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BOOK REVIEWS

THE ABORTION CONTROVERSY: A MYOPIC VIEW

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ABORTION: A CASE STUDY IN LAW AND MORALS, by Fred M. Frohock

In the highly acclaimed Japanese film "Rashomon" four people are in various ways involved in a rape and murder. The film vividly depicts their starkly different perceptions and understandings of these events. Frohock finds an analogy between the abortion controversy and this film because it so forcefully illustrates that reality is based more in individual perceptions than commonly believed. Like the characters in "Rashomon," abortion activists hold widely differing views of the same action, namely, the termination of pregnancy through induced abortion.

Frohock attacks his subject from a variety of perspectives. He begins by announcing the several themes he subsequently develops and by hinting at the solution he proposes in the final chapter. He reviews methods commonly relied upon to settle disputes and finds them all lacking as responses to the difficulties presented by this case. Morality is an insufficient guide because the positions of both sides rest upon fundamental and deeply held moral beliefs, respect for human life in the case of pro-life, and the affected woman's freedom of choice in the case of pro-choice. These principles are in irreconcilable conflict. An additional substantial obstacle to resolution of the dispute through a morals-based consensus rests in differing beliefs about the status of the embryo. The pro-life partisans maintain that human life begins at conception while many of the pro-choice proponents believe that it begins later.

Another obvious avenue needing exploration is the law. Frohock presents a detailed analysis of relevant past and present law which captures the most important of the numerous legal issues involved. Developing a number of legal sub-themes, he focuses on *Roe* v. *Wade* and the right to privacy. He points out that even though the court

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disclaimed the choice of one moral principle over another, such a choice is implicit in the court's creation of the "viability principle." Moreover, since the decision in that case has not served to settle the issue, but, rather, has further inflamed pro-life passions, he identifies a number of alternative resolutions to the controversy that might have proved less unsettling. Furthermore, the author recognizes that due to changing technology, viability comes earlier and earlier in pregnancy, presumably shrinking the area of discretionary authority of the pregnant woman.

Frohock concludes that a resort to law is a poor way to resolve this dispute and points to its failure thus far as shown by the refusal of pro-life forces to acquiesce in the *Roe* decision. He chronicles successful post-*Roe* political attacks on the right to abortion, such as the Hyde amendment, and returns to the idea of the failure of "common justifications" in declaring that justice and fairness concepts are not helpful in resolving this conflict. In addition, because of the asymmetry of power between the born and the unborn and two conflicting philosophies, one based on an "individuated" society and the other on an "organic" society, he argues that the best hope of achieving settlement is through a "constructed consensus."

Frohock proposes the adoption of a middle position which the mainstream of both sides might find tolerable and by which the present powder keg atmosphere might be defused. He argues that a policy which allows only first trimester abortions and refuses public funding for them (in the absence of individual taxpayer consent through use of a "check-off" system) would express enough of each position to make it politically acceptable. According to Frohock, since abortion opponents are members of a political society which cannot long suffer this extreme polarity, they should recognize that a political compromise of this nature is the most promising avenue for arriving at a truce between "two moral agents."

I found both strong and weak points in the book's style and analysis. In presenting his ideas, Frohock shows stylistic strength and gives them more force by inserting quotations from interviews of abortion controversy activists. It makes the book more lively and, at the same time, gives additional credibility to the author's summary of their positions. Use of quotations also makes palpable the high level of emotion and the great depth of feeling involved in what might otherwise seem a one-dimensional and dry analysis.

The basic outline of the facts and ideas presented is logical. In addition, through the use of interview quotations and minute dissection of opposing viewpoints, including their implications and ramifica-

tions, Frohock skillfully brings into fine resolution the intractibility of the issue. If one ever doubted the depth of the moral conflict, reading this book will make it self-evident. The author accurately concludes that the law is ill-equipped to solve this problem in a satisfactory manner. There is no consensus on the issue; there is no right or wrong answer; and, like alcohol consumption during Prohibition, it won't go away.

Considering the substance of the ideas offered, the book presents a wide variety of relevant concepts, although those well-versed in the controversy will find little that is new. Frohock identifies and discusses philosophical inconsistencies of the abortion controversy opponents. Pro-choice people are often "liberals" who, in their desire to achieve social justice, favor state intervention. In this particular instance, however, they believe the state ought to have no role, that individual privacy and discretion should prevail. While that view has some legitimacy, I am not persuaded that it is inconsistent to insist on protection for civil liberties and, at the same time, to believe it is society's duty to help those who cannot help themselves. The means are not the same, but there is consistency in the ends sought to be achieved.

