Abortion and American Liberal Democracy


Like slavery before it, it has often been said, abortion seems to be an issue that the normal operation of the American political system cannot handle. The recent (July, 1989) Supreme Court decision 'in Webster v. Reproductive Health Services may indicate that we will soon have a better chance to find out. From 1973 until Webster, the "normal" operation of the American political system was preempted by the Supreme Court's decision in Roe v. Wade, which left room only at the margins for the legislative process to deal with abortion questions. Webster upheld a Missouri law in an opinion whose obiter dicta were critical of the broad principles and reasoning of Roe, although Justice Sandra Day O'Connor's concurrence providing the necessary fifth vote in the case refused to confront Roe head on. It is still too soon, in fact, to say whether Webster is a harbinger of the complete overturning of Roe. In the absence of any new appointments to the Court (or in the absence of a solidly anti-Roe appointment, which is always possible with the Bush administration and with a Democratic Senate), it may actually be unlikely that the Court will completely overrule Roe. But even if the issue were to be put back entirely into the legislative arena, it remains to be seen whether the United States can arrive at a satisfactory resolution of the issue in the foreseeable future. The depth of differences on that very question emerge from an examination of these books, whose authors represent three very distinct positions on the spectrum of views regarding abortion. Krason's book is a strong statement of the anti-abortion position; Luker's is a social and political analysis informed generally by a pro-abortion view; and Glendon's is a curious mixture of a somewhat anti-abortion substantive view of the moral issue with a moderate pro-choice political position. A reading of these three books provides little ground for optimism that the American regime is likely soon to resolve the question very well.

Krason

Stephen Krason's book is essentially his dissertation, written at SUNY-Buffalo, where he obtained both a Ph.D. in political science and a law degree. He currently teaches at the University of Steubenville, a

The author wishes to thank the Earhart Foundation for a summer grant through the Intercollegiate Studies Institute to support the preparation of this article.
Catholic Institution drawing much of its vitality in recent years from people oriented toward the charismatic movement. Krason's book shows the influence of his Catholicism (including its strong commitment to the anti-abortion position), his study of political philosophy (especially with Richard Cox, a student of Leo Strauss), and his legal training.

The topics covered in the book include: the emergence of the pro-abortion consensus in the late 1960s and early 1970s and the corresponding emergence of the anti-abortion movement; the structure and language of the 1973 Supreme Court decisions in *Roe v. Wade* and its companion case *Doe v. Bolton*; the Court's understanding of medical and legal history (and responses thereto); the arguments presented to the Court in those cases with respect both to constitutional doctrine and to the various justifications for and health consequences of abortion (with responses to these various arguments); an inquiry into the unborn child's humanity; a description of the thought behind the controversy (natural rights, positivism, utilitarianism; the relationship of the medical profession and of science to the political order); and a discussion of an Aristotelian/Stoic ethic as a proposed basis for resolving the question in American political life. Appendices include guidelines for federal legislation against abortion and a model federal anti-abortion statute.

Krason’s aim is to propose a solution to the abortion controversy that will be "dictated by justice and by the truth," but one that is also "compatible with our political order and the realities of political life today," and one that does not depend directly on religious views. While he "turn[s] to the classics to propose a solution to the abortion issue," he recognizes that "this can only be done within the context of our American political tradition" (2). To accomplish this, he draws on the political thought of the Founding, which was more sympathetic to classical thought than contemporary political thought is. Abortion is presented as a threat to our political order precisely because it rejects key elements of the thought of the Founding:

- political liberty as opposed to individual license;
- the need for a virtuous and self-restrained citizenry;
- the right of our popular institutions to make our public policy;
- and the existence of at least a limited notion of public morality. (6)

The book's subsidiary purposes (serving as a sourcebook for persons in the anti-abortion movement and as a tool for sympathetic legislators in shaping new public policy) leave a firm impress on he book. Most of the sources employed are anti-abortion sources, and the form of the book is almost-and its spirit certainly is-that of a 700-page legal brief against abortion.
Krason gives a good brief overview of the pre-1973 emergence of a pro-abortion consensus that paved the way for *Roe v. Wade*. (Given his sources, they tend to emphasize the events in New York somewhat more heavily than those elsewhere.) What were the reasons which explain this development? Krason gives seven: the “sexual revolution” and its goal of maximum sexual freedom (with the avoidance of its consequences), the secularization of religion in America (as liberal churches embraced the sexual revolution), latent anti-Catholicism, the rise of contemporary feminism (especially important in the transition from reform of abortion laws to repeal of them), changes in American liberalism in the 1960s (the shift from New Deal liberalism to a new liberalism that, influenced by new psychological and scientific ideas, advocated elimination of restrictions based on the “old” morality), the notion that we were facing a population crisis, and widespread ignorance of biological facts related to the unborn child and of general facts related to abortion (e.g., the exaggeration of number of deaths due to illegal abortion).

Relying again especially on the experiences in New York State, Krason describes the origins of the anti-abortion movement, emphasizing particularly its grassroots character. Initially unorganized, at the time of the first successes of the abortion reform movement in the mid- to late-1960s, right-to-life groups sprouted quickly enough to register some major political victories (e.g., in 1972 the New York legislature voted to repeal the 1970 reform law, although the repeal was vetoed by Governor Nelson Rockefeller). By the time of the decision in *Roe v. Wade* the momentum of the reform movement in the legislative arena had been stopped, though there seemed little likelihood of any rolling back of the extensive reform legislation passed in the late 1960s.

Krason’s discussion of the historical background of the modern abortion question begins with a brief discussion of ancient history, which tries to indicate that there was more opposition to abortion than the Court admitted in *Roe*, but he concedes that abortion was practiced in Greece and Rome, though not without some opposition. He devotes considerable attention (with mixed results), to minimizing the apparent tolerance of abortion and infanticide in Plato and Aristotle—an obvious embarrassment, given his intention of employing an Aristotelian ethic to ground opposition to abortion in contemporary American society.

Another key historical question in the debate about abortion has been its status in the common law. The Supreme Court adopted a view pioneered by Cyril Means, which contended that abortion was an English common law liberty. Krason reviews the cases and materials to show (fairly successfully) that Means’s interpretation is doubtful and that abortion after “quickening” was a serious crime (though not a felony). The *Roe* Court likewise relied on Means to establish that the
nineteenth-century American laws against abortion were primarily intended to protect the health of the mother, not the life of the child. Kra-son also carefully reviews the cases relevant to this issue and persuasively counters Means’s contentions. While there was certainly a concern for maternal health, that was perfectly compatible with maintaining a concern for the life of the child (at least after quickening, as in the common law).

Other historical questions reviewed include the status of the unborn child in other areas of the law (e.g., tort, property, child support, and also vis-a-vis the religious rights of mothers who refuse transfusions during pregnancy on religious grounds), the general view of the unborn child in the founding and at the time of the framing of the Fourteenth Amendment (by which time the common law had been supplemented with many state anti-abortion laws, promoted especially by the emerging medical profession), and the development of "privacy" law relative to abortion.

The chapters of the book that respond to alleged justifications for abortion and the consequences of abortion for the woman serve the book’s purpose of being a handbook effectively. The best scientific evidence from anti-abortion sources (including their analysis of the deficiencies of pro-abortion studies) is presented on questions such as the infrequency of genuine threats to the life of the mother, the infrequency of threats to a mother’s mental health (in contrast to widespread abuse of that ground for abortion), the infrequency of pregnancy due to rape, the number of deaths resulting from illegal abortions in the pre-Roe era, and the physical, psychological, and fertility harms of induced abortion. Broader arguments against abortion are also presented with respect to justifications such as incest (where abortion deals with symptoms rather than the problem), fetal deformity (the difficulty of detecting them and their severity, the possible harms of various methods of detecting them, and the worth of handicapped life), contraceptive failure (which is probably increased by the availability of abortion, as many come to rely on abortion instead of contraception to prevent births), overpopulation problems (the harmful effects of increasing population being exaggerated and its benefits ignored, while other methods of controlling population growth are downplayed), and the problem of unwanted children (90% of battered children in one study were "wanted," there is no evidence that abortion has decreased child abuse, and arguments that unwanted children are better off dead is absurd speculation—i.e., about what their lives will be like at best, and it is more plausible to speculate that, given a choice, unwanted children would opt to continue living).

Kra-son devotes a chapter to "An Inquiry into the Unborn Child's Humanity and the Presence of a Soul." The first section reviews biological
development from conception to birth, and then Krason turns to Aristotle’s discussion of the soul as the framework for his analysis. He eventually reaches (relying on certain modern expert testimony to flesh out—but also to modify—Aristotle’s analysis) what might be viewed as a relatively “weak” anti-abortion conclusion:

By applying modern biology and psychology to Aristotle’s notion of the tripartite soul in *De Anima*, we can say conclusively that the unborn child has the nutritive soul from fertilization; almost conclusively that he possesses the sensitive soul from very early in gestation—probably in the first month—and quite likely from fertilization; and conclusively that he possesses the rational soul in the eighth and ninth months, almost certainly from the start of the sixth month, and a strong argument can be built that he has it from fertilization.

I discount the last part because Krason relies on work by psychiatrist Thomas Verny that asserts that human beings can “recollect” as far back as conception—a contention I find so difficult to take seriously that I would hesitate to rely on such a source generally. Subtracting that kind of evidence, probably the most we could accept would be Krason’s lesser claim that there are signs of rational activity as early as the start of the sixth month. But that could be called a “weak” anti-abortion conclusion because few anti-abortion advocates would be happy with an argument that might be used by their antagonists to justify abortion for over half of pregnancy.

The key question is whether—as Krason puts it elsewhere—“if Aristotle had had access to modern biology, he would have put aside his view that the tripartite soul is not present from the start, but develops successively” (368). I am not sure that there is any rational demonstration of when the human (rational) soul exists, given the abstract possibility that the soul might come into existence, as Aristotle suggests, in stages. It would only be possible to prove demonstratively that the rational soul exists if one could point to some activity that could not take place without it (i.e., some point well into pregnancy). In the final analysis, how (apart from religious sources) does one choose between this Aristotelian view and the view that the rational soul exists from conception, only manifesting itself as the physical “instruments” of its activity develop and make that possible? Perhaps a certain kind of scientific “elegance”—positing only one substantial change, at conception, instead of several of them at indeterminate periods during pregnancy—leads one to conclude that the rational soul exists from conception. Given especially modern evidence about the simple biological humanity of the human being from conception (specifically, the presence of a distinctively human genetic code), the view that a single, human, rational soul exists from conception
seems most plausible. I suspect that most of the contemporary opposition to this comes, not from a partiality for Aristotle’s analysis, but from a materialism that denies the existence of any soul at all.

