is to shiver with an intensity Burke could never have contemplated. But, then, you see, he believed “that religion is the basis of civil society, and the source of all good, and of all comfort.” Resuscitated, imported to America (whose resistance to the crown he applauded), fitted up with his own website and political action committee, the author of such sentiments would find his prospects narrow and himself shrilly accused of anti-pluralistic behavior. Would that stop him? No more, probably, than the same considerations inhibit courageous Catholics stepping forward today, speaking unwelcome truth to immense and daunting power.

And that truth? A fundamental one: You can’t do this thing; not in “our Father’s world” you can’t.

## Throwing Open the Windows—Again

George McKenna

Who remembers Leander Perez? Probably not many people, because his fifteen minutes on the national stage were played out long ago, in the 1950s and early '60s. He was a Louisiana state judge and the undisputed political boss of Plaquemines Parish in Louisiana. He was also a hard-core racist. In 1965 he provided this helpful summary of his racial views: "Animals right out of the jungle. Passion. Welfare. Easy life. That's the Negro." But Perez went beyond offering opinions; he put them to work by preventing the county's large black population from voting, getting decent housing, attending schools or using any public facilities with whites. And he used his powerful influence to keep the Catholic schools all-white. This put him on a collision course with New Orleans Archbishop Joseph F. Rummel. In 1953 the Archbishop began gingerly moving toward integrating the parish's Catholic schools. He made the case for it in a pastoral letter, "Blessed Are the Peacemakers," which he ordered to be read at all the archdiocese's churches. The next year, after the Supreme Court's 1954 decision in *Brown v. Board of Education*, he went further, predicting that the Church would integrate its schools before the public schools did, and in 1956, in still another pastoral letter, he flatly declared that "racial integration is morally wrong and sinful" and ordered integration to begin.

Perez and his followers exploded in wrath. Challenging his right to speak in the name of the Church and insisting that the Bible permitted segregation, they picketed the archbishop's residence and organized boycotts to cut off donations. A cross was burned on his lawn. One of the Catholic schools was torched, and at another school someone drained the fluid of the schoolbus's brakes. Undeterred, Archbishop Rummel stepped up the pressure at his own end, threatening to excommunicate Perez and two other Catholics who were active in resisting his orders. When they persisted, he finally followed through, excommunicating them shortly before Easter of 1962.

In what many now call "the liberal press" but in those days was just called the press, Archbishop Rummel was hailed as a hero. *Time* and *Newsweek* portrayed him as a courageous man of the cloth defending basic Church doctrines against challenge by powerful politicians. Under the headline, "The Archbishop Stands Firm," *Time* said: "It is unmistakable church doctrine

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that segregation, in schools and church, is against the law of God.” CBS gave Dan Rather a full hour to narrate a program entitled, “The Priest and the Politician,” which left no doubt as to who was in the right.

Recently, in what appeared to be a quibbling attempt to minimize the valor of Archbishop Rummel, the aptly named *Times-Picayune* of New Orleans reported that he came to his decision “reluctantly,” because he “was worried that he might overplay his hand and split the church.” But this only underscores his bravery and depth of character. He did not enter rashly into this emotional confrontation. He knew that he was confronting not just Perez and the two others but the majority sentiment of whites in Plaquemines Parish, including, probably, the majority of Catholics—and a substantial portion of his own clergy. It was a confrontation which he earnestly wished to avoid. In the end, rightly or wrongly, he concluded that there was no alternative to this most extreme form of discipline.

**R**ummel’s dilemma bears some obvious parallels to the one facing America’s Catholic bishops today. The vast majority of Catholic Democratic officeholders, and a minority of Catholic Republicans, regularly support abortion, euthanasia, and the killing of human embryos for research. To say that their actions directly violate Church doctrine seems almost beside the point. Yes, the Church is pretty much against killing innocent people; you can find that in the Catechism. You can also find it in the Declaration of Independence, the U.N.’s Universal Declaration of Human Rights, and in the hearts and minds of civilized people everywhere. Until recently in this nation’s history, American officials of all religions embraced the principle without qualification: it was applied to the healthy and the sick, to newborn babies and to children yawning in the womb, to young people and to old people suffering from dementia. Now, for many politicians and judges, the principle no longer applies across the board. Certain categories of people can be killed at the will of others. These exemptions have resulted in the death of at least 45 million since 1973.

For reasons which they may have to explain some day, a number of Catholic lawmakers now openly flout the warnings of their Church against complicity in the killing. The bishops of the Church are supposed to take care of their flocks, instruct them and, when necessary, discipline them. What are they supposed to do at this point? Are these the only alternatives: stand back and do nothing while professed Catholics participate in gross violations of human rights, or impose a penalty which, as Archbishop Rummel realized more than forty years ago, may risk overplaying their hand and splitting the church?

Before we can even consider these questions, we have to ask this question:



Why are we just starting to talk about this *now*? Catholic politicians have been doing this for decades. It was in the 1970s that Senator Kennedy changed from saying that abortion “is not a legitimate or acceptable response to any problem of society,” as he did as late as 1976, to actively supporting it. The same was true of the late Senator Daniel Patrick Moynihan, who has been credited with inventing the “personally opposed” line that Governor Mario Cuomo later made famous in a speech at Notre Dame University. Abortion was debated at the Democrats’ 1976 presidential nominating convention, but the party sponsored a plank backing *Roe v. Wade*. By 1980 the debate was all but over: the Democratic party platform that year backed the public funding of abortion. The Democrats had become the abortion party, and few Democratic Catholic politicians cared, or dared, to dissent.

As early as 1976, then, some 28 years ago, the Catholic bishops could have begun a campaign of unequivocally condemning abortion—and not just condemning, but explaining that abortion is wrong, that it is a killing process visited upon the most vulnerable and defenseless human beings. They could have talked about the humanity of the unborn child, the beating heart, the brainwaves, the child in the womb sucking her thumb. All of this was known at the time; ultrasound was making it visible even to resisting eyes. The bishops could have begun a long-term public education campaign on abortion. And, in fairness to them, it must be acknowledged that they did speak out—at first. But in the face of an enraged reaction by pro-abortion Democrats, they flinched.

One of the first to speak out was Joseph Cardinal Bernardin, who was president of the United States Catholic Conference (USCC) from 1974 to 1977. He roundly condemned abortion and urged Catholic politicians to take a public stand against it. But he was unprepared for the reaction. The late ’70s marked the high-water point of radical feminism, and his remarks unleashed a torrent of abuse against the Catholic clergy: What right did these celibate males have to talk about women’s reproductive rights? What did they know about bearing children? What did they even know about sex? Mixed with these taunts was what appeared to be a resurrection of the old nineteenth-century nativist charge that the Vatican was trying to “meddle” in American politics.

Cardinal Bernardin was literally dumbstruck, as were most of his brother bishops. For two or three years they said nothing, or next to nothing, about abortion, and when they finally started talking again, it was in a new, softer, language. Of this, more later. The intriguing question is why they retreated in the face of a transparent campaign of intimidation. These men were not cowards. One can easily imagine them standing beside Archbishop Rummel,

fearlessly defying the racial bigots and thugs in Plaquemines Parish. So why, less than twenty years later, did they retreat in the face of anti-Catholic bigotry?

To understand the reason, we can't focus only on the bishops. We need a larger canvas and a broader brush. We have to look at the Catholic clergy as a whole, the priests and the nuns, and also the activists in the Catholic laity. And we must do so in the context of a certain time frame.

The best time to start is the year 1962, the year Archbishop Rummel excommunicated Leander Perez. In 1962 the curtain was going up on "the sixties." John Kennedy was in the White House and John XXIII was Pope. Vatican II began in the fall of that year. Civil Rights marches and sit-ins were breaking out all over the South, and they were being met with police dogs, fire hoses, not to mention TV cameras and sympathetic reporters from New York City. Where did that leave Catholics? Well, if they were attentive Catholics they would have marked what the Pope said when he convened the new Council: "I want to throw open the windows of the Church so that we can see out and the people can see in." Even then, three years before *Gaudium et Spes* made it official, the most earnest and serious Catholics wanted to bring the Church into the modern world, to engage it in dialogue, to teach it and to learn from it.

Over the next five years it seemed clear to these same earnest and serious Catholics that the people whose views were the most compatible with the teachings of the Church were those fighting for civil rights and peace. It didn't matter that many of them were not Christian in any sense, either in belief or in their lifestyle. What mattered was that they were moving America toward goals that were essentially Christian, so it was not the business of Catholics to make pharisaical judgments about their religious views or their personal behavior. They were doing the Lord's work, and that was enough. So they all marched together, including the priests and the nuns and earnest, sensitive lay people—people who hadn't marched in anything before except religious processions. They were helping to throw open the windows of the Church so that they could be seen in the company of their new friends. Their friends were liberals.

The "L" word. The word has become so naughty that liberals don't want to be called that anymore. (They're "progressives" now.) But "liberal" wasn't an unpopular label back in the early '60s. It was associated with the New Deal, which was very popular. Not everyone in the liberal movement was Catholic but the movement as a whole was philo-Catholic. No sane liberal politician would ever accuse the Catholic Church of "meddling" in American politics. Republicans of old sometimes talked like that, and so did the

Klan, but not Northern liberal Democrats. Sometimes they even welcomed a little Catholic meddling, especially when they came looking for support for their economic programs. To serious, devout Catholics, then, it made sense both morally and politically to align themselves with liberals in the 1960s. What they were unprepared for were the changes that came over liberalism during the decade. Abortion was never even mentioned in the first edition of Betty Friedan's *The Feminine Mystique*, published in 1963, but by 1968 it was one of the key items on the agenda of Friedan's National Organization of Women. In the next few years the normalization of homosexuality was added to the list of liberal causes (it was seen as a new civil rights movement). Finally, a distinctly anti-Christian streak was starting to appear in liberalism—evident, for example, in the use of courts to oversee the removal of all Christian references and symbols from the public square. The Catholic Church was often singled out for especially unfriendly notice, partly because, of all the major Christian denominations, its teachings were the most sharply opposed to the new liberal agenda, and partly because, well, it was the Church. It was a hierarchical organization based on authority, tradition, and revelation, and it seemed to rank obedience and self-restraint higher than autonomy and self-expression. It was the antithesis of everything the new liberals stood for, and they were not shy about identifying the Church as one of their chief enemies. In just five years, liberalism had gone from Catholiphilic to Catholiphobic.

The Catholics who had allied themselves with the liberals were uncomfortable with these new developments. But they were always assured that *they* were fine, it was just that their Church needed to change with the times. Hadn't their own Vatican II said as much? Couldn't they work within their Church to make it more understanding—get a little dialogue going? All we ask is that . . . By successive stages, "all we ask" escalated, and each time the impression was left that this was absolutely the last demand, that if the Catholics could bring their Church in line with *this*, it would finally be in a position to address the modern world. And so the liberal Catholics would comply. They would go back to their church halls and their Catholic journals and try to convince their confreres that these new demands were really in line with "the spirit of Vatican II." But then, a year or two later, the bar would be raised a little higher. There would be new demands.

We need to understand the plight of liberal Catholics. Many of them probably suspected that they were being rolled—but what else could they do? Where else could they go in the late '60s and the early '70s? To Richard Nixon? To George Wallace? There was nothing left, then, but to cling to the

horse they had mounted in the early '60s, even though the horse had somehow mutated, and seemed to be racing out of control. So they stayed on through the '70s, demonstrating their support for all the new causes, from feminism to environmentalism, while leaving much of the heavy lifting on abortion protests to the laypeople who came out to the "March for Life" in Washington every January. The Democrats' official endorsement of abortion finally moved the bishops into public criticism of pro-abortion politicians. But then there came that furious reaction.

What struck them dumb, what silenced them for three years and then caused them to water down their message, was the fact that the fury was coming from their *friends*. These were the people who, literally or figuratively, they had marched with for twenty years. Most of the bishops were cradle Democrats to begin with, and their party ties had grown even firmer during the civil rights and antiwar years. Now their friends were reacting with the most shrill, coarse, bigoted language, sneering at their celibacy, calling them male chauvinists, telling them to get their rosaries off their ovaries. What have we done to deserve this?, they asked their friends. And their friends told them: What you have done is to side with the Republicans and Ronald Reagan. The same year, 1980, that the Democrats endorsed taxpayer-funded abortions, the Republicans went so far as to propose a Constitutional amendment banning them. It had become a party issue.

The bishops, then, needed to put the abortion issue into some context that could more even-handedly hold politicians to account. And in 1983 they came up with it: the seamless garment. In 1983, at a lecture at Fordham University in New York, Cardinal Bernardin linked the Church's pro-life stand with its opposition to nuclear war and the death penalty, in what he called a "consistent ethic of life." Then he went further, linking the "right to life" with the "quality of life." "Those who defend the right to life of the weakest among us must be equally visible in support of the quality of life of the powerless among us. . . . Such a quality of life posture translates into specific political and economic positions on tax policy, employment generation, welfare policy, nutrition and feeding programs, and health care."

At a stroke, it appeared, Cardinal Bernardin had put his fellow Catholics back into the good graces of liberal Democrats. Now a politician who had voted for abortion could say, "but look at my whole shopping cart: look at my votes against cutting welfare, against tax cuts for the rich; and for a nuclear freeze. And look over here! I voted for national health insurance and for raising the minimum wage." Then he might point his finger at his opponent's shopping cart, noting he had voted "wrong" on all these other "life" issues. Therefore, the pro-abortion politician could conclude, "if you're

looking for the most consistent right-to-lifer, I'm your candidate. I'm not perfect, but I'm closer than my opponent."

The flaw in this reasoning, as a number of critics have pointed out, is that it equates prudential questions with questions directly concerning human life. Welfare limits, for example, do not necessarily reduce people's quality of life. They may actually increase it by nudging people out of dependency and into productive work. Similarly, tax cuts may provide more jobs for poor people, while minimum wage laws may actually decrease employment. Or, they may not. The point here is not to take one side or the other in these prudential arguments but merely to insist that they have to be *argued*, not pronounced upon in advance. Abortion is different. No one can argue that an abortion could, by some means, actually preserve the life of the child. It kills the child. No counterweight, no adding-together of the other groceries in one's shopping-cart, can justify it, for by that logic a killer could offer as a defense the large number of times he contributed to the American Cancer Society.

The bishops now seem to realize where the "seamless garment" has taken them. The vast majority of Catholic Democrats in Congress, and a few Catholic Republicans, consistently vote for abortion, and so does John Kerry, the first Catholic Democrat since John Kennedy to run for President. The same is true of some Catholic governors and mayors. They have become quite open about it, insisting that their support for the environment, peace, and social welfare makes them, on balance, more pro- than anti-life. Liberal Catholics who have gone along with this sophistry now discover that the bar has been raised again. Now they have to accept partial-birth abortion, which was too much even for the late Senator Moynihan, author of the "personally opposed" sophism. And abortion itself has metastasized into areas that no one had even thought of before: assisted suicide, extracting stem cells from embryos, cloning them for research purposes. Catholics will have to jump still higher if they want to remain in the liberal fold.

A few bishops have had enough. Archbishop Charles Chaput of Denver, Colorado is one of those who thinks the time has come to ask whether it is appropriate for pro-abortion Catholic politicians to receive Communion. "We've come a long way from John F. Kennedy," he wrote in a column in his diocesan newspaper, "who merely locked his faith in the closet. Now we have Catholic senators who take pride in arguing for legislation that threatens and destroys life—and who then also take Communion." In 2003 Bishop William K. Weigand of Sacramento, California, called on pro-choice Catholic politicians like then-Governor Gray Davis to refrain from taking Communion. Archbishop Raymond Burke of St. Louis, Missouri, went further,

saying that he would refuse Communion to pro-abortion politicians. The following year, Bishop Michel Saltarelli of Wilmington, Delaware and Bishop Bernard Harrington of Winona, Minnesota, took Bishop Weigand's position that pro-abortion politicians should voluntarily refrain. Most bishops, however, seemed unwilling to go even that far.

Because of these divisions, the bishops appointed a task force headed by Cardinal Theodore McCarrick of Washington, D.C., an outspoken opponent of denying Communion to pro-abortion politicians. McCarrick worried that it would entangle them in "partisan" contests and be "counterproductive." McCarrick's comments in the task force's "interim report," which was presented at the June, 2004 meeting of the United States Conference of Catholic Bishops (USCCB), show that he had still not entirely broken with "seamless garment" thinking. While agreeing that "all issues are clearly not of equal moral worth—human life comes first," McCarrick went on to say that "those things which make life truly human—faith and family, education and work, housing and health care—demand our attention and action as well." Well, all right, and maybe the bishops were also right to put items like the U.S.-Central American Free Trade Agreement and Low-Power Radio Legislation on their agenda for discussion. But there are only so many hours in the day, and one can only hope that McCarrick was serious about the need to put human life first.

After debating the task force's interim report behind closed doors, the bishops' conference issued a statement leaving the decisions about Communion to the individual bishops. The rest of their joint statement contained little more substance, though it did bullet these five points:

- We need to continue to **teach** clearly on our unequivocal commitment to the legal protection of human life. . . .
- We need to do more to **persuade** all people that human life is precious and human dignity must be defended. . . .
- Catholics need to **act** in support of these principles and policies in public life.
- The Catholic community and Catholic institutions should **not honor** those who act in defiance of our fundamental moral principles.
- We commit ourselves to **maintain communication** with public officials who make decisions every day that touch issues of human life and dignity. [All emphases in the original.]

The most edgy point is the one about not honoring public figures "who act in defiance of our fundamental moral principles." The bishops added: "They should not be given awards, honors or platforms which would suggest support for their actions." While that would seem screamingly obvious, we all know of numerous cases where Catholic universities have invited pro-abortion

speakers and given them awards. It will be interesting to see what effect, if any, this has on places like Georgetown and Fordham. It would practically bar them from inviting liberal Democrats or “moderate” Republicans, and what other kinds of politicians have been showing up at their commencements?

The bishops’ joint decision to leave the Communion question up to individual bishops avoided a divisive debate and a possible deadlock, but it leaves unanswered the question of what the individual bishops *should* do. My own view is that Cardinal McCarrick is probably right to advise against denying Communion, though not, as he contends, because it would look “partisan.” The bishops never worried about “partisanship” in the ’80s, when they opposed President Reagan’s defense policies. If it is the job of bishops to teach, persuade, and act in support of their principles, then let the chips fall where they may. If a disproportionate amount of blame goes to the Democrats, that’s the Democrats’ problem, not the bishops’. The reason Cardinal McCarrick is right is not because denying Communion may hurt the tender feelings of liberal Democratic politicians but because ordinary Catholics still have not been educated on the abortion issue. It seems strange to say that, more than thirty years after *Roe v. Wade*, but it is true. A few years ago my wife and I stood outside our local church gathering signatures for post-cards urging our state legislators to support a ban on partial-birth abortion. We were astounded to find that a large number of congregants in this middle-class, educated parish had no idea what partial-birth abortion is. I remember one in particular asking loudly, almost shouting, “They do *what*?” Poll after poll show that a majority of Catholics, along with other Americans, do not know what the Supreme Court decided in *Roe* and other major abortion cases, do not know that it permits abortions for all nine months, do not know that the Court’s definition of women’s “health” (as in, for example, “health exceptions” for bans on partial-birth abortion) includes women’s “social” or “emotional” health—which means that their doctor, who could be the abortionist, can simply write a note saying that she would be upset if she didn’t get an abortion. Americans know nothing of these things, because they have been kept ignorant and misinformed by the press, which does all it can not even to use the term “partial-birth abortion.” Many good, church-going Catholics have also begun to repeat the phrases they hear every day in the media, saying that they are “personally opposed” but worried about “imposing” their views on non-Catholics. Some even think that the Catholic clergy shouldn’t weigh in on the issue, citing as their reason the “separation of church and state.”

Back in 1962 it was not easy for Archbishop Rummel to make the final decision to excommunicate Leander Perez. He had to deal with physical threats against himself and against the schoolchildren, and he worried that

the parish would become even more bitterly divided by his decision. But the archbishop had one asset which, over the long run, helped his cause to triumph: a supportive national press. The TV networks, the big-city papers, the national newsweeklies, all movingly recounted his battle against bigotry and hate, and they acclaimed his decision to excommunicate Perez and his allies. But today the major media regard even the threat of denying Communion to proabortion politicians as clerical interference in the democratic process.

How could the same media that swallowed the camel of excommunication gag on the gnat of denying Communion? The answer, of course, is that this time the bishops are fighting what the press supports.

Since 1984, studies of major media reporters have shown them to be overwhelmingly pro-abortion. The percentages are astounding: they started out in the low 90s and they are now close to 100 percent. And the reporters tend to carry their biases into their reporting. Studies by the press itself, by the *Los Angeles Times* for example, have shown numerous examples of this, and more recently the *New York Times*' own ombudsman has conceded that on all the hot-button "social issues," including abortion, his paper has become a cheerleader for the left.

In the face of a hostile press, then, it should have been the mission of America's Catholic clergy to do what the bishops' conference in 2004 said they should do: inform, teach and persuade their Catholic flocks. They should have been doing that even before *Roe v. Wade*, and they certainly should have been doing it afterwards, month by month, year by year. Had they spoken out, continuously and unambiguously, they might have been able to match the momentum of the pro-abortion feminist movement and prevent its takeover of the Democratic Party. They failed to do so, I believe, because they couldn't bear to destroy their long friendship with liberals, which, stretching back to the early days of the civil rights movement, was so full of shared memories and hopes.

Now they have to play catch-up. More than thirty years of hesitation and false starts have gone by. What is encouraging is the new note of commitment and determination, evident in the bishops' reaction to the interim report of their task force. Teaching, persuading, acting, telling Catholic institutions not to give out any more humanitarian awards to people who facilitate partial-birth abortion—all of this is very good. But their final commitment, "to maintain communication with public officials who make decisions every day that touch issues of human life and dignity," gives one pause. Yes, there is some value in it, especially when it comes to persuading the wavering and praising those—especially pro-life Democrats—who have put themselves



on the line in support of life. But for the others, those Catholic lawmakers who regularly support abortion, maintaining “communication” with them seems at best useless. These officials have calculated that they have more to gain than to lose from being pro-abortion. They know that their voting constituencies either want them to vote that way, or, more likely, don’t even know about their pro-abortion votes, and if they stopped voting pro-abortion, their donations would dry up and they might have a tough challenger in the next primary election. So, again, since there are only so many hours in the day, the bishops would be better off ignoring the politicians—better off going over their heads and talking to ordinary Catholics, to the people in the pews. Over the past thirty years it does not appear that they have done much of that. Weekly Mass-goers hear all kinds of cheerful, uplifting, and innocuous messages, but they hear very little about abortion. When they do, it is usually so brief and cryptic that the meaning fades before it gets deciphered. For a variety of reasons, most pastors like it that way. The common denominator is that it saves them from controversy, but, in addition, some pastors intensely dislike pro-life activists and are not particularly pro-life themselves, having bought into the “seamless garment” argument.

Archbishop Rummel faced a similar situation in Plaquemines Parish in the early '60s. Many of those attending Masses, and not a few of those who were saying them, were unenthusiastic about the prospect of racial integration. But Archbishop Rummel spoke to them directly, through pastoral letters that he *ordered* to be read at all the churches. The Catholic bishops today could do worse than to follow his example. If they really believe in teaching, persuading, and acting in support of their principles, let them do it. They don’t have to excommunicate anyone or bar them from Communion. But let them talk to faithful Catholics in language that they can understand. (They might want to avoid words like “catechesis” and “the magisterium,” because, thanks to modern Catholic religious education, nobody knows what those words mean anymore.) They don’t have to go into gruesome detail about what an abortion does. But they can talk about the child in the womb, they can talk about alternatives to abortion, about crisis pregnancy centers and how to reach and help them. They can also, without in the least jeopardizing the Church’s tax-exempt status, talk about how to reach their elected representatives and how to get information on their votes. If the bishops ordered these pastoral letters to be read, it would give cover to pastors who are pro-life but afraid to say so at length, and it would pressure the others into some sort of compliance. Inevitably, a few people in some of the churches would walk out during the readings. But in Christianity that has

always been the cost of doing business. People walked out in the '60s when racial justice was first preached from the pulpit. But it had to be done, and eventually the message sank in.

More important than "communication with public officials," then, is communication with ordinary Catholics. This will be a challenge for the bishops, for there has been a hardening of pastoral arteries over the past thirty years. During the 1980s the USCCB became increasingly dependent on its staff for drafting its pastoral letters. Its letters on nuclear defense policy and economic justice were so recondite in places that, when asked, some of the bishops themselves couldn't explain them. In recent years they have shown more independence, but they still need to get away from their scribes and out into the Catholic street.

The first priority, then, is better communication with the people who come to mass every Sunday—ordinary Catholic churchgoers, not just the activists. Let them know what their Church teaches on abortion, and why she teaches it. If the bishops don't have those people on their side, they've lost the whole ballgame. Then they need to reach beyond them to the more tepid Catholics who may have been suckered by some of the abortion clichés circulating in the mass media. Finally, they need to reach out to the rest of America. The times may be ripe for this. Americans of all religious persuasions seem to be moving closer to traditional Catholic teachings on cultural issues. More people today seem to understand that divorce has undesirable, and long-term, effects on children. Grass-roots anger at the availability of Internet pornography has led Congress into making serious efforts to keep it away from the nation's children—the pornographers have had to turn to a small judicial minority for protection. There is a widespread yearning for the public acknowledgement of religion—and, once again, only a handful of judges stand in the way. The vast majority of Americans want to stop courts from overturning a definition of marriage that has been sacred since the dawn of civilization. Finally, and more directly to the point, the majority of Americans, who have never supported the idea of abortion on demand, have been rejecting it by even larger percentages over the last five years.

There are some indications, then, that the Church in America may be entering an era congenial to a new give-and-take with the world. This time, though, the American Church may be able to present its teachings more determinedly, having had forty years to see how the world has gotten along without them. Sobered by that experience, the world actually seems ready to listen. It remains to be seen whether the bishops seize the moment—but one can hope that, in a new, confident spirit, they "throw open the windows of the Church," as John XXIII put it, so that they can see out and the people can see in.

## Hard Cases, Easy Cases

Ellen Wilson Fielding

A small crowd gathered out by the office reception area, where Kelly sat with her seven-month-old little girl Michelle, just collected from the building's day care to be oohed and aahed over. And Michelle was definitely worthy of oohs and aahs—a beaming, giggling, wriggling and squirming bunch of secure responsive babyhood.

One of Kelly's co-workers told her, "It must really give you peace to see her so happy and well, and know she's doing just fine in day care. You can tell she's thriving."

The other working moms agreed—with both the conclusion and also the lurking anxiety that had flushed the remark out. And they were right—this was clearly a happy, secure, un-anxious, un-neurotic, outgoing and responsive child. Kelly told us, "They love her down there at the day care. I'm so glad she isn't one of the babies that cry a lot. They love to pay attention to her."

I've been thinking about this conversation partly because of a recent book by Brian Robertson damning the effects of fulltime, institutional day care on children and on parent-child attachments (*Day Care Deception: What the Child Care Establishment Isn't Telling Us*, Encounter). He assembles large numbers of studies from researchers across the ideological spectrum—including many studies funded by day-care-friendly sources seeking validation. What he finds is that, in the aggregate, the children of day care display attachment problems, aggression, insecurity, and sadness. Most suffer the emotional difficulties of dealing with rapidly rotating staffs, since day-care staff turnover tends to be extremely high. A litany of well-documented and duplicated studies shows more frequent infections (middle ear infections, well-known to many parents, are one of the common culprits), safety risks (especially at the caliber of day-care facility most parents are able to afford, where higher child-to-staff ratios exist), and possible exposure to abuse by staff.

Then there are the somewhat harder to calculate effects, harder on some children's personalities than on others, such as excessive sensory stimulation; over-regulation of children's activities and daily schedules; small opportunity to be original, eccentric, or a dreamer who needs a significant amount of down time; excessive stress from all-day socializing (one researcher likened the social stress of fulltime day care to taking part in a cocktail party

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that lasts all day, every day—without the lubricating effects of the alcohol!).

Reading this book can launch a rising tsunami of alarm in any but the most closed-minded reader. In fact, the very overwhelming nature of the evidence is perhaps the thing most likely to leave some readers with residual skepticism. “How can institutionalized day care—how can almost *anything*—be *this* bad?” one asks oneself. “If it were, wouldn’t most people hear about all these studies and statistics, wouldn’t most academics and researchers—including most child-care experts—be sounding the alarm on talk shows and media interviews?” (Some of them are, but they are mostly ghettoized in Christian media venues.)

