

A RESPONSE

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Speculation proceeding upon no set path and minimizing a logical thread of analysis may often be far more productive of insights into our never-ending search for knowledge than the most logical and analytical pursuit of "truth." The latter process is often premised upon unchallenged and unchallengeable truths; a set of unexamined premises which both control perceptions of reality and import a dangerous degree of rigidity into the process of reconciling the need for order in society with preserving individualism — the primary functional goal of the legal process. Professor Frankel's speculation rightly proceeds upon no set thread of logical development but consists of a series of insights concerning a conflict of fundamental values in the continuing evolution of the premises upon which our society is organized. We are given a series of insights, potentially related, possibly conflicting and certainly stimulating. Many of Frankel's insights are penetrating and of value. Others suggest beliefs and assumptions one can only call disturbing, if not potentially dangerous to the peaceful and acceptable implementation of legal decision-making to govern our society.

Professor Frankel hypostatizes law (he thingify's it) to the point where one is left with several potential inferences posing conundrums of the first order.¹ A distinction is suggested between judgments premised upon religious values and those derived from worldly values (secular). The former are called moral judgments and it is inferred the latter are not. It should be recognized that the choice to give recognition to a "right of privacy" or bodily integrity of a pregnant woman and the decision not to extend personhood status to a fetus for purposes of constitutional analysis, are just as much choices premised upon moral values as are the converse value choices. Understanding the significance of what the Court was about in *Roe v. Wade*² is scarcely advanced by pretending otherwise, and praise or criticism of the result must be superficial at best since the moral premises or ethical value choices underlying the decision are not dredged up for critical examination. Highlighting the prohibition experience and the current experience with marijuana regulation is instructive as to the appropriate, if any, use of the criminal law in regulating abortion or any other area of individual activity subjected to regulation by the criminal process. Suggesting that the central lesson to be derived, however,

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¹ Hypostatization has been defined as treating a conceptual, relational idea as though it were a *concrete thing* (and, hence, locatable in space and time). This is an error that is often encouraged by the structure of our language. . . . Thus, a person who has learned that he can explain what a hammer is by pointing to a thing, a hammer, looks around for something to point to in answer to the question, "what is 'justice'?" . . .

W. BISHIN & C. STONE, *LAW, LANGUAGE, AND ETHICS* 201-02 (1972). Professor Frankel repeatedly refers to "the law" without describing what he means by "the law" and leaving an impression that it is something to be described like a hammer, when, in fact, there is no such thing to point to. Thus, commenting upon his observations is complicated by indulging in assumptions about the attributes and consequences he attributes to "the law."

² 410 U.S. 113 (1973).

is that morality should not be enforced through criminal sanctions misses the point. The question is what moral values should be enforced, from where they are to be derived, and, by what process (criminal, civil, or otherwise) should they be adopted or rejected by the legal system. Thus, if Frankel's criticism of the status of abortion regulation by the legal process pre-*Roe v. Wade* is that it was based on moral value judgments, the same criticism must be made of post-*Roe v. Wade* abortion regulation for it too is premised on moral judgments. The source of such a morality is not as important as recognizing law as a moral value choice, the consequences of implementing the moral value choice made, and the process by which the Court employed the morality. Secular value judgments are no less "moral" choices and no less "religiously" based, at least from the view that treats such beliefs warily because they seem rooted in a conviction that their possessor has "truth"—a danger depriving legal institutions and law-making of needed tolerance in the decision-making process. *Roe v. Wade* is not limited to the moral choice of circumscribing the appropriate limits of criminal sanctions, but is a withdrawal of the societal force of law to protect fetal rights (if any) in favor of leaving the control of fetal rights to the discretion of the pregnant woman—a moral value choice whichever result is realized.