On the other side of the controversy, pro-life advocates are generally "conservatives," who in most circumstances are staunch believers in liberty and individual responsibility. Yet it is these "conservatives," Frohock observes, who insist that the state should play a decisive role in individual abortion decisions by taking away choice and ensuring that a pregnant woman carries her pregnancy to term. As Frohock recognizes, however, there is difficulty in generalizing about "liberals" and "conservatives" and on which side of this issue they fall. Despite my less than full agreement with it, I found this part of the analysis thought-provoking.

Frohock identifies a major related problem which neither side has sufficiently addressed in rhetoric or in action. According to statistics presented in the book, approximately three-quarters of pregnancies ending in abortion are unwanted or unplanned. A decrease in unwanted pregnancies should dramatically reduce the need for and, consequently, the number of abortions performed. Frohock is right on target when he says pro-life forces unrealistically insist on chastity for unmarried teenagers and no sex education outside of the home when it is well-known that teenagers are becoming sexually active at younger and younger ages and that most parents do not discuss sexual matters with their children. Pro-choice advocates acknowledge a high level of youthful sexual activity but focus almost exclusively on technical birth control information without addressing the moral

and emotional issues involved. The provision of purely technical information has apparently reached an insufficient number of the sexually active or too few have been persuaded to use it. Significant progress on this front could make abortion a non-issue due to reductions in numbers of abortions obtained.

Despite its strong points, in my judgment this book has a number of glaring shortcomings both in style and substance. Stylistically, Frohock could have made his points in a much more succinct and clear manner. He frequently rambles from idea to idea, and, even though the issues he develops and discusses are inherently overlapping, there is needless repetition from chapter to chapter of the same concepts. Furthermore, at times he goes into painstaking detail to build to a relatively minor point, while at other times major assertions pop up without development or support.

The book's substantive inadequacies are more problematic. Frohock's proposal to resolve the conflict seems weak and unlikely to end the debate. The existing denial of public funding as a result of the Hyde Amendment and individual state actions has angered pro-choice forces, and yet has failed to bring about a significant reduction in abortions (according to Frohock's statistics). This is clearly the goal of pro-life advocates. Thus, their drive to deny the right to abortion remains unabated. Moreover, I disagree with Frohock and see no logical or even emotional basis for distinguishing, on a governmental funding level, abortion funding from so many other hotly debated government expenditures, such as the vast sums spent to support the Vietnam War. In other words, cutting funding here may establish an undesirable and unworkable precedent where any controversial expenditure could become subject to taxpayer "check-off."

Similarly, it is overly optimistic to believe that pro-life forces would accept first trimester abortions or that pro-choice proponents would accept loss of individual control after the first trimester. A rule requiring that a woman who does not discover her pregnancy until after ninety days must under all circumstances carry it to term would surely be unacceptable to pro-choice adherents. A tremendous rise in the number of illegal abortions would occur and would result in serious complications or death for the women involved. In addition, if such a rule were in place, it is likely that many potential early second trimester abortions would be obtained sooner, to beat the deadline, further thwarting the pro-life objective.

Toward the end of the book, Frohock admits that any solution may be only temporary in nature due to technological "advances" which continue to move viability to ever earlier developmental stages.

This is an inherent weakness of his thesis. In other words, once the *eight*-week embryo is "viable," even moderate pro-life advocates will find the notion of first trimester abortions unacceptable, and Frohock's compromise will fall apart.

What is more likely to happen and more "viable" as a practical solution is only touched on in the book: technological advances obviating the need, in most cases, for abortion. A relatively trouble-free "morning-after-pill," while perhaps still repugnant to pro-life forces, will give women complete discretion on the question of whether to carry to term. Such a drug will be virtually impossible to regulate, practically or politically, according to Representative Henry Hyde, author of the amendment which prohibits the use of federal funds for abortions.

Frohock ignores two crucial aspects of the abortion debate. First, he fails to focus on the very religious nature of the dispute. In many respects it is a religious conflict. This is yet another reason why pro-choice proponents are unlikely to accept any restrictions on the right to choose. They are not willing to have the religious beliefs of others imposed on them.