There are a couple of answers. One is that widespread use of day care is both very political and at this point seemingly essential to both the economy and the culture. While it is true that most working parents’ preference is for non-institutionalized day care (relatives, neighbors, smaller in-home day care), and that, when it is feasible, many parents will split schedules, or arrange for one parent to work part-time or from home, sometimes none of these preferred options are available, and neither, for most people, are the more expensive top-of-the-line institutional choices that at least offer smaller ratios of children to caregivers.

The result? We’ve seen this with so many other human life issues, such as the ideologically based undermining of studies that show higher incidences of breast cancer among women who have had abortions; or “scholarly” attacks on the reality of post-abortion stress syndrome. We’ve seen some scientists with axes to grind or grant money to defend make wildly unrealistic claims for the near-term promise of fetal tissue research for treating long unsubstantiated lists of health conditions. We’ve seen the efficacy of adult tissue use dismissed by the same scientists and the same lobbies, despite contrary evidence. We’ve seen this kind of willed blindness—and even duplicity—among those who claim that science does not tell us when human life begins, or whether the unborn can feel pain. Veterans in these often deceptively argued human life debates are likely to conclude that “pure science,” like the economist’s construct of “economic man,” is something nowhere to be found in reality.

So of course we shouldn’t really be surprised to find many of those researching childcare collaborating, for personal, political, and professional reasons, in the suppression or misinterpretation of data they don’t like. And this Emperor’s New Clothes policy of averting one’s gaze from unpleasant realities can sometimes leave us with the surreal feeling that we can’t tell what reality is.

But we also can be tempted to doubt our own data, as we look at human

history's examples in every era of people misreading and misinterpreting through the skewed vision of their own biases. None of us is exempt from the human desire to be right and win arguments, or from the human temptation to exaggerate, oversimplify, or credulously accept evidence that seems to support our case. Many of us have a personal vested interest in traditional family life, complete with a stay-at-home mom, as our adversaries have a vested interest in two-career families and the opportunity to break the glass ceiling barring women from full parity at the upper echelons of professional life. Those of us tied to politics or political theorizing by profession have additional baggage: not only a loyalty to a party platform, but a reflexive belief that our customary opponents on Issues A through P must also be wrong on Issues Q and R.

So what about Kelly and Michelle? Must we believe that Michelle is secretly doomed to repeated illness, to neuroses, dysfunctional attachments and maladjustments? That she is concealing major deleterious effects of her day-care experience that will emerge when it is too late to put the genie back into the bottle or the baby back into the home? Well, it is unlikely that Michelle or her mom can escape all demonstrated negative effects of institutionalized day care, though individual variations can modulate them.

For example, healthier babies with better developed immune systems will likely suffer less severe versions of infectious illnesses and recuperate faster. Outgoing babies with lots of charm will attract more positive, individualized attention (remember Kelly's remark about the "babies that cry" in day care).

Today, Michelle appears healthy, happy, comfortable, unstressed. And long may she continue that way, despite statistics and descriptions of day-care babies in the aggregate. Michelle is a child hard-wired for happiness; she is an example of a category that is the opposite of the "hard cases"—she qualifies as an "easy case."

All of us involved in any way with the pro-abortion and pro-euthanasia and pro-fetal tissue research issues are familiar with arguments founded on hard cases, and we're also familiar with the axiom that "hard cases make bad law." These are the gruesome exceptions that constitute a tiny minority of cases: profoundly handicapped children, anencephalic fetuses; 12-year-olds pregnant by incestuous rape, etc. We know that, even under these circumstances, such babies have a right to life too, but these cases can so seize the public imagination that it becomes difficult to convince the wavering or undecided onlooker that heaven and earth shouldn't be moved to accommodate these exceptions.

So we must ask whether the day-care example falls into that category of

touted hard cases, or whether enough kids thrive under such a system that we may be accused of using our own “hard cases” argument to magnify the subset of cases that suffer special harm from untraditional upbringings.

That’s a fair question, but one that accumulated, replicated studies, many performed by people harboring a pro-day-care bias and hoping for confirmation of their belief that all will be well, have thus far disproved. It is not that all babies and young children exposed to full-time industrial day care psychologically crash and burn, but that clear majorities suffer ill effects to their physical, emotional, and psychological well-being.

And most of the research “results” that from time to time surface in the popular media touting supposed benefits from early and prolonged exposure to day care—citing the famous greater independence argument, for example—are actually examples of labeling a negative effect as a positive. “Early independence,” when examined a little more closely, often describes looser parental and familial attachment, and/or greater reliance on the peer group at an age when, in most times, parental influence has customarily held sway. What may be appropriate at certain stages of development is not what you are looking for among the preschool set.

The Michelles of this world exemplify the “easy cases.” Like their counterparts, the “hard cases,” they too can make bad law or bad social policy if we allow their reassuringly thriving state to determine how we evaluate a particular category of caretaking and its effects on our children. When it comes to the overall evaluation, the “easy cases” have to come out of the mix, or else they become the anecdotal, case-in-point refutation of discomfiting study results.

“I know that’s not true, because just look at Michelle.” There will always be enough Michelles to make the institutionalized upbringing of children seem more or less okay, especially if you toss in a cohort of kids a little further down the spectrum from normalcy. Together, they can allay the concerns of parents who want the best for their kids but sincerely hope, for their own complicated reasons, that “the best” can include the kind of day care that is both affordable and available for their work situation.

The truth is, individual human beings are not predictable machines that will universally work well under one set of circumstances and break down under another. To take a drastic example, think of the children who spent critical years of their childhood in Dachau or Auschwitz or one of the other horrific Nazi concentration camps. It cannot possibly be argued by sane, non-sadistic people that this was a good or healthy place to grow up. Yet by some inexplicable combination of grace and nature, by some extraordinary triumph of the human spirit, some of the children of concentration camps

who survived into adulthood did okay. They did not emerge without scars and inner wounds, but they were able to go on to successfully study in school, find jobs, form families, take pleasure in pleasurable things, resist the impulse to “curse God and die.” We see such instances of inexplicable survivors in other children growing up in very traumatic circumstances and in conditions of severe deprivation and abuse. Many become deeply and sometimes permanently blighted, but others, amazingly, survive.

The average day-care situation—no matter how drearily average it is—does not even approach the horrors of traumatic situations like these. And the arguments get further complicated by the difficulty in teasing out every possibly relevant variable that could be contributing to the negatives: marital status of the parents, social influences, family size and support network, etc. Even so, it is true that pointing at this or that success story does not necessarily tell us whether this is a good way to rear children.

And what holds true in this case also holds true for the children of divorce. The shock waves produced several years ago by Judith Wallerstein’s long-term research on the persistent emotional and psychological handicapping of children of divorce were enormous. The Wallerstein book was relentless in confronting a society trying to believe in the possibility of “good divorces,” healthy divorces, divorces that at least were better than the alternative for kids as well as the adults involved, with evidence to the contrary.

It was so clear to most people that things would be so much nicer if in all cases what appeared good for the adults involved also ended up being good for the kids. Perhaps, therefore, the most stunning result of this long-term study was the discovery that, except for very extreme situations, the kids didn’t really care all that much whether their parents were unhappy being together, as long as the parents stayed together to care for and love their kids. At a certain point, abusive or self-destructive behaviors of the parents could cross a threshold that made them abusive and destructive for the children also, but that point was much farther down the road than many people had thought, or had wanted to think.

The Wallerstein research also connected a lot of statistical dots more familiar to us regarding family disintegration and the child’s greatly increased risk of dramatic failures like trouble with the law, substance abuse, flunking out and dropping out of school, teenaged pregnancy, running away. These are scary statistics for those whose children have fallen into the at-risk category, but we know that the majority even of these children disenfranchised of a normal home avoid addiction, criminal behavior, or descent into a ghetto underworld. So, parents of “divorced” children are accustomed to reserve to

themselves the modest comfort that the odds at least favor their children achieving a functional adulthood.

But in this area too, Wallerstein's study was an eye-opener. Focusing on well-off children from Marin County, California, and deliberately excluding from her study subjects children with other issues such as learning disabilities or other handicaps, Wallerstein disclosed not how bad things are in the worst cases, but how unsatisfactory they were in the best and near-best cases. Even these healthy and relatively prosperous children, growing up in circumstances that most of the rest of the world would envy, almost universally suffered prolonged negative fallout from their parents' divorce.

Years later, when these children were adults themselves, they were less happy, more anxious about relationships, more emotionally insecure or out of touch than comparable adult children of the middle class, even those who had grown up in homes with troubled marriages. The children of divorce wanted to believe they could form lasting relationships and lifelong marriages, but were left with a gnawing sense that "things fall apart, the center cannot hold." For them, life was not the friend and giver of good things that it was for many at least of their peers who had not experienced a family breakup.

Did the Wallerstein study drive down the divorce rate appreciably? No, and one would not really expect it to. To begin with, many of this generation's parents are themselves wounded veterans of failed or dysfunctional families, out-of-wedlock births, or other social pathologies of modern times. Although surveys show that children of divorce are determined not to repeat their parents' experiences, they are also usually even less capable of preventing that experience, because they are less capable of fully committing, less trusting, more anxious, less happy. Whether or not they are diagnosed and placed on medications, you could consider them naturalized citizens of the Prozac Nation.

The very intensity of their desire to have ideal families cuts both ways. While it can make them more resistant to pursuing their own happiness at the expense of their children, it can also make them intolerant or less capable of handling the reality of very messy, imperfect families, exposed to all the disintegrating forces the culture can bring to bear. In any event, although it takes two people to make a marriage, it only takes one to make a divorce.

In circumstances like these, where imperfect but loving parents experience cultural stresses along already existing fault lines, strained parents would like to believe that their children will not be doomed to live depleted lives if their parents part—much as in earlier eras with lower life expectancies, adults wanted to believe that a child whose mother died in childbirth or whose



father died in war would only be the tougher for surviving some hard knocks.

And so, just as in the case of day care, parents lean on the (almost inexplicable) success stories, bolstered by the “almost success” stories, distant enough from disaster to resemble success. The “easy cases” of children who seem to do okay—who, as far as anyone can see, really *do* do okay—seem to promise that if you follow the right procedures, display enough sensitivity, enlist the assistance of appropriate counselors and teachers, turn up at enough athletic events, awards ceremonies, and school outings, etc., the “divorced” child will not suffer an unacceptable deficit. But parents who think this are largely self-deluding, like the parent who counters the statistics about effects of full-time institutional day care with the belief that ideal day care can equal or better the traditional home-based upbringing under parents’ and relatives’ eyes.

¶ Ideal divorce, ideal step-families, ideal day care—by definition, none of these really exist. It’s true that ideal traditional families don’t exist either, but the normal, imperfect, compromised version has until recently not needed to prove itself. Families within the range of normal naturally trump these “ideal” day care and divorce families. The structure of the institution itself is already better adapted for its function. Male and female adults filling complementary roles, with ties of biology and lifelong attachment providing long-term, secure relationships of love and support for the children (and for the adults in their old age)—really, the old-fashioned model is elegant in its simple functionality. Added features like extended family could supply insurance for hard times or parental deficiencies or premature death. Taken as a whole, it worked.

It still works, where it isn’t modified out of existence, despite the partially successful efforts of the culture at large to undermine what it’s trying to do. The tragedy about failed families is that no other arrangement for protecting, nourishing, and loving a child into adulthood works nearly as well, as cheaply, as efficiently, as individually.

We see, then, these two examples of large-scale social innovations—institutionalized day care and widespread no-fault divorce—which have, on the average and in most cases, demonstrated deleterious effects on children, and which parents would very much want to believe are very much less likely to harm their children than the studies and statistics indicate. To feel better about enrolling their child in a social innovation labeled harmful by most rigorous studies, such adults reassure themselves with anecdotal evidence based on the “easy cases,” the children hard-wired for happiness or fortunate in the unforeseen accidents of their new circumstances. (An “easy case” may, for example, have encountered extraordinarily loving adults

or may rely on strong and healthy relationships with siblings or extended family members.)

To bolster their belief in the likelihood that their children will have a relatively normal, non-traumatic, non-problematic upbringing, the concerned parents in question also associate with those easy cases all the mildly adversely affected cases on the continuum. This includes all those who seem more or less to be performing acceptably: to be forming friendships, doing passably at school, avoiding delinquency, drugs, bad driving records and the like, and eventually holding down a job, socializing comfortably, perhaps settling down at some point to start their own family.

Similarly, most concerned parents who turn to full-time institutionalized day care seek the reassurance of the anecdotal successes because, though bothered by studies, surveys and statistics, however disquieting, they are not going to change their decisions because of them. Often they cannot and sometimes they believe they cannot change course by accepting the relative poverty of a single income, or rearranging their lives, schedules and careers to work staggered hours or work from home. Whether driven by financial necessity or another reason, parents making these choices barely feel as though “choice” is the right word, when they are attempting to produce with two paychecks a standard of living produced with one in the 1950s. Instead, these “choices” seem more like inevitabilities which, precisely because they can’t see how comfortably or reasonably to avoid them, the parents want to be able to feel good about. In other words, they want to feel *both* that they are doing the best they can and that this “best” will be good enough.

Now let’s consider a more cutting edge example of using “easy cases” to make more palatable adult choices that may put a child at risk. A similar dynamic goes on in discussing homosexual marriage, which is correctly understood by those who oppose it as the claim of openly homosexual couples to be appropriate full-time residential parents and role models for children—a mutated form of the nuclear family.

Not all homosexual couples seeking to make their present or future pairings the legal equivalent of marriage are driven by the desire to bring up children in an openly homosexual household. Why, then, is this where those opposing gay marriage marshal energy and attention? For two reasons: because children are vulnerable, and “didn’t ask to be born” or adopted into a highly experimental kind of family; and because marriage, whether or not this or that individual couple end up as parents, is institutionally *always* about children.

Many people who defend the right of homosexual couples (whether male or female) to certify their committed unions through a legally recognized

marriage license think it's wrong to deny them the psychological satisfaction of seeing their unions validated or publicly recognized, just like other people's. This framing of the issue makes it a matter of parity and social inclusion. (There are also economic issues, such as tax filing status and a share in a partner's health benefits and social security, but if we were only concerned with sharing these benefits with non-married cohabiting couples, whether homosexual or heterosexual, we could pursue more purely ad hoc, less socially volatile ways of obtaining them.)

No, the point of disagreement between those opposing homosexual marriage and those supporting it lies precisely on the purpose of marriage—Is it primarily about children?—just as the disagreement over the licitness of homosexual *acts* depends upon the purpose of sex—Is it primarily about two people having a good time, or is it an exchange of bodies that naturally belongs in lifelong unions ordered towards children?

Marriage can be “about children” in two separate ways. It can be an institution entered into by those who want children (or who may want them in the future). Or marriage can also be understood as the social unit recognized by the state or the polity throughout human history as the best adapted for nurturing and bringing up healthy children. This is the understanding that traditionally has interested society in what otherwise might seem to be merely a private arrangement. This is the point at which marriage licenses enter the picture, and, if things eventually do not turn out happily ever after, the point at which divorce courts, separation and custody agreements and child support become germane. After all, the state interests itself in marriage because of the effect a given marriage might have on present or future children.

Those who define marriage traditionally, in such a way as to exclude homosexual partnerships, also share this understanding of the relationship between marriage and children. It's not that every heterosexual union has to produce children, whether by conception or adoption, to qualify as “married,” but that the kind of people who exchange their marital vows before a priest, judge, justice of the peace or even ship's captain have to be the kind of biological specimens—an adult male and an adult female—who naturally produce babies together.

But how does this transfer to child-rearing? What is it that makes one man, one woman the ideal formula for a young child needing to absorb not only food but everything important about life? Wouldn't any reasonably mature adult or combination of adults do? Yet, even before analyzing what mother and father each contribute to their child, we can assume that Nature was not merely supplying a spare part.

For the “spare” was not differently designed by oversight. Reproductively

speaking, the complementarity of male and female is the means by which the human race is propagated. As far as we can tell from simpler animal life forms, the alternative is budding or simple cell division. In the animal world, this complementarity also allows for the protection and provision of the young (and their nursing mothers) during their period of immaturity and defenselessness.

All of these we might be willing to jettison as accommodations to earlier, outdated stages of evolution. Yes, one female parent could nurture and one could go to the office each day to provide the paycheck; one daddy could act as primary caregiver and one could slay corporate dragons. But, as single parents can tell you, the one thing a mom can't do is be a dad, and a dad can't be a mom. A second female parent can't model for a son what he should be as an adult, and can't show a daughter how she should expect to be treated by men. A second male parent can't model for a daughter what she should be as an adult, or show a son within the family how to distinguish himself from women and define himself as a man, while honoring, appreciating and learning to get along with women.

And two parents of the same sex can't demonstrate by their own loving and respectful relationship with one another how male and female are meant to interact, to respect one another, to support one another, to appreciate one another and at times drive one another a little crazy. These are things that can't be learned as well, if at all, from TV sitcoms, or even a friend's family.

Again, the hard cases and easy cases exist, and again, by themselves they can't advise us about the wisdom of radically redefining an institution that throughout recorded human history and (so far as we can tell) prehistory, in societies at all stages of development in every part of the world, has always begun with the wedding of a man and a woman.

Down the street or in the apartment two floors up there may live two men or two women who have been cohabiting peacefully for years, who work productively, contribute to society, like children of both sexes without being sexually attracted to them, and would, from all of these points of view, individually make great parents and together quite possibly do better than a foster home, an institution, or a radically dysfunctional "traditional" family would. But that should not be the point of comparison, especially in a society which still has many times more childless couples yearning to adopt than it has available babies for adoption. You do not deconstruct and reconstruct the basic building block of human society—of all human societies with a track record that we know about—because the homosexual couple down the street seem so nice (the easy case) or the baby currently consigned

to foster care or conceived by a raped teenager needs a loving and financially secure home (hard case).

There are times when caring for children is bitterly hard; there are other times when it is heartwarming easy. But from the child's point of view, whether it's hard or easy, it's something best done within a family, within a traditional marriage, by loving parents who implicitly promise, not only each other but perhaps even more poignantly their unborn children, that they'll be there "for better and for worse."



*"Can you support my daughter on what a beggar makes?"*

## Unborn Life's Protection:

### Exactly What Does Constitute *Us*?

Patrick J. Mullaney

The growing body of knowledge of life before birth is fueling a lively discussion of the unborn child's status as a protectable or even a rights-bearing entity. One of the most interesting exchanges was between Robert Bork and Nathan Schlueter, over the question whether the guarantees of life in both the Fifth and Fourteenth Amendments extend to unborn life ["Constitutional Persons: An Exchange On Abortion," *First Things*, January 2003, reprinted in *HLR* Winter 2003]. Mr. Schlueter maintains that the Due Process clauses of those two amendments do indeed extend that far and argues that those who are fighting merely for the *status quo ante Roe*, wherein the issue would be returned to the states, are asking for far too little. Judge Bork, while applauding Mr. Schlueter's goal—the protection of unborn life—looks at the text and historical context of those amendments and finds it impossible to read them as Mr. Schlueter does. "The constitutional question," Judge Bork writes, "is not what biological science tells us today about when human life begins. *No doubt conception is the moment. The issue, instead, is what the proponents and ratifiers of the Fifth and Fourteenth Amendments understood themselves to be doing.*" [Emphasis supplied.]

Having concluded that the mere existence of human life is insufficient for due-process entitlement—that an original legislative intent to provide it is what matters—Judge Bork considers the possibility that such an intent may in fact be somewhere reflected in the legislative history. He concludes: "That reading seems to me *absurd*. I think that the Constitution has nothing to say about *abortion*, one way or the other, leaving the issue as the Constitution leaves most moral questions, *to democratic determination.*" [Emphasis supplied.]

So, we're told an intent to protect unborn life is properly derived from a legislative consideration, not of life, but of *abortion*. And since abortion wasn't so considered, the fate of an entire class of human life—though its existence is conceded—is properly relegated to the electoral arena.

But why shouldn't the constitutional status of unborn human life be considered on its own merits rather than from a legislative silence on abortion? After all, unborn life is a class of life, and life, not abortion, is the enumerated due-process interest we are considering, embodied in the Constitution

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not once, but twice. Properly viewed, abortion is only the issue's attendant circumstance. Attendant circumstances and constitutional rights are as a matter of course separated. Would anyone advocate the banning of e-mail communications because the framers of the First Amendment said nothing about the circumstance of the Internet? Of course not. The value of free speech is easily severed from the circumstance within which it is communicated. So why is it any different with the unborn child? Why can't the value of unborn life be severed from the circumstances within which it is terminated?

I propose we take this opportunity to look at all this from another point of view. Let's simply put life first. Let's forget about abortion and consider life—not just unborn life, but life generally—on its own terms. How is it protected within the Constitution? Do the two Due Process clauses really protect life only through procedural guarantees, as Judge Bork would have it, or do they, or either of them, provide actual substantive protections to life as a right *itself*? If we can determine the latter to be the case, we'll go on to examine the nature and proper scope of that protection. Does it extend so far as unborn life?

In conducting our inquiry, we'll remain faithful to Judge Bork's interpretivist standard by attempting to unearth the original intent of the various proponents and ratifiers. We'll consider their concerns and objectives, taking into account the times in which they lived. Looking ahead a little bit, we'll see that the Fifth Amendment Due Process Clause is exactly what Judge Bork contends, a guarantee of procedural protection only. But the Fourteenth Amendment's story is a different one, deeper and more meaningful, and yielding some conclusions that are of great interest in defining the proper place of life—including unborn life—in the constitutional matrix.

I can attest to a certain level of experience in this regard. From 1990 through 1994, I represented a young man named Alex Loce as he prosecuted the claim to life of his unborn child from New Jersey's Morristown Municipal Court to the Supreme Court of the United States—a first, I'm told, in American jurisprudence. (Alex's Petition for Certiorari was denied in 1994.) The claim was backed by the trial judge's finding that life begins at conception—another first, I'm told. Along the way a number of extraordinary people lent their talents to Alex's efforts—Mother Teresa, Jérôme Lejeune, John Cardinal O'Connor, Bernard Nathanson, Richard Traynor,<sup>1</sup> Harold Cassidy, Robert George, and Russell Hittinger. Their efforts, which none of them thought to be “absurd,” certainly deserve to be continued and developed.

We'll begin with a brief but dispositive look at the Fifth Amendment,

adopted along with the balance of the Bill of Rights in 1791. As ably pointed out by Akhil Reed Amar in his 1991 work, *The Bill of Rights*, the primary thrust of those first ten amendments was not to define or protect individual liberties, but rather to ensure that the new national government not be a repeat of its predecessor. Throughout, Professor Amar makes the core and compelling point that the first ten amendments established primarily collective majoritarian rights and rights reserved to the states, all serving to define an acceptable relationship between the new federal government, the people collectively, and the states. The first objective of the framers and ratifiers of those amendments was “to monitor and deter federal abuse, ensure that ordinary citizens . . . participate in the federal administration of justice through various jury provisions,” and reserve to the people “the transcendent sovereign right . . . to alter or abolish government . . .”.<sup>2</sup>

The Fifth Amendment’s Due Process Clause reflects these populist concerns. The Clause finds itself among the jury and criminal-procedure requirements of the Fifth, Sixth, and Seventh Amendments. Juries played an important role in balancing the possible tendencies of the federal government against the interests of the people. Drawn from the community, juries provided built-in protection against punitive or self-interested acts of federal officials by leaving the final decision-making to the people themselves, a protection implemented by the Fifth Amendment’s requirement of a grand-jury indictment for capital and infamous crimes, the Sixth’s of a petit jury for criminal prosecutions, and the Seventh’s of a civil jury for suits at common law.

The purpose of the Due Process Clause of the Fifth Amendment was, at its core, supplemental to these procedural guarantees. The little legislative history that exists shows it to be an overriding procedural requirement that criminal prosecution, commencing with a grand-jury indictment and proceeding to trial and conviction, be done in accordance with “due process of law.” “Due process of law” meant that the “indictment or presentment [be of] good and lawful men and trial and conviction in consequence.”<sup>3</sup> The Clause is, thus, nothing more than the rather general codification of common-law principles, providing for procedural guarantees when a given case places at risk one’s life, liberty, or property.

For our purposes that takes care of the Fifth Amendment’s Due Process Clause. We have to agree with Judge Bork that it is a procedural guarantee only, offering no prospect of a substantive protection of life extending to the unborn child. So we’ll now turn to the Fourteenth Amendment’s Due Process Clause.

At the outset, it must be noted that in the seventy-seven years between the



ratifications of the Fifth and Fourteenth Amendments, things had changed. Slavery—directly and indirectly—had brought to the forefront issues of individual rights, which had, in turn, begun to develop in the case law. The Supreme Court had weighed in by deciding two landmark cases, *Barron v. Baltimore* (1823) and *Dred Scott v. Sandford* (1857), both of which must be understood in order to understand the Fourteenth Amendment.

*Barron* considered whether the Bill of Rights applied against acts of the states. Chief Justice Marshall held that it did not—that the original Constitution and its amendments had been limitations on the national government only and, unless a clear intent to the contrary was indicated in the text, no protections against the federal government limited the states.

*Dred Scott* placed itself in the annals of infamy with two separate strokes. First, it struck down the Missouri Compromise, which had outlawed slavery in the territories, by finding slave ownership to be a constitutional right. That not being enough, the Court went further and touched upon a topic more important to what was to become the Fourteenth Amendment by considering the scope of numerous countervailing rights which might have interfered with the newly protected practice of slavery, in particular the Fifth Amendment’s guarantee of liberty. Chief Justice Taney wrote that the Constitution, including the Bill of Rights, was for the benefit of “citizens” and citizens only. He then went on to narrowly define “citizens” as lineal descendants of national citizens at the time of the adoption of the Constitution in 1789. Mr. Scott, failing to meet that status requirement, was out of luck. “Liberty” was not to be his.

It’s easy to see how *Barron* and *Dred Scott* made the scope of individual rights immediately prior to the Civil War unrecognizable by modern standards. Under *Barron* there were no protections at all against state acts. Under *Dred Scott*, protections against federal acts were for the very few lineal descendants of 1789’s citizens. Not surprisingly, violations of enumerated rights were common, in particular ones perpetrated by the states. Slavery, a creature of state law, was, of course, the primary culprit. But other enumerated rights were denied in support of slavery. Newspapers had been banned;<sup>4</sup> the right to petition government—including Congress—had been outlawed;<sup>5</sup> teaching slaves to read, including the Bible, had been criminalized;<sup>6</sup> and the dissemination of anti-slavery literature had been made a capital offense.<sup>7</sup>

Following the Civil War, in wake of the carnage resulting at least in part from the law’s disregard of the individual, the 39th Congress set about its work of reconstructing the nation. As its predecessors in 1789 had been concerned with making a repeat of King George’s regime unlikely, the 39th

Congress's reconstructionists were concerned with making a repeat of slavery and its collateral violations unlikely. Aware of the gaps in the constitutional structure caused by *Dred Scott* and *Barron*, the 39th Congress had as its first goal to overrule those cases and, in the process, to expand the constitutional protections afforded individual rights. Its work, in particular Section One of the Fourteenth Amendment, achieves precisely that. Section One reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens* of the United States and the state wherein they reside. *No state shall* make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; *nor shall any state* deprive any *person* of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [Emphasis supplied.]

Section One must be read very carefully, word by word, clause by clause, sentence by sentence. It is a remarkable piece of legislation that both demonstrates an awareness of *Dred Scott* and *Barron* and remedies their limiting legal effects. The first sentence—although leaving intact *Dred Scott*'s citizenship requirement—greatly expands the class afforded protection against federal acts by expanding the definition of citizen from descendants of 1789's citizens to "all persons born or naturalized in the United States." Next, the first clause of the second sentence overturns *Barron*'s doctrine by making "plainly and intelligibly" clear<sup>8</sup> that states may not violate the "privileges or immunities" of "citizens." The accompanying legislative history explains that the function of the Privileges or Immunities Clause was to *incorporate* against the states those privileges and immunities which were discussed at length as being a broad class of current and historically recognized rights, specifically including those mentioned in the first eight amendments to the Constitution.

Section One, then, in one fell swoop legislatively amended both *Dred Scott* and *Barron*, in the process greatly expanding individual constitutional protections against both the state and federal governments.<sup>9</sup>

But reading on to the Due Process Clause raises an intriguing question, one directly relevant to our inquiry: Why is it even there? If the Fifth Amendment's protections of life, liberty and property were to be incorporated against the states through the Privileges or Immunities Clause, why do we need a *second* Due Process Clause to do the same thing *directly*? This apparent redundancy in an otherwise masterly act is puzzling. Congressman John Bingham of Ohio—the man who wrote Section One—provided the explanation when he said:

[N]atural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution *guarantied* by the broad and comprehensive word

“*person*,” as contradistinguished from the limited term *citizen*—as in the fifth article of amendments . . . that “no person shall be deprived of life, liberty or property but by *due process of law* . . .” [Emphasis supplied.]<sup>10</sup>

Bingham’s words, spoken in 1859, deserve close attention, not only because he later wrote Section One, but because he wrote it as one of the few legislators who understood the impact of *Dred Scott* and *Barron* upon the constitutional structure. As such, he addresses directly what Section One was to be and provides valuable insight into its designs and intents.