Of course, even were one to follow Aristotle, one might make the moral argument that ending the life of a human being—even a “potential” human being, before the actual presence of a rational soul—is seriously immoral, as St. Thomas did—an aspect of his thought often uncited by those who quote approvingly his position, following Aristotle, of ensoulment at forty days (for males) or ninety days (for females) after the start of life. Moreover, if one adopted the position that it was unclear whether Aristotle or those who argue for ensoulment at conception are right, then there are even stronger grounds for arguing that it is seriously immoral, since one ought not to perform a deed that even might involve homicide.

In analyzing the thought behind the pro-abortion position, Krason focuses on what undergirds the most radical and least serious position on abortion, a “crude utilitarianism.” A distorted and radical liberty and positivism are the building blocks of the pro-abortion position. Krason denies that natural rights philosophy leads to abortion (though he notes an article that is an example of that contention). Most of the analysis contained in this section is “second-hand,” i.e., it consists of what anti-abortion scholars say about pro-abortion scholars. While some of its observations are on target, it is unfortunate that Krason never goes directly to the sources, the more sophisticated philosophical defenses of abortion. (In that sense, the book is again more like a legal brief or a political position paper, which lines up witnesses critical of the opposition and supportive of its own position, but does not aim at deeper, original analysis by the careful and thorough examination of opposing positions.) The same chapter also points out ably the extent to which the pro-abortion position exalts the importance of the medical profession and in general the very important role that science plays in the pro-abortion position.

A Framework for Americans?

The final chapter of the book lays out Krason’s solution to the problem of abortion in contemporary America. He argues that classical thought, in the form of Aristotle and the Stoics, can provide a framework for the solution. According to Krason, abortion is wrong in an Aristotelian scheme because it is contrary to the ends of the sexual faculty, subverts the family and its chief ends, and is incompatible with Aristotle’s scheme of virtue (including chastity). Abortion should be legislated against because it is contrary to the individual virtue the law should promote, it takes the life of innocent human beings, and it harms the common good.
(depriving the nation of citizens, damaging their health in some cases, harming the family, promoting an "anti-life" ethic). This regulation makes sense in view of the right of those in charge of the common good to regulate the sciences and arts. Krason concedes that Aristotle's support of infanticide creates problems, but tries to show that there are sound Aristotelian grounds for prohibiting at least many abortions. To deal with some of the cases that cannot be covered, he turns to Stoic thought, drawing especially on its teaching of charity or compassion or benevolence to all men and on its invocation of natural law (providing specific mandates and prohibitions). (Again, he has to deal with the discomfitting support of at least some abortion by some Stoics.)

Apart from factual questions, about Stoic thought (which has come down to us in fragments and about which our knowledge is quite limited), the question that leaps out in this section is why the author tries so hard to invoke an "Aristotelian-Stoic formula," when it requires so much dealing with materials that are so very awkward for the anti-abortion position? While I cannot say conclusively why Krason favors this approach, I suspect that the answer goes something like this. Aristotle and the Stoics provided an ethical scheme that, in its outlines, was fairly good. This scheme was eventually modified and improved substantially by later Christian writers, such as St. Thomas Aquinas. Their improvements were not simply based on revelation, but were an improvement even from the perspective of reason pure and simple. But St. Thomas was a theologian, primarily, and it would be difficult to convince many people (especially in a country not always receptive to Catholic thought, to say the least) that his analysis is a legitimate basis for American public policy. Therefore, it will be rhetorically more effective, and not substantively worse, if we employ a formula that enables us, in effect, to read St. Thomas's improvements back into Aristotle and other classics. (So, for example, we find chastity as part of the revised Aristotelian scheme, although it was noticeably absent in the original Nichomachean Ethics—which is not to say that Aristotle had no conception of sexual virtue, but only that the grounds and character of sexual temperance might be different in important ways from the Christian virtue of chastity.) We then, Krason might say, would have a secular or non-religious basis for our position that is less subject to attack for being religious or sectarian.

Given the thinness of the disguise, however, might it not only exacerbate such accusations, as well as subjecting anti-abortion advocates to the rhetorically weak position of citing someone who tolerated infanticide as the foundation for an anti-abortion position? Perhaps it would be simpler and more honest (and therefore more rhetorically effective) to adopt a natural law position straightforwardly (perhaps even drawing carefully on some of the rhetoric of the natural rights position, as discussed below).
Krason also has to try to face the question of whether his classically-based position is compatible with the American tradition. Krason is aware of the gap here, but he collects texts (not always, I think, with a full appreciation of their contexts) from the founders, Locke, Montesquieu, and Tocqueville to demonstrate the founders’ concern for having a virtuous citizenry, and concludes too facilely that therefore an Aristotelian scheme of sexual virtue is appropriate to pursue in America. What would have to be examined more carefully is the kind of virtue appropriate to (or, on the high side, “tolerable” in) the American regime, in contrast to the decisive orientation of classical political thought toward the promotion of virtue as the purpose of the regime. Are there any limits to this promotion of sexual virtue in the American regime, for example? Articulating some limits to this power might make it somewhat more credible than I believe it is likely to be, stated as baldly as it is here.

Luker

Kristin Luker’s *Abortion and the Politics of Motherhood* is not ostensibly a brief or handbook for the pro-choice position. Much of the first part of the book-relating especially to historical background—could be, however. Her conscious attempt to be fair to both sides is more successful in the later part of the book, in its descriptions of the world views of the activists on both sides and her connection of abortion with broader views of motherhood. It is a measure of her success in those sections that, while her own views come across subtly as pro-abortion (especially in the first part of the book), her presentation of the material might well strike anti-abortion activists as a cogent argument for their position.

Luker argues that “[s]urprising as it may seem, the view that abortion is murder is a relatively recent belief in American history” (11), or indeed in history generally. While early Christians generally condemned abortion, penalties for it were not the same as those for murder. Later Christians distinguished between later abortions, which were homicides, and earlier ones, which were not. (Luker downplays, however, the still-intact serious moral condemnation of abortion, whether or not as homicide.) At the beginning of the nineteenth century, American legal and moral practice, Luker says, corresponded to this position: “early abortions were legally ignored and only late abortions could be prosecuted” (13-14). Under the English common law tradition, abortion undertaken before “quickening” was at worst a misdemeanor (which meant, in today’s terms, that all first trimester and many second trimester abortions were not legally proscribed). How did we move from an abortion climate that was remarkably open and unrestricted to one that
restricted abortions (at least in principle) to those necessary to save the life of the mother? (15) For the most part the change is attributable to the first "pro-life movement" in the mid-nineteenth century.

This first pro-life movement was led by certain doctors, not on the basis of any remarkable new scientific evidence (the general public knew that pregnancy was a continuous process from conception prior to this time), but rather on the basis of their occupational self-interest. Regular licensed physicians used the abortion issue to claim both greater technical expertise and higher moral stature for themselves. The paradox of their position was that their strong ideological commitment to the sanctity of life (including fetal life) was not entirely consistent with their willingness to do abortions when the life of the mother was endangered. They argued not for an absolute right to life, but for a conditional one, with themselves as the arbiters of which abortions were "necessary." Moreover, Luker argues, saving the "life" of the mother was deliberately vague, being applicable not only to "physical life in the narrow sense of the word (life or death), [but also to] the social, emotional, and intellectual life of a woman in the broad sense (style of life)" (34). Like most Americans, then and now, nineteenth-century anti-abortion doctors subordinated the rights of the embryo to the life of the mother, in both the broad and the narrow sense. The long-term result of this movement was that abortion slipped from sight, handled by a profession that prevented gross violations of community norms, but often made abortion available (especially to upperclass women) within the ambiguities of professional norms.

Luker asks why a general silence about abortion dominated the next period (roughly 1890-1966), and why the issue emerged in the 1960s. To the first question she answers that the medical profession "owned" the question, with a great measure of discretion accorded individual doctors in their practice of "therapeutic" abortions. Nor was abortion private because it was morally shameful. Abortion was "not spoken about" in polite company because of the Victorian norms about mentioning sexual matters. But this does not mean that abortion did not exist or was considered immoral: this is belied by frequent "therapeutic" abortions, illegal abortions, and "home remedy" abortions. Moreover, abortionists often were not convicted by juries or received very lenient sentences. (Much of Luker's evidence about the nineteenth century, it should be noted, is highly speculative. There is other evidence to justify contrary speculation.)

But pressures for change began to grow and eventually led to the eruption of the issue into public life. Most important was the declining genuine medical grounds of therapeutic abortions, which gradually was unmasking the reality of non-therapeutic abortion on allegedly therapeu-
tic grounds. "Strict constructionist" physicians began to insist on limits and the "broad constructionists" felt threatened and wanted legal protection for what they had been doing. Efforts by the medical profession to keep this "in house" in the 1950s, e.g., by setting up hospital boards to make judgments, foundered on the deepening split within the profession, a split exacerbated by the move of medical treatment more and more from home to hospital and the emergence of an institutionalized "strict constructionist" view in the form of Catholic doctors. As often is the case, a particular event became the catalyst for public change. With abortion, it was the thalidomide scandal and the case of Sherri Finkbine.

As Luker moves to a discussion of abortion politics from the 1960s, she focuses much of her attention on California. With the increasing split within the medical profession, broad constructionists felt the need for legal protection and sought abortion reform. Most of the activists at this stage were members of the medical profession, and they grounded their case on the dangers of illegal abortion and the need for therapeutic abortion (such as the Finkbine case, and deformities caused by a rubella epidemic in California in the mid-1960s,' and cases involving the mother's health). In 1967 the reformers, with the growing support of intellectual and professional elites (e.g., the AMA, the ABA), succeeded in California. The new law allowed abortions in a hospital by a qualified doctor to prevent physical or mental damage to the woman and also in cases of rape and incest. (Fetal deformity was originally included, but was struck out at the insistence of Governor Ronald Reagan.)