Within the Christian belief system is the notion that human life begins at conception and ends at earthly death. While many may ascribe to this view, many pro-choice people do not believe human life begins at conception (Frohock states this many times) or believe that existing life, that of the pregnant woman, has a superior right (a point not emphasized by Frohock). Furthermore, there are those who have a more fluid view of human life, who do not see it beginning and ending within these narrow confines, and, on that basis, are not troubled morally by abortion. Human energy denied one outlet will find another.

The most serious flaw of this book is the failure of the author to address an issue seen as the essential partner to and co-equal of abortion in the view of pro-choice proponents. Frohock discusses the great tragedy of the pregnant teenager/child as if for most other women, especially those who are married, unwanted pregnancy is merely a minor inconvenience requiring only the slightest rearrangement of plans. This may have been unintentional on his part, but I think it is fair to say that most readers will be struck by this misconception. I think it is also fair to say that "inconvenience" greatly understates the ramifications and implications of an unwanted pregnancy. It is not merely inconvenient to be pregnant for nine months and, with great pain, give birth. It is not merely inconvenient for a person to give up for adoption a part of herself. In the same vein,

it is not merely inconvenient to drop out of the work force, or abandon a career for several months or years for which one has worked long and hard and, in any case, it is not merely inconvenient to maintain an 18 or 20 year continuing and daily emotional and financial commitment to a child. The missing issue is about women's ability to fully participate in economic and political affairs.

The abortion controversy involves not only embryos and fetuses but the position of women in society, and the right, or lack thereof, to make very fundamental choices about how one's life will be lived. To pro-life adherents, biology is destiny. To pro-choice adherents, reproductive freedom is the essential key to the opportunity for full and equal participation. Such a central issue must be explored in a work which seeks to fully capture, discuss, and propose a settlement of the abortion debate.

AN ENGLISH JUDGE AND HIS SCOTTISH CRITICS

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JUSTICE, LORD DENNING AND THE CONSTITUTION. Edited by Peter Robson & Paul Watchman. England: Gower Publishing Co. Ltd., 1981. Pp. xvi, 253. $18.

Hero worship begets debunking of both the hero and the worshippers. Nowhere is this more true than in the community of scholars, a most inhospitable environment for adulation of any kind. So it is that Lord Denning, a heroic figure in the history of English jurisprudence (ironically, a self-described iconoclast[1]), takes his lumps at the pens of eight Scottish[2] academics in this collection of essays. They have set for themselves a formidable task. For over thirty years, Lord Denning has occupied center stage as a jurist whose opinions and extra-judicial writings have heavily influenced the politics of his country. And, as a departed countryman of his might have observed: therein lies the rub. Judges should be neither popular nor political. When they are both, the capacity for evil boggles the mind. Believing that the antidote is exposure, the essayists seek to provide an "alternative view"—alternative, that is "to the uncritical admiration for the judiciary in general, and Lord Denning in particular"[3]

Who is this judge and what has he done to warrant this critical attack? At the risk of boring, if not offending, the Anglophiles among us, a resume is provided. Denning was born in 1899; educated at Magdalen College, Oxford (Firsts in Mathematics and Jurisprudence); named Prize Student, Inns of Court; appointed Judge of the High Court of Justice, 1944; appointed Lord Justice of Appeal, 1948-1957; appointed Lord of Appeal in Ordinary, 1957-1962; and appointed Master of the Rolls, 1962, his present position.[4] The titles are impressive and

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1. Denning, *The Way of an Iconoclast*, 5 J. SOC'Y PUB. TCHRS L. 77 (1959).

2. They may not all be Scots but with one or two exceptions they are listed as affiliated with Scottish universities. JUSTICE, LORD DENNING AND THE CONSTITUTION v (P. Robinson & P. Watchman eds. 1981.) [hereinafter cited as LORD DENNING].

3. *Id.* at xiii.