If Frankel's comment, on the other hand, is that *Roe v. Wade* does at bottom present the Court with a moral choice and that the choice made reflects and should reflect the moral values of a majority of society, the ice indeed becomes thin. Subjecting the legally recognized core values of a society to popular vote, the sentiment of the time, or the unrestrained perceptions of a judge surely has been demonstrated to produce unacceptable consequences to a society seeking to maximize individualism, extirpate racism or genocide, and preserve a commitment to a generally defined and reasonably stable set of core moral values. The dilemma is not resolved by labeling some legal regulation as imposed solely to vindicate a moral premise. The result of *Roe v. Wade* can be viewed as imposing a "law" to vindicate the moral premise of a constitutional right of privacy in this sense, but understanding is not greatly furthered by positing the issue as one between enforcing morality versus enforcing non-morality. The difficulty is only deepened by intimating that the moral views of the majority be given primacy, at least where the central values of a society are in issue. Compromising those central values to satisfy short term or shifting majority choices in a pluralistic society can seriously undermine long-range cultural values and objectives, if not rupture the very glue of assent to a peaceful resolution of disputes through the legal process. The Frankel position on all this is unclear but one is left with the disturbing feeling that he may ultimately subscribe to a religious tenet of some secularists—majority rule even on our most fundamental value judgments about selfhood. Another possible inference is that the Court should sustain some value choices as fixed and immutable truths—a perfectly acceptable choice to govern individual moral beliefs and behavior but a danger to be avoided in maintaining a flexible and evolutionary legal system. Every legal decision "imposes" a moral viewpoint; but all moral choices are not and should not be subject to the intervention of the legal process. Professor Frankel does not deal with this deeper question—the

ultimate dilemma of when the legal process by action or non-action should impose moral choices.

Or, is Professor Frankel telling us the Court confronted the issues raised by abortion, but was unable to resolve them to a degree where the value choices made will "stick" for the foreseeable future? Frankel seems to be gently warning the supporters of the result in *Roe v. Wade* that they may practice and foster abortion, but not too much, lest the populace becomes over-emotional about the widespread destruction of things which look and behave like you and me—except less so during the early stages of pregnancy. If it is doubtful that the "moral claims" of anti-abortionists will be mollified by such "half measures" as limiting abortions to the early stages of pregnancy and in clear cases of necessity, it seems equally likely that the "moral claims" of pro-abortionists will not be mollified by such half measures. The former seem to have a fixed moral "truth" in the belief of a right to privacy, while the latter have a fixed moral "truth" in the personhood of a fetus at all stages of development. In either case, the potentially disruptive pressure on the legal system will not and perhaps should not be alleviated because the Court was up to much more than Frankel seems willing to admit and, the Court may not have "pulled it off."

It may be useful to recognize law as primarily a process by which the values of a pluralistic (not secular as Professor Frankel would have) society are implemented in the ongoing struggle to achieve order and preserve our cultural concepts of selfhood and individualism. The process is a highly sophisticated one involving discreet factors of rules, roles, language, a unique reasoning process, perceptions, concepts and the entire mix of values and cultural heritage each participant brings to the process. Those value judgments intrude upon each step of the process, while the role of the decision-maker, the force of the reasoning process, the impact of rules, of language, and of values (moral assumptions from wherever derived) act as constraints upon otherwise unbridled discretion.

It may also be useful to view the multiplicity of values underlying the decision-making process called law as shifting and changing premises rather than eternal verities or as moral (religiously based) and non-moral (secular) values. Without challenging the possibility that some values may be eternal verities regardless of their source—*regula* or secular—it may be helpful to view the particular values of a culture and its legal system as a shifting and changing force field of beliefs much in the sense of the metaphor Quine relies upon³ when expostulating the "coherence theory" of truth. Certain beliefs exist in the center of that force field relatively immune from change. Others are not so central; while still others exist in a peripheral area subject to continual challenge and flux. The Court, as trustee of this force field of beliefs, must reconcile, import and shift the relative position of such beliefs in the ongoing process of evolving the clash between the demands of order and individuality to develop—with an eye to the long term cultural values and objectives of our society—a fuller realization of the human condition within commonly accepted value assumptions of an organized society. Such a model does not necessarily make moral values relative; but treats moral values as knowledge

³ W. QUINE, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 20 (2d ed. rev. 1961), reprinted in W. BISHIN & C. STONE, *LAW, LANGUAGE, AND ETHICS* 326 (1972).

— not truths in the sense of eternal verities. Knowledge, in the sense of the relationship of ideas to consequences of moral values, is used by the legal system to adjudicate the ongoing struggle of order and selfhood without either ever becoming fixed stars—a luxury individuals and religious organizations may follow in making their choices but courts must temper with the principle of tolerance.