But abortion reform was soon left behind as abortion became a key issue in a new grassroots women's movement which rejected reform in favor of repeal. Unlike the reformers, who wished to clarify the rules by which the medical profession controlled the issue, the women's movement wanted to displace physicians' decision-making power in favor of decision-making by women. Their claim was a much broader one, that women have a right to abortion.

There were many structural forces underlying this movement: the sexual revolution, the birth control pill, the 1960s climate favoring social movements, and especially changed attitudes toward a labor market that was gender-segregated and the emerging centrality of work (i.e., remunerated work outside the home) in many women's lives. In the context of the latter, unplanned pregnancies were a tragedy and the "brute facts of biology" were at odds with the way working women viewed themselves. Abortion, with the freedom from bearing unwanted children that it offered, would undermine excuses for discriminating against women in the labor market. Women professionals who had supported reform became radicalized and joined with grassroots women activists to support complete repeal, providing abortion networks beyond what the
reformed law allowed, often with support from clergy. It was this group that set in motion the social movement to which Roe v. Wade was a response.

By 1973 the abortion movement was nationwide, while pro-life forces were still unorganized and ineffective. "Historically, of course, the Supreme Court decision on abortion was in no way sudden or unprecedented," Luker argues (wrongly, I think) but rather the product of over a decade of political activity, during which 16 states had liberalized their laws. But those who were to become "pro-life" activists were shocked by it. They had not known that silence about abortion was due to sexual taboos, not moral beliefs, and they had thought that the fetus was protected by law, not knowing about the ambiguities of "therapeutic abortions." Roe had the effect of mobilizing the pro-life movement in America.

Pro-Life Activists' Views

Luker moves at this point into a generally balanced presentation of the values and world views of activists on both sides of the issue (drawing on extensive interviews in California). Whether or not the activists should be the key to discussing the politics of abortion (as we shall see, Glendon suggests focusing on general public opinion rather than activists), this section of Luker is fascinating and quite revealing about abortion as a moral/political issue.

The post-1973 pro-life activists were typically women with a high school education, married with children (half with four or more) and not employed outside the home. They had grown up thinking that the fetus was a person and abortion was not a part of their social lives. They objected to the distinction between "perfect" and "not-so-perfect" human lives, and thought of personhood as a natural, inborn, and inherited right, not a social, contingent, and assigned right.

An essential element in pro-life activists' values is that there are intrinsic differences between men and women, which are both a cause and a product of their having different roles in life (men in the public world of work, women in the home, rearing children). Motherhood is the most fulfilling role women can have and a demanding, fulltime job. Sex is understood primarily in terms of procreation: "contraception, premarital sex, and infidelity are wrong not only because of their social consequences but also because they strip sexual experience of its meaning" (164). They see sex as sacred, because it has the capacity to be something transcendent, bringing into existence another human life, and therefore they view "amative sex" (whose goal is sensual pleasure and mutual enjoyment--"as healthy as volleyball but somewhat more fun") as sec-
ularizing and profaning it. While they all emphasized the pro-life movement’s official neutrality on contraception, most of them disapprove of artificial contraception and find considerable value (even secular benefits) in natural family planning (though they use it more to affect the timing of having children rather than foreclosing entirely the possibility of having them).

Pro-life activists see parenthood as a natural rather than a social role: one becomes a parent by *being a parent*. They find the values implicit in such in-vogue terms as “parenting” alien, and worry that excessive emphasis of financial and educational “preparation” for parenthood are often *obstacles* to it.

If men and women are to be sexually active, they should be married. If married, they should be prepared to welcome a child whenever it arrives. Balancing commitments such as motherhood and work—especially when parenthood gets shuffled into second or fourth place—is wrong. While not opposed to “planning” as such, they see very concrete limits to human planning and emphasize the responsibilities that go with their activities.

They oppose premarital teen-aged sex and view sex education and contraception as simply adding fuel to the fire (moral education being the real answer to the problem). They are deeply disturbed by public policy decisions that intrude into the family by making contraception, abortion, and venereal disease treatment available to teenagers without parental knowledge or consent.

In general, pro-life people subscribe to explicit and well-articulated moral codes. Morality is a straightforward and unambiguous set of rules, originating in a Divine Plan and applicable at all times and places. Abortion offends their deepest moral convictions, breaking a divine law, and pro-abortion logic (the concept of an intermediate category of “potential” human life, and the argument that individuals should arrive at a personal decision about the moral status of this intermediate category) seems simply inadmissible.

**Pro-Choice Activists’ Views**

"On almost all the dimensions just considered, the values and beliefs of pro-choice diametrically oppose those of pro-life people, as does the logic whereby they arrive at their values" (175). Men and women are similar, and women’s reproductive and family roles are not a natural niche but potential barriers to full equality. Women who think the family is the only role they will have are foolhardy, "only one man away from disaster." They value amative sex (sex apart from procreation) and see procreative views of sex as leading to an oppressive degree of regulation
of sexual behavior (especially women’s). They have often reacted against a "sex-negative" environment in their own family environment when they were young and see themselves as seeking a set of "sex-positive" values. "For people who plan anyway to have small families, who have no moral opposition to contraceptives, who value rational planning in all realms including pregnancy, and whose other values focus on the present and other people rather than on the future and God, putting a taboo on sexual expression seems irrelevant at best and potentially damaging at worst" (178). Sex is good as an end in itself (to afford pleasure, human contact, intimacy), and it can be transcendent under some circumstances, but it requires practice. Contraception is like brushing your teeth—a matter of sensible routine, a good health habit.

Most pro-choice people do oppose abortion for routine birth control, partly for pragmatic reasons (health risks), but also because of a gradualist view of personhood. Embryos gradually actualize the potential human life and acquire greater moral weight. Moreover, if a woman has an alternative, and brings an embryo into existence, this offends the moral sense of pro-choice activists. For the same reason they find multiple abortions morally troubling. Pro-choice activists have clear standards about what parenting entails: "giving a child the best set of emotional, psychological, social, and financial resources that one can arrange as a preparation for future life" (181). Children demand financial sacrifice and so parents ought to acquire the necessary financial position, lest under pressure they come to resent the child. Likewise, parents must have the proper emotional resources for the intense one-to-one psychological caring that parenting requires, to make sure that children feel loved and have self-esteem. That many people become parents by stumbling into it is disturbing to them. By making parenthood optional, they believe that they will enhance the quality of parenting. A planned child is a wanted child, and a wanted child starts out life on a much better basis than one who is not. As one minister said, this can be viewed as being an advocate of the fetus’s right not to be born. Pro-choice people accept teen-aged sex, as long as it is responsible, i.e., avoids parenthood. Sex to create intimacy, caring, and trust requires practice, and so concerns about teen-aged sex are merely pragmatic. They view taboos as inhibiting planning for sex more than they inhibit sex.

The values pro-choice people attach to sex, contraception, and abortion are rooted in certain basic convictions about the nature of morality, which may be described as "situation ethics". Being pluralists, they doubt that a single moral code can serve everyone, and being secularists they do not accept traditional Judeo-Christian codes as absolutes. Morality is not obedience to a set of rules, but applying a few general ethical principles to a vast array of cases. Together with a staunch belief in indi-
individual rights, this leads them to believe that only individuals can ultimately make ethical decisions. With respect to abortion, they assume that there is a distinction between an embryo and a child, that the embryo, though not a full human being, has some implicit moral rights, and that each person should follow her own conscience. Luker suggests the dubious religious metaphor that "pro-choice activists seem to have a New Testament approach to morality" because they ask "what is the loving thing to do." "The choice of the word loving," she says, "emphasizes the fact that moral judgment relies upon a subjectively reasoned application of moral principles rather than upon an externally existing moral code" (18). (This sounds more like modern psychology than the New Testament.) Therefore, they often find themselves debating moral dilemmas, not seeing certain activities as intrinsically right or wrong. Luker fairly observes that pro-choice activists do believe some things are wrong-they would oppose necrophilia, for example-but "[g]iven their explicit values, however, this does not make sense" [Idem]. This inconsistency is the mirror image, she says-less fairly-of the fact that some pro-life people, when faced with their children's 'illegitimate pregnancies, do seek abortions for them.

In Luker's examination of different aspects of the activists' views, two important omissions stand out. First, she does not talk specifically about the activists' attitudes toward the permanence of marriage. The stability of marriage is a key issue (especially in light of empirical evidence about the harms that flow from divorce, especially for children) and it would have been useful to spell out the differences here. It seems clear, however, from all that she has said that the pro-life activists would generally have been committed to the permanence of marriage (often based on a divine bond), minimizing divorce and even in many cases (much more than in the general population) rejecting it completely (except sometimes in the form of civil divorce-without remarriage-as a way of enforcing legal separation). Pro-choice activists, on the other hand, would likely value marriage highly, but as an agreement between two people that ought to be ended if it ceased to provide the ends for which it was entered into, e.g., a particularly deep form of intimacy and friendship. Divorce would be, like abortion, not desirable in itself, but a necessary option.

1. But are these "mirror images"? Isn't there a difference? A pro-life person who sought an abortion would be "falling short of" pro-life principles. A pro-choice person who found necrophilia reprehensible, on the other hand, would be "exceeding" pro-choice principles—except for those hardy souls who carry their ethical relativism as far as tolerance of necrophilia. That comparison might say something about the principles.
Second, while there is a general discussion of sex roles, there is no specific discussion of it in regard to the raising of children. The pro-choice activists, one assumes, would argue that a "division of labor" between the sex roles in parenting is unnecessary, an artificial social invention, while the pro-life activists would argue that the sex role differentiation they embrace is essentially related to the requirements of raising human children. While it is easy enough to imagine intermediate positions, e.g., hostility to sex differentiation in the law or in marketplace, but support for it in the home and in parenting, the activists in general do not seem prone to accept such intermediate positions. (And one should not assume too quickly that they are wrong and that the "moderate middle way" is necessarily superior. It is, after all, conceivable that activists on both sides are correct in seeing the middle way as an impossible one.) The issue of sex roles in parenting is of more than passing interest, among other reasons, because of its bearing on questions of homosexuality—which seems often to be tied in some ways to parental roles—and of adoption of children by homosexuals. This is not to say that heterosexuality is tied to a particular conception of social sex roles—I am not intimating in any way that the pro-choice world view necessarily leads to homosexuality (though a quite different argument is demonstrable, i.e., that it is less likely to oppose homosexuality on moral grounds). I raise the issue only as an example of how even modern psychology maintains that the father-child and mother-child relation is different in some way, and so the difference is worth exploring. It would be interesting to see more clearly how pro-choice activists would handle such a question.