First, he draws a distinction between “natural or inherent rights” and all others. “Natural rights,” including the due-process rights of life, liberty, and property, are intrinsically possessed; granted by nature prior to and independent of any formal conferral by law. They simply “*belong to all men*” regardless of the law’s action or lack of action, that is “*irrespective of all conventional regulations.*”

Bingham’s logic finds its way into Section One in 1868. As we’ve seen, Section One incorporates the first eight amendments for the benefit of the limited class of *citizens*. There is nothing wrong with this “citizenship” limitation to the extent that it concerns rights other than natural rights. Bingham specifically stated that “other” rights are properly limited by conventions such as “citizenship.” However, mechanical incorporation of the Fifth Amendment Due Process Clause would have created a problem, in that the life, liberty, and property rights would have been subject to the citizenship limitation and, thus, not guaranteed at all to *non-citizens*. According to Bingham, such a result would have violated the Constitution’s obligation to guarantee Due Process rights broadly and comprehensively to “all men.” So to make good on the Constitution’s obligation to guarantee nature’s grant of Due-Process rights to “all men,” the *second* Due Process Clause, with the word *person* providing the guarantee, was enacted.

Having examined through the eyes of its drafter and principal proponent the structure of Section One and the reason for its Due Process Clause, we can now begin to consider whether that new clause provides a *procedural* or a *substantive* protection to its enumerated rights and, further, whether that protection is broad enough to encompass unborn life.

Let’s commence by defining procedural and substantive Due Process. Procedural Due Process is not a protection of life, liberty, and property as individual rights *themselves*. Rather, it is a guarantee that various procedures set forth elsewhere in the Constitution—guarantees such as the right to have an attorney, to be given a speedy trial, to confront witnesses, etc.—must be provided before one’s life (or liberty or property) can be taken by an act of government. Being a guarantee of procedure only, and not of the rights

themselves, procedural due process gives no *right* to life. Substantive due process, by contrast, is a guarantee of due process rights as rights *themselves*. As such, states may, and may be required to, affirmatively protect through statutory or other action any life, liberty, or property interest that falls within the scope of the substantive guarantee. At the very least, substantive due process prohibits the states from affirmatively violating, or participating in any violation of, these same interests.

The issue of which sort of due process is involved is of particular importance in the abortion circumstance because unborn life prior to being taken is not denied the benefit of any constitutional procedure. (If anything, it is experiencing, post *Roe*, one constitutional procedure too many.) Abortion, as Judge Bork correctly points out, is a private act not directly undertaken by a state. That being so, there is no constitutional infirmity under a procedural standard when an unborn child is aborted.<sup>11</sup> But if the Fourteenth Amendment's Due Process Clause is substantive, and if its substantive guarantee of life is broad enough to extend to unborn life, we have a vastly different result. The states would be permitted, even required, to provide affirmative statutory guarantees to unborn life. At the very least, substantive due process would prevent any governmental involvement in its being taken, involvement such as allowing abortion procedures to be performed by state-licensed physicians and other professionals or in hospitals licensed or funded by the state. It would also prohibit enactment or enforcement of statutory or state constitutional abortion rights. The protection of unborn life as a substantive due-process right would change everything.

These differing consequences having been noted, let's determine which type of due process was intended by the Fourteenth Amendment's proponents and ratifiers. Procedural due process would require the procedural rights themselves (the guarantee of which *is* procedural due process) to be made applicable against the states. The Fourteenth Amendment as drafted may do this through either the Privileges or Immunities Clause or the Due Process Clause. Each binds the states. However, if the procedural guarantees are applied through the Privileges or Immunities Clause, they would be for the benefit of *citizens* only. The Privileges or Immunities Clause would therefore fail to provide the procedural protection on as broad a basis as due process itself requires—to all persons.

Still, among numerous similar examples in the legislative history, while addressing the 39th Congress on February 28, 1866, Congressman Bingham again specifically explained that the Privileges or Immunities Clause *incorporated* the "Bill of Rights," using the term at least twelve times and

indicating Section One's mechanism for incorporation as the Privileges or Immunities Clause.<sup>12</sup> Before Congress in 1871, several years after the Amendment's ratification, he again made the point: "[T]he privileges and immunities of citizens of the United States . . . are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows." [Bingham then read into the record *all* the first eight amendments verbatim.]<sup>13</sup>

If a procedural intent is dubious because the proponents and ratifiers didn't apply the procedural guarantees as broadly as due process requires, let's look at the case for substantive due process. Consider again, in material part, what John Bingham had said in 1859: "Natural or inherent rights . . . are . . . guaranteed by the . . . word 'person' . . . as in the fifth article of amendment . . . that 'no person shall be deprived of life, liberty or property *but by Due Process of law* . . .'" [Emphasis supplied.]

Bingham makes his intent very clear. Due process rights are guaranteed by the word "person" as substantive rights within the Constitution. They are, however, not absolute. The subject person may be properly deprived of them by government if he is afforded "due process of law."

Bingham thus makes unequivocally clear that life, liberty, and property have the status within the Constitution as substantive rights and that "due process of law" is separate and distinct from that substantive right itself. There is only one source more succinct than Congressman Bingham in resolving the procedural or substantive issue, and that is the Fourteenth Amendment Due Process Clause itself. It reads: "no person shall be deprived of life, liberty or property without due process of law; nor shall any state deprive any person of life, liberty or property without due process of law." Bingham's explanation of a package of substantive rights and separate procedural guarantees in one clause is reflected clearly in the language of the clause itself.

How, then, could Bingham have intended to protect all "persons" with regard to their due process rights, but have constructed Section One to deny them to non-citizens? The problem is best illustrated by example. Consider Jacques Monet, a French citizen charged with murder in Ohio. Wouldn't the denial of the procedural due process components—the rights to be informed of the charge against him, to be represented by counsel, to confront witnesses, to be released on reasonable bail, to not be tried without grand jury indictment, to not testify against himself, to be protected against cruel and unusual punishment, etc.—because he is not a citizen *itself* be a denial of substantive due process given that his life is implicated? Of course. And isn't there a problem in that there seems to be no mechanism within Section

One to protect these rights? Yes. And the solution is that the protection of these guarantees, of the procedural due process components, must be provided as “due process of law” to him as a “person,” because his *substantive* due process right to life *requires* them. It would seem that the statements by proponents of Section One that the procedural due process components are “privileges and immunities” and, therefore, not due process *itself*—when they are clearly very often necessary to protect substantive due process rights *themselves*—may be the most subtle yet powerful proof that those proponents intended a substantive Clause.

Finally, let’s consider the nature of the problem that the 39th Congress was attempting to remedy. It had inherited the legacy of *Dred Scott* which granted the Constitution an authority to condition a person’s entitlement to all rights—including those basic entitlements which are due-process rights—by limiting them to citizens, very narrowly defined. Thus, for those who did not meet the citizenship requirement, *Dred Scott* was a tool of active disfranchisement. What better method could Bingham and the rest of the proponents and ratifiers have used to prevent a repeat of that episode than to reverse *Dred Scott* at its core? That is, to amend the Constitution in such fashion that no branch of government any longer had the authority to disfranchise “any man” from due-process rights and, simultaneously, to impose upon the government an affirmative obligation to guarantee them as rights *themselves*. Substantive due process as a guarantee of the natural character of due-process rights is the perfect solution to the problem that had been presented to the 39th Congress.<sup>14</sup>

**I**f we can agree that life is a substantive constitutional right, we can now turn to the final question of whether unborn life is within the scope of the due process guarantee. *Roe v. Wade* squarely considered the due-process status of the unborn child and squarely held against it on the grounds that it was not a due process “person.” That determination was made after the Court examined fourteen unrelated constitutional uses of the word “person”—uses ranging from the age requirements for election to the Presidency and Congress to the Fugitive Slave Act—and concluded that as none of these uses had a pre-natal application, then neither does the “person” of the Due Process Clause. Judge Bork agrees with this methodology and accepts this result.

Assume as we have throughout that the unborn child possesses this thing we call life.<sup>15</sup> It must be observed that under *Roe*, “person” has become the equivalent of *Dred Scott*’s “citizen,” a tool of classification, imposing a legal status—birth—upon the Constitution’s obligation to protect a pre-existing

entitlement. Under *Roe* you have to qualify to be a “person,” even if you possess life. Consequently, rather than complying with the original intent as articulated by John Bingham in 1859 to comprehensively guarantee the natural right to life wherever it may be found (to “all men”), “person” has been turned into, in Bingham’s words, a “conventional regulation,” an act of law serving to dispossess that natural right, to rupture the possession granted by nature to life as a pre-existing entitlement. As such, *Roe*’s “person” has been used exactly opposite to the Amendment’s intended purpose, in the process effecting exactly what the Amendment had been intended to protect against. It is an act of historical incompetence.

A proper consideration of the issue would have been simply to apply the Clause’s historical purposes. As we’ve seen from Mr. Bingham, the word “person” affirmatively guarantees substantive protection to due-process rights. Viewed conversely, “person” prohibits the dispossession of these rights through imposition of any legal convention. Recall that John Bingham said these rights “*belong to all men irrespective of conventional regulations.*” Properly construed, then, one does not have to qualify to be a “person.” Not by citizenship, not by birth. One is a “person,” and entitled to the guarantee “personhood” provides, if one possesses life.

I hope this article has demonstrated that an honest review of the history of basic human dignities and their embodiment into our law makes clear, above all else, that a power or authority to ignore a basic human right is not what constitutes us. Our Constitution—what we actually are—recognizes the external truth that life is inherently valuable and links that truth with positive law by committing the law to a guarantee of that value. And while an interpretation of the Constitution toward that end is certainly a radical change from the current state of affairs, it is also clearly consistent with the intent of its proponents and ratifiers. It is also a hope for the future.

#### NOTES

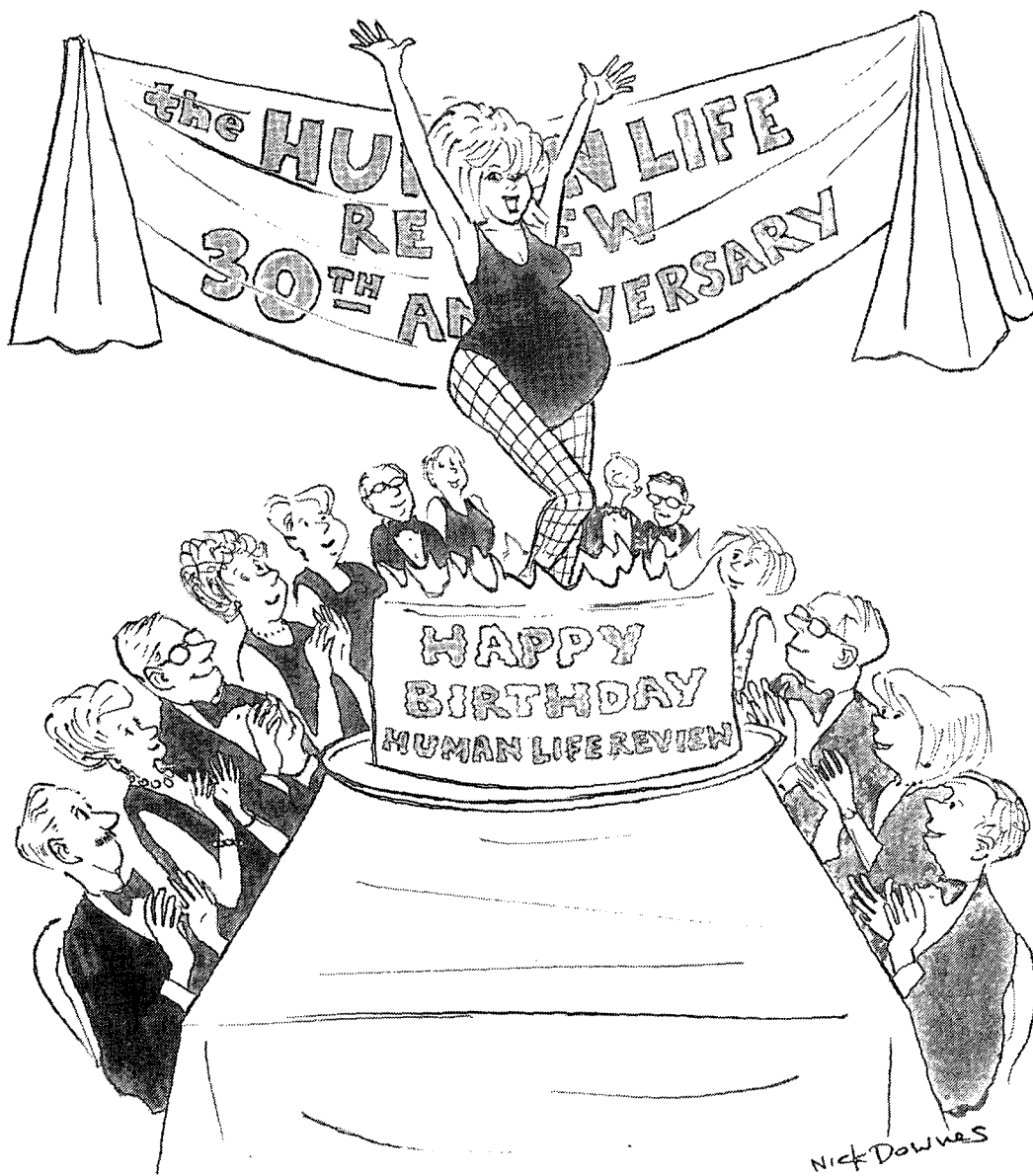
1. Richard Traynor founded New Jersey’s Legal Center For Defense of Life, a group of attorneys providing pro-bono legal services to life-related cases. The Legal Center was instrumental to the *Loce* case and in many other efforts taken on life’s behalf in New Jersey.
2. Akhil Reed Amar, *The Bill of Rights*, Yale University Press, pg. Xiii (1991).
3. 2 James Kent, *Commentaries on American Law* (2d ed., 1832).
4. Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper’s Book, The Impending Crisis; Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 Chi.—Kent L.Rev. 1113, 1127, 1132 (1993).
5. *Id.*
6. Cong. Globe, 39th Cong., 1 St Sess. 1013 (1866) (Remarks of Rep. Tobias Plants).
7. See Kurt T. Lash, *The Second Adoption of the Free Exercise Clause; Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1134 and n. 127 (1994).
8. The Privileges or Immunities Clause actually uses Chief Justice Marshall’s pre-approved “No

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state shall . . .” language to make clear it was intended to bind the states.

9. See, Amar, *The Bill of Rights*, *supra* at 163-211 for a detailed discussion of the Privileges or Immunities Clause as the intended vehicle in Section One to incorporate the Bill of Rights against the states.
10. *Cong. Globe* 35th Cong. 2nd Sess. 982 (1859).
11. This position may be disputed by the impact of the next Clause in Section One, the Equal Protection Clause. Such a discussion is beyond the scope of this article. However, suffice it to say the same logic which would require a substantive Due Process would require a substantive equal protection with the same result as is concluded here.
12. *Cong. Globe* 42nd Cong. 1st Sess. 1088-94.
13. *Cong. Globe* 42nd Cong. 1st Sess. 84 (1871).
14. It should be noted that state courts had a similar “substantive” reaction to *Barron*. At least nine state courts upheld various Bill of Rights protections against the states on the basis these rights pre-exist constitutional declaration and are enforceable on their own terms. The logic is identical to Bingham’s thoughts that Due Process rights are pre-existing entitlements and enforceable as such, indicating the concept of natural rights being enforced as natural rights was not rhetorical during the 19th century, but rather structural.
15. Judge Bork concedes life exists in his first quote included above. The fact of pre-natal life is undisputed scientifically. In addition, I have argued that the pre-natal life is recognized from conception for federal constitutional purposes. See *State of New Jersey v. Alex Loce: A Father’s Trial and the Case for Personhood*, *Human Life Review*, Spring 2001.





## A Special Tribute

The announcement of President Ronald Reagan's death came as we were beginning to plan our special 30th anniversary issue of the *Review*—the same issue which we would be presenting on October 15th at our second annual Great Defender of Life Dinner, honoring Professor Hadley Arkes. As we remembered the remarkable essay the President wrote for our Spring, 1983 issue, "Abortion and the Conscience of the Nation," and the great esteem that my father J.P. McFadden had for him, we thought it would be entirely appropriate to have as part of our anniversary celebration a tribute to Reagan and his contribution to the pro-life movement.

In the pages that follow we have reprinted Reagan's essay, as well as his proclamation declaring January 17th, 1988 as National Sanctity of Human Life Day. We've also included some recent reflections on his legacy, written by former national security advisor William Clark, our senior editor John Muggeridge, and Baylor University Professor Francis Beckwith. And, as you've seen, we proudly opened this section with our very own sparkling, original, Nick Downes cartoon! Thank you to our good and talented friend.

In the summer of 1982, the *Human Life Review* printed a letter it had received from a Mrs. Valerie Protopapas, responding to a *Review* article which, while deploring the use of spina bifida as a rationale for abortion, had labeled it as a "terrible" birth defect. Mrs. Protopapas wrote passionately about the trials *and* the joys of raising a handicapped child. Her 12-year-old son, born with spina bifida, used a wheelchair, but was otherwise a happy young man of superior intellectual accomplishments, working at college level and reading and writing in several languages (including Greek and Russian!). Mrs. Protopapas deplored abortion in her letter, and called on then-President Ronald Reagan to "re-inculcate the sense of values which made this country great." Much to her surprise, she received a personal letter from the President in reply. Dated July 12, 1982, Reagan's letter (reprinted in our Fall, 1982 issue) commended Mrs. Protopapas for her commitment and strongly affirmed the President's belief in protection for all babies, most especially those born handicapped.

As my father told us, when he saw that Reagan was indeed *reading* the *Review* he thought: "Why not ask him to *write* for it?" So he "floated" the idea among his pro-life colleagues in Washington. Much to *his* surprise, in the spring of 1983 a manuscript arrived on his desk: "Abortion and the Conscience of the Nation," by President Ronald Reagan. And, although the first draft had been prepared for the President by members of his Office of Policy Development, the essay had been edited and polished by the great man himself (J.P.'s dear friend Anne Higgins, then head of White House correspondence, sent him the marked-up manuscript copy to prove it).

In 1984 the *Review* collaborated with Thomas Nelson Publishers to bring out

*Abortion and the Conscience of the Nation* in book form. It included afterwords by Dr. C. Everett Koop and Malcom Muggeridge, and an introduction by J.P., from which the following:

This book will undoubtedly bring Mr. Reagan's words to a far greater and longer-lasting readership. Which is indeed most fitting: in ten years of publishing, the *Human Life Review* has printed over a million words of "compelling reasons" why abortion is a national disaster, but none more compelling than those you will read here.

Perhaps the best description of what it all means came to us from our friend Malcolm Muggeridge (who never fails to put things in just the right perspective). We had sent him a specially-bound copy of the "Reagan issue," and he replied:

*"Dear Jim: I was delighted to have the elegant copy of President Reagan's article. It is, of course, a fine piece of journalism—concise, eloquent without being rhetorical, and, above all, unequivocal. What, however, impresses me most is that a President of the United States while in office should have the courage and honesty to commit himself, without any sort of reservation, to delegalizing abortion. . . . The abortion issue is far and away the most important one now facing what we continue to call Western Civilisation. If we go on tolerating legalized abortion, it will amount to collective suicide. . . . On such vital moral issues as abortion, politicians tend to sit on the fence, hoping to pick up a few votes from both sides. Your President Reagan is the only example I've come across in half a century of knockabout journalism of a political leader ready to stand up without any reservations for the sanctity of life rather than for what passes for being the quality of life. All honor to him! Affectionately, Malcolm Muggeridge."*

And J. P. concluded with this:

The question remains: Who will listen? After the Nazi Holocaust, it was charged that those who *knew* what was happening (great men among them) failed to halt the slaughter. No one who reads this book can fail to know that an abortion holocaust is happening now. Nothing in history is inevitable; men choose, and we Americans can choose to halt the slaughter of our own innocents. If we do not, history will record—this book is proof of it—that the guilt is ours, that we were not failed by our great men, that our own president called upon us to make the choice. For that, we say, with Mr. Muggeridge, "All honor to him."

And for that, I say, with the rest of our staff, all honor to J.P. McFadden as well, and long live the *Human Life Review*. —*Maria McFadden*.

# Abortion and the Conscience of the Nation

Ronald Reagan

The 10th anniversary of the Supreme Court decision in *Roe v. Wade* is a good time for us to pause and reflect. Our nationwide policy of abortion-on-demand through all nine months of pregnancy was neither voted for by our people nor enacted by our legislators—not a single state had such unrestricted abortion before the Supreme Court decreed it to be national policy in 1973. But the consequences of this judicial decision are now obvious: since 1973, more than 15 million unborn children have had their lives snuffed out by legalized abortions. That is over ten times the number of Americans lost in all our nation's wars.

Make no mistake, abortion-on-demand is not a right granted by the Constitution. No serious scholar, including one disposed to agree with the Court's result, has argued that the framers of the Constitution intended to create such a right. Shortly after the *Roe v. Wade* decision, Professor John Hart Ely, now Dean of Stanford Law School, wrote that the opinion "is not constitutional law and gives almost no sense of an obligation to try to be." Nowhere do the plain words of the Constitution even hint at a "right" so sweeping as to permit abortion up to the time the child is ready to be born. Yet that is what the Court ruled.

As an act of "raw judicial power" (to use Justice White's biting phrase), the decision by the seven-man majority in *Roe v. Wade* has so far been made to stick. But the Court's decision has by no means settled the debate. Instead, *Roe v. Wade* has become a continuing prod to the conscience of the nation.

Abortion concerns not just the unborn child, it concerns every one of us. The English poet, John Donne, wrote: "... any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee."

We cannot diminish the value of one category of human life—the unborn—without diminishing the value of all human life. We saw tragic proof of this truism last year when the Indiana courts allowed the starvation death of "Baby Doe" in Bloomington because the child had Down's Syndrome.

Many of our fellow citizens grieve over the loss of life that has followed *Roe v. Wade*. Margaret Heckler, soon after being nominated to head the largest

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Ronald Reagan, while sitting as the fortieth president of the United States, sent us this article shortly after the tenth anniversary of *Roe v. Wade*; we published it with pride in our *Spring*, 1983 issue.

department of our government, Health and Human Services, told an audience that she believed abortion to be the greatest moral crisis facing our country today. And the revered Mother Teresa, who works in the streets of Calcutta ministering to dying people in her world-famous mission of mercy, has said that “the greatest misery of our time is the generalized abortion of children.”

Over the first two years of my Administration I have closely followed and assisted efforts in Congress to reverse the tide of abortion—efforts of Congressmen, Senators and citizens responding to an urgent moral crisis. Regrettably, I have also seen the massive efforts of those who, under the banner of “freedom of choice,” have so far blocked every effort to reverse nationwide abortion-on-demand.

Despite the formidable obstacles before us, we must not lose heart. This is not the first time our country has been divided by a Supreme Court decision that denied the value of certain human lives. The *Dred Scott* decision of 1857 was not overturned in a day, or a year, or even a decade. At first, only a minority of Americans recognized and deplored the moral crisis brought about by denying the full humanity of our black brothers and sisters; but that minority persisted in their vision and finally prevailed. They did it by appealing to the hearts and minds of their countrymen, to the truth of human dignity under God. From their example, we know that respect for the sacred value of human life is too deeply engrained in the hearts of our people to remain forever suppressed. But the great majority of the American people have not yet made their voices heard, and we cannot expect them to—any more than the public voice arose against slavery—*until* the issue is clearly framed and presented.

What, then, is the real issue? I have often said that when we talk about abortion, we are talking about two lives—the life of the mother and the life of the unborn child. Why else do we call a pregnant woman a mother? I have also said that anyone who doesn’t feel sure whether we are talking about a second human life should clearly give life the benefit of the doubt. If you don’t know whether a body is alive or dead, you would never bury it. I think this consideration itself should be enough for all of us to insist on protecting the unborn.

The case against abortion does not rest here, however, for medical practice confirms at every step the correctness of these moral sensibilities. Modern medicine treats the unborn child as a patient. Medical pioneers have made great breakthroughs in treating the unborn—for genetic problems, vitamin deficiencies, irregular heart rhythms, and other medical conditions. Who can forget George Will’s moving account of the little boy who

underwent brain surgery six times during the nine weeks before he was born? Who is the *patient* if not that tiny unborn human being who can feel pain when he or she is approached by doctors who come to kill rather than to cure?

The real question today is not when human life begins, but, *What is the value of human life?* The abortionist who reassembles the arms and legs of a tiny baby to make sure all its parts have been torn from its mother's body can hardly doubt whether it is a human being. The real question for him and for all of us is whether that tiny human life has a God-given right to be protected by the law—the same right we have.

**W**hat more dramatic confirmation could we have of the real issue than the Baby Doe case in Bloomington, Indiana? The death of that tiny infant tore at the hearts of all Americans because the child was undeniably a live human being—one lying helpless before the eyes of the doctors and the eyes of the nation. The real issue for the courts was *not* whether Baby Doe was a human being. The real issue was whether to protect the life of a human being who had Down's Syndrome, who would probably be mentally handicapped, but who needed a routine surgical procedure to unblock his esophagus and allow him to eat. A doctor testified to the presiding judge that, even with his physical problem corrected, Baby Doe would have a "non-existent" possibility for "a minimally adequate quality of life"—in other words, that retardation was the equivalent of a crime deserving the death penalty. The judge let Baby Doe starve and die, and the Indiana Supreme Court sanctioned his decision.

Federal law does not allow federally-assisted hospitals to decide that Down's Syndrome infants are not worth treating, much less to decide to starve them to death. Accordingly, I have directed the Departments of Justice and Health and Human Services to apply civil rights regulations to protect handicapped newborns. All hospitals receiving federal funds must post notices which will clearly state that failure to feed handicapped babies is prohibited by federal law. The basic issue is whether to value and protect the lives of the handicapped, whether to recognize the sanctity of human life. This is the same basic issue that underlies the question of abortion.

The 1981 Senate hearings on the beginning of human life brought out the basic issue more clearly than ever before. The many medical and scientific witnesses who testified disagreed on many things, but not on the *scientific* evidence that the unborn child is alive, is a distinct individual, or is a member of the human species. They did disagree over the *value* question, whether to give value to a human life at its early and most vulnerable stages of existence.

Regrettably, we live at a time when some persons do *not* value all human life. They want to pick and choose which individuals have value. Some have said that only those individuals with “consciousness of self” are human beings. One such writer has followed this deadly logic and concluded that “shocking as it may seem, a newly born infant is not a human being.”

A Nobel Prize winning scientist has suggested that if a handicapped child “were not declared fully human until three days after birth, then all parents could be allowed the choice.” In other words, “quality control” to see if newly born human beings are up to snuff.

Obviously, some influential people want to deny that every human life has intrinsic, sacred worth. They insist that a member of the human race must have certain qualities before they accord him or her status as a “human being.”

Events have borne out the editorial in a California medical journal which explained three years before *Roe v. Wade* that the social acceptance of abortion is a “defiance of the long-held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition, or status.”

Every legislator, every doctor, and every citizen needs to recognize that the real issue is whether to affirm and protect the sanctity of all human life, or to embrace a social ethic where some human lives are valued and others are not. As a nation, we must choose between the sanctity of life ethic and the “quality of life” ethic.

I have no trouble identifying the answer our nation has always given to this basic question, and the answer that I hope and pray it will give in the future. America was founded by men and women who shared a vision of the value of each and every individual. They stated this vision clearly from the very start in the Declaration of Independence, using words that every schoolboy and schoolgirl can recite:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.

We fought a terrible war to guarantee that one category of mankind—black people in America—could not be denied the inalienable rights with which their Creator endowed them. The great champion of the sanctity of all human life in that day, Abraham Lincoln, gave us his assessment of the Declaration’s purpose. Speaking of the framers of that noble document, he said:

This was their majestic interpretation of the economy of the Universe. This was their lofty, and wise, and noble understanding of the justice of the Creator to His creatures. Yes,

RONALD REAGAN

gentlemen, to all His creatures, to the whole great family of man. In their enlightened belief, nothing stamped with the divine image and likeness was sent into the world to be trodden on . . . They grasped not only the whole race of man then living, but they reached forward and seized upon the farthest posterity. They erected a beacon to guide their children and their children's children, and the countless myriads who should inhabit the earth in other ages.