4. The chronology of the titles would suggest a demotion from the House of Lords to the lesser position of Master of the Rolls. But this is only relatively so since the Master of the Rolls presides over and controls the civil litigation in the Court of Appeal which is in many respects a more important appeal court than the House of Lords. For Lord Denning, the "activist," the choice was clearly to "step down" and head the court which has the last word on most of the cases of great urgency.

so are the accolades bestowed on him in and out of the legal profession: "[t]he contemporary scene in Great Britain is unthinkable without Lord Denning..."[5] "[t]he post war era [is] the period of legal aid, law reform, and Lord Denning"[6]; "[y]oung lawyers for several decades have given him their hero worship as a Mr. Valiant-for-Justice"[7]; "[a] St. George of the law courts".[8] His publications include over 200 judicial opinions, twenty-six articles and lectures published in professional journals, and two books which made *The Sunday Times* best sellers lists.[9] The influence of his judicial opinions on the development of the law has been pervasive. According to the introductory essay, he has stamped his imprimatur on

> [t]he creation and development of the concept of promissory estoppel, the attempt to introduce a *jus quaesitum tertio* into English law, the proposal of a just and equitable approach to frustration of contract, the campaigns against exemption clauses and penalty clauses, the rapid extension of the boundaries of tortious liability, the limitation of Crown privilege, the increased accountability of local authorities for their officials, the greater willingness of the judiciary to scrutinise administrative actions by the application of natural justice principles and the way of judicial review, and the rebellion against the principle of *stare decisis*....[10]

The essayists are primarily attempting to indict Denning's *method* of judicial decision making, not his results. However, lest we consider their emphasis on method trivial, they label the accused a "poser of a real threat to the rule of law"[11] whose methodology is "dangerous and unconstitutional."[12] The essayists further charge that "his approach is teleological. He thinks of the result before he considers the legal reasoning...." And "[h]e dispenses justice on the basis of pragmatism rather than principle."[13] The essayists are not content

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Whether a demotion or not, he did not lose the title. Apparently, once a lord (like judges), always a lord. He will, however, be referred to as Denning throughout this review.

5. LORD DENNING, *supra* note 2, at 2.
6. *Id.* at 3.
7. *Id.* at vii.
8. *Id.* at 2.
9. *Id.* at 37.
10. *Id.* at 2.
11. *Id.* at 4.
12. *Id.* at 3.
13. *Id.*

to rest their case on broad brush rhetoric or on an analysis of Denning's opinions in celebrated or landmark cases. They recognize that to do so would make them guilty of that which they criticize. They therefore painstakingly examine the Denning record across the judicial board including such arcane areas as the delineation of tenant's rights, the interpretation of testamentary deeds, and the frustration of contract.

One cannot do justice to the essays by summarizing or paraphrasing their content. They are exceedingly detailed and well-crafted. Perhaps their criticism can be best exemplified by illuminating the role played by Denning in a single episode—his "creation" of a short-lived contract doctrine called "fundamental breach."

Fundamental breach was a doctrine whose time came in the 'fifties and went in the 'sixties. Prior to its development, the cases and literature on both sides of the Atlantic bristled with attempts to deal with the problem of disclaimers or "contracting-out." Maine had observed that the movement of progressive societies was "from status to contract." He was not around to see the continuation of the movement from status to contract and back again to status. With the power of the pen (and printing press) the merchants' draftsmen imposed a serf-like status on consumer buyers by disclaiming responsibilities and excluding remedies.

The American case law of disclaimers divided into 1) those courts which expressed sympathy for the victims and invited the legislature to do something and 2) those courts which utilized what Llewellen called the "covert" or "back-door" techniques of "interpreting" the clauses to avoid their intended meanings.[15] Denning would have neither. Living up to his "St. George" reputation, he confronted the dragon with a weapon forged from an ancient and honorable line of precedents in the law of bailments and carriers. Denning christened the new doctrine in a case of a car that "would not go." The car had been sold under a contract containing the clause: "No condition or warranty that the vehicle is road worthy, or as to its age, condition or fitness for any purpose is given by the owner or implied herein."[16] Reversing the trial court's judgment for the seller, Denning held that "a breach

14. The issue reminds one of the perhaps apocryphal account of the dialogue between Hand and Holmes as the latter departed to assume his seat on the United States Supreme Court. Hand's parting admonition: "Do justice, Sir." Holmes' terse response: "Mine is not to do justice, but to apply the law."