**Underlying World Views**

There are certain fundamental world views which explain this broad spectrum of different values on many issues. The pro-life activists’ views center on God and religious faith. They trust in Providence and are sceptical about the ability of human beings to understand and control. They are critical of secularization, which they see as involving both the decline of religious commitment and the decline of a collective sense of right and wrong. This creates a climate in which abortion can flourish, and in which belief in the afterlife is replaced by the absorption in material goods and by a utilitarian mentality.

The pro-choice world view, Luker says, is based, not on belief in a Divine Being, but rather around belief in the highest abilities of human beings. Reason, not faith, is the core of their world. Religious values are subordinated to this-world considerations. The centrality of reason has various implications. Pro-choice activists are utilitarians, they are inter-
ventionists (sceptical that certain areas are sacrosanct and beyond reach of human intervention), they are somewhat more optimistic about human nature. They see suffering neither as ennobling nor as spiritual discipline, but "as stupid, as a waste, and as a failure" when technology exists to eliminate it. Given the ability to alter Nature, it is immoral not to do so, especially when those activities will diminish human pain" (189). All these values come home for pro-choice people when they talk about "quality of life," which means that life involves social as well as biological dimensions. Human beings share physical life with other beings, but reason and therefore social life are the more valuable dimensions of life for pro-choice people. The embryo, having only a biological and not a social dimension, is therefore only potentially a person. Social life begins at viability, when the embryo can live-and begin to form social relationships-outside of the womb. While quality of life arguments evoke pleasing images of human beings resolving complicated problems for the pro-choice activist, for the pro-life activist they evoke the image of Nazi Germany, where the less socially productive were less valuable and were sacrificed by and for the powerful.

Luker argues that neither side appreciates that neither religion nor reason is "static, self-evident, or 'out there.'" Reasonable people (including religious people) are located in different parts of the social world, exposed to diverse realities, and come up with different-often equally reasonable-constructions of the world. The fact that abortion is based on these "deep, rarely examined notions about the world" is why "chances for rational discussion, reasoned arguments, and mutual accommodation are so slim" (191).

Within this battle of world views is the further fact that the abortion battle "is a referendum on the place and meaning of motherhood (193). Feminist and housewives views of motherhood are opposing visions and represent different social worlds. The debate, Luker says, is really less about the embryo's fate than about women's lives. On almost every social background variable there were considerable differences between pro-life and pro-choice women activists: income, kind and amount of work outside the home, education, marriage, divorce, family size, and religion.

At times Luker overemphasizes the extent to which abortion values reflect deeper "needs" and "interests" tied to their lifestyles. She does acknowledge that the causation may go the other way: the lifestyles (with their "interests") may have been chosen as a result of different moral values. But more often she is found pointing out that abortion stands correspond to the present-day interests of activists, interests that are as much psychological as material. Pro-choice women have access to "male resources" much more than pro-life women, and abortion facilitates
their maintenance of these; pro-life women have a lifestyle focused on the traditional division of labor and are "threatened" in a world that depreciates motherhood as the central fact of a woman's life. "In short, the debate rests on the question of whether women's fertility is to be socially recognized as a resource or as a handicap" (202). The activists live in very different worlds, which strongly reinforce their views on abortion. Another factor in the fierceness of the abortion dispute, then, is that one group of women will see "the very real devaluation of their lives and life resources," depending on the outcome of the struggle (215).

It is a tribute to Luker that, despite the pro-choice bias apparent in the first part of the book and in the last section (see below), this description of world views is rather even-handed. Perhaps pro-choice advocates expect that most Americans would tend toward their world views, as the two sets are compared here. Most pro-life activists would, I believe, be satisfied to present the issue to the world in this context. While recognizing that not all people would share their world view (especially on the contraception issue), they would be hopeful that the superiority of their world view would be apparent on many other salient issues (e.g., the sacredness of sex, the existence of at least some moral absolutes, teen-aged sex, the preeminence of the role of motherhood for those who have children, and perhaps especially belief in God). Perhaps this expectation would rest on a hope that Americans' ideals typically exceed their own practice—a reasonable hope, I think. Luker's sociological relativism reduces the world views to being results of different social situations that produce ("often") equally reasonable constructions of the world. But the qualifier—"often," that is, and therefore not "always"—suggests that at some point one must move beyond the relativism.

Whither U.S. Policy?

In the concluding section of the book, Luker begins by reading public opinion as shifting toward the pro-choice position over time and therefore has to ask why the pro-life movement has had such successes. She gives three factors: the intensity of commitment (since pro-life women find their values, their status, and their way of life devalued), the use of new technologies (especially ones such as more sophisticated telecommunication that permits political activist work in the home), and willingness of pro-life voters to engage in single-issue politics.

Luker initially argues that pro-life activists have not been able to shape public opinion, which shifted to a pro-choice position even before Roe v. Wade, declined slightly in the late 1970s, and has leveled off at high levels of support for abortion since. She then shifts, however, to the more nuanced view that Americans support abortion for "hard" reasons
and are divided about "soft" ones. (This is an important shift because it adds another reason for pro-life success, which she omitted: the hostility of Americans to at least much abortion.) The question is: "which group will be able to capture the `middle ground' of public opinion more effectively?", overcoming the dilemmas they face in this regard. Pro-lifers deeply believe that every abortion takes a baby's life, but American support for certain categories of abortion (life of the mother, rape and incest, deformed embryos) is deeply ingrained. It is questionable whether pro-life activists can accept these without undermining their moral position or persuade Americans that they should be prohibited. The pro-choice dilemma is how to hold on to the middle and involves different problems, rooted in the mixed feelings Americans have about abortion on "soft" grounds. The first scenario Luker envisions for the future is the case where pro-lifers propose a package that allows for "necessary abortions," and pro-choice insistence on discretionary abortions comes to be seen as selfish, leading to a loss of pro-choice support. This could conceivably be supported by a swing back to more traditional lifestyles (including a kind of male backlash against competition from women in the labor market.) The much likelier second scenario, according to Luker, is that the pro-lifers will do an "end around" public opinion and use their political resources to get Congress and state legislatures to restrict abortion. (Again, Luker underestimates, I think the extent to which those political resources include public opposition to much abortion.)

The task of the pro-choice movement in either case will be twofold. First, it must persuade Americans that any attempt to distinguish between necessary and unnecessary abortions, as a matter of public policy, will inevitably fail, and that "unnecessary" abortions must be tolerated to protect necessary ones. But pro-choice activists are reluctant to make any argument that would admit such a distinction between different kinds of abortions. Second, it must overcome hurdles (especially the complacency of having "won") to mobilize its members into political activity. For that reason, both sides have an interest in overemphasizing the power of the pro-life movement. But, while pro-lifers have been compared to abolitionists, they are really more like the temperance movement. And like Prohibition, the most pro-lifers are likely to obtain is a law that makes abortion harder and more expensive to obtain, but still about as common as before. But such a law could last for a while and especially harm poor and socially vulnerable women.

The probable future is not any increase in civility in the debate, but it may become less important, since women are in the work force to stay. Even if the debate should become muted for now, however, technological developments (e.g., in-home abortions, transferral of fertilized eggs from one woman to another, and artificial uteruses) may again make it a
battleground for competing social, ethical, and symbolic values.

But if women are in the work force to stay, as they are, it is not clear that they are in there in quite the same way that Luker might be implying. Most American women with pre-school children still do not have full-time jobs during that period. (Bureau of Labor Statistics for 1986 indicated that about two-thirds of women with children under six either do not work outside the home or work part-time.) This fact suggests that many women who have young children—those with some kind of job, often part-time or at-home, as well as those at home consider motherhood the top priority and somehow fit their job responsibilities within that more fundamental responsibility. Many of them say that they work because they “have to,” for financial reasons. One can argue about how exact this data and these self-perceptions are, but they do indicate a strength of attachment to motherhood that Luker overlooks. They also suggest that powerful natural forces exist to maintain the seriousness with which most Americans view the abortion issue.

Abortion in Comparative Perspective

Mary Ann Glendon of Harvard University Law School has written a remarkable book, which deserves to have a profound impact on contemporary legal scholarship. And it is precisely because Abortion and Divorce in Western Law is so good that its deficiencies are particularly worrisome. But if, in the final analysis, its prescriptions for dealing with the abortion question should be rejected, it goes very far in the direction of heading contemporary conversation about abortion in the right direction.

Glendon’s field is comparative law, and her essays in this book start from a puzzle: why is it that the U.S., which participates in overall Western trends regarding abortion and divorce, so often occupies an extreme end of the spectrum? The roots of the differences she finds in the realm of ideas, and they are connected with different ways of looking at law. More than America, Western European countries have tended to hold on to older ideas of law that emphasize its educative function. Laws do not operate by simple coercion. In the best cases, they try to create goodwill and make citizens ready to receive intelligently the commands of law.

Glendon links this classical theme (described eloquently using Plato’s Laws) to certain strands of contemporary thinking, especially the cultural hermeneutic encouraged by Clifford Geertz and the rhetorical method of law stressed by James Boyd White. Following these thinkers, law can be seen as a distinctive manner of imagining the real. Legal systems differ from each other in the “stories” they tell. Glendon focuses on
two important aspects of the rhetorical activity of law: the interpretive aspect—how the law converts "social facts" into legal data and language—and the constitutive aspect—how legal language and concepts affect ordinary language and influence the manner in which we perceive reality. Applied to the current subject, this approach yields the following questions: 1) What stories are being told in abortion and divorce law now?; 2) How do the stories affect what issues are raised and treated as important (and which are excluded from discussion or even obscured from view)?; 3) Is there a distinctively American story?; 4) What sorts of meaning is family law creating and what sort of society is it helping to constitute?