He warned also of the danger we would face if we closed our eyes to the value of life in any category of human beings:

I should like to know if taking this old Declaration of Independence, which declares that all men are equal upon principle and making exceptions to it where will it stop. If one man says it does not mean a Negro, why not another say it does not mean some other man?

When Congressman John A. Bingham of Ohio drafted the Fourteenth Amendment to guarantee the rights of life, liberty, and property to all human beings, he explained that *all* are "entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal." He said the right guaranteed by the amendment would therefore apply to "any human being." Justice William Brennan, writing in another case decided only the year before *Roe v. Wade*, referred to our society as one that "strongly affirms the sanctity of life."

Another William Brennan—not the Justice—has reminded us of the terrible consequences that can follow when a nation rejects the sanctity of life ethic:

The cultural environment for a human holocaust is present whenever any society can be misled into defining individuals as less than human and therefore devoid of value and respect.

As a nation today, we have *not* rejected the sanctity of human life. The American people have not had an opportunity to express their view on the sanctity of human life in the unborn. I am convinced that Americans do not want to play God with the value of human life. It is not for us to decide who is worthy to live and who is not. Even the Supreme Court's opinion in *Roe v. Wade* did not explicitly reject the traditional American idea of intrinsic worth and value in all human life; it simply dodged this issue.

The Congress has before it several measures that would enable our people to reaffirm the sanctity of human life, even the smallest and the youngest and the most defenseless. The Human Life Bill expressly recognizes the unborn as human beings and accordingly protects them as persons under our Constitution. This bill, first introduced by Senator Jesse Helms, provided the vehicle for the Senate hearings in 1981 which contributed so much to our understanding of the real issue of abortion.

The Respect Human Life Act, just introduced in the 98th Congress, states



in its first section that the policy of the United States is “to protect innocent life, both before and after birth.” This bill, sponsored by Congressman Henry Hyde and Senator Roger Jepsen, prohibits the federal government from performing abortions or assisting those who do so, except to save the life of the mother. It also addresses the pressing issue of infanticide which, as we have seen, flows inevitably from permissive abortion as another step in the denial of the inviolability of innocent human life.

I have endorsed each of these measures, as well as the more difficult route of constitutional amendment, and I will give these initiatives my full support. Each of them, in different ways, attempts to reverse the tragic policy of abortion-on-demand imposed by the Supreme Court ten years ago. Each of them is a decisive way to affirm the sanctity of human life.

We must all educate ourselves to the reality of the horrors taking place. Doctors today know that unborn children can feel a touch within the womb and that they respond to pain. But how many Americans are aware that abortion techniques are allowed today, in all 50 states, that burn the skin of a baby with a salt solution, in an agonizing death that can last for hours?

Another example: two years ago, the *Philadelphia Inquirer* ran a Sunday special supplement on “The Dreaded Complication.” The “dreaded complication” referred to in the article—the complication feared by doctors who perform abortions—is the *survival* of the child despite all the painful attacks during the abortion procedure. Some unborn children *do* survive the late-term abortions the Supreme Court has made legal. Is there any question that these victims of abortion deserve our attention and protection? Is there any question that those who *don’t* survive were living human beings before they were killed?

Late-term abortions, especially when the baby survives, but is then killed by starvation, neglect, or suffocation, show once again the link between abortion and infanticide. The time to stop both is now. As my administration acts to stop infanticide, we will be fully aware of the real issue that underlies the death of babies before and soon after birth.

Our society has, fortunately, become sensitive to the rights and special needs of the handicapped, but I am shocked that physical or mental handicaps of newborns are still used to justify their extinction. This Administration has a Surgeon General, Dr. C. Everett Koop, who has done perhaps more than any other American for handicapped children, by pioneering surgical techniques to help them, by speaking out on the value of their lives, and by working with them in the context of loving families. You will not find his former patients advocating the so-called “quality-of-life” ethic.

I know that when the true issue of infanticide is placed before the American

people, with all the facts openly aired, we will have no trouble deciding that a mentally or physically handicapped baby has the same intrinsic worth and right to life as the rest of us. As the New Jersey Supreme Court said two decades ago, in a decision upholding the sanctity of human life, “a child need not be perfect to have a worthwhile life.”

Whether we are talking about pain suffered by unborn children, or about late-term abortions, or about infanticide, we inevitably focus on the humanity of the unborn child. Each of these issues is a potential rallying point for the sanctity of life ethic. Once we as a nation rally around any one of these issues to affirm the sanctity of life, we will see the importance of affirming this principle across the board.

Malcolm Muggeridge, the English writer, goes right to the heart of the matter: “Either life is always and in all circumstances sacred, or intrinsically of no account; it is inconceivable that it should be in some cases the one, and in some the other.” The sanctity of innocent human life is a principle that Congress should proclaim at every opportunity.

It is possible that the Supreme Court itself may overturn its abortion rulings. We need only recall that in *Brown v. Board of Education* the court reversed its own earlier “separate-but-equal” decision. I believe if the Supreme Court took another look at *Roe v. Wade*, and considered the real issue between the sanctity of life ethic and the quality of life ethic, it would change its mind once again.

As we continue to work to overturn *Roe v. Wade*, we must also continue to lay the groundwork for a society in which abortion is not the accepted answer to unwanted pregnancy. Pro-life people have already taken heroic steps, often at great personal sacrifice, to provide for unwed mothers. I recently spoke about a young pregnant woman named Victoria, who said, “In this society we save whales, we save timber wolves and bald eagles and Coke bottles. Yet, everyone wanted me to throw away my baby.” She has been helped by Sav-a-Life, a group in Dallas, which provides a way for unwed mothers to preserve the human life within them when they might otherwise be tempted to resort to abortion. I think also of House of His Creation in Coatesville, Pennsylvania, where a loving couple has taken in almost 200 young women in the past ten years. They have seen, as a fact of life, that the girls are *not* better off having abortions than saving their babies. I am also reminded of the remarkable Rossow family of Ellington, Connecticut, who have opened their hearts and their home to nine handicapped adopted and foster children.

The Adolescent Family Life Program, adopted by Congress at the request

of Senator Jeremiah Denton, has opened new opportunities for unwed mothers to give their children life. We should not rest until our entire society echoes the tone of John Powell in the dedication of his book, *Abortion: The Silent Holocaust*, a dedication to every woman carrying an unwanted child: "Please believe that you are not alone. There are many of us that truly love you, who want to stand at your side, and help in any way we can." And we can echo the always-practical woman of faith, Mother Teresa, when she says, "If you don't want the little child, that unborn child, give him to me." We have so many families in America seeking to adopt children that the slogan "every child a wanted child" is now the emptiest of all reasons to tolerate abortion.

I have often said we need to join in prayer to bring protection to the unborn. Prayer and action are needed to uphold the sanctity of human life. I believe it will not be possible to accomplish our work, the work of saving lives, "without being a soul of prayer." The famous British Member of Parliament William Wilberforce prayed with his small group of influential friends, the "Clapham Sect," for *decades* to see an end to slavery in the British empire. Wilberforce led that struggle in Parliament, unflaggingly, because he believed in the sanctity of human life. He saw the fulfillment of his impossible dream when Parliament outlawed slavery just before his death.

Let his faith and perseverance be our guide. We will never recognize the true value of our own lives until we affirm the value in the life of others, a value of which Malcolm Muggeridge says: "... however low it flickers or fiercely burns, it is still a Divine flame which no man dare presume to put out, be his motives ever so humane and enlightened."

Abraham Lincoln recognized that we could not survive as a free land when some men could decide that others were not fit to be free and should therefore be slaves. Likewise, we cannot survive as a free nation when some men decide that others are not fit to live and should be abandoned to abortion or infanticide. My Administration is dedicated to the preservation of America as a free land, and there is no cause more important for preserving that freedom than affirming the transcendent right to life of all human beings, the right without which no other rights have any meaning.

THE WHITE HOUSE

WASHINGTON

July 29, 1983

Dear Jim:

It was very thoughtful of you to send that beautifully encased copy of the Spring, 1983 Human Life Review. Your publication has been an unfailing source of information and insight into the most profound issue of all facing our society -- quite simply, what value do we place on human life?

Our history gives a clear answer. The United States of America was born out of a passionate conviction, derived from our Judeo-Christian heritage, that each and every human person is the handiwork of God with rights the state is obliged to acknowledge and defend. Our national birth certificate, the Declaration of Independence, proclaims it clearly: people are "endowed by their Creator with certain unalienable rights," and the first of these rights is the right to life.

It is this fundamental truth that the Human Life Review has championed eloquently for the past nine years. You have published essays by such outstanding writers as Malcolm Muggeridge, Clare Boothe Luce, William F. Buckley, Michael Novak, Joseph Sobran, Eugene Ionesco, and George Gilder. I am grateful that you have added me to this imposing roster of voices speaking up in defense of innocent human life in the wake of the tragic Roe v. Wade decision. That chorus must continue to swell.

The moral evil of legalized abortion taints this land we love. Speaking of the evil of slavery, Thomas Jefferson said that he trembled for his country, knowing that "God is just, and that His justice cannot sleep forever." I tremble for my country because of the evil of abortion, but I take courage from the fact that so many Americans are working and praying to uproot this evil. With God's help, we shall prevail.

Sincerely,



Mr. James P. McFadden  
Human Life Review  
150 East 35th Street  
New York, New York 10016

## A Proclamation

*Ronald Reagan*

America has given a great gift to the world, a gift that drew upon the accumulated wisdom derived from centuries of experiments in self-government, a gift that has irrevocably changed humanity's future. Our gift is twofold: the declaration, as a cardinal principal of all just law, of the God-given, unalienable rights possessed by every human being; and the example of our determination to secure those rights and to defend them against every challenge through the generations. Our declaration and defense of our rights have made us and kept us free and have sent a tide of hope and inspiration around the globe.

One of those unalienable rights, as the Declaration of Independence affirms so eloquently, is the right to life. In the 15 years since the Supreme Court's decision in *Roe v. Wade*, however, America's unborn have been denied their right to life. Among the tragic and unspeakable results in the last decade and a half have been the loss of life of 22 million infants before birth; the pressure and anguish of countless women and girls who are driven to abortion; and a cheapening of our respect for the human person and the sanctity of human life.

We are told that we may not interfere with abortion. We are told that we may not "impose our morality" on those who wish to allow or participate in the taking of the life of infants before birth; yet no one calls it "imposing morality" to prohibit the taking of life after people are born. We are told as well that there exists a "right" to end the lives of unborn children; yet no one can explain how such a right can exist in stark contradiction of each person's fundamental right to life.

That right to life belongs equally to babies in the womb, babies born handicapped, and the elderly or infirm. That we have killed the unborn for fifteen years does not nullify this right, nor could any number of killings ever do so. The unalienable right to life is found not only in the Declaration of Independence, but also in the Constitution that every President is sworn to preserve, protect, and defend. Both the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life without due process of law.

All medical and scientific evidence increasingly affirms that children before birth share all the basic attributes of human personality—that they are

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**Ronald Reagan**, the fortieth president of the United States, issued this Proclamation declaring January 17, 1988, as National Sanctity of Human Life Day.

RONALD REAGAN

in fact persons. Modern medicine treats unborn children as patients. Yet, as the Supreme Court itself has noted, the decision in *Roe v. Wade* rested upon an earlier state of medical technology. The law of the land in 1988 should recognize all of the medical evidence.

Our Nation cannot continue down the path of abortion, so radically at odds with our history, our heritage, and our concepts of justice. This sacred legacy, and the well-being and the future of our country, demand that protection of the innocents must be guaranteed and that the personhood of the unborn be declared and defended throughout our land. In legislation introduced at my request in the First Session of the 100th Congress, I have asked the Legislative branch to declare the "humanity of the unborn child and the compelling interest of the several states to protect the life of each person before birth." This duty to declare on so fundamental a matter falls to the Executive as well. By this Proclamation I hereby do so.

**NOW, THEREFORE, I, RONALD REAGAN**, *President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim and declare the unalienable personhood of every American, from the moment of conception until natural death, and I do proclaim, ordain, and declare that I will take care that the Constitution and laws of the United States are faithfully executed for the protection of America's unborn children. Upon this act, sincerely believed to be an act of justice, warranted by the Constitution, I invoke the considerate judgment of mankind and the gracious favor of Almighty God. I also proclaim Sunday, January 17th, 1988, as National Sanctity of Human Life Day. I call upon the citizens of this blessed land to gather on that day in their homes and places of worship to give thanks for the gift of life they enjoy and to reaffirm their commitment to the dignity of every human being and the sanctity of every human life.*

IN WITNESS WHEREOF, *I have hereunto set my hand this fourteenth day of January, in the year of our Lord nineteen hundred and eighty-eight, and the Independence of the United States of America the two hundred and twelfth.*

—RONALD REAGAN

## For Reagan, All Life Was Sacred

William P. Clark

PASO ROBLES, CALIF.

Ronald Reagan had not passed from this life for 48 hours before proponents of human embryonic stem-cell research began to suggest that such ethically questionable scientific work should be promoted under his name. But this cannot honestly be done without ignoring President Reagan's own words and actions.

Ronald Reagan's record reveals that no issue was of greater importance to him than the dignity and sanctity of all human life. "My administration is dedicated to the preservation of America as a free land," he said in 1983. "And there is no cause more important for preserving that freedom than affirming the transcendent right to life of all human beings, the right without which no other rights have any meaning." One of the things he regretted most at the completion of his presidency in 1989, he told me, was that politics and circumstances had prevented him from making more progress in restoring protection for unborn human life.

Still, he did what he could. To criticize the *Roe v. Wade* decision on its 10th anniversary in 1983, he published his famous essay "Abortion and the Conscience of the Nation" in the *Human Life Review*. "We cannot diminish the value of one category of human life—the unborn—without diminishing the value of all human life," he wrote. He went on to emphasize "the truth of human dignity under God" and "respect for the sacred value of human life." Because modern science has revealed the wonder of human development, and modern medicine treats "the developing human as a patient," he declared, "the real question today is not when human life begins, but, What is the value of human life?"

In that essay, he expressly encouraged continued support for the "sanctity of life ethic" and rejection of the "quality of life ethic." Writing about the value of all human life, he quoted the British writer Malcolm Muggeridge's statement that "however low it flickers or fiercely burns, it is still a divine flame which no man dare presume to put out, be his motives ever so humane and enlightened." And in the *Roe v. Wade* decision, he insisted, the Supreme Court "did not explicitly reject the traditional American idea of intrinsic worth and value in all human life; it simply dodged the issue."

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William P. Clark was national security advisor and secretary of the interior under President Ronald Reagan. This column appeared in the *New York Times* June 11, 2004 and is reprinted with permission.

Likewise, in his famous “Evil Empire” speech of March 1983—which most recall as solely an indictment of the Soviet Union—Ronald Reagan spoke strongly against the denigration of innocent human life. “Abortion on demand now takes the lives of up to one and a half million unborn children a year,” he said. “Unless and until it can be proven that the unborn child is not a living entity, then its right to life, liberty, and the pursuit of happiness must be protected.”

His actions were as clear as his words. He supported the Human Life Amendment, which would have inscribed in the Constitution “the paramount right to life is vested in each human being from the moment of fertilization without regard to age, health or condition of dependency.” And he favored bills in Congress that would have given every human being—at all stages of development—protection as a person under the 14th Amendment.

Aside from the moral principle, President Reagan would also have questioned picking the people’s pocket to support commercial research. He understood the significance of putting the imprimatur of the nation, through public financing, behind questionable research.

He consistently opposed federal support for the destruction of innocent human life. After the charter expired for the Department of Health, Education and Welfare’s ethical advisory board—which in the 1970s supported destructive research on human embryos—he began a *de facto* ban on federal financing of embryo research that he held to throughout his presidency.

As for today’s debate, as a defender of free people and free markets, he would have asked the marketplace question: if human embryonic research is so clearly promising as the researchers assert, why aren’t private investors putting money into it, as they are in adult stem cell research?

Mr. Reagan’s suffering under Alzheimer’s disease was tragic, and we should do everything we can that is ethically proper to help others afflicted with it. But I have no doubt that he would have urged our nation to look to adult stem cell research—which has yielded many clinical successes—and away from the destruction of developing human lives, which has yielded none. Those who would trade on Ronald Reagan’s legacy should first consider his own words.



# Ronald Reagan: An American Christian

*John Muggeridge*

For Ronald Reagan religion and patriotism coincided. He took the words of the Declaration of Independence at their face value. His America was a promised land, flowing with democracy and freedom, under, of course, the rule of God. For Reagan, acceptance of divine authority was the key to social order. "If we will not be governed by God," he warned an audience of Evangelicals in March, 1983, quoting William Penn, "we must be governed by tyrants." Like the Israelites of old, in ignoring God's laws, Americans brooked disaster. But Reagan was American enough never to lose faith in their essential goodness. Corrupt government had led them astray, as had King Joram his subjects when "he made the inhabitants of Jerusalem to commit fornication and Juda to transgress." It took another century and a half, but didn't Ezechias finally manage to undo the evil Joram had caused? Reagan expected the same sort of reformation in his own kingdom of Judah. Restore prayer to public schools; keep parents informed of what was really happening to their teenage children in birth control clinics; fight child pornography, but above all put an end to the massacre of innocent children that had resulted from the *Roe v. Wade* decision of 1972, and, as Reagan confidently assumed, Americans would be brought back to their senses. Some day, he promised his evangelical audience, Congress would indeed enact human life legislation to end the tragedy of abortion on demand; meanwhile, they must never rest until that happened. Their task was no less than that of helping to enforce the Declaration of Independence. Since science dictates that preborn children are indeed living persons, their right to life, liberty and the pursuit of happiness required protecting.

And the same American-born spirit of militant hopefulness animated Reagan's foreign policy. He fought the Cold War not to placate the Soviets, but to defeat them. Hence he refused to countenance a nuclear freeze. Pursuing peace by leaving your enemy permanently in possession of superior military force to him seemed suicidal. The thing to do was end the arms race by winning it. Reagan believed that the United States was founded on moral principles. And, since in the end good must prevail over evil, the Soviet Union, as he told members of the British House of Commons in 1982, was indeed destined for the ash heap of history. Thus perish all evil empires.

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**John Muggeridge**, a writer and retired academic living in Toronto, is a long-time senior editor of this *Review*. This article originally appeared in *Catholic Insight* and is reprinted with permission.

Nevertheless, like American abortion advocates in high places, Soviet freedom-usurpers in the Kremlin were not about to quit without a fight. So in 1983, his ears plugged against the massed choirs of anti-war protesters, Reagan advanced U.S. Pershing and cruise missiles to within range of Eastern European targets. Soviet negotiators stormed out of arms limitation talks. Pundits around the world rose as one man in protest. Reagan responded by announcing that U.S. scientists had started work on a missile shield in space. This was the so-called Strategic Defence Initiative, parodied by opponents of Reagan's foreign policy as "Star Wars." Peaceniks mocked S.D.I., but ruling circles in Moscow treated it with deadly seriousness. They knew that, should Washington ever develop an effective defence against on-coming missiles, Mass Assured Destruction would for their country become Mass Assured Defeat. S.D.I. persuaded the Kremlin to resume arms limitation talks, as Reagan predicted it would.

**T**he crunch came at the Reykjavik summit meeting in October of 1986, where, against the advice of his aides, Reagan refused to barter away S.D.I. in return for further arms cuts. Now he had his enemy over a barrel. Moscow lacked the economic resources to build its own anti-missile defence. This left then-Soviet leader Mikhail Gorbachev with nothing more to bargain with. Gorbachev flew home from Reykjavik having failed either to achieve an arms limitation agreement or put an end to S.D.I. Such a resounding diplomatic defeat put heart into opponents of his regime and ultimately led to its demise. Pharaoh-like, Gorbachev let his peoples go, although it must be said in his defence that, unlike his Egyptian predecessor, he never once authorized the use of force to prevent their departure. As for Reagan, the fall of Soviet communism did not surprise him. It was God's will that it should give way to democracy, and Reagan felt proud to have had the privilege of helping to make that ideological change happen.

The question is: why wasn't he equally successful in overthrowing *Roe v. Wade*? The legal slaughter of unborn children must surely be every bit as heinous in God's eyes as the imprisonment of innocent adults in Gulag. Yet in authoritarian-minded Russia, Gulag is no more, while in democracy-obsessed United States, government approved abortion facilities continue to flourish. Lou Cannon, the biographer who has followed Reagan's career most closely, explains this anomaly by asserting that Reagan in his dealings with Congress gave only scant attention to the human life file. William P. Clark, a key member of Reagan's staff both when he was governor of California and after he became President, however, takes exactly the opposite view. According to Clark, Reagan's record shows that "no issue was of greater

importance to him than the dignity and sanctity of all human life.” And Clark backs this statement up by quoting the last sentence of “Abortion and the Conscience of a Nation,” an article Reagan wrote for the *Human Life Review* in 1983, and Nelson published a year later in book form: “My administration is dedicated to the preservation of America as a free land, and there is no cause more important for preserving that freedom than affirming the transcendent right to life of all human beings, the right without which no other rights have any meaning.”

And, as Clark shows, Reagan was as good as his word. Every congressional initiative designed to curb the abortion holocaust received his blessing. During his watch, no foreign aid was to be used for promoting or performing abortions, and he enthusiastically supported the Hyde Amendment, which calls for an anti-abortion rider on all federal spending measures. But perhaps most significantly, given current developments, he managed to stop the public funding of embryo research throughout his presidency.

Yet the evil empire of abortion shows no signs of cracking. *Roe v. Wade* is as firmly as ever entrenched in U.S. constitutional law. Some sociologists are even praising it for having made possible the killing off of potential criminals, thus lowering contemporary crime rates. Meanwhile, Reagan has hardly had time to turn in his grave before his name is being invoked to promote the butchering of unimplanted, unborn babies to serve the dubious ends of lab-coated utilitarians. What are we to say? Is Peter Kreeft right, and we really are in the run-up to Armageddon? Or is this just another of those dark ages so familiar to Old Testament history when the Children of Israel, having reverted to the worship of Baal in high places, find themselves once again at the mercy of the Assyrians? One thing is certain. If there is to be another dawn, we can expect that Americans will remember Ronald Reagan with the same respect and admiration that the Children of Israel must have bestowed on Ezechias.

# What Would Reagan Do?

Francis J. Beckwith

In 1984 President Reagan published a small book, *Abortion and the Conscience of the Nation* that included postscripts by his surgeon general, C. Everett Koop, and the British writer Malcolm Muggeridge. It was the first book published by a sitting president. Reagan's contribution to the volume had been published in the spring of 1983 in the *Human Life Review*, but he saw fit to republish it so that his argument could reach a wider audience.

On June 5, 2004, President Reagan died of pneumonia after a ten-year battle with Alzheimer's disease. His death brought an avalanche of media coverage, including commentary by the late president's friends and foes, and apparently neutral observers in the press. Despite all of that, his position on abortion was rarely mentioned in the mainstream media. I did, however, hear several mentions of Nancy Reagan's support of embryonic stem-cell research—an endorsement based on that research's purported promise of finding a cure for Alzheimer's.

In fact, Ron Reagan, the son of Mrs. Reagan and her late husband, will be offering a prime-time address at the Democratic Convention tonight in which he will defend such research.

We can certainly understand why Mrs. Reagan takes the position she does. For a decade she suffered as she saw her beloved husband's mental faculties deteriorate, until he could no longer recognize her, his children, or their closest and dearest friends. If the president had died of a heart attack or even cancer, it would have been painful for his family, but it wouldn't have approached the anguish of witnessing the protracted escaping of talent, memory, and wit from a man who had those things in abundance. No one can blame Mrs. Reagan for employing her public reputation and reservoir of good will to promote the scientific research she believes will spare other families from the misfortune that she and hers have suffered.

But as I listened to the commentators extolling Mrs. Reagan's cause, I asked myself the question: What would Ronald Reagan do? So I pulled out my copy of *Abortion and the Conscience of the Nation*, to apply the implications of President Reagan's argument to the sort of research his widow now advocates.

Ronald Reagan's work on abortion is animated by his understanding of

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human equality. He found it in the ideas of the Declaration of Independence, and in reality in President Lincoln's project of "a new birth of freedom." For President Reagan, what mattered in the abortion debate—what is doing the moral work, so to speak—is whether the unborn is a member of the greater human family, not whether it exhibits the characteristics we find in that family's healthy adult members. "[W]e live in a time," he wrote, "when some do *not* value all human life. They want to pick and choose what individuals have value. Some have said that only those individuals with 'consciousness of self' are human beings. . . . Obviously, some influential people want to deny that every human life has intrinsic, sacred worth. They insist that a member of the human race must have certain qualities before they accord him or her status as a 'human being.'"

Reagan saw in this debate what Lincoln saw in the issue of slavery: Are the slaves truly human beings in possession of the same nature as their owners? If so, then they are not meant to be property, but are bearers of rights, entitled to the same protections under the law as all beings who possess that nature. For Reagan, in turn, the question was: Does the unborn fetus possess the same nature she will possess as she grows and develops into an infant, a child, an adolescent, a young adult, a middle-ager, a senior citizen?

President Reagan saw the deep connection between our human nature and the rights that spring from it, which a just government is obligated to recognize. The unborn—from zygote to blastocyst to embryo to fetus—is the same being, the same substance, that develops into an adult. The actualization of a human being's potentials—that is, her "human" appearance and the exercise of her rational and moral powers as an adult—is merely the public presentation of functions latent in every human substance, from the moment it is brought into being. A human may lose and regain those functions throughout her life, but the substance remains unchanged.

As Reagan understood, if one's value is conditioned on certain accidental properties, then the human equality affirmed by the Declaration and advanced by Lincoln—the philosophical foundation of our constitutional regime—is a fiction. In that case there is no principled basis for rejecting the notion that human rights ought to be distributed to individuals on the basis of native intellectual abilities or other value-giving properties, such as rationality or self-awareness. One can only reject this notion by affirming that human beings are intrinsically valuable because they possess a particular *nature* from the moment they come into existence. That is to say, what a human being *is*, and not what she *does*, makes her a subject of rights. But this would mean that, like slavery, the nation ought to discard the right to abortion, for it is as inconsistent with our fundamental principles as was slavery.

Stem cells are found in all animals, including human beings. In adults, stem cells serve the function of repairing damaged tissue. In the early embryo—before its cells differentiate into the cells of particular organs—stem cells are called totipotent cells, because they “retain the special ability to develop into nearly any cell type,” according to a 1999 report of Bill Clinton’s National Bioethics Advisory Commission (NBAC). The embryo’s germ cells—cells that “originate from the primordial reproductive cells of the developing fetus”—have similar properties. Whatever the potential of human stem-cell research, the real issue that animates opponents and raises deep ethical questions is how these cells are obtained and from what entity they are derived.

The NBAC report focused on four potential sources of human stem cells—all raising severe ethical issues: from “human fetal tissue following elective abortion,” from human embryos created by IVF that are either no longer needed by couples seeking infertility treatment or have been donated for the sole purpose of providing research material, and from “potentially, human (or hybrid) embryos generated asexually by somatic cell nuclear transfer cloning techniques.” With the exception of the first source—which is controversial for other reasons—an embryo’s stem cells can only be extracted at the cost of killing that embryo.

**G**iven President Reagan’s writings and beliefs, it is clear to me that he would oppose research with stem cells derived from human embryos, no matter what the potential benefits of such research might be. He would see the moral incoherence of using an embryo to acquire its stem cells, thus ending one human being’s life so that another can reacquire the capacities the younger human being was not allowed to develop.

Ironically, the President’s son, Ron, in a June 23 interview on *Larry King Live*, inadvertently offered an insight into the depth and clarity of his father’s convictions that would lead one to think that Ron has not taken seriously his father’s published work on the nature of the unborn: “My father used to just say what he meant. If he felt something, felt it strongly, he’d go out and talk about it. I never got the feeling that there were different rules for him and the rest of us.”

Nevertheless, there is a way that Mrs. Reagan can honor both her late husband’s memory as well as his deeply held convictions about the nature of the unborn. She can shift her focus away from embryonic stem-cell research and support the promotion of research on adult stem cells. It seems to have much promise, as Wesley J. Smith has pointed out on National Review Online.

During the week following Reagan’s death, several commentators asked

how President Bush would handle the delicate situation of publicly assessing Mrs. Reagan's policy recommendations. But they were making the wrong inquiry. The important question is not, "What will President Bush do?" but "What would President Reagan do?," since it is on behalf of his memory that Mrs. Reagan is making her case. It is that question that must be respectfully asked of Mrs. Reagan and those who agree with her.

President Reagan, in his usual winsome fashion, knew how to convey the moral power of this reasoning: "Abortion concerns not just the unborn, it concerns every one of us. The English poet, John Donne, wrote: ' . . . any man's death diminishes me, because I am involved in mankind; and therefore, never send to know for whom the bell tolls; it tolls for thee.'"