15. Llewellyn, Book Review, 52 HARV. L. REV. 700, 705 (1939).

16. Karsales Ltd. v. Wallis, [1956] 1 W.L.R. 936 (C.A.) at 937-38.

which goes to the root of the contract disentitles the party from relying on the exempting clause."[17]

Although some of his critics would have us believe otherwise, he was not content to rest the result solely on his own authority. From the law of sea carriers (and later bailments), he drew an analogy based on the concept of "deviation." When goods were lost while a carrier was "deviating" from the route (or when goods were lost or damaged when stored by a warehouseman in an unauthorized place), a clause limiting liability would not apply even though the loss was not caused by the deviation. The deviation "ousted" the contract, and with it, the clause limiting liability. When draftsmen sought to avoid this result by "authorizing" the deviation, the House of Lords rejected the attempts as being "inconsistent with what one assumes to be the main purpose of the contract."[18]

It was but a short step for Denning to connect the present to the past and find that the "main purpose" of a contract was a "core" and that a breach which went to the "core" (or "root") disentitled a party from relying on limitation or exclusion clauses. The doctrine was short-lived, as the House of Lords repudiated it in 1967.[19] In a later case, Lord Witherforce dryly observed: "there are ample resources in the normal rules of contract law for dealing with these [clauses] without the superimposition of a judicially invented rule of law."[20] Thus the doctrine was consigned to history to be revived only as an example of Denning's alleged arrogant usurpation of legislative power.

The fundamental breach episode is a microcosm of the theme which pervades the entire collection of essays. The title, *Justice, Lord Denning and the Constitution*, does not warn the reader of its sarcasm. The authors' thesis in these essays is that Lord Denning has sought "justice" at the expense of rules of law—that his judicial method is *un*constitutional. They argue that it would be bad enough if the evil were confined to his judicial opinions. But he also writes

17. *Id.* at 940-41.

18. Glynn v. Margetson & Co., [1893] A.C. 351 at 357. Denning does not deserve all the credit (or blame) for the historical underpinnings of the fundamental breach doctrine. Lord Devlin (then Devlin J.) had foreshadowed its formulation in several cases a few years earlier in Alexander v. Railway Executive, [1951] 2 K.B. 882 and Smeaton Hanscomb & Co. v. Sasson I. Setty, Son & Co., [1953] 1 W.L.R. 1468 (Q.B.). Denning's role was to make the dicta law. The story is told at some length in Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178, 1189-98 (1964).

19. Suisse Atlantique Societe d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale [1967] A.C. 361.

20. Photo Production Ltd. v. Securicor Transport Ltd., [1980] 1 All Eng. Rep. 556, 561.

books *about* the law "without departing from the judicial manner, [or] the style in which the contentious and controversial are presented as if beyond contradiction."[21] The authors might pardon judges if they sometimes speak with an authority greater than their own when they decide cases. After all, they are merely applying the law. But when writing books judges become mere mortals. The author of the concluding essay makes sure that neither our eyes nor our ears can miss the point:

> That is to say, he colludes when he is on the Bench. In his books, Law is invoked then occluded. Lord Denning the virtuoso justifies professionally his performance by reference to an orchestra and, somewhere, a score. From time to time we are permitted to hear the other players, but mostly in the books if our maestro is not blowing his trumpet and banging his drum he is humming the other parts so loudly that we can never have the opportunity of judging them for ourselves. The over-exuberance for which he is frequently criticized in the Court of Appeal is translated into egocentricity in the texts (citations omitted).[22]

Were he in competition with American activist judges, Denning would be bringing up the rear. To be cavalier in *our* midst is to disregard doctrine, precedent, and the legislature. The American activist judge tells it like it is; which, according to some, is the same as telling it like it ought to be. But in a country which legal realism forgot, Denning's innovative use of doctrine, history, and precedent makes him a suspect target. On the American scene, Cardozo manifested many of the Denning characteristics: a passionate concern for justice, an abiding respect for precedent, a craftsman's approach to the writing of an opinion, and an advocate's zeal in "selling" the justness of his result. When the tension between precedent and his sense of justice became too great, Cardozo was not above manipulating the doctrine to fit the cause.[23]

One suspects that Lord Denning has enjoyed reading these essays more than did the authors in writing them. Disingenuous?, maybe; Dangerous?, hardly; Wounded?, yes. But when you strike at a king, you must kill him. This the authors have not done. Like the hero in the melodrama, Lord Denning survives—a bit bloody, perhaps, but unbowed.

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21. LORD DENNING, *supra* note 2, at 212.

22. *Id.* at 213.

23. *See, e.g.*, DeCicco v. Schweizer, 221 N.Y. 431, 117 N.E. 807 (1917) (where he went to great pains to uphold but distinguish a precedent embarrassing to his result).