After surveying the factors that have produced the trend toward liberalization of abortion laws in the last twenty years, Glendon surveys the abortion law of the U.S. and Europe (especially Western Europe), dividing them into three categories: elective abortion countries (America, through at least viability; five European countries with elective abortion in early pregnancy); countries with abortion for cause, where in practice abortion may be easily obtained in early pregnancy (for "soft" grounds in eight European Countries, for "hard" grounds in four); and restrictive abortion countries (Belgium, in theory though not practice, and Ireland).

**Europe vs. America**

Glendon develops the contrast between American and European law by contrasting abortion law in the U.S. and France and by comparing *Roe v. Wade* and the leading constitutional decision on abortion in West Germany. In France, abortion is available up to the tenth week for "distress" (as determined by the woman) and so it seems that it could, as a practical matter be defined as "abortion on demand." But Glendon argues that the law is very different because of the messages it communicates. The law explicitly characterizes the factual situation as one involving human life and requires that there be no derogation from the principle of respect for life except in cases of necessity. Abortion is not to be a means of birth control. For "distress" abortions, the statute mandates procedures to make a woman aware of and able to choose alternatives, including an interview with a government counseling service not in the abortion facility and waiting periods before abortion. After 10 weeks, only "therapeutic" abortions (so certified by two physicians) are allowed. Abortion mills are not permitted (by restricting abortion to a maximum percentage of a medical facility’s business). Glendon concedes that the law, imitating life in this respect, is not strictly logical in carrying out its basic principles (16), and acknowledges that one can be cynical about
such a law, on the grounds that it combines abortion on soft grounds with platitudes about human life. She views it differently, however: as a moderate law. At the minimum, it is a “humane, democratic compromise.” More, it is pervaded by compassion for pregnant women, concern for fetal life, and a commitment of society to minimize occasions for tragic choices between them (carried out by provision of birth control assistance and comparatively generous financial support).

In contrast to American law, the French law names the situation as one involving human life. It tries to make the pregnant woman aware of alternatives without unduly frightening or burdening her. It prevents the existence of specialized abortion clinics. In no European country is abortion available as readily as in America. American law goes beyond even the least restrictive European abortion laws, which limit later abortions to a greater extent and sometimes impose various kinds of requirements to obtain abortions. (Birth control and social welfare laws also make alternatives to abortion more readily available.) The U.S. is alone in not permitting consideration of fetal life before viability and not requiring protection of the fetus after viability. One telling difference is that it is rare outside the United States even for those who advocate the availability of abortion to speak of a “right to abortion,” which the Supreme Court has made the foundation of American law on the subject.

In 1974 the West German parliament liberalized German abortion law. Abortion in principle remained a crime, but first trimester abortions were decriminalized and abortions were allowed for certain serious reasons later in pregnancy. The West German Constitutional Court struck down even this law (far short of Roe v. Wade). Life developing in the womb is constitutionally protected and women’s self-determination and privacy rights are subordinated. Government must not only refrain from interfering with the life of the fetus, but must affirmatively act to protect it. Not all abortion has to be criminally punished—the legislature might, for example, choose to use welfare and social assistance to reawaken the maternal protective will. But the criminal law has to be used where such alternative means are insufficient. When the criminal law is used, other factors besides the value of fetal life can be considered, e.g., priority can be given to a woman’s life or health interest, and extraordinary burdens (regarding what is “reasonably to be demanded” from a woman) such as grave fetal defect, pregnancy due to rape, and even grave implications for the general social situation of the woman and her family, can be considered. But the decisive point, says Glendon, is that there is another interest equally worthy of protection by the Constitution asserting itself with urgency (though the legislature is left free to remove a broad range of cases from punishment). In general, the totality of abortion regulations have to be in proportion to the legal value of
life and as a whole work for the continuation of pregnancy.

It can be doubted whether the decision of the German Constitutional Court was likely to make much of a difference in practice, but Glendon argues that it was very different in the way the criminal law affirms the moral order of society. Besides the outcome, how does this decision compare with *Roe v. Wade*? It left considerable room to the legislature to devise and revise abortion policy, unlike *Roe*. The decision "imagined the fact of abortion" as a situation where developing human life was at stake, whereas Blackmun avoided describing the fetus as either human or alive. In terms of the content of court values, the German decision emphasizes the connections among the woman, developing life, and the larger community, while *Roe* sees society as a collection of separate, autonomous individuals.

Glendon powerfully notes here that it is not a question of the West German court imposing a certain version of morality upon pregnant women, while the U.S. leaves the moral decision to individual women. The notion that abortion is an individual and private decision is itself a moral notion, and the moral basis for preferring the values of toleration and freedom of choice when other important values are at stake is beginning to seem increasingly unclear.

The notions of privacy in the two cases differ, with the American case emphasizing "the right to be left alone" of the isolated individual, while the West German constitutional "right to the free development of one's personality" is more affirmative, has a social dimension, and is limited more by the rights of others and the constitutional and moral order. The final contrast is the emphasis on rights in the American decision and relative lack of emphasis on rights in the German decision. Even the right to life of the Basic Law, which serves as the foundation for the German Constitutional Court’s decision, is characterized as a value of the community more than as something belonging to the fetus. This suggests that it is a fallacy to say that the two sides share almost no common premises and very little common language (citing Luker on this point). In fact, both pro-life and pro-choice advocates in the U.S. "share several familiar premises and terms about individuals and rights that are in marked contrast to European law. These "two seemingly irrevocably opposed positions are actually locked within the same intellectual framework, a framework that appears rather rigid and impoverished when viewed from a comparative perspective" (39).

*The Possibility of Compromise*

What can we learn from Europe? The above analysis suggests that two widely-held beliefs are erroneous, i.e., that the U.S. legal situation
is not unusual and that no compromise is possible. Political compromise is not only possible but typical. Focusing on general public opinion, rather than following Luker, with her concentration on activists’ opinions, is the key. Line-drawing between early and late abortions (or on circumstantial grounds) is difficult to defend on rational grounds and distasteful to activists, but it is possible, and enables societies to live peacefully without violence.

Is there the possibility of such a compromise in America? With a very sure hand, Glendon feels the pulse of American public opinion and points out that a consensus based on uncertainty already exists (indeed, has all along). A majority are opposed to elective abortion and to abortions after the first trimester. But majorities are also in favor of abortion under some circumstances (notably, in cases of threats to maternal life and health, rape and incest, and serious fetal deformity). Unlike the activists on both sides, most Americans feel uncertainty and ambivalence about abortion, which is not the same as indifference or moral relativism. They believe that there is a difference in the value of life between early and late stages of gestation and they believe that the value of unborn life ought to be weighed against competing claims.

For compromises to occur, however, it is necessary that the Supreme Court re-evaluate Roe v. Wade and give state, legislatures the leeway to work out compromises. Strictly speaking, given the broad prohibition of abortion in the Texas statute, Roe could even be distinguished and confined rather than overruled. (The seeds of this appear in O’Connor’s Akron opinion.) The widespread criticism of the opinion among leading constitutional scholars should facilitate Court re-evaluation. Moreover, the increasing emphasis on constitutional law as a form of social dialogue among some leading supporters of Roe (e.g., Tribe, Perry) should lead them to question the Court’s cutting off of that dialogue.

Activists would be unhappy with compromise, of course. Few people in our society contend that the fetus deserves no protection even in late pregnancy. And “[m]any in the pro-life ranks ... are beginning to realize that in our pluralistic society it may not be possible fully to protect fetal life” (46), and that a law that restricted abortion to serious reasons would be preferable to Roe’s determination that unborn life is of little or no value. Glendon concludes that

[p]erhaps it is fitting that abortion law at present should mirror our wonder as well as our ignorance about the mystery of life, our compassion for women who may be frightened and lonely in the face of a major crisis, and our instinctive uneasiness at terminating a form of innocent human life, whether we call it a fetus, an embryo, a baby, or an unborn child. (46)
In Western Europe, intense discussion continues, but without the "sense of desperate embattlement" that has characterized the U.S. since Roe. She cites Guido Calabresi's argument that the law should not "reject the ideals of the losers as invalid or outside the law" (47). Glendon believes that, if Roe had not intervened, this process might have occurred in the U.S. as well as Western Europe—and might still if Roe ceases to be the basis of our abortion law. A few states might restrict abortion greatly, and a few others allow abortion very broadly, but most would probably opt for a compromise of some sort (early abortion being treated leniently, but all abortion being treated as a serious matter). It is unlikely that strict laws would be maintained, given the pattern to the contrary, and especially with the development and use of self-administered prescription drugs to induce early abortions, which are practically impossible to regulate.

The concern apparent in the last sentence to allay pro-choice fears continues in a section on abortion as women's choice, in which Glendon confronts the question about whether we should be uneasy that it is largely male-staffed institutions that decide these questions that males themselves will never face. Her perceptive responses are that abortion may, in the first place, be viewed as serving male interests (a point long and often made by pro-life activists), and that, secondly, Roe may be viewed as a very "masculine" (or, better, a very "American") decision, "with its emphasis on the separateness, the rights, and the self-determination of individual women" rather than on the social bonds that receive more emphasis in analysis of moral issues by women. At the very least, it is difficult to view Roe as a decision that unambiguously represents women's views and interests.

If we do rethink our abortion policy, Glendon says, we must view it in the context of other laws affecting mothers and children, e.g., welfare and child support laws (as an important segment of the pro-life movement has recognized). The U.S. lags far behind other western nations in benefits and services for mothers and dependents (e.g., maternity leave, day care, cash grants). A Martian might (mistakenly) conclude from the overall picture that we had decided to solve the problem of children in poverty by aborting them rather than supporting them with tax dollars. At the root of the problem is the American tendency to believe that poor people are undeserving of assistance. Moreover, the American idea of privacy as the "right to be let alone" seems to extend not only to women who want abortions but also to men who father children and then are unwilling to support them.

In general, American law stresses autonomy, separation, isolation. European law tells pregnant women that abortion is serious and fathers that producing a child is serious, and tells both that the welfare of each
child is a matter in which the entire society is vitally interested.