In *Roe v. Wade*, the Court was involved in the process of redefining the force field of values upon which is premised the ongoing clash of order and individualism in our society. The Court moved more closely to the center of the force field of fundamental beliefs a "right of privacy" and in the process defined a further aspect of a central belief—person—to exclude fetal personhood. The significance of the beliefs defined and balanced is indeed central since the values defined present diverse facets of the concept of selfness—life and being on the one side and "privacy" and self control of one's body on the other. Viewed from this perspective, the value choices presented in *Roe v. Wade* go to the very essence of the incidents of individualism by defining who or what is entitled to the rights of individualism. The Court elaborates the contents of those rights for those the Court recognizes as persons entitled to the protection of fundamental rights, giving those possessing the rights defined primacy over those not recognized as "persons."

Abortion presents a fundamental conflict of the selfhood of the fetus and that of the woman, analytically and morally complicated by the physical dependence of the former upon the latter during pregnancy. Euthanasia and suicide, which often raise similar value choices centering upon selfhood, do not have this complicating factor except where euthanasia is not self-destruction, but is done by the hand of another. The central belief of our cultural and legal system about the form and content of personhood in these kinds of cases often invokes regulation by the legal process since life and death are central between and among individuals in organized society and with the institutions society has designed to preserve order and protect the integrity of selfhood. When legal regulation by courts on such questions takes place, stripped of peripheral devices to avoid decision-making (*e.g.*, political question, mootness or deference to other rule-making institutions) or of devices to deflect decision-making from core values (*e.g.*, void for vagueness, statutory construction, or remanding for a decision on other issues), the clash of fundamental values becomes clear and the moral force of the court in resolving the clash is deeply dependent upon its mastery of the legal process and a sophisticated understanding of the moral choices to be made.

Roe v. Wade handled the issue of abortion directly—as a confrontation of fetal rights and the state's power to protect those rights on the one side, and of the pregnant woman's rights and the state's authority to control the exercise of her rights on the other. The prevalence of widespread and dangerous illegal abortions, the growing recognition of female equality, and the inability of legislative bodies to act in a uniform and responsible manner on the issue may well have forced the court to take the case stripped to the core values involved. The choice to decide the case on its core issues may or may not have been avoidable, but once made it was incumbent upon the Court to do so with the objectives of weighing the moral values involved in terms of long term societal consequences, minimizing

future dispute, preserving the moral authority of the court, and escaping rejection of its decision by widespread non-compliance or constitutional amendment.

History will judge whether the Court achieved these objectives. But at least three aspects of the Court's opinion are troubling and suggest the Court may not receive history's acclaim. First, the Court allowed itself to specify the meaning of "person" for fourteenth amendment purposes and excluded fetal life from the legal content of the concept. Specifying where personhood begins and ends for fourteenth amendment purposes across the continuum of life invites further specification of the concept—a concept better left vaguely defined—if at all possible. Paradoxically, in a society where concern for life—be it plants, animal, or the people of My Lai—seems to be growing, the legal process should avoid inflexibility and permit the evolution of such a concept. While acknowledging others have been unable to decide when life begins, the Court had no hesitancy in deciding when life does not begin for due process purposes. A more sensitive awareness of the issues involved or at least humility about deciding the negative should have led the Court to avoid the issue. At least the spectacle of the contrast of corporations having fourteenth amendment personhood and fetal life not, may have been escaped had the Court avoided defining "person" in *Roe v. Wade*.

Second, the Court made the touchstone of state interest in regulating abortion an artificial division of pregnancy into trimesters. The Court relied on viability and the trimester as defined by scientific (medical) knowledge to create a sliding scale of state regulation from no control in the first trimester through extensive regulation in the third trimester. Making the balancing process between fetal rights and the woman's rights dependent upon such flimsy facts as scientific knowledge (*qua* truths) predicates the weighing of vital moral values of our society on a slippery and elusive foundation. Viability is being pushed back earlier and earlier and may one day be recognized (medically) at the moment of conception. Perhaps the problem will be even further complication when the womb can be replaced by a test tube. In any event, it is safe to predict that predicating the adjudication of fundamental values on scientific facts rather than widely accepted or acceptable moral beliefs (from wherever derived) can only provoke further litigation or the dangerous inflexibility of a legal system which believes it has discovered eternal truth.⁴