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## Justice Blackmun and the Little People

Mary Meehan

When the late Harry A. Blackmun was a Supreme Court justice, he once appeared before his colleagues to request admission of two members of his family to the Supreme Court bar. According to his daughter Sally, the experience gave him a new view of his fellow justices up on the bench. From this new perspective, they looked like “eight old, grumpy, stern men.”<sup>1</sup>

But Blackmun himself was often dour in appearance, and sometimes grumpy at Court. He routinely labored days, nights, and weekends over cases. A perfectionist, he made his crushing workload even heavier by personally checking all citations for the opinions he wrote, instead of having his law clerks check them. Blackmun was so tightly wound that he could erupt if someone left an office window open at night, failed to sharpen his pencils properly, or interrupted him at work. “His outbursts varied in intensity and usually passed quickly,” wrote Bob Woodward and Scott Armstrong in their famous inside account of the Supreme Court, *The Brethren*, “But they made life more difficult; they added an extra tension.”<sup>2</sup>

Nancy Blackmun Coniaris, the oldest of Blackmun’s three daughters, loved her father but complained that he had been “married to the job as far back as when I was in kindergarten.” She said that he was “too often not an easy father, and not an easy man [for her mother] to be married to” and that he “barely had what most of us would consider a personal life.” Coniaris, a psychologist, also remarked that there “was often a shadow of pessimism, of sadness, of intermittent depression about him.” She traced this to difficulties in his childhood, especially the early death of a baby brother, the death of his best boyhood friend, and an embezzlement scandal that led to the suicide of one uncle and the imprisonment of another.<sup>3</sup>

### The Other Side

There was, though, another side of Harry Blackmun, which is in evidence in his recently opened papers at the Library of Congress. There was much to like about him, and a good deal to admire.

Born in 1908, the future justice grew up in a working-class neighborhood in St. Paul, Minnesota. When he was a toddler, his baby brother died days after birth; a sister was born when Harry was eight. They apparently had a fairly normal childhood, although their father found it hard to make a living.

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Mary Meehan, a freelance writer living in Maryland, is a longtime contributor to this *Review*.



They were brought up in the Methodist faith, a commitment that young Harry would retain through life. As an adult, according to a daughter, he would sit “at the piano with his mother in her house in St. Paul, the two of them playing Methodist hymns and singing together.”

Harry’s grandfathers, both Civil War veterans of the Union Army, were liberal Republicans. He would follow that tradition, although not in a very partisan way. He would vote at least once for Democrat Franklin D. Roosevelt for president, and would ring doorbells for Democrat Hubert H. Humphrey in a campaign for mayor of Minneapolis. Harry won a tuition scholarship to Harvard College, where he majored in mathematics and graduated *summa cum laude*, and then attended Harvard Law School. But he had to work many jobs to pay for room and board, and he could not afford to go home even at Christmas. Frugality became so much a part of him that years later, as a lawyer serving on a Methodist publication board, he complained about the high cost of the board’s annual meetings. “I am a conservative old fuddy-duddy,” he wrote, “who is still impressed with how hard some of these dollars are for poor people to part with.”<sup>4</sup>

Blackmun never forgot his roots. Nor did he lose his unpretentious Midwestern ways after arriving as a new Supreme Court justice in Washington, D.C., a city of self-importance and the flaunting of wealth and power. He often referred to himself as “Old Number Three” because he was President Richard Nixon’s third choice for a Supreme Court vacancy in 1970. When, after his retirement, he was asked about his strong work ethic, he suggested that possibly he had “worked long hours because I was dumber than the rest of the guys and took maybe longer to come to a conclusion.” For years he drove a little Volkswagen Beetle to work, and even to social affairs at the White House. On weekdays he had breakfast with his law clerks in the Court’s public cafeteria, discussing anything from news events and baseball scores to his youthful experience of working on a dude ranch in Wyoming. When the Chief Justice and the other senior justices were away from the Court on one occasion, and Blackmun felt “a little mischievous,” he circulated a memo identifying himself as “Acting Chief Justice” and adding: “It occurs to me that in this happy state of affairs, things ought to be done, such as reassigning cases and striking some as too difficult to decide, setting July and August argument sessions, closing the building now for a week or two, scheduling square dancing in the Great Hall, and obtaining a Court cat to chase down the mice and Boris, who I am told is the rat upstairs. I have discussed this with many who labor in the building, and find unanimous consent for all these worthy projects. . . .”<sup>5</sup>

Although he worked his clerks very hard, as most justices do, Blackmun

was courteous and kind to them and genuinely interested in their families and careers. The clerks loved and revered him. He was interested in the working conditions of other Court employees as well. He helped obtain shelters for Court police who had guard duty outside, often in bad weather, and chairs for inside staff who were stationed in the corridors for long hours. Concerned about the backbreaking workload and the high tension of the two months before the Court's summer recess, on several occasions he arranged spring concerts to relieve the general stress.<sup>6</sup>

While often unavailable to family because of his workaholic ways, Blackmun was a good father when he was paying attention to that role. His daughter Nancy recalled that when she was in the eighth grade, "a difficult year for most new teenagers, he smoothed my path by reading me Sherlock Holmes and helping me prepare for, of all things, home economics quizzes. We got an A, of course." A writer who stressed Blackmun's grumpy side at Court also noted that he "could be relaxed, charming, and cheerful" when away from work. He quoted a friend of the justice who remarked that "she was amused to see Blackmun and his wife together. 'They teased each other and had fun like two teenagers,' she said." In his rare times of unwinding, the justice enjoyed baseball, whodunits, classical music, long walks, and canoeing.<sup>7</sup>

But legal work had always been the center of his adult life. He was, if anything, even more conscientious about it after his appointment to the Supreme Court. That Court, he said at his 1970 confirmation hearing, "is the terrible end of the line of litigation. There is no further place to go. The decision had better be right." He often stressed the effects of the Court's decisions on the "little people": a child badly abused by his father; Haitian refugees facing forced return to their extremely dangerous country; a death-row prisoner who claimed innocence. These concerns were not abstract or academic. He had once visited Haiti with a physician friend who warned him that it "won't be a happy trip." For nine years, Blackmun was resident counsel for the Mayo Clinic, which did a lot of surgery for the penal system; this inspired him to get out and see the prisons. He also visited mental institutions where patients "were treated like animals." These experiences doubtless left their mark; especially during his later years on the Court, his clerks and other admirers saw him as a champion of the little people and the outsiders of America.<sup>8</sup>

Of course, not everyone agreed with Blackmun's *legal* conclusions on cases involving little people. Some, such as legal writer Jeffrey Rosen, believed that "feeling deeply is no substitute for arguing rigorously" and that Blackmun "often misinterpreted or ignored the underlying constitutional issues." But Rosen respected the justice's earnest efforts to, in fact, do justice. Instead of "flitting about to dinners and receptions," he said, Blackmun

“worked long and lonely hours poring over the facts of the most obscure cases and agonizing about the fate of the parties.”<sup>9</sup>

#### How About the Littlest People of All?

One might have thought that Justice Blackmun’s passion for the underdog would have inspired in him a certain sympathy with unborn children—who are, after all, the smallest people in the world. When the courts were under great pressure to legalize abortion, his deep concern for justice should have led him to say, “Whoa! Let’s take a very close look at this. We are asked to strip away all civil rights from an entire class of human beings. And we are dealing with the right to life itself.”

He chose, as is well known, another course. In writing the 7-2 majority opinion in *Roe v. Wade* in 1973, Blackmun ignored scientific evidence about fertilization as the beginning of human life, claiming that “we need not resolve the difficult question of when life begins.” He admitted that the Constitution offers no explicit definition of “person,” but nonetheless concluded that the Fourteenth Amendment’s use of that word “does not include the unborn.” At the same time, he claimed that the Fourteenth Amendment *does* include a right of privacy “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” He did this despite the fact that most states had anti-abortion laws when they ratified the Fourteenth Amendment.<sup>10</sup> While *Roe v. Wade* theoretically allowed states to ban late-term abortions except to preserve a mother’s life or health, Blackmun wrote such a broad definition of health into *Roe*’s companion case, *Doe v. Bolton*, that it allowed something very close to abortion on demand.<sup>11</sup>

How could this be? How could someone who was in many ways a decent and good person, and a champion of little people, write opinions so devastating to the littlest people of all?

Much research in the Blackmun Papers at the Library of Congress has left me still perplexed by this question. The justice certainly agonized over the *opinions* in these cases, but I found no evidence that he agonized over the photographs of unborn children in two of the briefs, or over the possibility of fetal pain. Nor did I find any agonizing over the widespread killing already underway in New York, California, the District of Columbia, and elsewhere as the result of loosened restrictions on abortion. (I did not find agonizing of this sort by any other justices, either; but the papers of several are not yet open to researchers.)

Perhaps Blackmun did agonize, privately, over the unborn; when protest against the *Roe* and *Doe* decisions began, he referred to “the bitter nights” of the deliberative process. It’s also possible that his experience with the death

penalty had accustomed him to separating his personal convictions from his official work. Blackmun personally opposed the death penalty, but he upheld it for many years on a federal appeals court, and then on the Supreme Court, because he believed the Constitution allowed it. (Finally concluding that it was unconstitutional “as currently administered,” he declared: “From this day forward, I no longer shall tinker with the machinery of death.” Abortion foes, both those who opposed the death penalty and those who supported it, found bitter irony in that statement.)

It is also worth noting that Blackmun was a junior justice, still insecure in his position on the Court and thus susceptible to pressure from his seniors, when he received the assignment to write the abortion opinions. Responding to a letter in which Justice William O. Douglas had welcomed him to the Supreme Court the year before, Blackmun had confessed that “I question my competency.” Many years later, he said it had taken him from three to five years to feel comfortable on the Court.<sup>12</sup>

The Blackmun Papers confirm an irony noted in previous accounts of *Roe* and *Doe*: Blackmun’s initial position on those cases was ambivalent, and his first draft of the *Roe* opinion was far less radical than the final one. Other justices—especially Douglas and William J. Brennan Jr.—pushed him to a more extreme position. But once the Court issued his *Roe* and *Doe* opinions, Blackmun did not look back. Blasted by furious right-to-lifers on one side, but welcomed and praised by abortion supporters on the other, he became more firmly committed to legal abortion and expressed his position in more woman-centered terms as the years went by. Women who wrote him to describe their own experiences with abortion, and to thank him for the *Roe* decision, gave him much encouragement. His Methodist pastor and various leaders of the United Methodist Church did the same. And some of his law clerks urged him to take a more radical and partisan stance on the issue.

The 1973 abortion opinions were not written by Blackmun alone; to understand them, one must consider all of the nine justices who decided them. In the pages that follow, I will describe the justices, note many influences upon them, and show how they handled *Roe* and *Doe*. Then I will deal with later abortion cases and describe how Blackmun’s position became more extreme, despite criticism from legal scholars and enormous resistance from right-to-life forces.

### **The Main Actors**

Here is the Burger Court’s cast of characters from late 1971 through 1973: *Chief Justice Warren E. Burger*, a Minnesotan and former federal appeals-court judge . . . appointed by Republican President Richard Nixon, who hoped Burger would rein in a Court that had become quite activist under

Chief Justice Earl Warren . . . Burger could be gracious and charming . . . could also be domineering and stubborn . . . resented by other Court members, especially Douglas and Potter Stewart.

*Harry A. Blackmun*, also a Nixon appointee . . . friends with Burger since early childhood, when both had attended the same Sunday School in St. Paul . . . *Roe* and *Doe*, plus other cases down the line, would strain their friendship.

*Lewis F. Powell, Jr.*, another Nixon appointee . . . a Virginia gentleman . . . fairly conservative . . . had practiced corporate law and served as president of the American Bar Association . . . legal representation of someone involved in an abortion had given him strong views on the subject.

*Potter Stewart*, an Ohioan and former federal appeals-court judge, appointed by Republican President Dwight Eisenhower . . . liked reporters and leaked much Court information to them . . . often a swing vote on the Court . . . a key 1971 case had identified him as a supporter of legal abortion.

*William J. Brennan Jr.*, a Democrat from New Jersey, although appointed by the Republican Eisenhower . . . architect of much of the Warren Court's activism . . . genial and a skilled conciliator . . . leader of the Court's liberal bloc . . . the only Catholic on the Court at the time.

*Thurgood Marshall*, a New Yorker appointed by Democratic President Lyndon B. Johnson . . . the leading civil-rights attorney of his era . . . an appeals-court judge, then Solicitor General . . . first African American to serve on the Supreme Court . . . great storyteller . . . sometimes cranky . . . close to Brennan.

*William O. ("Wild Bill") Douglas* of Washington State, appointed by Democratic President Franklin D. Roosevelt . . . strong for civil liberties and the environment . . . often distracted by his world travels, his writing, and his four marriages . . . an ornery loner on the Court, although Brennan could reach him.

*William H. Rehnquist*, a Nixon appointee from Arizona . . . very conservative . . . good sense of humor . . . hearty and liked by his colleagues . . . but, as youngest and one of the newest justices, not yet influential . . . one of only two dissenters in *Roe* and *Doe*.

*Byron White* of Colorado, appointed by Democratic President John F. Kennedy . . . something of a loner, but influential . . . pro-civil rights . . . advocate of judicial restraint . . . blunt, and sometimes fierce, in dissent . . . the other dissenter in the abortion cases.

Of all the justices who decided *Roe* and *Doe*, William Rehnquist—now Chief Justice—is the only one still living.

Law clerks also had major influence on the 1973 and later abortion decisions.

Each justice has several clerks, so that the Court has “nine little law firms.” The clerks are high-achieving graduates of law schools (often Ivy League or other prestigious ones), most of whom have clerked a year for lower federal-court judges. Most remain at the Supreme Court for only one year, although some serve for two. The clerks are very bright, and many are intensely political. Like hospital residents, they work long hours to the point of exhaustion. This may adversely affect their judgment, and it certainly adds to the tension over major cases.

In the early 20th century, the clerks were mainly research assistants. In recent decades, though, justices have relied heavily on them for opinion-drafting as well—to the point where clerks now write most of the Court’s opinions. Some justices supervise them very closely, others less so. Clerks have become diplomats and brokers, working out compromises between or among the justices. Some consciously push opinions to one extreme or another. (In *Roe v. Wade*, several clerks had crucial influence on the legalization of abortion beyond the first trimester—a major reason why it has been so hard to outlaw even the horrific D & X or “partial birth” abortions.) Many observers, and occasionally a justice or two, worry that the clerks have developed too much power. As Douglas once told Burger: “The law clerks are fine. Most of them are sharp and able. But after all, they have never been confirmed by the Senate.”<sup>13</sup>

When the Court considered the abortion cases in the period from 1971 to 1973, nearly all of the clerks were men, as were all of the justices.

#### **The Sexual Revolution and Population Control**

The abortion cases reached the Court just after the social and political tumult of the 1960s, including the sexual revolution and the strong drive for population control. But the sexual revolution was not entirely new and not something that happened only on college campuses. Justices Douglas and Marshall had been lacking in sexual restraint—to put it mildly—well before the ’60s, and the problems of both were aggravated at times by heavy drinking.<sup>14</sup> Perhaps they realized that legal abortion could be extremely helpful to *men*—enabling them to escape paternity suits, years of child support, social embarrassment, and the wrath of betrayed wives. But none of this, of course, would be mentioned in the Court’s opinions.

Like other Americans, Court members had been subjected to years of propaganda in favor of population control. Since the 1950s, wealthy businessman Hugh Moore and his colleagues had distributed in huge numbers a pamphlet called “The Population Bomb”; they had mailed it repeatedly to everyone listed in *Who’s Who*, including Supreme Court justices and other federal judges.

Moore and his friends were mainly concerned about rapid population growth in poor countries, which they feared would make those countries ripe for Communism. But they wanted population control in the United States as well. Starting in 1961, they ran full-page ads in the *New York Times*, the *Washington Post*, the *Wall Street Journal*, and other key publications. One of their ads had a huge headline, "Threat to Peace," over a photograph of a little baby. "Population Explosion Nullifies Foreign Aid," proclaimed another. Blaming crime on population growth, a third shouted, "Have You Ever Been Mugged? Well, You May Be!" A fourth claimed that such growth could hold back progress on every front: "Whatever your cause, it's a lost cause unless we control population."<sup>15</sup>

Justice Douglas had written Hugh Moore in 1961 about another Moore anti-population venture, saying that "I have seen some of the literature . . . all of which I thought was excellent." He suggested cooperation between Moore and an international model-villages project with which the justice was involved.<sup>16</sup> In early drafts of his key opinion in the 1965 *Griswold v. Connecticut* case, in which the Court struck down an anti-contraception law, Douglas included a reference to marriage as "the main font of the population problem," adding that "education of each spouse in the ramification of that problem . . . is central to family functioning." This reference disappeared from later drafts.<sup>17</sup> Perhaps a law clerk or another justice convinced Douglas that it wouldn't sound right in an opinion that was supposed to be about liberty.

The authors of *The Brethren* reported that in Justice Potter Stewart's view, "abortion was becoming one reasonable solution to population control." (They may have heard this directly from Stewart, who apparently was their best source among the justices.<sup>18</sup>)

In the years just before the *Roe* and *Doe* decisions, wealthy population controllers, members of the power elite, were putting substantial sums into propaganda and legal efforts for abortion. John D. Rockefeller 3rd, his sister Abby, and Cordelia Scaife May (a Mellon heir) were funding the Association for the Study of Abortion. That group pressed for legal abortion in both public and judicial forums; they coordinated friend-of-the-court (amicus) briefs in *Roe* and *Doe*. The Rockefeller Foundation was also supporting work on *Roe*. Investor Warren Buffett and a friend financed a sophisticated set of amicus briefs that helped win a major California case for abortion forces. John Cowles—publisher of the Minneapolis *Star* and Minneapolis *Tribune*—was contributing to the National Association for Repeal of Abortion Laws (NARAL) and also to the legal defense of Jane Hodgson, a doctor who had done an abortion to force a test case.<sup>19</sup> The abortion train had left the station—loaded with population controllers, philanthropists, and media

cheerleaders. In their whistle-stop tour, they would welcome aboard many others, including many judges.

Judges and Supreme Court justices do not necessarily know who is financing appeals and amicus briefs in cases they hear. If they had known about the wealthy people involved in *Roe* and *Doe*, would they have been more skeptical about the briefs? Or would they have been impressed to learn that fellow members of the elite were backing the abortion cause?

Eugenicists and population controllers also had substantial influence on the abortion cases through books and articles, which are cited in *Roe v. Wade*. Blackmun cited eugenicists Christopher Tietze and Glanville Williams; he also relied heavily on two pro-abortion activists, attorney Cyril Means and writer Lawrence Lader. A zealous population controller who had once worked for Hugh Moore, Lader was the key founder and leader of NARAL; he thought it was “absurd to keep denying the function of abortion in population control.” Means was associated with NARAL as well. Eugenics and population control also influenced some lower-court decisions cited in *Roe*.<sup>20</sup>

#### **The Feminist Influence**

Feminist leaders of the 19th and early 20th centuries—such as Susan B. Anthony, Elizabeth Cady Stanton, and Alice Paul—opposed abortion, often with eloquence. Anthony once said that she had helped “bring about a better state of things for mothers generally, so that their unborn little ones could not be willed away from them.” Alice Paul asked, “How can one protect and help women by killing them as babies?” But Betty Friedan and other feminist leaders of the later 20th century were adamant supporters of legal abortion. “Only one voice needs to be heard on the question of whether a woman will or will not bear a child,” Friedan proclaimed in 1969, “and that is the voice of the woman herself: her own conscience, her own conscious choice.”<sup>21</sup>

The new feminists gave a tremendous boost to the population controllers’ campaign for legal abortion. To an elitist movement, they brought grassroots troops, energizing anger, and the conviction that women could not achieve equality unless they had absolute control over their child-bearing capacity. Their anger did not come from ideology alone, but in many cases from experience with the sexual double standard for men and women; sexual harassment and even rape; enormous pressures for sex from male partners (including husbands), some of whom abandoned them when pregnancy resulted; difficult pregnancies; illegal abortions; and severe discrimination in the workplace. These were genuine problems, deserving much attention. Unfortunately, though, as the new feminists fired their heavy artillery—from several directions and against nearly the entire culture—unborn



children were caught in a devastating crossfire.

Too often, Friedan, Gloria Steinem, and their colleagues were believed to be speaking for women in general. They certainly *didn't* speak for the large numbers of women who opposed abortion, many of whom were already active in the young right-to-life movement. They didn't speak for Nellie Gray, Barbara Willke, Mildred Jefferson, Carolyn Gerster, Judie Brown, Darla St. Martin, Erma Clardy Craven, or Wanda Franz. These women were already active, or soon would be, in the pro-life movement, and most would later head national pro-life groups. Nor did Friedan and her colleagues speak for the women who would join Feminists for Life of America (FFLA), which follows the earlier feminist tradition. FFLA emerged shortly after the *Roe v. Wade* decision, but has found it difficult to compete with the foundation support and media recognition of the pro-abortion feminists.<sup>22</sup> (The anti-feminist stance of some abortion foes certainly has not helped FFLA.)

The position of Friedan and her troops probably influenced most of the justices, but especially Brennan and Marshall. As time passed, it would have much influence on Blackmun as well.

#### Family Influence

The authors of *The Brethren*, one of whom interviewed Justice Blackmun twice in 1978, said that Blackmun "presumed that his three daughters felt that early abortions should be allowed. He claimed to be unsure of his wife Dottie's position." But they added that when the justice was working on the abortion cases, Mrs. Blackmun told one of his law clerks, who supported ending restrictions on abortion, "that she was doing everything she could to encourage her husband in that direction"; they also reported that after *Roe* was announced, Mrs. Blackmun told the Justice, "I'm very proud of the decision you made." (Woodward and Armstrong did not indicate sources for these quotations.) Blackmun himself, in 1995, insisted that he hadn't discussed the case with his wife beforehand and that neither his wife nor his daughters had lobbied him about it. His daughter Sally, though, recently said, "*Roe* was a case that Dad struggled with. It was a case that he asked his daughters' and his wife's opinion about."<sup>23</sup>

Lay people out in the countryside, whose opinions are not requested, resent it when judges do this sort of thing. And the Code of Judicial Conduct, adopted by the American Bar Association while the Supreme Court was considering *Roe*, declared that a judge "should not allow his family, social, or other relationships to influence his judicial conduct or judgment" and should not "convey or permit others to convey the impression that they are in a special position to influence him."

But on one occasion the justice, after receiving three different opinions on *Roe* from his three daughters, said he had a migraine headache and was going to bed.<sup>24</sup> Sally Blackmun, a lawyer who is active in Planned Parenthood, also described an experience of her own that may have affected her father's views on abortion. In 1966, when she was a 19-year-old college student, she found that she was pregnant. "It was a big disappointment to my parents," she recalled. "I did what so many young women of my era did. I quit college and married my 20-year-old college boyfriend. It was a decision that I might have made differently, had *Roe v. Wade* been around." Shortly after a low-key wedding, she experienced a miscarriage. Six years later, after she finally completed college, she and her first husband were divorced.<sup>25</sup>

### The Mayo Influence

Being resident counsel (1950-59) of the Mayo Clinic was an ideal job for Blackmun, because he was fascinated by medicine and had seriously considered it as a career. In typical Blackmun fashion, he attended meetings of the Clinical Society and Surgical Society at Mayo, because "I felt the more I could learn about how medicine was practiced there, the better off I would be in advising the physicians." He developed a "feeling of reverence" for Mayo, and many observers believe that led to his heavy emphasis on physician judgment when he wrote the abortion opinions.

One of Blackmun's friends at Mayo, Dr. Joseph H. Pratt, was a strong supporter of legal abortion. In 1970 Pratt testified for Dr. Jane Hodgson, an alumna of the Mayo Graduate School who had done an illegal abortion openly in order to test the Minnesota anti-abortion law. Pratt, described by one writer as "Hodgson's most prominent Minnesota medical supporter," would later join other doctors in signing an amicus brief supporting the abortion side in *Doe v. Bolton*.<sup>26</sup>

In a 1972 memo to fellow justices on that case, Blackmun noted that he had "seen abortion mills in operation and the general misery they have caused despite their being run by otherwise 'competent' technicians."<sup>27</sup> Was he referring to mills he knew about in Rochester while he was at the Mayo Clinic? Or perhaps to ones he knew about when he was a young lawyer in Minneapolis? He did not explain.

Decades after his work at Mayo, asked if he'd had any contact with abortion there, he replied, "Very little, as I recall. The clinic, of course, was not, and did not wish to be, an abortion mill of any kind, and I do not recall the raising of any legal issue about abortion in the decade I was there at all." That is not the same as saying that no abortions were *done* when he was there. Minnesota law allowed abortion only to save the mother's life or—

to cover the case of inducing labor prematurely—the child’s life. A 1967 article in *Minnesota Medicine* discussed “Therapeutic Abortion” in Minnesota from 1955 through 1964—that is, including about five years of Blackmun’s tenure at Mayo. It listed a total of 36 abortions by Mayo doctors, most of them in cases where the mothers’ diseases ranged from breast cancer and brain tumors to kidney disease and diabetes. One case involved rubella (German measles, which can cause fetal handicaps) and probably was a eugenic abortion. Another abortion was done for “socioeconomic” reasons.<sup>28</sup>

#### The Methodist Influence

Blackmun was a founder and board member of the Rochester Methodist Hospital, which was closely connected with Mayo. Apparently most of the Mayo abortions were done at the Methodist Hospital.<sup>29</sup>

This reflected the dominant Protestant position at the time, which was basically anti-abortion but permitted it to save a mother’s life. By the early 1960s, many Protestants allowed it to preserve maternal health as well. There were further changes in mainstream Protestant attitudes toward abortion in the 1960s and early 1970s. Blackmun’s own United Methodist Church went through radical change, and population control seemed to be the driving force behind it. In 1970 the church’s General Conference passed a resolution on “the population crisis,” including a section on abortion that “caused animated floor debate.” According to the Methodist magazine *Together*, the resolution supported “legalized abortion and voluntary sterilization as partial solutions to the population crisis.” The conference urged that states drop abortion from their criminal codes and, instead, regulate it as part of medical practice.<sup>30</sup>

This was not a one-time gesture. Activist Rodney Shaw headed a large and well-funded population-control effort within the church. Hugh Moore (a Unitarian) thought so highly of Shaw’s work that, when tax-law changes led to dissolution of the Hugh Moore Fund late in 1971, Moore transferred \$700,000 of its assets to a United Methodist agency for Shaw’s use. The sum was to be divided evenly between the church’s own population program and the Population Institute (also headed by Shaw), which offered a secular version of the same message. A United Methodist agency contributed to the work of attorney Roy Lucas, who was strategizing to overturn anti-abortion laws and was a key figure in the *Roe* and *Doe* cases.<sup>31</sup> (Pro-life Methodists have tried for years to change their church’s position. While they have won a few concessions at the theological level, they have been unable to divert the church’s public-policy engine from its abortion track.)<sup>32</sup>

Harry Blackmun was a committed and active United Methodist, one who took theology and the Scriptures seriously. At the time of his nomination to

the Supreme Court, he was on the Rochester Methodist Hospital board, the church's Board of Publication, and the board of Hamline University, a Methodist-related institution. Earlier he had chaired the board of his local church for several years, and his pastor described him as a "superb Christian layman, the kind every minister looks for and depends on in his congregation." It seems reasonable to believe that his church's position on abortion had a major effect on Blackmun.<sup>33</sup>

#### **Justice Powell's Bias**

A few years before he joined the Court, Lewis Powell was contacted by a young and desperate messenger at his Richmond law firm. The young man's pregnant girlfriend had died when she tried—with his help—to perform an abortion on herself. Powell talked with a local prosecutor, who decided not to prosecute the boyfriend. According to his biographer, the experience "convinced Powell that women would seek abortions whether they were legal or not and that driving the practice underground led to danger and death." The biographer's account does not say whether the woman in this case considered alternatives, nor whether the boyfriend encouraged her to do so.

Justice Powell's late father-in-law had been a prominent obstetrician, and his two brothers-in-law were in the same specialty. His biographer suggests that the justice believed that "well-educated, high-minded, socially responsible" doctors should not "have their hands tied by restrictive laws." And one of Powell's daughters argued for legal abortions to avoid the danger of illegal ones (and to avoid births of "unwanted children").

According to *The Brethren*, Powell felt so strongly about the issue that in 1972, at lunch with one of his law clerks, he remarked that abortion laws were "atrocious" and made it clear that "his would be a strong and unshakable vote to strike them. He needed only a rationale for his vote."<sup>34</sup> If this account is correct, it represents a classic case of a "result-oriented" judgment, in which a judge first decides what result he or she wants and then rummages around for some legal explanation to justify it. The practice leads to much cynicism among the lay public—and sometimes to great injustice.