Glendon points out that she is not arguing that compromise legislation should be adopted only because of the fact of an existing consensus. Law also assists often in the formation of a consensus, by influencing the way people interpret the world and by communicating that certain values have a privileged place in society. But activists on both sides (in keeping with her own deft rhetoric, Glendon refers to them as "my pro-choice friend" and "my pro-life friend") might ask whether the message makes any difference. On this point, Glendon finally has to concede that there seems to be no correlation between the message of the law and the actual rates of abortion. What does the message matter then?

To her pro-life friend (a "she", be it noted), Glendon points out that even when a legal norm seems ineffective, it can help to create a climate of opinion that impedes more extensive violations of the norm. At the least, compromise should help "replace strident discord with reasoned discussion about the grounds and conditions under which abortion might be permitted" (60). Moreover, she says, we must attend not only to the fetus but also to the hearts and minds of people who make these decisions. The best protection for the weak and dependent is the mores, not the law, but the law may have a beneficial influence on behavior and opinions. To the argument that the mores may evolve in a hostile direction Glendon says that all she can do is to have faith that the evolution is not an inexorable historical process and that we must assume an active role in the democratic process of education and persuasion.

To her pro-choice friend (a "he"), she says, if he is still there: think of what law says and does to a people and society if it sets individual liberty or mere life style over innocent human life. While Americans want abortion legally available in some circumstances, they do not want an extreme and isolating version of individual liberty, or a fundamental right to dispose of developing life.

The stories we tell make a difference, and the legislative process, however imperfect, is the major way we as a society try to imagine the right way to live. The Supreme Court's decision on abortion is doubly disappointing, in the final analysis. Not only did it get the story wrong—it foreclosed the possibility of working out a better story.

The third and last chapter of Glendon's book tries to account for the differences between European and American law. It pursues the roots of American individualism through an examination of Tocqueville, 2. I cannot do justice to Glendon's whole book, though it is a short one. For purposes of this review I am giving a fairly detailed summary of her first chapter, on abortion, and a briefer summary of chapter three, with only an isolated comment below on the second chapter (on divorce).
Hobbes, and Mill and contrasts the somewhat different European route to modernity through Rousseau and Kant. While warning against exaggeration of the differences, Glendon shows how the civil law system in Europe retained greater vestiges of the classical idea of law as education, vestiges that are retained in the modern French civil code, for example, even as it accommodates the plurality of French views on subjects such as divorce and abortion. Compared to American law, which emphasizes rights, the civil law gives more attention to social context and individual responsibility. Continental legal systems envision man more than we do as situated within family and community: rights are viewed as inseparable from corresponding duties, liberty and equality are seen as coordinate with fraternity, and personal values, while higher than social values, are rooted in them.

Glendon emphasizes the utility of having an explicit national family policy, as most European countries do. The symbolism involved in the contrast between those policies and Americans’ implicit and largely unexamined and insufficiently discussed policy is important. She re-emphasizes the broader social welfare context. European countries assume that government is responsible for public welfare (parties of the left and right agreeing on this). The United States has a broad range of social assistance, but it conveys a different message regarding various kinds of economic dependency. American programs focus more on the elderly, less on children; more on individuals, less on families. They sometimes seem to reward abandonment of personal responsibility and to be implemented grudgingly rather than in a spirit of respect and solidarity.

Glendon skips a bit too quickly over a point that she does at least acknowledge:

In the United States ... debate rages over whether public aid shores up families or erodes their capacity for self help, whether it really helps the needy or seals them into dependency. It is true that we know remarkably little about what kinds of state intervention help or hurt families and family members, and that laws, programs, and policies meant to strengthen families often seem to produce the opposite effects from those intended. (137)

But she emphasizes the other side, the widespread belief that the poor are not needy or deserving of aid and the puzzling "seeming indifference" to the large proportion of children among the poor. Again she cites Tocqueville to explain this, noting the difficulty modern democracies have in discerning long-range goals and implementing them. But, given that she herself has admitted that state intervention has often made...
things worse, is it so clear that those who oppose large-scale social welfare programs are being insensitive or indifferent? 3

Law as Education

The last section of the book speaks eloquently of the need for a "continuing conversation" about the law and its educative function. The experience of totalitarianism in this century has made moderns understandably suspicious about governmental promotion of virtue. Who, after all, is to define virtue? Glendon’s response is right on target. We cannot escape from the fact that the "law performs a pedagogical role. It contributes in a modest but not a trivial way to that framework of beliefs and feelings within which even our notions of self-interest are conceived." Neutrality on controversial moral questions is not possible, for refusing to take a stand is a moral stand in itself: Pluralistic, secular societies like America are in a predicament: lacking a common religion, history, or customs, law (especially constitutional and criminal law) is likely to become "an expression and source of common values," but there is "an almost total lack of agreement about how and where the values it carries are to be discovered." It is in this context "that ideas of law as embodying a social dialogue come to have a special appeal (139).

Glendon sees some healthy implications in this new emphasis, which she views as a "slow and painstaking attempt at reconstruction of moral philosophy." What its eventual implications for legal theory will be unclear for a long time, but if modern law cannot establish a single vision of virtue, at least it can promote the "potentially self-correcting processes of dialogue and dialectic." One benefit of this is that it will be clearer that we are impoverished and diminished by views of the law, powerful for so long in the American legal profession, that put moral questions out of bounds.

That is the context in which Glendon appreciates the continental treatment of divorce and abortion-viewed not just as political compromises, but as conversation about the right way to live. European legal reformers have chosen to maintain a widely shared ideal in the law (e.g., the value of developing life, responsibility in personal relation-

3. This is tied to a significant political quandary for the pro-life movement, which generally draws on conservatives and Republicans for the main source of its political strength at the national level (which is where they believe the issue has to be resolved, eventually). But there are many conservatives (e.g., Barry Goldwater) who are ambivalent or actively pro-choice either on libertarian grounds or, one suspects, out of quasi-eugenic concerns. And in general conservatives are doubtful about the beneficial effects of social welfare legislation. A "package" of pro-life and social welfare measures might lose as many votes on the right as it might pick up in the center or on the left.
ships), while accommodating the opinions and behavior of those who do not share or cannot live up to the ideal (and with prudent attention to the possibility of enforcement and equitable application).

While laws are one of the ways societies constitute themselves, Tocqueville reminds us that the laws are less important than the habitual and intellectual attitudes called "mores." The influence of law varies with how much it is in harmony with other ways of perceiving reality (e.g., art, science, literature, religion, history, and mass media). American language tends to be the language of individualism, but others "claim that Americans have a half-forgotten second language of generosity and community" (141). But a language is strengthened by practice and atrophies through disuse.

What is to be done? We must understand what the totality of our law is saying about the family, be attentive to and responsible in the stories that we tell, and-recognizing the limits of law-be solicitous about the groups (e.g., families, churches, local communities) where values are formed, maintained, and transmitted. Comparative law provides no blueprint, but it can help us to understand ourselves better, the necessary first step to dealing with our problems.

The Pitfalls of the Middle Way

Glendon’s book is so serious, so admirable in many ways that one can easily be drawn to its siren song of sweet reasonableness and moderation. Especially when combined with her perceptive analysis of public opinion, which seems so unlikely to accept anything other than a compromise position, the argument is a powerful and seductive one.

But if I would never say that Glendon is fiddling while Rome burns, I am inclined to say that she plays a beautiful, if somewhat subdued and melancholic, sonata, as the country slips toward a kind of moral oblivion.

A number of times Glendon points out the value of a compromise position4 on the grounds that it prevents strident discord and even vio-

4. When I refer to "compromise positions" in this section, I will be referring to the "middle way" of European countries supported by Glendon. My rejection of that position does not mean that I would reject all tactical compromises by pro-life forces. A law prohibiting abortion except in the "hard" cases (especially life of the mother, serious health threats to the mother, rape and incest, serious fetal deformity) and also excepting abortifacient contraceptives may be the best that pro-life forces can obtain in American politics at a given time. Compromises along those lines-at least until public opinion can be brought to see the inadequacy of such a position-may be worthwhile supporting, especially if they take the form of "de-criminalizing" them rather than positively authorizing them (i.e., the form adopted by the West German Constitution Court). But Glendon’s "middle way" has the same practical effect as abortion-on-demand for at least the earlier part of pregnancy (the first trimester), and therefore would not, in my opinion, be an acceptable compromise, for reasons noted below.)
lence. But as desirable as harmony and the prevention of violence are, are they always the ultimate desideratum? Might there be circumstances under which serious discord is positively preferable to harmonious compromise? The answer, it seems to me, is clearly yes. What would have happened to American slaves over time if there had never been an abolitionist movement or the terrible conflagration of the Civil War?

Glendon underestimates how important it is to the ongoing "social dialogue" to have people who are absolutely unbending (or at least a great deal more unbending than herself) on the principle that we should never directly take innocent life-unbending not just morally, but politically. What would be some of the likely effects if pro-life activists followed her prescriptions to compromise politically?

First, there would be a very significant practical problem of "organizational maintenance" for the pro-life movement. That movement depends for its existence on the passionate commitment of its people. But it is also true that it is not every form of abortion that mobilizes all of these people. It is not the "hard cases" or the very very early abortions that pack the emotional whallop that leads many to commitment in the pro-life movement. A compromise political resolution would certainly leave an active pro-life movement, but one that would certainly be smaller and weaker, shorn of those who could tolerate the less egregious forms of abortion. (Perhaps this is similar to the dilemma of the real Marxist confronted with aineliorist socialism.)

Second, practically speaking, doesn't the compromise position represent, not a compromise, but a substantial victory for the pro-choice position? Not that the pro-life elements of the resolution are completely unimportant-they are. But they pale before the reality of the pro-choice victory: abortion on demand would be the reality for at least the first part of pregnancy, so that the chief burden placed on pro-choice organizations would be to reach women early enough in pregnancy to ensure their access to abortion (not a bad trade-off for securing the substantial financial support of government).

Third, to what extent is a society morally superior if pregnant women have abortions about as often, but do so as a "lamentable necessity" rather than as an unambiguous and confidently-asserted right? One might suppose that, intrinsically, a person with the ability to see the moral ambivalence of abortion is morally superior to one who is blind to it. But one might also ask whether murder by a decent citizen under pressure—not with remorse, but with some measure of chagrin at the supposed necessity—might not be, in some sense, a more terrible phenomenon than homicide committed by a gangster. What would be terrible would be the extent to which the alleged necessity inoculated
decent people from the remorse that they are capable of experiencing. The moral superiority of the compromise position is not as clear-cut as it seems.