A third difficulty with the Court's opinion is that the Court seemed to be moving the right of privacy closer to the center of the force field of the value system entrusted to its care. A more persuasive justification for primacy of such a right could have been made had the Court devoted as much effort to tracing the right's origins and history as was devoted to the history of abortion and fetal rights. While the specific content of the right was justifiably vague and ambiguous, the moral value of the right of privacy the Court was propounding and its potential outline may have been more persuasive with care and balance in tracing its source and importance in the process of decision. As it is, the decision fails to be per-

⁴ The failure to fully and efficiently implement the moral value choice and commitment of *Brown v. Board of Education*, 347 U.S. 483 (1954), was in no small part attributable to the misconception that the decision was based on scientific facts. See generally Kahn, *Jurisprudence*, 30 N.Y.U. L. Rev. 150 (1955).

suasive about privacy and sounds like a rose is a rose is a rose argument. Rational discussion about the decision might have also been promoted by a better effort to define the source, importance and meaning of the privacy defined. Had the Court done so, the subsequent debate might have been more rational and avoided such sloganeering as "outrageous nonsense", "bodily integrity", "right to life", "presumptuous nonsense", and other emotion ridden verbiage which does little to foster knowledge. In either case, the persuasive force of the Court's decision seems wanting, and the want appears to be the product of a lack of creative effort or an insensitivity to the magnitude of the moral value being propounded vis-a-vis the moral values it was being weighed against.

Although I believe cases like *Roe v. Wade* make obvious the function of legal decision making as the device for implementing long term moral assumptions of a society in striking the balance between order and individualism, Professor Frankel does not proceed from this assumption. The question is not whether the legal process may be used to impose moral values, but the circumstances and process by which the values perceived are imposed. An even deeper question is how and why certain values are perceived—the issue Frankel seems to struggle with, as does the Court implicitly without ever expressly admitting so. Implicitly Professor Frankel is describing the circumstance in which he believes the Court should favor the moral claims of pregnant women and deny fetal claims without resolving the deepest question of how the moral values perceived were arrived at.

Professor Frankel does not tell us whether these or other pitfalls in *Roe v. Wade*, with its highly exposed clash of central moral values, will resolve the societal conflicts which provoked the case. We are left with the impression of a vague sense of uneasiness in Frankel's mind about what the Court has wrought, and a kind of "cool it" advice to the proponents of abortion free of legal constraints. While I share Professor Frankel's sense of disquiet, I do so for different reasons. I do not think the Court grappled artistically with the issues. The opinion has a tone of brute conflict of value judgments rather than sophisticated analysis of a deeply troubling conflict of basic values. The clash presented cannot be reconciled by the anti-abortionists' one-sided view which ignores the trauma of unwanted pregnancy and widespread butchering by illegal abortions; nor can it be resolved by the one-sided view of the pro-abortionists' cry of bodily integrity immune from the reality of fetal life with all its human attributes. The difficulty is that a sophisticated legal process cannot afford to indulge in the assumption that the moral values involved are eternal truths.⁵ The proponents and opponents do so, and seem to expect the legal process of a pluralistic society to do so ignoring the force of contrary values contending for the status of central truths. Law-making should not establish non-breachable barriers to competing moral value choices but should weigh each as bits of knowledge in the never-ending search for truth to govern the human condition through the institutions of organized society. When the clash is fundamental, wisdom perhaps calls for an unclear result satisfying to no

⁵ To say this is not to deny the possibility of eternal, discoverable and immutable moral values. Nor is it necessary to reject the necessity for relatively immutable moral values at the center of a legal system's force field of beliefs. Moral relativism is not the issue when analyzing the appropriate function the judicial process must play in a pluralistic society.

one view of moral truth. The consequences are too important to yield to the drive for certainty and the eternal vindication of a belief in a "truth". Reflection by the concerned mind sensitive to the values and realities involved may well produce the kind of waffle Professor Frankel exhibits in his final paragraphs. Perhaps the conflict cannot be resolved and the best that may be hoped for is a societal effort to minimize those factors which place women in the dilemma of facing such terrible choices, fetal being in a relatively defenseless posture and judges in having to judge the choice made. This is not enough for those who deal in moral absolutes, of course, but it is perhaps the best one can hope for from a court seeking to implement an ever shifting but reasonably stable force field of moral values underlying the legal process. After all, charging mere mortals to be philosopher kings while pretending otherwise, inevitably leaves something to be desired.