#### **Influences on Burger, White, and Rehnquist**

How about influences on the ambivalent Chief Justice Burger, who ultimately voted with the majority, and on the two dissenters, Justices White and Rehnquist?

Justice Blackmun, in 1995 oral-history interviews, made several cryptic references to family influence on his old friend Burger. "I know of some problems he had personally on this kind of an issue in his family," Blackmun

remarked. He suggested this was why Burger did not himself write the *Roe* opinion. Blackmun thus seemed to imply, but did not say explicitly, that one or more Burger family members strongly opposed abortion. Someone who knew Burger well after his retirement from the Court described him as “defensive” and “apologetic” about his vote for *Roe v. Wade*: “‘I never meant for it to be abortion on demand,’ he would say. ‘And later on I dissented.’”<sup>35</sup>

The White and Rehnquist dissents on *Roe* and *Doe*, as well as on later abortion cases, were based on their philosophies of judicial restraint and deference to state legislatures. They did not think the Fourteenth Amendment guaranteed a right to abortion. They viewed abortion as a policy question that should be left mainly to the people and their state legislatures. Some observers suggest that Justice White had personal pro-life convictions; but his biographer—a former clerk for White who interviewed many others who had clerked for him—says White “told several law clerks late in his career that if he had been a legislator he would ‘have been pro-choice.’” (This is hard to reconcile with the rhetoric of some of White’s dissents.)

We will not have a full picture of Burger, White, and Rehnquist for years to come, because their papers are not yet open to researchers. And White, alas, destroyed many of his old files in the 1980s because, he said, “it was time to clean up the place.”<sup>36</sup>

#### The *Vuitch* Precedent

Milan Vuitch, a Serbian-born immigrant who was a busy abortionist in Washington, D.C., precipitated the first abortion case heard by the Supreme Court. An arrogant man, Vuitch did not take great pains to hide his abortion practice. “I’m the granddaddy of abortion,” he once said. “I like to know I’m the best. I guess I’ve got that competitive spirit you find in people who start poor.” Although he was arrested 16 times for illegal abortion, smart lawyers and much help from judges kept him out of jail. He fought a 1968 indictment by challenging the District of Columbia abortion law, which banned abortion except to preserve a woman’s life or health. In 1969 a federal district judge found the law unconstitutional on grounds of vagueness, and Vuitch was back in business while the government appealed the case to the Supreme Court. In 1970 a teenager died six days after a Vuitch abortion. A grand jury indicted him for the abortion; but according to the *Washington Star*, the prosecutor’s office “said there was no indication that the death was a direct result of the abortion.” (One suspects that the word “direct” should have been underlined.) But this case did not end Vuitch’s career, either. Thanks to the courts that kept him in business, two more women would die after Vuitch abortions, apparently from overdose of anesthesia.<sup>37</sup> And many

thousands more of unborn children would die at his hands.

Two other abortion clinics were operating openly in Washington, D.C., by the time the Supreme Court decided *United States v. Vuitch* in April 1971. Hugo Black and John Marshall Harlan were still on the Court at the time, and Black wrote the majority opinion. The justices reversed the lower court on the vagueness issue, but they saved the D.C. law by creating a huge loophole in it: They interpreted “health” to include “psychological as well as physical well-being.”<sup>38</sup> Six weeks later, the *Washington Post* reported that the capital city was “rapidly emerging as a big-league abortion town, second only to New York in the East” and that abortion “has already become a highly profitable business here.” By September, at least five abortion clinics were operating in the city. The medical director of one of them remarked that its definition of health was consistent with that of the World Health Organization: “a state of complete physical, mental and emotional well-being.” (One might ruefully ask, how often in a *lifetime* does anyone achieve this wonderful state? No matter; what the doctor was really talking about was abortion on demand.)

The *Washington Post* writer who quoted that doctor also gave a glowing description of his clinic: “The modern suite of offices, filled with fresh flowers, softly piped-in music, colorful silk-screen paintings and comfortable furniture . . . communicates an aura which is immediately warm, supportive and reassuring.”<sup>39</sup> This sort of cheerleading from the *Post* and other media probably influenced the justices. As successful Supreme Court litigators always remember, the justices do read newspapers and watch television.

There were suggestions in the *Vuitch* case of even worse to come. Justices Douglas and Stewart dissented in part, indicating radical positions. Stewart even said that a competent, licensed physician should be “wholly immune” from prosecution under the D.C. law when he does an abortion he judges to be necessary.<sup>40</sup>

A Planned Parenthood brief in the *Roe* and *Doe* cases would include a tough reminder to the justices about *Vuitch*. By their votes in that case, the brief asserted, “at least seven members of this Court . . . would permit abortions in cases in which fetuses would be denied constitutional rights if they had any such rights. These seven Justices reached this conclusion despite the fact that the Court had before it in *Vuitch amici curiae* briefs in which it was argued that the fetus is a person for constitutional purposes.”<sup>41</sup>

#### A “Bobtailed Court” Tackles *Roe* and *Doe*

Severe illness forced the retirements of Justices Black and Harlan in September 1971. What Blackmun called a “bobtailed” Court—it had only seven members instead of the usual nine—heard oral arguments on *Roe* and *Doe*

in December. Nixon's two new appointees, Powell and Rehnquist, had been confirmed by the Senate but not yet sworn into office, so they did not hear the cases or vote on them the first time around.<sup>42</sup> (They would have their chance the following year, after a decision to have the cases reargued.)

When the seven justices gathered for their conference after oral arguments, Douglas led an attack on the Texas law at issue in *Roe v. Wade*. That law, which a lower federal court had found unconstitutional, banned abortion except to save a mother's life. Although there was some ambivalence, and not everyone voted formally, there seemed to be a 5-2 majority on the "bobtailed" Court to void the Texas law. Blackmun was in that majority.

Views on the Georgia law challenged in *Doe v. Bolton* were more complicated. The Georgia law banned abortion generally, but allowed exceptions for the mother's life and health, serious fetal handicap, and rape. A lower federal court had declared unconstitutional the restriction of abortion to hard cases, while upholding a requirement that abortions be done only in hospitals. Brennan, Marshall, and Stewart favored striking down most of the Georgia law. Douglas and Blackmun wanted to send it back to a lower court for fact-finding on whether it discriminated against poor women.

Chief Justice Burger and Justice White thought the Texas and Georgia laws should be upheld, although Burger called the Texas law "archaic and obsolete."<sup>43</sup> Court tradition provides that when the Chief is in the majority, he assigns the writing of the opinion to himself or another justice in the majority. But when the Chief is in the minority, the senior justice in the majority (Douglas in these cases) assigns the case. Burger surprised his colleagues—and greatly annoyed Douglas—by making the assignment although he was in the minority. He gave both cases to Justice Blackmun.

Why Blackmun? His familiarity with medical practice from his Mayo years may have been one reason. But Justice Douglas thought Burger wanted to control the cases by assigning them to his then-ally Blackmun, hoping this would lead to narrow opinions or even to turning the Court around altogether. Alternatively, he suspected that Burger was trying to help Richard Nixon in the 1972 presidential election by delaying *Roe* and *Doe*. (Blackmun was a slow writer.) Douglas was also upset because he felt Burger had abused the assignment power in other cases.<sup>44</sup>

Responding to Douglas's protest, Burger suggested that "there were, literally, not enough columns to mark up an accurate reflection of the voting in either the Georgia or the Texas cases. I therefore marked down no votes and said this was a case that would have to stand or fall on the writing." He also remarked that the cases were "quite probable candidates for reargument."<sup>45</sup>

Blackmun settled down to research on abortion, obtaining many references

from a friend who worked in the Mayo Clinic's medical library. The justice was especially interested in the history of abortion and of the anti-abortion Hippocratic Oath: He remembered having seen the oath on the walls of Mayo Clinic examining rooms, and had seen new doctors take it at medical-school graduations. He was not far along in his research, though, when he told Burger that he, too, felt the abortion cases should be reargued. Neither justice was satisfied with the quality of the first oral arguments, and Blackmun thought the issues were so important "that the cases merit full bench treatment" with nine justices. But there was not then enough support among the other justices for reargument, so Blackmun soldiered on.<sup>46</sup>

#### Douglas and Brennan Strategize

The restless Douglas had already written a rough draft of an opinion in *Doe v. Bolton*, claiming a constitutional right to abortion based on a right of privacy. Douglas sent it to Justice Brennan and proposed: "Let me have any of your suggestions, criticisms, ideas, etc. and I will incorporate them, and then we can talk later as to strategy."<sup>47</sup>

The two justices decided to wait for Blackmun's first draft on the Texas case before circulating one of their own on Georgia. Meanwhile, Brennan wrote down his own ideas, "so that I won't forget them," in a long letter to Douglas. Since Brennan had major influence on the abortion decisions, the letter is worth a close look.

Calling for a virtual gutting of the Georgia law, Brennan insisted that the abortion decision "is that of the woman and her alone." A requirement that abortions be done by licensed physicians was the only limit he was willing to accept.<sup>48</sup> Brennan cited many federal cases he felt could be useful on privacy, including Douglas's own *Griswold* case. And he referred to an opinion he had written quite recently in *Eisenstadt v. Baird*, declaring unconstitutional a Massachusetts law that banned distribution of contraceptives to single people. Brennan didn't yet have a majority for the *Eisenstadt* opinion, and he suggested that Douglas join him in it. (Douglas did.) *Eisenstadt* was, Brennan said, "helpful in addressing the abortion question." He had slipped into the opinion a sentence claiming that the privacy right included freedom of decision "whether to bear or beget a child." *Eisenstadt* was not about "bearing a child," but about "begetting"; but Brennan knew his phrase could be cited in the abortion cases. As one attorney wrote years later, "Brennan knew well the tactic of 'burying bones'—secreting language in one opinion to be dug up and put to use in another down the road."<sup>49</sup>

A book on Brennan is subtitled *Freedom First*; apparently that was his major motivation. In the letter to Douglas about the Georgia law, he identified



several groups of “fundamental freedoms” including “freedom from bodily restraint or inspection . . . freedom of choice in the basic decisions of life . . . autonomous control over the development and expression of one’s intellect and personality.” He declared that the “decision whether to abort a pregnancy obviously fits directly within each of the categories of fundamental freedoms I’ve identified and, therefore, should be held to involve a basic individual right.”<sup>50</sup> Brennan also mentioned the issue of “the material interest in the life of the fetus and the moral interest in sanctifying life in general,” acknowledging that this “would perhaps be the most difficult part of the opinion”—but then he showed how to deal with the conundrum by the tactic of promoting doubt about the beginning of human life. He cited an unabashedly pro-abortion article that former Justice Tom C. Clark had written for a law review. Overlooking a great deal of evidence from embryology, Clark had declared: “The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. . . . The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide.” Brennan quoted part of this and added: “The inconsistent position taken by Georgia in allowing destruction of the fetus in some, but not all cases might also be mentioned.”<sup>51</sup>

Brennan thought his oath of office required him to separate his Catholic religious beliefs from his judicial work.<sup>52</sup> But did it ever occur to him, one wonders, that he should find out what modern embryology says about the human embryo? Or consider the wrong of depriving a human being of, say, 75 years of life? I have found no indication that Brennan cared about these questions. His letter to Douglas is abstract, cold-blooded; his position was calmly stated, but ruthless.

The Brennan letter influenced later Douglas drafts, which eventually became the Douglas concurring opinion in *Doe* and *Roe*. At some point, Douglas sent one of his drafts to Justice Blackmun, who was still plodding along in his research. In late May of 1972, Blackmun told Douglas that the draft “was very helpful” and that “I suspect we are really not very far apart.”<sup>53</sup> Several days earlier, on May 18, Blackmun had finally circulated a first draft of the *Roe v. Wade* opinion. He wanted to avoid some key issues—and possibly achieve a unanimous opinion—by simply finding the Texas law “unconstitutionally vague.” But he told his colleagues that “I am still flexible as to results, and I shall do my best to arrive at something which would command a court.” Brennan was unhappy with the Blackmun approach. He responded right away, saying that he wanted a decision on “the core constitutional question.” Douglas chimed in the next day to the same effect.<sup>54</sup>

On May 25 Blackmun circulated his first *Doe v. Bolton* draft. It was conservative on one issue, upholding the requirement that abortions be done only in hospitals. But it supported the lower court's basic position and even extended it to strike down several more parts of the Georgia law, including the requirement of approval by a hospital abortion committee. Brennan and Douglas were pleased with how far Blackmun had gone on *Doe*, although they hoped to push him even further. Brennan wanted to strike down Georgia's requirement that any abortions must be performed in hospitals, so that abortion clinics as well could operate in the state. He also wanted to move toward Justice Stewart's *Vuitch* position of making doctors immune from prosecution.<sup>55</sup>

#### **The Flare of Battle, Then a Truce**

But Brennan and Douglas didn't want to press Blackmun too hard. After Byron White circulated a *Roe* dissent—stressing that the Texas law was actually *less* vague than the law the Court had upheld in *Vuitch*—Blackmun said on May 31 that he thought both abortion cases should be reargued. He did not suggest any change in his basic position, but said he was “not yet certain about all the details.”<sup>56</sup> Douglas, Brennan, and Marshall quickly responded with votes against rearguing the cases. Douglas said he felt “quite strongly that they should not be reargued. . . . The important thing is to get them down.” He assured Blackmun that “you have a firm 5 and the firm 5 will be behind you in these two opinions until they come down.” Chief Justice Burger, though, sided with Blackmun on reargument, remarking that he'd “had a great many problems with these cases from the outset. They are not as simple for me as they appear to be for others.”<sup>57</sup>

Douglas worried that Burger was maneuvering to gain a majority for an anti-abortion position by bringing Rehnquist and Powell into the picture and by leaning on Blackmun to uphold the Texas and Georgia laws. Had Douglas understood Powell's personal views, he might not have worried so much, but Powell voted for reargument and remarked that “I certainly do not know how I would vote if the cases are reargued.” Rehnquist and White also voted for reargument, so there was a majority to delay the cases until the fall.<sup>58</sup>

Stewart and Douglas were furious. According to Brennan, Stewart “expressed his outrage at the high handed way things are going . . . He also told me he will not vote to overrule *Wade*, *Miranda* etc. & resents CJ's [Chief Justice's] confidence that he has Powell & Rehnquist in his pocket.” Douglas threatened to file a dissent from reargument that attacked the Chief. Renewing his complaint about Burger's assigning the case from the minority, Douglas declared in a draft: “Russia once gave its Chief Justice two

votes; but that was too strong even for the Russians.”<sup>59</sup>

Brennan persuaded Douglas to tone down his draft, but “Wild Bill” made his point by circulating a later draft to all the justices. Brennan and others, worried about a public shouting match, eventually convinced him not to issue a statement at all. Justice Blackmun apparently was the key persuader, according to a legal writer who interviewed him in 1992. “Douglas refused to withdraw his dissent,” James F. Simon reported, “until Blackmun personally assured him that his position of declaring the abortion statutes unconstitutional was firm, and that he had no intention of reversing that position after reargument.” On June 26, when the Court announced that the abortion cases would be reargued, the victorious Douglas was content with a simple note that he dissented.<sup>60</sup>

If there had been any chance of averting strongly pro-abortion decisions in *Roe* and *Doe*, Blackmun’s assurance to Douglas ended it. Douglas and his allies then knew they had their majority; from that time on, it was just a question of how radical the decisions would be.

There were more fireworks on and off the Court, appropriately beginning on the Fourth of July. Someone—probably Justice Stewart—leaked information about the Douglas-Burger fight to the *Washington Post*, which ran it as a front-page story on July 4. Douglas, in his remote vacation home in Goose Prairie, Washington, heard about the *Post* story that day. Knowing he would be suspected of the leak, he immediately sent a handwritten note to the Chief about the “nasty story,” declaring that “I am upset and appalled. I have never breathed a word concerning the cases, or my memo, to anyone outside the Court. I have no idea where the writer got the story.” Late in July, Burger sent Douglas a long letter defending his own actions and insisting that “I have never undertaken to assign from a minority position.” He declared that “there was no majority for any firm position” on the abortion cases when he assigned them. Douglas, responding, did not back down on his version but stressed that “we are a group with fiercely opposed ideas but we have always been a friendly, harmonious group. That’s the only way I want it.” He invited the Chief and his wife for a visit to Goose Prairie.<sup>61</sup>

#### **Blackmun and His Aide at Work in the Summer**

Blackmun, meanwhile, took time from his summer vacation for research at the Mayo Clinic library. He found a way to deal with the Hippocratic Oath’s abortion ban when he located a study concluding that the oath represented a minority opinion among the ancient Greeks. It became popular and accepted as an absolute standard, he would suggest in *Roe v. Wade*, with the rise of Christianity, whose “teachings were in agreement with the Pythagorean

ethic” represented by the oath. He thought this “a satisfactory and acceptable explanation” of the oath’s “apparent rigidity.”<sup>62</sup> But he didn’t explain why the fact that an ethical stance was a minority position in an ancient culture constituted an argument against that position. Some ancient cultures favored cannibalism, human sacrifice, and gruesome and excruciating forms of torture. Undoubtedly some people in those cultures—especially those about to be thrown into the pot or sacrificed to the gods—held minority positions on such practices. Most of us believe it was a sign of progress when ancient cultures changed so that those positions were accepted by all.

Blackmun was in touch with one of his clerks, George Frampton, who was revising the abortion opinions back at the Court. There were ominous signs for the unborn in a long August note from Frampton to his boss. In dealing with the idea of a right to fetal life, the clerk recalled that in a previous memo he had “suggested that the best way to handle this constitutionally would be to recognize that there is an ‘interest’ or ‘concern’ involving future life or potential life.” But a “fundamental” constitutional right—such as the right to abortion that Blackmun and Frampton were busy inventing—trumps an interest or concern unless the latter is “compelling.” Frampton had chosen viability—the time when the unborn child can live outside the womb—as the point where the state interest in fetal life could become compelling. And he emphasized that “I tried to avoid saying or intimating that a state *must* assert its interest to protect fetal life at a certain point; only that it *can* assert such an interest.”<sup>63</sup>

#### Extending the Hunting Season

The nine justices heard oral arguments in *Roe* and *Doe* in October. Attorneys for Texas and Georgia failed to stress two crucial points: the scientific fact that human life begins at conception, and the political fact that passage of anti-abortion laws in the mid- and late 1800s had been prompted by strong support for the right to life of the unborn. (Earlier, the common law had protected unborn children after “quickening”; some states had provided statutory protection as well.) Attorneys on the other side persuaded most of the justices that the laws had been passed mainly to protect women’s health from what was then very dangerous surgery. Blackmun himself had reason to know better; in *Roe* he would quote an 1859 statement of the American Medical Association—then a leader of the effort to strengthen anti-abortion laws—against the destruction of unborn “human life.” And he would quote an 1859 AMA committee that said the failure of existing law to offer more protection was based upon “mistaken and exploded medical dogmas.” With that knowledge, he should have asked his clerks to research thoroughly the

legislative history of state anti-abortion laws. Instead, he cited the partisan Cyril Means to support the false position that those laws were adopted only to protect women's health.<sup>64</sup>

When the justices met to discuss the cases, the Chief seemed inclined to void at least the Texas law. Powell sided with Blackmun's majority on striking down the Georgia and Texas laws. Rehnquist sided with White on upholding the Georgia law, but both seemed undecided on Texas. Stewart wanted the Court to elaborate on the idea that the unborn are not persons under the Fourteenth Amendment. (Blackmun would do this, to his later regret; he felt it wasn't needed and that it was a red flag to the opposition.) Blackmun now favored striking the hospitalization requirement in the Georgia law, and he gave up his "vagueness" approach to the Texas case.<sup>65</sup>

By November it was clear that *Roe* would be the lead case, the one that would give state legislatures their marching orders on how to change their laws. But Blackmun's November *Roe* draft would have allowed states to ban abortions after the first trimester (roughly the first twelve weeks of pregnancy) that weren't "therapeutic." This led to a strong effort, largely clerk-driven, to protect all second-trimester abortions—and many in the third—by moving the cut-off point to viability. Larry Hammond, a clerk to Justice Powell, urged his boss to push for viability because poor, scared, unsophisticated girls—"hoping against hope" that they weren't pregnant—might not decide on abortion until after the first trimester. Powell wrote Blackmun to suggest viability, and Blackmun asked all the justices for their opinions.

Brennan thought Marshall would be the best point man on this issue. After much consultation with Brennan clerk William Maledon, Marshall clerk Mark Tushnet drafted a letter for his boss to send Blackmun. In it, Marshall pressed for "drawing the line at viability," since otherwise states might ban abortion after the first trimester.<sup>66</sup> Douglas, surprisingly, was more conservative than the others. "I favor the first trimester, rather than viability," he told Blackmun, but did not explain why. Stewart worried about "being quite so inflexibly 'legislative'" and suggested that the states should have "more latitude to make policy judgments." Douglas and Stewart lost on this point, but stayed with the majority. Blackmun revised *Roe* again: *Only* after viability—which, he said, could occur six to seven *months* into the pregnancy—could a state ban abortion, "except when it is necessary to preserve the life or health of the mother." With this, and with their broad definition of "health" in *Doe*, Blackmun and his colleagues set up a classic Catch-22 trap for unborn children and those who tried to defend them.<sup>67</sup>

While some clerks were deeply involved in the negotiations for extending the abortionists' hunting season, others were dismayed by the whole process.

According to Woodward and Armstrong, these clerks “were surprised to see the Justices, particularly Blackmun, so openly brokering their decision like a group of legislators”<sup>68</sup>—or, one might say, like traders haggling over bric-a-brac in a Middle Eastern bazaar. No one reminded them that they were bargaining over human lives.

#### **White and Rehnquist Dissent; So Do Legal Scholars**

Justices White and Rehnquist, who had been rather quiet during the majority’s negotiations, wrote sharp dissents as announcement time approached. “I find nothing in the language or history of the Constitution to support the Court’s judgment,” wrote White. He called the decisions “an exercise of raw judicial power” and declared that the abortion issue, “for the most part, should be left with the people.”<sup>69</sup>

Justice Rehnquist challenged the Court’s use of the privacy concept, saying that abortion privacy is not even “a distant relative of the freedom from searches and seizures protected by the Fourth Amendment.” In a powerful footnote, he listed the many states and territories that had laws restricting abortion in 1868, the year the Fourteenth Amendment was adopted. There were only 37 states in the Union then; according to the Rehnquist list, 30 of them had anti-abortion laws. He concluded that the drafters of the Fourteenth Amendment did not intend to remove the states’ power to pass such laws.<sup>70</sup>

The *Roe* and *Doe* decisions were announced on January 22, 1973. Abortion supporters were delighted; opponents were stunned and angry. Reactions might have been louder, though, if all media had accurately portrayed the decisions. Confronted with Blackmun’s long opinion in *Roe* and faced with pressing deadlines, reporters emphasized the trimester system and said states could regulate abortion after the first trimester. Many either didn’t see or didn’t understand the *Doe* definition of health, which covered “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.” This definition, when applied to the *Roe* provision that a state may ban abortion after viability “except when it is necessary to preserve the life or health of the mother,”<sup>71</sup> nullifies it.

Noticing Mrs. Blackmun in the courtroom the day the abortion decisions were announced, Justice Powell had sent her a handwritten note: “Dottie—Harry has written an historic opinion, which I was proud to join. . . . I am glad you were here.” But legal scholars did not share Powell’s pride. Some who agreed with *Roe*’s policy conclusions were bewildered by its interpretation of the Constitution. Yale law professor John Hart Ely, one of the first critics out of the gate, declared that *Roe* “is *not* constitutional law and gives almost no sense of an obligation to try to be.” Other scholars criticized its

history of abortion law. Some attacked its admission of incompetence on the question of when human life begins; given that admission, they suggested, it was unfair of the Court to forbid states' adoption of "one theory of life" and their use of that theory to ban abortion. One of the sharpest legal criticisms came, not from a legal scholar, but from Dr. Mildred Jefferson, a Boston medical professor. She said the Court had elevated "a woman and her doctor to the positions of super citizens, able to enter a private contract to end a life."

I would add that *Roe* is strikingly *reactionary*, taking us back to ancient and medieval science. In saying that it need not resolve the question of when life begins, the Court seemed to suggest that science couldn't answer the question. That simply was not true. Doctors in the 1800s lobbied for anti-abortion laws largely because scientific knowledge *had* advanced so much; they knew that the old common-law distinction of "quickening" made no scientific sense. *Roe* is also reactionary in denying rights to a whole class of human beings, as was done so often in ancient times and in our own country in the slavery and segregation eras. It was odd that Blackmun, the grandson of Union soldiers, would repeat this historic error. It was strange that the Court's leading liberals—Marshall (whose ancestors included both a Union soldier and a slave), Douglas, and Brennan—would push him there.<sup>72</sup>

#### Lots of Letters

There was plenty of blame to go around for the abortion decisions. But the unlucky Blackmun, as author of the opinions, quickly became the chief target of people dismayed by them. When he spoke in Cedar Rapids, Iowa, two days after the decisions were announced, about 50 pro-lifers greeted him with picket signs such as "Adoption not Abortion" and "Legality Doesn't Make Morality." This was, by later standards, a fairly mild protest; after Blackmun went into the building to address the Chamber of Commerce, the pickets said some prayers and left. By 1974, though, Blackmun would be meeting tougher crowds. As he told reporters: "And it's a new experience for me to go places . . . and be picketed and called Pontius Pilate, Herod, and the Butcher of Dachau and accused of being personally responsible for 500,000 deaths in the past year."<sup>73</sup>

In Washington, letters of protest and outrage were piling up for him to read; the outpouring would continue as long as he was on the Court. Over the years, Blackmun often referred to his "hate mail." There was, his papers show, a good deal of it. A Californian thought it too bad that "your mother didn't practice abortion" and added, "Or are you the product of a failed abortion? Why don't you kick off & make room for a unborn citizen who would contribute something to the U.S.?" A Kansan declared that "if I could play

God as you have I would render all nine of you incapacitated in some way to get you off the Supreme Court . . . may God forgive me but I hope all of your future descendants are shown to you in a bottle of formaldehyde.” There were many references to Hitler: “Genghis Khan and Adolf Hitler would have loved men of your amoral fiber!” “You five pro-baby murderers make Hitler look like a Sunday School teacher.”<sup>74</sup> There were also many writers who, while angry about the issue, were *not* personally abusive.

Lots of letters threatened Blackmun with hellfire if he failed to repent; others assured him of prayers. Some writers were very polite and respectful; some were pleading. “Please, Judge Blackmun,” wrote a Texan, “because you’re in a position of high authority, please speak up and defend these little ones who cannot defend themselves.” A couple from Wisconsin wrote a thoughtful critique of a later Blackmun abortion opinion and added, “You have done too good of a job otherwise, to be remembered for this opinion, which cannot and will not stand the test of time.”<sup>75</sup>

Blackmun actually read most of his abortion mail, although he rarely answered letters from abortion opponents, even the polite and pleading ones. I suspect the latter might have made a deeper impression on him if more of them had related personal stories of hard cases that turned out well or experiences with abortion that were devastating. There was some of this, but most of the letters stressed abstract principles.

From the other side, many women told the justice horrific stories of illegal abortions they had experienced in the old days and thanked him for the *Roe* decision. Some told him about legal abortions they were able to have because of *Roe*. A Connecticut teenager declared: “Recently I had an abortion, and frankly, it saved the rest of my life from ruin. . . . I just want you to know that I believe I made the right decision . . . and I did not have a tragic experience because I was forced to go to some quack.” Others did not deal with personal experience, but expressed profound gratitude. “In this house,” one woman wrote, “your name is blessed.” The beleaguered Blackmun usually answered supportive letters with a brief but heartfelt note of thanks. To a woman who wasn’t sure it was proper for her to write a justice, he said there “is no reason why you should not express your opinion, for the cases in question were decided some time ago.” He added wryly, “Certainly everybody else seems to be writing.”<sup>76</sup>

Mail from the general public in support of *Roe* was tiny in volume compared to the outpouring of letters against it. But Blackmun also heard from former clerks, judicial colleagues, and old friends in support of his abortion opinions. People he trusted, admired, and loved kept reassuring him that he was right.



### Pastoral Support

So did members and leaders of his United Methodist Church. Blackmun received especially strong support from his Methodist pastor, Rev. William A. Holmes, from 1976 onward. Holmes, senior pastor of the Metropolitan Memorial United Methodist Church in northwest Washington, D.C., was delighted when the justice attended his church in 1975. He asked Blackmun to participate in the liturgy for a Judiciary Sunday early in 1976. In thanking him for his assistance in that service, Holmes also expressed "my gratitude for the courage, vision, and wisdom" of the Court's abortion decision.