Fourth, doesn’t the compromise position underestimate the importance of the “story” that the law’s command or permission itself tells, as opposed to the law’s “rhetoric.” Compromise laws teach citizens that abortions should always be taken to be a very serious matter, even when they are justified by necessity. But what is the most important educative impact of such a law? Isn’t the teaching that abortion is justified by necessity far more profoundly important than the teaching about the spirit in which it ought to be done? (Many, if not most, pro-choice activists, after all, would probably be willing to concede that abortion is not to be viewed as a “pleasant” or “minor” matter, that there is a certain lamentable quality to it, as Luker argues.)

Fifth will the compromise position stimulate or suppress the ongoing social dialogue about abortion? To the extent that many will not accept it, the debate will continue, of course. But won’t the absence of “strident discord,” the issue being defused to some significant extent, weaken the conditions that typically force societies to confront unpleasant issues and grapple with them? One can easily argue that Roe v. Wade stimulated the social dialogue precisely by being so extreme as to galvanize the pro-life movement into existence and action.

Sixth, practically speaking, will a compromise law be more likely to foster a greater respect for life or to foster a utilitarian attitude toward it? Two examples suggest the latter answer. First, slavery was viewed by a majority of American leaders in the founding as a “lamentable necessity.” As Martin Diamond argued, the founders were right to compromise on the issue, because of the importance of the good to be obtained (Union and its attendant benefits), but also because it was a temporary compromise, the founders looking to the future with an expectation of the eventual extinction of slavery. But the discomfiture or what might be called “cultural cognitive dissonance,” in tandem with strong material interests, led to an important change over time, with the “lamentable necessity” argument increasingly being transformed into an argument that slavery was a positively good institution.

A second example is suggested by the topic of Glendon’s second chapter, divorce. Glendon’s main focus is not so much on divorce itself, but on the consequences of our particular kind of divorce law. A discussion of divorce in itself would, after all, not be that “practical” a topic, since it

5. Diamond’s argument appears in his The Founding of the Democratic Republic (F.E. Peacock, 1981), 34-39. Diamond is, of course, following Lincoln in this approach. See Lincoln’s Cooper Union address in 1860 for his discussion of the founders and slavery.
has become such a deeply rooted aspect of our society. Glendon’s focus is on the effects of "no fault" divorce law, our particularly extreme version of divorce law.

But wasn’t divorce law in this country once pretty much like what Glendon proposes as a compromise position for abortion? That is, at one time, the sanctity of marriage was a principle strongly embedded in the law, but for reasons of "lamentable necessity" it was sometimes-comparatively infrequently-compromised. How did we get from moderate divorce law to divorce on demand? That is a complicated question, no doubt, but whatever the answer is, is it likely to make us optimistic about the long-term impact of a compromise abortion law? It seems that once the laws undermine the principle (in one case, the sanctity of the marriage bond, in the other, the value of all innocent human life) by compromise that endorses exceptions to the rule, it is very difficult (if not impossible) to keep the exceptions very limited.

Glendon is right to point out that these matters are not subject to inexorable historical determinism, that we must become actively involved in the democratic process to vindicate important principles. As her last section suggests, the ultimate battle is not over the law, but over our mores, with law playing a limited though not trivial part in that battle. But these examples do suggest the possibility that accepting this middle way on the abortion issue may not be the most prudent way of carrying on the fight.

I suppose there are other "middle ways" in principle. If we invert the European compromise position described by Glendon, we might come up with another compromise, in which genuinely little abortion is allowed (only for the most extreme cases) and in which the law’s "messages" are carefully crafted to show deep, authentic sympathy for the plight of a woman with an unwanted pregnancy (e.g., in the form of generous financial support, both for such women themselves and for groups that help them, a reform of adoption laws to facilitate that resolution of the difficulties, mitigation of workplace gender and pregnancy-related discrimination by law as much as possible). If such a compromise as this would be dismissed out of hand by pro-choice groups, however, as it surely would be, one wonders why pro-life groups should be much more sympathetic to the European-style compromise.  

6. I do not mean to downplay these "inverted compromises". In fact, I believe that it is incumbent on pro-life forces to pursue them, and I am confident that pro-life forces would wholeheartedly join efforts to help women with problem pregnancies—as many of them already have—as part of an overall package that eliminated most abortions.
Pro-Life Rhetoric

As Glendon points out, it is striking that both pro-choice and pro-life activists use the intellectual framework and the language of rights. In the battle between traditional social forces and liberal social forces, it is more typical that liberal forces invoke modern rights thinking and traditional forces invoke the non-modern elements of our regime. It is another instance of the battle between the ancients and the moderns—this time a battle for the soul of the American regime. That is one reason why so much ink has been spilled on the question of whether America is really a “Lockean” regime, and also, what it means to be a Lockean regime.

Precisely because America is, fundamentally, a modern liberal regime, which emphasizes the securing of rights rather than the shaping of character as the purpose of government, it is difficult even for traditional social forces to resist grabbing onto the handle of rights language when it is readily available. Abortion provides an excellent opportunity for that. The sight of small corpses is a powerful statement that the most fundamental of rights, the right to life, has been taken away. Nor need someone more attuned to classical thought necessarily feel awkward invoking the language of rights. If that was not the natural idiom of classical political philosophy, nonetheless what is naturally right, and hence forms the basis of a duty to treat people in a certain way, may have as a kind of natural correlative the “right” of people to be treated in a certain way.

But the invocation of rights language may be a pitfall for pro-life forces in some ways. Rights typically are claimed by someone who is the subject of the rights. If someone is structurally incapable of making that claim himself, the claim may receive weaker support in society. If the right to life claims of relatively recognizably human fetuses are strong, can the same be said of early fetuses? Will a people oriented primarily toward rights respond strongly to the claim of a right to life on behalf of very early developing human lives?

That remains to be played out in American politics, but the least that can be said is that the pro-life position will be much stronger if there is a second kind of argument to support it and if Americans accept that kind of argument as legitimate, i.e., that people are responsible for their actions, that they have certain duties that flow from nature (rather than, for example, contract). Marriage, viewed as an institution that transcends the category of simple voluntary contracts (and many Americans do consider it to be more than that), is one area in which such an argument can be made. But it too can be assimilated to the category of voluntary contracts by those who are so disposed. If there is any social relation that can be considered “natural,” rooted in nature rather than contract, it is the
relation of parent to child. In one, very common sensical use of the phrase, there is no way to "un-become" a parent. One can cease to act like a mother or father, but one can never undo the fact of having engendered another human being.

The best that pro-choice advocates can do is to distinguish between biological parenthood and the social relationship of parenthood that allegedly does not begin until the early, unformed human being becomes a "person." On that view there is no parenthood without the voluntary act of the parent, at least implicitly, in not interfering with the coming to personhood of a child. But this is not the intuitive, common sense way of viewing parenthood, I think, which helps to explain the ambivalence of Americans about abortion.

Luker contends that even pro-choice activists do not deny that the fetus is worthy of some moral consideration, though by the individual rather than by the law. Glendon's response to that is, I think, very powerful: "[p]lease consider what a set of legal arrangements that places individual liberty or mere life style over innocent human life says about, and may do to, the people and the society that produces them." The concern here is partly for fetuses, or better, for developing human lives, but it is also a concern for the people who bring themselves, typically for reasons that do not carry the weight of even developing human life, to have the lives of their offspring snuffed out in the womb. The classical tradition of morality has always seen the perpetrator of evil as the one who "suffers," more than the victim. This suffering is sometimes perceived by the sufferers themselves—as it is for those women who suffer from "post-abortion syndrome"—and sometimes it is not. In either case, it, as well as the right to life of the unborn child, should receive attention as the ground for society's intervention.

Moreover, apart from the particular lives of mother and fetus now, what is the effect of abortion over time on society's mores, especially its attitude toward the dignity and inviolability of human life? As human life becomes increasingly subject to technological manipulation, what happens to the necessarily non-scientific limits on such manipulation? Kra-

son is right to point out the key question of the authority of science and technology. If abortion, contraception, and in vitro fertilization have struck many as unobjectionable technological answers to certain pressing human questions, how will we respond to pressing bioethical questions in the future: e.g., to what extent can we manipulate the genetic endowment of future human beings. Would it be wrong to create a race of hominoids (genetically lobotomized humans) to carry on the more unpleasant tasks in our society? How far away from normal natural processes can science and technology carry us before nature ceases to be even an inarticulate norm, and before the only limit on what we do is our tech-
nological limitations and the "irrational inhibitions" derived from a pre-scientific era?

**Technology and the Future**

In the near future I think that the abortion issue is likely to be influenced by two especially key developments in technology. The first has already occurred, and that is the development of the "morning after" pill. This form of abortion has a very different status politically for several reasons. One, it simply makes enforcement of anti-abortion laws very difficult. Two, it effects abortion at such a very early stage of pregnancy—before there is a recognizably human form—and therefore does not evoke the opposition that later abortion does.

This technological development is not as new as it seems, since certain so-called contraceptive pills, as well as the IUD, have acted as abortifacients, not contraceptives, preventing implantation of a fertilized egg in the womb rather than preventing conception. That tie between abortion and contraception is an important one, as pro-choice forces recognized in the *Webster* case, where they emphasized that a complete ban on abortion would interfere with the previously established constitutional right to contraceptives.

Contraception has become, in a remarkably short period of time, a standard feature of American life. Only in this century have most Christian denominations dropped their opposition to it, and only since the development and marketing of the pill in the 1960s has it become, in Luker’s phrase, simply a good health habit, like brushing your teeth.

In general, the same forces that have contributed to the legalization of abortion earlier spearheaded the widespread change in attitudes toward contraception, though contraception has achieved legitimacy more rapidly and completely than abortion because it seemed only to involve "possible life" in a prospective way and not some form of "actual" life. As far as I know, there is no country that has the widespread practice of contraception that does not also have broad abortion rights. Luker's analysis suggests, rightly I think, that, despite the important differences between nonabortifacient contraception and abortion, they are both products of the same world view.

While contraception is often viewed as an alternative to abortion, the ties between them seem stronger than the differences. Most importantly, contraception frees people from the responsibilities formerly associated with sexuality, i.e., children. The very nature of sexuality must be understood differently to the extent that it is divorced from its most distinctive and important end, the bearing and education of children. Whether a strong and stable family system is compatible with this radi-
cal division between sexual activity and children remains to be seen. The recent American experience at least raises the question as to whether a society whose attitude toward children is rooted in a "contraceptive mentality" is capable of maintaining strong family bonds. (Contraception was, after all, touted as a way of reducing the tensions within many marriages and thereby as a support for the family. It remains to be seen over time whether the weakening of familial bonds during the contraceptive era has been an accidental occurrence or a logical consequence.)

The other technological development that bears upon the future of abortion is one that may make it obsolete. It seems very plausible that at some time in the foreseeable future, technological developments may make possible easily reversible sterilization. Given the increasing popularity of sterilization and the broad cultural acceptance of contraception, one is tempted to predict that the "method of choice" in ten or twenty years or whatever will be this: children will be sterilized at puberty, later have the sterilization reversed when they want to have their one or two children, and then they will be re-sterilized. With such a social practice, abortion will be "necessary" relatively infrequently, i.e., due to occasional technical failures, or in the case of fetal deformity or serious maternal health problems during a "wanted" pregnancy.

On the other hand, it is also important to balance the prior observations on modern science and technology with a contrary point: rarely have science and technology been able to support traditional morality as much as on the issue of abortion. Take a bunch of grade school children and show them the extraordinarily wonderful pictures we have of human beings developing in the womb, in a single uninterrupted process, and the effect can be powerfully anti-abortion. The more knowledge we have of fetal life, the more techniques we develop for aiding pre-natal life (e.g., the various kinds of intrauterine surgery now possible), the more the wonder and mystery of life can be seen to start long before birth.

Another social variable for the future that should be mentioned is the question of how children will be viewed. There is still concern about expanding population these days, but unlike twenty years ago it is matched by concern about declining population. One of the ironies of Glendon's book is that it suggests that we look to Europe for guidance on family law—at a time when Europe is more and more concerned about the difficulties arising from people's reluctance to have families, which has led to what some regard as a birth dearth. The U.S. variation on this theme is wondering how a declining working population will support an increasing (baby-boomer-created) aging population, especially in the form of Social Security and Medicare. The latter, in particular, is going to raise some extremely important "life" issues, as younger generations
are "saddled" with enormous medical expenses of older generations.

Thus, the abortion issue is tied to a series of other important questions that will be key political/legal/moral issues for a long time to come. If Luker is right that abortion reflects a world view that emphasizes human planning and control, it is tied not only to the issue of contraception, but also to issues of artificial procreation, legal regulation (permission or denial thereof) for having children, and euthanasia, in which human beings seem to assert control over precisely the decisions once reserved to God. While the future is unclear, there are at least reasonable grounds for considerable pessimism that human beings will manage to make these decisions responsibly. In a world whose leading intellectuals tend so often to deny that there is an objective, universal, knowable human good, one would, after all, expect sentiment and self-interest to be even more than usually powerful.

American Liberal Democracy

The United States has been, from its inception, a liberal democracy. While by no means the only figure, Locke still seems to me, despite the protests of scholar-advocates of early American "republicanism," the most central figure of the political philosophy of the founding. Efforts to regard American government as a "mixed regime" or to deny that America is on the modern side of the quarrel between the ancients and the moderns appear misplaced to me. On the other hand, that is the important starting point for characterizing the nature of the regime, not its conclusion.

From the beginning the regime has been moderated by two factors (which overlap to some extent). First, it contained important holdovers or remnants from classical and Christian sources. The common law, for example, contained important pre-liberal elements. (Compare, for example, Blackstone's account of the origin of government—which generally follows Aristotle—with Locke's.) Christianity also had a significant impact on our political life and institutions, as Tocqueville pointed out. While it is important to see that Aristotle and Christianity were less influential in defining the nature of the regime than Locke and other modern thinkers, it is also important to see that they were important elements of the regime.

Second, modern liberalism itself is more complicated than some overstatements of the classical/modern split would allow. If the securing of rights takes center place in the purposes of government, in contrast to classical governments in which education was central, that does not mean that modern thinkers could be or were completely insensitive to questions of education. If concern for rights is elevated and concern for
duties deemphasized, that does not mean that there was no concern for any duties.

Over time, it is true, the more liberal elements of the regime have tended to overshadow and push out the non-liberal ones. This was helped by the fact that our foundational documents-the Declaration and the Constitution-concerned a national government whose purposes were limited to the fundamental concerns of modern governments (defense and commerce), while the more classical and Christian elements were embedded in state and local law and practice. An "American" citizen education, then, indirectly gave more support to one than the other. Over time, both the practice of serious Christianity and the political influence of its traditional moral teachings have declined significantly. Modern philosophical ideas have exercised a powerful sway over intellectuals, and intellectuals tend to shape society's opinion-makers and lawmakers (e.g., schools-including professional schools-and the media), and do so more today than ever (with more people being schooled longer and with the expansion of the role of the electronic media in our society). Nor should the absorption of Americans in the pursuit of material well-being be neglected as a factor in the undermining of the less liberal elements of American life.

It may be said with considerable truth that these tendencies are not completely accidental, but are tendencies implicit in the foundations of our government. (Stating this problem of "civic virtue" in a decent republican regime epigrammatically, one might say that American liberals worry about avarice and American conservatives worry about lust, and Aristotle and Montesquieu would say that they are both right.) But it is also true that the founders hoped and expected that such dangers would be offset by other elements and that they have been resisted successfully in many ways (especially until relatively recently).

Nor is the final victory of these tendencies a matter of inexorable historical necessity, as Glendon rightly notes. The final attainment of a "pure" liberalism so devoutly hoped for and pursued by leading legal scholars is not imminent. The bitter battle over abortion is a sign of that. The demands of "nature" (and of nature's God) still assert themselves. The fundamental right to life of liberal political thought (which, it is worth remembering, was put forward in Locke's writing and accepted by Americans on the basis of a natural theology), and the centrality of marriage and family both in individual lives and in political life, have proved to be real barriers to the expansion of radical personal autonomy.

Glendon is right to emphasize, like Tocqueville, the relation between the laws and the mores. Trying to stop and to roll back fully the expansion of abortion law simply by changing the law would be a hopeless task. Change in the law must be only one-albeit an important one-of the
means employed, and the battle to change the law may even be more important for its impact on the mores than its impact on the law. But the abortion battle is part of a broader war, apparent in a whole range of issues, and the question is how to win this broader war.

Glendon realistically talks of "a slow and painstaking attempt at reconstruction of moral philosophy." This reconstruction may become a greater possibility as we experience the inadequacies of continuing attempts to implement and defend the reigning liberal legal philosophies, and the dangerous implications of leading contemporary alternatives (e.g., critical legal studies and feminism). In some way, it will have to involve a recovery and restoration of the natural law tradition (including in that phrase theories of natural right as well). But it will not simply be a question of showing why modern theories are wrong and classical (including medieval) theories are right, or of downplaying the differences between them. Classical and Christian political thought needs to be clarified on some points (e.g., to show how it is fully compatible with fundamental religious freedoms) and to be presented in the form of a public philosophy well adapted for American society.

The political philosophy of the American founding will provide important elements of this new public philosophy, for example, its clear recognition of the dignity and rights of the individual, and its genuine though less salient recognition that human dignity is reflected as much in living up to responsibilities (e.g., political and familial duties) as in the claiming of rights. But there will be a need for applying and adapting these and other elements as well, taking into account important changes since 1789: e.g., the increased pluralism of American society, the nationalization of most aspects of American life, the profound changes in the understanding of gender roles, the rise (and apparent decline) of political parties, and the rising power of "the new class" (rooted especially in changes regarding education, professional and technical skills, and communications and entertainment media).

That is, I would not argue that the public philosophy of the American founding is either theoretically unobjectionable in all respects or simply the best practical constitution possible under any circumstances for America. The breakdown of the synthesis between liberal and non-liberal elements over time suggests that there was a built-in instability in the founders' public philosophy. Perhaps through a "slow and painstaking reconstruction of moral philosophy" it will be possible to improve on the founders.

I would argue, however, a) that the public philosophy of the founders has, for much of our history, been the foundation of an unusually free, prosperous, and decent regime, b) that the founders' public philosophy is much better than any practical alternative at this time and for the near future, and c) that alterations of important features of our government ought to be done only through the appropriate constitutional mechanisms, which do not, as I have argued at length elsewhere, include a form of judicial review detached from the Constitution. Constitutional change on important matters should occur only with the full "social dialogue" that the political process, and especially the amendment process, requires.
Abortion is an issue that goes straight to the heart of the regime. It tests our commitment to the principles of the Declaration, to the inalienable rights of every human being, irrespective of any qualifications based on the stage of development, meaningfulness of life, or whatever. It also tests our commitment to non-liberal principles implicit in the regime that help to keep us from interpreting liberal principles in ways that degrade the regime, such as the commitment to stable family life that protects us from the allure of an excessive personal autonomy.

Krason helps us to see that abortion must be eliminated if we are to live up to what is best in the American regime. Luker helps us to see that abortion is an issue with far-reaching implications, since the different positions of the activists reflect fundamentally different views of the world and especially of the key human experience of motherhood (and, I would argue, of parenthood). If it is unlikely that Americans will embrace either world view entirely, nonetheless the decisions they make about abortion, personally and as a legal issue, will incline them in a certain direction.

Glendon helps us to see that the "story" our law tells about marriage and parenthood and developing human life is profoundly important and that the "social dialogue" involved in law is part of a necessary reconstruction of moral philosophy in the American regime. She underestimates the extent to which compromise along European lines will lead us in the wrong direction, diminishing the quality of the social dialogue by accepting too readily what is not acceptable. But her timely and eloquent reminder about the educative function of the law should be the guiding light in continuing discussions of abortion and the broader reconstruction of an American public philosophy.

Marquette University

CHRISTOPHER WOLFE