The Blackmun began attending Metropolitan Memorial on a regular basis. The justice became a lay reader of Scriptures during services, usually at Easter and once in the fall. He mingled with other members of the congregation during social events and spoke to several church groups. He became good friends with Rev. Holmes; this resulted in an extremely interesting Dear Harry/Dear Bill correspondence.<sup>77</sup> In a 1985 handwritten letter, Holmes told Blackmun—apparently for the first time—that when working in Texas before 1973, he had been part of national group of clergy who counseled "women with problem pregnancies." He had referred women to hospitals in New Mexico and California for legal abortions. Holmes said it was tragic, though, that many women couldn't afford to travel outside Texas, so they had "either illegal abortions or unwanted children." He felt this was "not only against their best interests, but also against what I believe to have been the best interests of the fetuses they carried." (Rev. Holmes was saying that the children would have been better off dead. One wishes he had pondered the comment of the British writer who remarked: "No human being has the right to make any such judgment about another human being. Even if one had the right, there would be no guarantee of making a correct decision.")

Holmes, who was writing just before the twelfth anniversary of *Roe v. Wade*, added, "Although I deeply regret the verbal attacks and personal threats which the decision still brings to you, I literally thank God for the conscience and courage which produced that decision." Blackmun responded that it "touched me deeply that you wrote as you did. . . . Your friendship and support mean much to Dottie and to me. These are rather strainful times and, in that respect, they seem to be getting worse rather than better."<sup>78</sup>

Church leaders also supported and encouraged Blackmun's judicial work on abortion. A representative of the Methodist bishop and district superintendents of Minnesota wrote him in 1983 to "convey our appreciation for your courageous stand on this sensitive issue." And in 1986 a seminary vice president told him that *Roe* "represented a significant forward step in the emancipation of women."<sup>79</sup>

**Deeper into Abortion**

As the years passed, Blackmun became ever more committed to abortion. Viewing it as a benefit for women, he seemed unconcerned about its brutal reality for unborn children. In 1976 he wrote an opinion striking down a Missouri ban on saline abortions—a cruel method used in the second trimester, and one the state legislature had found harmful to maternal health. He was hostile to requirements that doctors try to save the life of a viable unborn child by using a method that would give the child a chance to survive. He was hostile to mandates for parental consent, and even parental notification, for a minor's abortion.<sup>80</sup> In one case involving saline abortion, Blackmun went outside the evidentiary record to make a point. In a sharp dissent, Justice White insisted that the case “must be decided on its own record”; he protested the idea that normal rules “suddenly become irrelevant solely because a case touches on the subject of abortion.” White said the justices should defer to the state legislature, unless the Court claimed to be “not only the country's continuous constitutional convention but also its *ex officio* medical board.”<sup>81</sup>

Notably absent from Blackmun's majority opinion was any description of what the unborn child looks like in the second trimester and what saline abortion does to the child. It's doubtful that he was ignorant of those facts. Two of the 1971 briefs in *Roe v. Wade* had included photos of fetal development from 40 days to 18 weeks of age. One photo showed an unborn child sucking his/her thumb at 18 weeks. Soon after *Roe*, Justice Douglas had passed on to Blackmun “a handbook on abortion that an irate New Yorker sent me.” The book contained photos of aborted children, including one killed by the saline method at 19 weeks.<sup>82</sup>

By the late 1970s, Blackmun's majority on abortion cases was no longer secure. A severe stroke had forced Douglas off the Court; his replacement, John Paul Stevens, supported *Roe* but had mixed positions on parental consent and public funding of abortion. Burger, Stewart and Powell—all members of the *Roe* majority—did not believe the Constitution required public funding. So from 1977 through 1980, Blackmun, Brennan, and Marshall lost a series of cases on Medicaid funding of abortion. Brennan contended that the law must treat both normal childbirth and abortion as “necessary medical treatment for the condition of pregnancy,” so that if a state funded childbirth for poor women, it must fund abortion for them as well. Marshall attacked the funding denial as unjust to minority and poor women. He cited the fact that non-whites were having abortions “at nearly twice the rate of whites” *not* as an example of how economic pressures (the stick of poverty, the carrot of abortion funding) can be used for genocide but, rather, as proof

that denying abortion funding to poor women would be especially devastating to them. Blackmun echoed this theme and, in a passage that must have appealed to both cranky taxpayers and crafty eugenicists, said the cost of a “nontherapeutic” (elective) abortion “is far less than the cost of maternity care and delivery” and could not compare with “the welfare costs that will burden the State for the new indigents and their support in the long, long years ahead.” He continued: “There is another world ‘out there,’ the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow.” Blackmun essentially was arguing for abortion as a solution for poverty. He and his allies apparently considered the interests only of the women, assumed that all of them really *wanted* to have abortions, and ignored the responsibility of the male partners to help support children they had fathered. As far as the three justices were concerned, the women might as well have been married to the government.

Blackmun, far from considering it unjust to use taxpayers’ money to kill the unborn, seemed to resent those taxpayers who protested. Commenting on the suggestion that states could still fund abortion if they wished, he asked: “Why should any politician incur the demonstrated wrath and noise of the abortion opponents when mere silence and nonactivity accomplish the results the opponents want?” In 1980, in a private letter to Justice Marshall, Blackmun expressed the frustration of seeing his old majority slip away again in a parental-notification case. “I fear that the forces of emotion and professed morality are winning some battles,” he remarked. He expressed a hope that “the ‘war,’ despite these adverse ‘battles,’ will not be lost. You and Bill Brennan, of course, have been most supportive.”<sup>83</sup>

#### Damage Control

In the 1983 *City of Akron* case, Blackmun and Brennan did damage control for the abortion industry. Justice Powell was writing for a majority of six who struck down an Akron, Ohio, law that regulated abortion. Before joining his opinion, Blackmun and Brennan asked him to make changes in his first draft, including deletion of a footnote in which he had criticized assembly-line abortions. While it might be true, Brennan told Powell, “that some abortion clinics do not meet the standards of medical ethics, I would like to avoid making a general statement to that effect”; he thought that would give “aid and comfort to those who would justify burdensome regulation . . . without investigating whether such violations are in fact occurring.” Blackmun dismissed the issue by saying, “We all know that there are rascals in the medical profession as there are in the legal profession.” Powell

substantially revised the footnote, deleting a long description of assembly-line counseling he had picked up from earlier cases. He did this although, as he told Brennan, "I had thought from the discussion at Conference that we were of one mind, namely, that abortion mills do exist, and are operated to the great profit of unethical physicians who care little about their patients."<sup>84</sup>

So the justices knew that legal abortion hadn't eliminated abortion mills; but Blackmun and Brennan didn't want them to say so out loud. Sometimes, though, news stories said it for them. Two months after *City of Akron* was announced, the *Washington Post* reported that the notorious Milan Vuitch had made a settlement with the family of a woman who had died after a 1980 abortion at his clinic. Conditions at the Vuitch clinic were so awful that the following year a coalition of abortion *supporters* worked to shut it down. A city inspection had found improper labeling of drugs, use of drugs beyond their expiration date, and several problems with anesthesia at the clinic. A university-hospital doctor had filed a complaint against Vuitch after handling two or three of his botched abortions; there had been malpractice awards against Vuitch for improper repair of a torn uterus and failure to give even a local anesthetic during one abortion. The city finally closed his clinic, and Vuitch retired.<sup>85</sup>

#### **A Bullet through the Window**

In the fall of 1984, someone sent Justice Blackmun a brief note: "H. Blackmun: Dog, you are hereby found 'guilty' of butchery, and your sentence is death, (time and method at our discretion). If you reverse your butchery vote, the execution will be cancelled." It was signed, "Army of God." That name had been used before on messages claiming responsibility for the firebombing of an abortion clinic in nearby Maryland, other attacks on clinics, and the kidnapping of an abortionist and his wife in Illinois; so the FBI and other federal agencies took the threat seriously. Supreme Court police protected Blackmun between home and office and at public events.

On February 27, 1985, Blackmun's office received a threat from a man in Buffalo, N.Y.: "Sir: I do not like the way you are doing your job. One day i am going to see you and shoot your brains out. I am going to shoot you dead and i will be coming to your funeral."<sup>86</sup> The next night, while the Blackmun's were at home in their Northern Virginia apartment, a bullet pierced their living-room window—not far from where Mrs. Blackmun was sitting—and lodged in a chair. According to a *Washington Post* report, the Justice "had just left the room when the shot was fired," and the shot "showered glass" on his wife. The FBI had kept a lid on the story for several days; so the *Post* didn't run its account until March 5. That same morning, a man called

Blackmun's office and told his secretary: "I hope the bullet gets him next time. . . . That murderer deserves to die and he deserves to go to hell."<sup>87</sup>

The FBI concluded that the bullet had come from a handgun, probably from across the Potomac River in Washington. Judging from the bullet's trajectory, the FBI judged it to have been a random shot, possibly fired by accident, rather than one aimed at the Justice. But Blackmun's youngest daughter, Susan, later wrote that "my sisters and I lived in terror he'd be killed by an assassin." The presence of U.S. Marshals at family events was a constant reminder of danger.<sup>88</sup> There were other threats over the years, sometimes from people with serious mental problems. An Atlanta man sent one in April 1994, soon after Blackmun announced his retirement from the Court. The writer attacked *Roe v. Wade* and said Court members "should be lined up and shot by a firing squad." When the FBI located the man for an interview, "He seemed barely coherent . . . he was trembling and barely able to stand." He hadn't worked for 17 years, had been diagnosed with paranoid schizophrenia in 1988, and was living on Social Security disability. "He said that he means no harm to any Supreme Court justice and does not intend to write any additional letters of this nature."<sup>89</sup>

#### *Thornburgh and Webster*

If those who sent threats to Blackmun thought they could change his abortion position or frighten him into retirement, they were very much mistaken. In the 1986 *Thornburgh* case, he wrote the majority opinion in a 5-4 decision that virtually demolished a Pennsylvania law restricting abortion. Although the Reagan administration's Solicitor General had asked the Court to overturn *Roe*, the majority reaffirmed it instead.

Pennsylvania had required the provision of specific information to a woman considering abortion—including information on the medical risks of both abortion and childbirth, the availability of prenatal and postnatal care, and the father's responsibility for child support. Blackmun wrote that states could not "intimidate women into continuing pregnancies." He claimed that a required description of fetal development was not "always relevant to the woman's decision" and might "serve only to confuse and punish her and to heighten her anxiety." In a footnote, he remarked that federal courts had stricken such requirements consistently "because of their inflammatory impact." (So much for informed consent, and respect for women as adults.) Blackmun again showed his hostility to requiring efforts to save the child in a post-viability abortion. "All the factors are here for chilling the performance of a late abortion," he complained.<sup>90</sup>

Justice White called the majority's positions "procedurally and substantially

indefensible . . . highly inappropriate . . . linguistic nit-picking . . . baffling.” Sandra Day O’Connor, who had replaced Potter Stewart on the Court, also dissented, as did Rehnquist and Burger. In his dissent, the Chief Justice declared that if *Thornburgh* and a similar case “really mean what they seem to say, I agree we should reexamine *Roe*.”<sup>91</sup> Burger announced his retirement from the Court several days later. But President Reagan moved Rehnquist up to Chief Justice and named Antonin Scalia to the Court, so the net result was a strengthening of the four-vote minority.

In 1987, after Justice Powell announced his retirement, Reagan nominated the conservative Judge Robert Bork to replace Powell. The Senate rejected Bork after a fierce confirmation battle, in which abortion was a key issue; but it accepted another conservative, Judge Anthony Kennedy, for the Powell seat. The anti-*Roe* forces hoped they at last had the five votes they needed to overturn the decision they had been fighting for 14 years, so there was enormous pressure on the Court during consideration of the 1989 *Webster v. Reproductive Health Services* case. This involved a Missouri law with tough restrictions on abortion funding and on abortion counseling in public facilities or by public employees. Both pro- and anti-*Roe* activists sent a great volume of mail to the Court about the case. Abortion supporters also put millions of dollars into media advertising and held a huge march on Washington. Among the many letters Blackmun received was one from a woman in his congregation: “After I sang in the choir at the 11:00 o’clock service on Sunday, I went down to the Pro-Choice March at 2:30 and stayed several hours. (I was astounded to see so many people!)”<sup>92</sup>

When the Court upheld the Missouri law’s key provisions by a 5-4 vote, Blackmun was bitter even though it had failed to overrule *Roe*. “The plurality opinion,” he said, “is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly.” If that happened, he predicted, hundreds of thousands of women would have back-alley abortions or even try to do abortions on themselves—leading to trauma or death for many, “all in the name of enforced morality or religious dictates or lack of compassion.” His dissent had a familiar ring, sounding remarkably like the fundraising letters of abortion groups. It ended with a passage that would be often quoted: “For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.”<sup>93</sup>

Justice Scalia, too, was upset—because an ambivalent Justice O’Connor had prevented a majority decision to overturn *Roe*. “It thus appears,” he wrote, “that the mansion of constitutionalized abortion law, constructed overnight in *Roe v. Wade*, must be disassembled doorjamb by doorjamb, and

never entirely brought down, no matter how wrong it may be.”<sup>94</sup>

On the Sunday after *Webster* was announced, Blackmun’s pastor preached a sermon criticizing *Webster* and praising *Roe v. Wade*. Rev. Holmes, stressing an “unwanted children” theme, called *Roe* “one of the most conscientious and civilized provisions a society could make for parenthood and childhood—Biblically defined.” Blackmun wrote Holmes that “you did a splendid piece of work Sunday morning. . . . It touched me deeply, and I thank you for it.”<sup>95</sup>

### The Politics of *Casey*

Pennsylvania, like Missouri, kept trying to limit and discourage abortion despite the huge barriers of *Roe* and its successor cases. At issue in the 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey* was a new Pennsylvania law that included a detailed informed-consent requirement, a 24-hour waiting period, parental notification, and spousal notification. Abortion supporters, having lost in the appeals court, decided on a risky strategy. Believing that *Roe*’s days were numbered in any case, they appealed to the Supreme Court right away and bluntly asked the justices to decide whether *Roe* was still in effect. As one legal writer said later, “If they were going to lose, they wanted to lose big—big enough to tilt national politics in their favor.” Focused on the 1992 elections, they thought an overturning of *Roe* would galvanize their activists and voters to toss President George H. W. Bush and other abortion foes out of office. Women, a Blackmun clerk told her boss, would have “the opportunity to vote their outrage.”<sup>96</sup>

By this time, President Bush had appointed David Souter to replace Brennan on the Court, and had named Clarence Thomas to replace Marshall. No one knew how Souter would vote on *Roe*, but observers were right in believing that Thomas would vote against it. Despite what O’Connor and Souter might do, there seemed to be a majority on the side of the two veteran *Roe* opponents, Chief Justice Rehnquist and Justice White. Yet there was always the chance that—confronted with the stark choice of overturning *Roe*—a few justices would draw back from what might seem to them a very steep cliff. This is, in fact, what happened, although those who stepped back damaged *Roe* in the process of saving it.

When the justices met in April 1992, to vote on the case, Rehnquist had the five votes he needed to uphold the Pennsylvania law (Kennedy, Rehnquist, Scalia, Thomas, and White). The Chief suggested this could be done without overruling *Roe* and assigned the *Casey* opinion to himself. Afterwards, though, Souter approached O’Connor about a possible compromise to resolve the abortion issue. She was receptive; she didn’t want to scuttle *Roe*,

but she thought the states should have more discretion than it allowed. The two approached Justice Kennedy, even though he had voted with Rehnquist in conference, and Kennedy joined their plan. The three justices, in secrecy at first, wrote an opinion that reaffirmed a constitutional right to abortion; stressed the importance of the *stare decisis* (“to stand by what has been decided”) doctrine; but substituted Justice O’Connor’s “undue burden” standard for *Roe*’s “strict scrutiny” test of state abortion laws. This meant that states could discourage abortion more than the immediate post-*Roe* decisions allowed, but could not ban it outright in any trimester.

The “troika” judged correctly that Blackmun and Stevens, the only firm defenders of *Roe* still on the Court, would join them in the end. Late in May, Kennedy sent a handwritten note to Blackmun: “I need to see you as soon as you have a few free moments. I want to tell you about some developments in *Planned Parenthood v. Casey*, and at least part of what I say should come as welcome news.” Blackmun’s notes on their meeting included a reference to “RC agony” and “traitor.” This probably meant that Kennedy was struggling with his strong Catholic beliefs against abortion and that he knew he would be perceived as a traitor by many fellow Catholics and conservatives if he voted to reaffirm *Roe*.<sup>97</sup>

Blackmun and Stevens, who had worried for years that *Roe* would go down in flames, were heartened that the troika had stepped in to rescue it. They would have preferred a full-scale affirmation of *Roe*, but realized they were lucky to have saved it at all. Stephanie Dangel, the clerk who drafted Blackmun’s concurring opinion, suggested that where he differed with the troika on modifying *Roe*, his tone should not “be harsh—it must be the more consoling tone of an older, wiser uncle.” She proposed ending his opinion with a pointed reminder that “while there may be something to cheer in the troika’s opinion, there is much more to fear from the right. And the difference between the two positions is a single vote—a single vote that is up for grabs in the coming election.” She drafted a paragraph making this point in slightly more subtle language; it noted that Blackmun was 83 and said the confirmation of his successor might focus on “the issue before us today.” Justice Stevens, knowing the paragraph would be seen as a political rallying cry, tried to persuade Blackmun to delete it; but Blackmun stayed with his clerks. “I hope you don’t feel that we were pressuring you too much” on the passage, Dangel told him at one point. After the *Casey* decision was announced, she said it was unfortunate that some people had tried to transform the passage “into a ‘call to arms’ . . . but I really believe that your final paragraph is the one clear message that came through all the ridiculous ‘spinning’ that both sides were engaging in yesterday.”<sup>98</sup>



**Awards from Abortion Supporters**

Justice Blackmun was old and very tired; he wanted to escape the Court's heavy workload. Soon after *Casey*, he heard from a friend in Florida who remarked, "When I saw you at church in March, you told me you were going to wait for the elections—that you felt you could endure one more year on the Court, but not much more. . . . So I am going to do my best to help you retire by volunteering to do work for the Democratic ticket here in Florida." It's safe to assume that both Blackmun and his friend were much relieved when Democrat Bill Clinton, a veteran *Roe* supporter, was elected to the presidency. When Byron White retired in 1993, and Clinton replaced him with Ruth Bader Ginsburg, Blackmun felt *Roe* was secure.

People who are still upset with Justice Kennedy because of *Casey* will be more so when they learn that Kennedy actually urged Blackmun to stay on longer. In a private note written just after White announced his retirement, Kennedy said he had benefited from Blackmun's "splendid juristic dedication" and that "you still inspire me to try to do better in my own work." He added, "It would be a great loss to this institution if Byron's successor were to be deprived of that same instruction. . . . If you were to stay here a while longer, it would influence the Court for years to come."<sup>99</sup>

Blackmun stayed for another year, finally announcing his retirement in April 1994. President Clinton praised him highly, as did many others. (Pro-lifers and conservatives issued sharp dissenting opinions.) There were tributes to him in law reviews at Harvard, Yale, Georgetown, and elsewhere. Blackmun had received many honorary degrees over the years, and there were more to come. He received at least 40 altogether, including ones from Harvard, Columbia, Dartmouth, Tufts, Emory, the University of Nebraska, and the Claremont Graduate School.<sup>100</sup>

Groups supporting abortion were also eager to honor him. Several had wanted to do it when he was still on the Court. In 1984 the Religious Coalition for Abortion Rights selected him for a religious-freedom award. Blackmun told them he was "humbled by the suggestion . . . Coming as it does in the midst of vilification continuing since 1973, this demonstration of support means very much to me." But he suggested postponing "anything of this kind at least until beyond this election year."<sup>101</sup>

In 1986 the National Family Planning and Reproductive Health Association (NFPRHA) selected Blackmun for a distinguished-public-service award, to be presented at its annual meeting the following year. Blackmun agreed to accept the award, and the organization announced it on its telephone hotline. The National Right to Life Committee noticed the announcement, and its president, Dr. John C. Willke, sent a letter of protest to Justice Blackmun,

noting that abortion providers made up much of NFPRHA's membership and that the group was a leading advocate of "legal abortion on demand and federal funding of abortion." Willke emphasized that the group "engages in pro-abortion litigation in the federal courts," and contended that if Blackmun accepted the award, he would violate the American Bar Association's Code of Judicial Conduct. Willke had his letter hand-delivered to Blackmun's office, and issued a press release declaring: "If Chief Justice Rehnquist were to appear at the National Right to Life Convention to receive an award, loud protests would be heard from law professors and editorial writers from coast to coast."

Blackmun quickly changed his mind and declined the award, but also declined to comment on the affair. Reporters wanted to know whether he had initially agreed to accept the award, and a NFPRHA leader called Blackmun's office for guidance on handling that question. Blackmun suggested that he just say "no comment" or not respond at all: "I dislike to retreat under fire &, if he speaks, that is the position he places me in. His opposition will make much of it." Ten years later, after he had retired from the Court, Blackmun accepted a lifetime-achievement award from NFPRHA.<sup>102</sup>

In 1992 the Family Planning Council of Southeastern Pennsylvania asked Blackmun's permission to establish a Justice Harry A. Blackmun Reproductive Freedom Award. They wanted to present the first award to Blackmun himself at their gala fundraiser that year. The Council, an umbrella group, included among its members Planned Parenthood of Southeastern Pennsylvania—the lead plaintiff in *Casey*. The Court had decided *Casey* less than two months before the Council contacted Blackmun about the award, and Blackmun had sided with the Planned Parenthood group on nearly every issue. It's possible, of course, that he didn't notice its name on the Family Planning Council letterhead. In any case, he told the Council that he shouldn't be present at their fundraiser—since the Canons of Judicial Ethics "frown upon a federal judge's participation in a fundraising activity"—but he had no objection to their naming the award after him. The Council would give its Blackmun award to a succession of old warhorses of the abortion movement—including Faye Wattleton, Joycelyn Elders, Gloria Steinem, and Catholics for a Free Choice—and notified Blackmun of each year's recipient. After his retirement, they presented the award to the justice himself.<sup>103</sup>

The American College of Obstetricians and Gynecologists (ACOG) selected Blackmun for its 1994 public-service award, presenting it to him just before he announced his retirement. According to the group's executive director, the award expressed "our appreciation to you for championing the

reproductive rights of women in cases that have come before the Court.” Those cases had included one in which ACOG was the lead plaintiff—the 1986 *Thornburgh* case. Blackmun had written the 5-4 majority opinion in that case, giving ACOG virtually everything it wanted.<sup>104</sup>

The Center for Reproductive Law and Policy at least waited until Blackmun announced his retirement. Its president and vice president, Janet Benshoof and Kathryn Kolbert, had both argued abortion cases before the justice. The Center wanted to establish an endowed Blackmun Fellowship for young lawyers who would assist Center staff in “cutting edge litigation.” Blackmun cooperated with this venture; but he explained that the inaugural dinner for the fellowship could not be a fundraiser, although it would be all right to charge for the cost of the dinner itself. The Center—before the dinner—raised large sums for the fellowship from wealthy people who had long supported population control and abortion. At the 1995 inaugural dinner, megabillionaire Warren Buffett and his wife were seated with the Blackmun.<sup>105</sup>

There were other honors in 1995. The National Abortion Federation—a trade group of abortion clinics—gave the retired justice its Christopher Tietze Humanitarian Award. The New York Civil Liberties Union (NYCLU) cited *Roe v. Wade* in giving him a right-of-privacy award. And NARAL pulled out all the stops for a big dinner to honor him in 1995. (One expected attendee, by the way, was Linda Greenhouse, veteran Supreme Court reporter for the *New York Times*. Blackmun’s secretary told her boss that NARAL president Kate Michelman “said Greenhouse will attend because she is a friend of NARAL, not because she is a reporter.”)<sup>106</sup>

The awards from groups supporting abortion did not raise questions about Blackmun’s financial integrity, which apparently was above reproach. When the NYCLU Foundation tried to give Blackmun the \$5,000 that went with its award, Blackmun returned the check. (It was “very generous” of them, he said, but “I have never taken an honorarium, and I certainly would not wish to start with the NYCLU.”) Yet Blackmun’s acceptance of the awards certainly posed questions about his impartiality in the many abortion cases he had heard. The award from ACOG, a plaintiff in a major case, raised such questions to an acute degree. The National Abortion Federation and NFPRHA, in their awards, were borrowing the prestige of high judicial office to advance their private interests. But Blackmun had become such an intense partisan that he apparently gave little if any thought to these issues. He didn’t seem to understand that much of the frustration and anger of abortion opponents resulted from their feeling that the deck was stacked against unborn children from the beginning; that often there was only a pretense of fairness; and that sometimes there was not even a pretense.

## A Tragic Life

The tragedy of Blackmun's life and career was that a man who was good and kind in many ways became so concerned about women's difficulties with pregnancy that he was willing to overlook the humanity and the rights of unborn children. He could have tried to find ways to help one without harming the other—and he apparently didn't consider the possibility that to help a mother take the life of her child is actually an injustice to both. This was an ethical blindness he shared with many judicial colleagues and, indeed, millions of other Americans. They accepted superficial slogans and ideas, including the notion that switching from illegal to legal abortion would solve the basic problem. It never occurred to them that the basic problem was abortion itself.

## NOTES

*In these notes, "BP" means the Harry A. Blackmun Papers at the Manuscripts Reading Room, Library of Congress, Washington, D.C. "BOH" refers to a 1994-95 series of oral-history interviews of the justice by his former clerk, Prof. Harold Hongju Koh; the interview transcripts are available at the same location. (Although valuable, the interviews are not spontaneous; the recently retired justice knew the questions in advance and had time to do research, or have his clerks do research, on the cases and other subjects to be discussed.) "Brennan Papers" are the papers of Justice William J. Brennan Jr.; "Douglas Papers" are those of Justice William O. Douglas; and "Marshall Papers" are those of Justice Thurgood Marshall. The Brennan, Douglas, and Marshall Papers are also at the Manuscripts Reading Room. (There are restrictions on the Brennan Papers.)*

*In correspondence within the Court, associate justices typically call each other by their first names and call the Chief Justice simply "Chief." For greater clarity, in these notes I refer to the justices by their last names alone—for example, "Blackmun to Burger." When a letter or memo was addressed to "the Conference," that meant all the justices.*

*My deep appreciation to the late Justice Blackmun's secretaries, who kept such excellent records, and to the Library of Congress staff who have been so helpful to my work in the Manuscripts Reading Room. I am also grateful to the estates of Justice Brennan and Justice Hugo Black for permission to review portions of the Brennan and Black papers.*

1. "Justice Blackmun Sheds Robe in 'Plea' for Family Practice," *Post-Bulletin* [Rochester, Minn.], 30 Nov. 1979, BP, box 1438. Sally Blackmun and her husband were admitted to the Supreme Court bar on this occasion.
2. David G. Savage, *Turning Right: The Making of the Rehnquist Supreme Court* (New York: Wiley, 1992), 236-237; Bob Woodward and Scott Armstrong, *The Brethren* (New York: Simon & Schuster, 1979), 181-182. Blackmun said *The Brethren* contained "a lot of myth." He was, however, one of its authors' sources, as were four other justices, over 170 ex-law clerks, and a huge volume of leaked documents. BOH, 292; "sjb" to Blackmun, 30 June 1978, BP, box 1435; Woodward and Armstrong, 3-4; and John C. Jeffries Jr., *Justice Lewis F. Powell, Jr.* (New York: Scribner's, 1994), 389-392. Scott Armstrong had two interviews with Blackmun—rather than just the one brief interview that Blackmun remembered in 1995.
3. Nancy Blackmun Coniaris in Mariana Cook, *Fathers and Daughters: In their Own Words* (San Francisco: Chronicle Books, 1994), 80-83; and Nancy Blackmun, "A Eulogy for My Father's Memorial Service," Washington, D.C., 9 March 1999, 4-5 & 2-3, BP, box 1376.
4. BOH, 47-81 & 120; John A. Jenkins, "A Candid Talk with Justice Blackmun," *New York Times*

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- Magazine*, 20 Feb. 1983, 20 ff., 24; Nancy Blackmun, "A Eulogy" (n. 3), 5 & 3; and Harry Blackmun, "Comments Re 1962 MPH Meeting," 2 Nov. 1962, 3, BP, box 59.
5. Ruth Marcus, "Author of 'Roe' Remains Proud, Protective of It," *Washington Post*, 20 April 1992, A-4; BOH, 117; Gregg Orwoll, "Harry Andrew Blackmun," *American University Law Review* 43 (Spring 1994), 733; Edward Lazarus, *Closed Chambers* (New York: Random House/Times Books, 1998), 38-39; and BOH, 56-57 & 379-380.
6. *Ibid.*, 476-477.
7. Nancy Blackmun Coniaris in Cook (n.3), 82; Savage (n. 2), 238; and BP, passim.
8. U.S. Congress, Senate, Committee on the Judiciary, *Hearing on Nomination of Harry A. Blackmun* . . . , 91st Cong., 2nd Sess., 29 April 1970, 43 & 37; BOH, 128, 444-446, 437 & 339; and Pamela S. Karlan, "Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders," *Dickinson Law Review* 97 (Spring 1993), 527-540.
9. Jeffrey Rosen, "Sentimental Journey," *The New Republic*, 2 May 1994, 13 ff., 13 & 14.
10. *Roe v. Wade*, 410 U.S. 113 at 159, 157, 158, 161-162 & 153 (1973). See also, 174-177 (Rehnquist, J., dissenting).
11. *Ibid.* at 164-165; and *Doe v. Bolton*, 410 U.S. 179 at 192 (1973).
12. Dale Kueter, "Blackmun: Resent Bringing Court into Abortion Issue," *Cedar Rapids Gazette*, 25 Jan. 1973, 1 & 7; BOH, 35-39, 187-188 & 459-461; *Callins v. Collins*, cert. denied, 510 U.S. 1141 at 1159 & 1145 (1994) (Blackmun, J., dissenting); Blackmun to Douglas, 19 May 1970, Douglas Papers, box 1780; BOH, 11; and Woodward and Armstrong (n. 2), 182.
13. Profiles of the justices are based on many sources, including standard books on the Court, biographies, and justices' papers at the Library of Congress. On law clerks' influence, see Bernard Schwartz, *Decision: How the Supreme Court Decides Cases* (New York: Oxford University Press, 1996), 6 & 48-55; Douglas to Burger, 13 July 1972, Marshall Papers, box 78; and Edward Lazarus (n. 5), 262-275. (Lazarus clerked for Justice Blackmun in 1988-89.)
14. Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* (New York: Random House, 2003), 198, 269-271, 287-288, 338, 362-365, 367-377, 392-399, 427-429; and Juan Williams, *Thurgood Marshall: American Revolutionary* (New York: Times Books/Random House, 1998), 190-192, 306, 322, 345-346, & 386. Their behavior included adulterous affairs and one-night stands as well as unwanted grabbing and fondling of women.
15. Hugh Moore, "The Population Bomb," Sept. 1972, Hugh Moore Fund Collection, box 14, Seeley G. Mudd Manuscripts Library, Princeton University, Princeton, N.J.; and Lawrence Lader, *Breeding Ourselves to Death* (New York: Ballantine Books, 1971), 20, 27-33, 95, 21, 100 & 78. I assume that Moore, in noting multiple mailings to everyone in *Who's Who*, meant *Who's Who in America*.
16. Douglas to Hugh Moore, 12 June 1961; and Douglas to James Y. C. Yen, 17 June 1961, Douglas Papers, box 599. Douglas suggested that Yen, head of the model-villages group, might be able to get "substantial contributions" from Moore. Yen responded positively to Douglas, 20 June 1961, *ibid.*; but I found no other correspondence on the subject through 1962.
17. *Griswold v. Connecticut* drafts, *ibid.*, box 1347. The final opinion, without the reference to "the population problem," is *Griswold v. Connecticut*, 381 U.S. 479 (1965).
18. Woodward and Armstrong (n. 2), 167; BOH, 224-225 & 292. Justice Stewart's Supreme Court papers at Yale University Library, New Haven, Conn., will not be available to researchers until the last remaining justices with whom he served (Chief Justice Rehnquist and Justice Stevens) retire from the Court.
19. David J. Garrow, *Liberty and Equality: The Right to Privacy and the Making of Roe v. Wade* (New York: Macmillan, 1994), 349, 355-360, 364-365, 377-380, & 506; John Ensor Harr and Peter J. Johnson, *The Rockefeller Conscience* (New York: Scribner's, 1991), 403; and Richard Lewis, "An Attorney's Crusade to Overturn Controls," *American Medical News*, 16 Feb. 1979, 11 ff. In coordinating amicus briefs, Association for the Study of Abortion (ASA) staff "kept careful watch over the language . . . for example, they substituted 'fetus' for 'baby.'" They also used "pro-choice" instead of "pro-abortion." Lee Epstein and Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (Chapel Hill, N.C.: University of North Carolina Press, 1992), 171. ASA's calculated depersonalization of the unborn was both manipulative and highly effective.
20. Williams and Tietze were both members of England's Eugenics Society; see [www.africa2000.com](http://www.africa2000.com), "Eugenics Watch . . . The British Eugenics Society, 1907 to 1994." On Lader and Means, see Garrow (n. 19), passim; and Lawrence Lader, *Abortion II: Making the Revolution* (Boston:

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- Beacon Press, 1974), 91, 218, 104 & passim.
21. Rachel MacNair, Mary Krane Derr and Linda Naranjo-Huebl, *Pro-life Feminism: Yesterday and Today* (New York: Sulzburger & Graham, 1995), 60, 41-50, & 136; and Betty Friedan, *It Changed My Life: Writings on the Women's Movement* (New York: Random House, 1976), 12-13 & 120-128, 123.
  22. For information on the pro-life feminists, see [www.feministsforlife.org](http://www.feministsforlife.org).
  23. Woodward and Armstrong (n. 2), 183 & 238; BOH, 198-199; Cynthia L. Cooper, "Daughter of Justice Blackmun Goes Public about Roe," *Women's e News*, 29 Feb. 2004, [www.womensenews.org](http://www.womensenews.org).
  24. E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* (n.p.: American Bar Association, 1973), [1] & 8; and Sally Blackmun, "Introduction" to Gloria Feldt with Laura Fraser, *The War on Choice* (New York: Bantam Books, 2004), xviii-xix.
  25. Cooper (n. 23). Sally Blackmun later remarried and had two children.
  26. U.S. Congress (n. 8), 7; BOH, 54, 111 & 113; Jane Hodgson, "Ex-Mayo Doctor on Trial Explains Abortion Views," Rochester, Minn., *Post-Bulletin*, 17 Nov. 1970, 25 & 32; Sharon Blinco, "Dr. Hodgson Claims 'Hypocrisy' in Abortion Law," *Minneapolis Tribune*, 18 Nov. 1970, 1 & 4; Garrow (n. 19), 474 & 501. See, also, Pratt letters supporting the Supreme Court's abortion decisions: Joseph H. Pratt to Blackmun, 24 Jan. 1973, BP, box 68; and J. H. Pratt to Blackmun, 31 Jan. 1989, *ibid.*, box 105.
  27. Blackmun, "Memorandum to the Conference," 25 May 1972, Douglas Papers, box 1590.
  28. BOH, 192; Fred A. Lyon, "Abortion Laws," *Minnesota Medicine* 50 (Jan. 1967), 17-22, 17; and Philip N. Bray, "Therapeutic Abortion," *ibid.*, 129-136, 131.
  29. U.S. Congress (n. 8), 8; BP, box 1535, folder 5; and Nancy Strobel, "St. Marys Refuses Abortions, Mayo Policy Remains Uncertain," Rochester, Minn., *Post-Bulletin*, 24 Jan. 1973.
  30. Paige Carlin, "Conference Acts . . . Tensions Relax," *Together* 14 (July 1970), 11-17, 15; and "Methodists Back Legal Abortion," *St. Louis Post-Dispatch*, 24 April 1970, 10-A.
  31. Hugh Moore to Emerson Foote, 23 Dec. 1971 (two letters); Thomas J. Furlong to George Granger, 23 Dec. 1971; and Rodney Shaw to Hugh Moore, 7 Jan. 1972 (two letters), Hugh Moore Fund Collection, box 18, Seeley G. Mudd Manuscripts Library, Princeton University, Princeton, N.J.; Garrow (n. 19), 463; and "Contributions to the James Madison Constitutional Law Institute, Inc., 1969-1972," in Roy Lucas to John Maier, 6 June 1972, Record Group (A 79), Series 200 A, folder on "Madison Const. Law Institute, Pop. Law," Rockefeller Archive Center, Sleepy Hollow, N.Y.
  32. For information on the pro-life Taskforce of United Methodists on Abortion and Sexuality (TUMAS), see its quarterly newsletter *Lifewatch* at [www.lifewatch.org](http://www.lifewatch.org). For official United Methodist statements on abortion, see United Methodist News Service at [www.umns.umc.org/resources/foreditors/backgrounders/abortion](http://www.umns.umc.org/resources/foreditors/backgrounders/abortion).
  33. U.S. Congress (n. 8), 8; and "New Associate Justice Praised by Minister," *Together* 14 (July 1970), 18-19. So far I have found no Blackmun correspondence about his church's 1970 decision to support legalized abortion. But soon after he joined the Supreme Court, he sent to Rochester Methodist Hospital many old files related to it. Blackmun to Howard Winholtz, 25 Aug. 1970, BP, box 1448.
  34. Linda Greenhouse, "Lewis Powell, Crucial Centrist Justice, Dies at 90," *New York Times*, 26 Aug. 1998, A-1 & D-19; Jeffries (n. 2), 346-347; Woodward and Armstrong (n. 2), 230. Justice Powell's papers at the Washington and Lee University School of Law, Lexington, Va., are available to researchers.
  35. BOH, 203, 195 & 494; and Ronald L. Trowbridge, *With Sweet Majesty, Warren E. Burger* (Washington: Trust for the Bicentennial of the United States Constitution, 2000), 186. Chief Justice Burger's papers at the College of William and Mary, Williamsburg, Va., will be open to researchers in 2026.
  36. Dennis J. Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* (New York: Free Press, 1998), 5-6, 517, 368 & 3. Justice White's papers at the Library of Congress will be open to researchers in 2012. According to a Supreme Court spokeswoman, 26 July 2004, Chief Justice Rehnquist has not designated a library to receive his papers.
  37. Lader (n. 20), 1-16 (Vuitch quote on 8-9); Bart Barnes, "Milan M. Vuitch, 78, Dies; Challenged Abortion Laws," *Washington Post*, 10 April 1993, B-6; Donald Hirzel, "Vuitch Indicted in Another Abortion Case," *Washington Star*, 1 Sept. 1970, B-1; "New Vuitch Case Hit as 'Persecution,'" *ibid.*, 2 Sept. 1970, C-4; Ed Bruske, "\$150,000 Payment Set in Abortion Clinic Suit,"

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- Washington Post, 19 Aug. 1983, B-2; and Kevin Sherlock, *Victims of Choice* (Akron, Ohio: Brennyman Books, 1996), 20 & 21.
38. John P. MacKenzie and Stuart Auerbach, "D.C. Abortion Law Upheld By Supreme Court, 5 to 2," *Washington Post*, 22 April 1971, A-1 & A-9; and *United States v. Vuitch*, 402 U.S. 62 at 72 (1971).
39. Henry Aubon, "Abortion Forces Bid to Push Washington Into Big League," *Washington Post*, 7 June 1971, C-1 & C-2.; and Kitty Kelley, "The New Legal Abortion Business in Washington," *ibid.*, *Potomac* magazine, 19 Sept. 1971, 20 ff.
40. *United States v. Vuitch* (n. 38) at 96-97 (Stewart, J., dissenting in part). Brennan and Marshall did not vote on the merits of the case. Blackmun voted with the majority on the merits.
41. Supplemental Brief for Planned Parenthood Federation of America and American Association of Planned Parenthood Physicians as Amici Curiae at 20-21, *Roe v. Wade* (n. 10) and *Doe v. Bolton* (n. 11).
42. Blackmun to Rehnquist, 20 July 1987, BP, box 151.
43. Garrow (n. 19), 528-533; and Bernard Schwartz, *The Unpublished Opinions of the Burger Court* (New York: Oxford University Press, 1988), 84-86. As Schwartz notes, various justices counted the votes differently.
44. Epstein and Kobylka (n. 19), 184; Woodward and Armstrong (n. 2), 170-172.
45. Douglas to Burger, 18 Dec. 1971, Douglas Papers, box 1590; and Burger to Douglas, 20 Dec. 1971, Marshall Papers, box 99.
46. Blackmun correspondence with Thomas E. Keys, Dec. 1971 & Jan. 1972, BP, box 152, folder 2; BOH, 194; Blackmun to Burger, 18 Jan. 1972, BP, box 132; Burger to the Conference, 31 May 1972, Douglas Papers, box 1590; Woodward and Armstrong (n. 2), 176-177.
47. Douglas, "Memorandum from Mr. Justice Douglas" on *Doe v. Bolton* [marked "File Not cir 12/ 21/71"], Douglas Papers, box 1590; and Douglas to Brennan, 22 Dec. 1971, *ibid.*
48. Brennan to Douglas, 30 Dec. 1971, 1, 10, 3 & 4, *ibid.*
49. *Ibid.*, 6-8; *Eisenstadt v. Baird*, 405 U.S. 438 at 453 (1972); Woodward and Armstrong (n. 2), 175-176; Garrow (n. 19), 541-542; and Lazarus (n. 5), 364-365.
50. Roger Goldman with David Gallen, *Justice William J. Brennan, Jr.: Freedom First* (New York: Carroll & Graf, 1994); and Brennan to Douglas (n. 48), 5-8.
51. *Ibid.*, 8-9; and Tom C. Clark, "Religion, Morality, and Abortion: A Constitutional Appraisal," *Loyola University of Los Angeles Law Review* 2 (April 1969), 1-11, 9-10.
52. In his 1957 confirmation hearing, asked about possible conflict between his religious views and his oath to support the U.S. Constitution and laws, Brennan had said that it "is that oath and that alone which governs." Kim Isaac Eisler, *A Justice for All: William J. Brennan, Jr., and the Decisions that Transformed America* (New York: Simon & Schuster, 1993), 118-119. But Brennan may have been influenced by the pro-legal-abortion views of Rep. Robert Drinan (D-Mass.), the Jesuit priest and congressman. In 1975 Blackmun told Drinan that Brennan had "spoken of you glowingly a number of times." Writing someone else about a strongly pro-life Catholic bishop, Blackmun remarked that Brennan "regards him as a member of the church's right wing." Blackmun to Robert F. Drinan, 26 Sept. 1975, BP, box 92; and Blackmun to Randall P. Bezanson, 25 April 1975, *ibid.*, box 1553.
53. *Doe v. Bolton* (n. 11) at 209-221 (Douglas, J., concurring); Douglas to Blackmun, 19 May 1972, Marshall Papers, box 99; and Blackmun to Douglas, 22 May 1972, Douglas Papers, box 1590.
54. Blackmun to the Conference, 18 May 1972, Douglas Papers, box 1589; Blackmun, first draft of *Roe v. Wade* opinion, circulated 18 May 1972, BP, box 151; Brennan to Blackmun, 18 May 1972, Marshall Papers, box 99; Douglas to Blackmun, 19 May 1972, *ibid.*; and Blackmun to the Conference, 25 May 1972, 2, Douglas Papers, box 1590.
55. *Ibid.*; Blackmun, "Memorandum of Mr. Justice Blackmun" on *Doe v. Bolton*, first draft, circulated 25 May 1972, *ibid.*, box 1589; Brennan, draft of memo to Blackmun, May 1972, 3, *ibid.*, box 1590, and Brennan Papers, box 286. Garrow indicates that Brennan did not send the draft, but "reportedly conveyed the contents of the letter to a seemingly receptive Blackmun face-to-face." Garrow (n. 19), 864-865, n. 93.
56. Blackmun to the Conference, 18 May 1972, (n. 54); Garrow (n. 19), 551-552; and Blackmun to the Conference, 31 May 1972, BP, box 151.
57. Garrow (n. 19), 552-554; Douglas to Blackmun, 31 May 1972, Douglas Papers, box 1590; and Burger to the Conference (n. 46).
58. Garrow (n. 19), 554-556; Woodward and Armstrong (n. 2), 186-187; and Powell to the

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- Conference, 1 June 1972, Douglas Papers, box 1590.
59. Brennan to Douglas, June 1972, *ibid.*; Douglas to Burger, 1 June 1972, *ibid.*; and Douglas, "Memorandum from Mr. Justice Douglas" on *Roe v. Wade* and *Doe v. Bolton*, first draft [marked "For Justice Brennan only, 6-2-72"], 3, *ibid.*, box 1589.
60. James F. Simon, *The Center Holds: The Power Struggle Inside the Rehnquist Court* (New York: Simon & Schuster, 1995), 103-104 & 309, n. 104; Woodward and Armstrong (n. 2), 188-189; and Garrow (n. 19), 555-556.
61. "Move by Burger May Shift Court's Stand on Abortion," *Washington Post*, 4 July 1972, A-1 & A-10; Garrow (n. 19), 557-558; Douglas to Burger, 4 July 1972, Douglas Papers, box 1589; Burger to Douglas, 27 July 1972, 3 & 1, *ibid.*; and Douglas to Burger, 7 Aug. 1972, *ibid.*
62. BOH, 19-20 & 196-198; and *Roe v. Wade* (n. 10) at 130-132.
63. "George" to Blackmun, 11 Aug. 1972, 8, 2 & 4, BP, box 152. Other material in the Blackmun Papers indicates this was George Frampton.
64. U.S. Supreme Court, Transcript of Oral Arguments in *Roe v. Wade* and *Doe v. Bolton*, Washington, D.C., 11 Oct. 1972; and *Roe v. Wade* (n. 10) at 141-142 & 151. On this point, see Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion," *Fordham Law Review* 41 (May 1973), 807-862 at 827-835; James S. Witherspoon, "Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment," *St. Mary's Law Journal* 17, no. 1 (1985), 29-77; and Ramesh Ponnuru, "Aborting History," *National Review*, 23 Oct. 1995, 29-32.
65. Garrow (n. 19) 573-576; BOH, 202 & 494; and Schwartz (n. 43), 148.
66. Jeffries (n. 2), 341-343; Powell to Blackmun, 29 Nov. 1972, BP, box 151; Blackmun to the Conference, 11 Dec. 1972, *ibid.*; Mark V. Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991* (New York: Oxford University Press, 1997), 6-7; BOH, 167-168; Garrow (n. 19); 581-585; and Marshall to Blackmun, 12 Dec. 1972, BP, box 151.
67. Douglas to Blackmun, 11 Dec. 1972, *ibid.*; Stewart to Blackmun, 14 Dec. 1972, *ibid.*; and *Roe v. Wade* (n. 10) at 160 & 163-165.
68. Woodward and Armstrong (n. 2), 233.
69. *Doe v. Bolton* (n. 11) at 221-223 (White, J., dissenting). Rehnquist joined this dissent, which also applied to *Roe v. Wade*.
70. *Roe v. Wade* (n. 10) at 172 & 174-177 (Rehnquist, J., dissenting); and "U.S. States," *Webster's New World College Dictionary*, 3rd ed., 1581.
71. *Doe v. Bolton* (n. 11) at 192; and *Roe v. Wade* (n. 10) at 163-164.
72. Powell to "Dottie" [Blackmun], 22 Jan. 1973, BP, box 151; John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *Yale Law Journal* 82 (April 1973), 920-949 at 947; John T. Noonan Jr., "Raw Judicial Power," *National Review*, 2 March 1973, 260-264; *Roe v. Wade* (n. 10) at 162; David J. Cocke, "Abortion Decision Stirs Controversy," *Harvard Law School Record*, 9 Feb. 1973, 5; Byrn (n. 64); Witherspoon (n. 64); Garrow (n. 19), 609-616 (including criticism from abortion supporters who thought *Roe* placed too much emphasis on the doctor's role and/or should have used arguments based on equal rights instead of privacy); and Randall Bland, "The Making of an Advocate," in Roger Goldman with David Gallen, *Thurgood Marshall: Justice for All* (New York: Carroll & Graf, 1992), 22-23.
73. Kueter (n. 12); and Bob Lundegaard, "Blackmun Calls Abortion Rule Supreme Court Turning Point," *Minneapolis Tribune*, 5 Feb. 1974, 1-A & 11-A.
74. R. B. Ryan to Blackmun, 24 Jan. 1985, BP, box 73; Patricia Lowry to Douglas (who passed the letter on to Blackmun), 22 Feb. 1973, *ibid.*, box 1404; Ace O'Brien to Blackmun and others, 12 June 1986, *ibid.*, box 73; and Carl Laurent to Blackmun, 16 June 1986, *ibid.*
75. Josephine Zain to Blackmun, 16 Jan. 1989, *ibid.*; Joe and Kay Crnkovich to Blackmun, 16 June 1986, *ibid.*
76. Unsigned letter to Blackmun, 6 March 1979, *ibid.*, box 74; Susan Bender to Blackmun, 6 Feb. 1974, *ibid.*; and Blackmun to Mrs. Beekman Pool, 15 Oct. 1973, *ibid.*, box 68.
77. William A. Holmes to Blackmun, 19 Sept. 1975 & 26 Feb. 1976, *ibid.*, box 1522. See, generally, boxes 1460-1462.
78. William A. Holmes to Blackmun, 21 Jan. 1985, *ibid.*, box 1461; Norman St. John-Stevass, *The Right to Life* (New York: Holt, Rinehart and Winston, 1964), 15; and Blackmun to William A. Holmes, 24 Jan. 1985, BP, box 1461.
79. Lyle T. Christianson to Blackmun, 4 Feb. 1983, *ibid.*, box 1462; and R. Bruce Poynter to Blackmun, 24 July 1986, *ibid.*, box 1461.



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80. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); *Colautti v. Franklin*, 439 U.S. 379 (1979); and *H. L. v. Matheson*, 450 U.S. 398 (1981).
81. *Planned Parenthood of Missouri v. Danforth* (n. 80) at 98-99 (White, J., dissenting).
82. Brief for Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology as [Amici] Curiae at 10-25, *Roe v. Wade* (n. 10) and *Doe v. Bolton* (n. 11); Brief for Appellee at 35-51, *Roe v. Wade* (n. 10); Douglas to Blackmun, 17 May [1973], BP, box 1404; and Dr. and Mrs. [Barbara] J. C. Willke, *Handbook on Abortion* (Cincinnati: Hiltz Publishing Co., 1972), *ibid.*
83. *Beal v. Doe*, 432 U.S. 438 (1977) at 452 (Brennan, J., dissenting), 459-461 (Marshall, J., dissenting), & 462-463 (Blackmun, J., dissenting) (1977); and Blackmun to Marshall, 12 Nov. 1980, Marshall Papers, box 279.
84. Powell, first draft in *City of Akron v. Akron Center for Reproductive Health*, circulated 3 March 1983, BP, box 369; Brennan to Powell, 8 March 1983, *ibid.*; Blackmun to Powell, 8 March 1983, *ibid.*; Powell to Brennan, 9 March [1983], *ibid.*; Powell to Blackmun, 9 March [1983], *ibid.*; and *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).
85. Bruske (n. 37); Margaret Engel, "Doctor Faces License Battle," *Washington Post*, 11 Nov. 1984, B-1 & B-4; Margaret Engel, "Dr. Vuitch Surrenders D.C. License," *ibid.*, 21 Dec. 1984, B-1 & B-6; and Barnes (n. 37).
86. WFO to FBI Director and others, 2 Oct. 1984, BP, box 1576; FBI Director to All Continental Offices, 12 Oct. 1984, *ibid.*; Robert H. Borruso to Alfred Wong, with attached threat, 27 Feb. 1985, *ibid.*, box 1455. The threatening note was unsigned and undated, but its envelope bore the return address of Nate Lowery and was postmarked 25 Feb. 1985.
87. Michael Specter, "Shot Fired Through Blackmun's Window," *Washington Post*, 5 March 1985, A-1 & A-6; and "wsm" [Wanda S. Martinson] to Robert H. Borruso, 5 March 1985, BP, box 1455.
88. Ben A. Franklin, "Bullet That Hit Blackmun Home Seen by Police as a Random Shot," *New York Times*, 7 March 1985, A-25; Nancy Scannell, "Blackmun Apparently Not a Target," *Washington Post*, 13 Jan. 1986, B-5; and Susie Blackmun, "Roe v. Wade: Its Impact Upon the Author and His Family," *Conscience* 18 (Winter 1997/98), 17-18.
89. FBI WMFO to Director FBI and FBI Atlanta, 18 April 1994, BP, box 1576; and FBI Atlanta to Director FBI and FBI WMFO, 21 April 1994, *ibid.*
90. Epstein and Kobyłka (n. 19), 252-260; and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 at 759, 762 & 771 (1986).
91. *Ibid.* at 805-809 (White, J., dissenting) and 785 (Burger, C.J., dissenting).
92. Epstein and Kobyłka (n. 19), 265-287; and Linda Brubaker to Blackmun, 14 April 1989, BP, box 1461.
93. *Webster v. Reproductive Health Services*, 492 U.S. 490 at 538, 557-558 & 560 (1989) (Blackmun, J., concurring in part and dissenting in part).
94. *Ibid.* at 537 (Scalia, J., concurring). See Lazarus (n. 5), 373-424, for an interesting but partisan account of *Webster*. Lazarus worked for Blackmun on the case.
95. William A. Holmes, "Christians and Abortion," Washington, D. C., 9 July 1989, [4 & 5], (attached to Holmes to Blackmun, 25 Sept. 1989), BP, box 1461; and Blackmun to Holmes, 10 July 1989, *ibid.*
96. Lazarus (n. 5), 462; and "MM" [Molly McUsic], "Attachment," 4 Jan. 1992, BP, box 602.
97. Lazarus (n. 5), 459-486; Charles Lane, "How Justices Handle a Political Hot Potato," *Washington Post*, 5 March 2004, A-1 & A-13; Kennedy to Blackmun, 29 May 1992, with attached Blackmun notes, 30 [May] 1992, BP, box 601. There has been much speculation about Kennedy's motives. See Terry Eastland, "The Tempting of Justice Kennedy," *The American Spectator*, Feb. 1993, 32-37; and Jeffrey Rosen, "The Agonizer," *The New Yorker*, 11 Nov. 1996, 82-90.
98. "Steff" [Stephanie Dangel] to Blackmun, 16 June 1992, [2], BP, box 602; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 at 943 (1992) (Blackmun, J., concurring in part & dissenting in part); [Stephanie Dangel] to Blackmun, 26 June 1992, 1, BP, box 602; Blackmun to Stevens, 27 June 1992, *ibid.*, box 601; and [Stephanie Dangel] to Blackmun, 1 July 1992, *ibid.*, box 602.
99. Mary Morrow to Blackmun, 17 July 1992, *ibid.*, box 1461; and Anthony M. Kennedy to Blackmun, 19 March 1993, *ibid.*, box 1405.
100. *American University Law Review* 43 (Spring 1994); *Yale Law Journal* 104 (Oct. 1994); *Georgetown Law Journal* 83 (Nov. 1994); *Harvard Law Review* 108 (Nov. 1994); *North*

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- Dakota Law Review* 71, no. 1 (1995); and "Harry A. Blackman: Biographical Data," Aug. 1995, BP, box 1370.
101. Mary Jane Patterson to Blackmun, 10 April 1984, *ibid.*, box 1355; and Blackmun to Patterson, 17 April 1984, *ibid.*
102. Scott R. Swirling to Blackmun, 14 Oct. 1986 and 17 Nov. 1986, BP, box 1525; John C. Willke to Blackmun, 2 Dec. 1986, *ibid.*; National Right to Life Committee, "Justice Blackmun's Intent to Receive Pro-Abortion Award Would Violate Ethical Rules . . .," 2 Dec. 1986, *ibid.*; Toni [House] to Blackmun, 2 Dec. 1986, *ibid.*; [Wanda S. Martinson] to Blackmun, 2 Dec. 1986 (with Blackmun's response), *ibid.*; and NFPRHA, program for Silver Anniversary Gala Awards Dinner, Washington, D.C., 29 Feb. 1996, *ibid.*
103. Dorothy Mann to Blackmun, 14 Aug. 1992, *ibid.*, box 1504; Blackmun to Mann, 25 Aug. 1992, *ibid.*; other correspondence in *ibid.*, folder 2; and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (n. 98) at 922-943 (Blackmun, J., concurring in part and dissenting in part).
104. Ralph W. Hale to Blackmun, 25 Aug. 1993, BP, box 1476; Blackmun to Hale, 8 Sept. 1993, *ibid.*; and *Thornburgh v. American College of Obstetricians and Gynecologists* (n. 90) at 750-772.
105. Janet Benshoof to Blackmun, 15 April 1994, BP, box 1496; Blackmun to Ellen Goetz, 1 May 1995, *ibid.*; Benshoof to Blackmun, 8 Aug. 1995, *ibid.*; Center for Reproductive Law and Policy, "Numerical Table List" [apparently for 8 Nov. 1995 Blackmun Fellowship dinner], *ibid.*
106. BP, box 1355, folder 13; *ibid.*, box 1527, folder 7; *ibid.*, box 1524, folders 11 & 12; and [Wanda S. Martinson] to Blackmun, 19 May 1995, *ibid.*, folder 12.



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