Lawyers and the Abortion Debate: Presenting a Balanced View

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BOOK REVIEWS

LAWYERS AND THE ABORTION
DEBATE: PRESENTING A
BALANCED VIEW

THOMAS B. MCAFEE*

A LAWYER LOOKS AT ABORTION. By Lynn D. Wardle1 and Mary A. Wood.2

I. INTRODUCTION

I am pleased to see the publication of A Lawyer Looks at Abortion because I believe that legal scholars have much to contribute to the understanding of public questions. Lay readers too often receive distorted impressions of legal issues from the media, and those who understand the system best are frequently too busy writing for the legal community to contribute to the popular literature. Yet it is legal scholars who are best equipped to make the intricacies of law accessible to lay persons by defining and explaining legal terms and doctrines and by examining the reasoning found in relevant judicial decisions. Lawyers also are trained in the art of advocacy, and legal scholars can construct able and persuasive arguments on behalf of legal policies and positions. Finally, as trainers of law students in the mental gymnastics of advocacy, legal scholars are uniquely experienced to expose readers to the competing policies, doctrines, and philosophies that frequently make controversial public issues excruciatingly difficult legal questions.

I hold a frank bias that the last-mentioned function is the most important service a legal scholar might perform in helping to inform public debate on legal issues. Many writers are persuasive advocates. The need of most people to understand legal terms and doctrines, or the precise scope of the holdings of particular cases, is not nearly so pressing as their need to gain greater insight into precisely what is at stake in the resolution of legal issues. In my view, the greatest risk of popular books by legal scholars is that the service of providing readers new perspective on the strengths of

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competing values and policies may be sacrificed to that of providing persuasive argument on one side of the debate.

There is admittedly a balance to be struck here. Scholars are people with views, and they should not refrain from reaching conclusions in books for lay persons. A scholar also has a right to his belief that a particular controversial social issue presents rather straightforward legal issues. Striking the right balance is a matter for judgment, not dogma, and the judgment involves a mixture of fair scholarship and personal taste. Nevertheless, I believe that since the danger is especially acute that lay readers will take a legal expert's word as the final word on legal matters, legal scholars have a special obligation to at least acknowledge and fairly account for opposing views. Legal scholars ought best to understand the distinction between pure legal advocacy and balanced scholarship and therefore should see the need to avoid drafting one party's brief when the judges—in this case the public—may well never read the opponent's. The purpose of this review is to evaluate A Lawyer Looks at Abortion in the above terms and, where a defect (in my view) is found, to supply the needed corrective.

II. An Overview

A Lawyer Looks at Abortion, written by two Brigham Young University law professors who have written previously on the law of abortion, provides an essential reference work for a lay person interested in exploring the legal issues surrounding abortion. The book, supplemented by three appendices and extensive notes, will give the reader access to much of the recent literature and cases on abortion. The book ably summarizes the legal history of abortion, defines and describes its current practice and legal status, and analyzes the developments leading to the current controversy over the legalization of abortion by the Supreme Court in Roe v. Wade. In addition, it critically reviews the important legal developments in several areas—including public funding, parental and spousal participation in the abortion decision, informed consent, and the right to refuse to participate in abortions—that have been addressed by the courts since the Supreme Court's 1973 decision. Clearly, the book is the best overall summary of the present state of abortion law written for non-lawyers that I have seen.

The authors succeed in writing clearly and understandably, providing straightforward accounts of technical legal and medical terms and concepts. By and large, they do so without eliminating the complexity of the subject.


under discussion. The authors are perhaps at their best in objectively describing and analyzing the various possible options, including several proposed constitutional amendments, for reforming the abortion rule laid down in Roe (pp. 189-205).

Finally, the book persuasively states its main themes: that the Supreme Court’s abortion decision unjustifiably interrupted the political process by which the law of abortion was moving toward an acceptable state of social equilibrium, and that the decision was a usurpation of legislative authority. Most readers with strong moral scruples about abortion on demand, but with no real commitment to the legal and constitutional issues, will find much here to persuade them that there is a strong case for constitutional and legislative reform.

My quarrels are with the book’s presentation of these major themes. Although the book is persuasive, at critical points it fails to acknowledge and confront opposing viewpoints and policies. Legal principles are stated more absolutely than they need to be to justify the authors’ conclusions. The result is not only that the perplexing issues in the abortion controversy are oversimplified, but that readers also obtain no help in determining how far the principles relied on can be carried in the resolution of legal and constitutional issues outside the abortion context. The following sections will outline the basis for these concerns by referring to the authors’ treatment of the role societal consensus should play in resolving the abortion issue, the woman’s claim to a right to choose, and the role of the Supreme Court.

III. CONSENSUS

A Lawyer Looks at Abortion begins with the premise that “one of the most important functions of the law . . . is to reflect the moral order of society” (p. 207). Hence “a law that disregards what most members of society at the time consider to be compelling moral dilemmas is bad law” (p. 207). From this perspective, the abortion law reform movement of the 1960’s can be seen as reflecting a growing social consensus that the traditional prohibition of abortion in all cases except to save the life of the mother was too absolute (p. 206). Similarly, the “right to life” movement is an indication that the Supreme Court’s legalization of abortion on demand “is bad law because it takes a position that refuses to acknowledge in law the profound moral dilemmas that trouble most Americans” (p. 208).5 Based on this argument,

5. The authors frequently seem to equate public opinion with what is right. They respond to justifications of abortion for economic hardship or to avoid social stigma to married women by noting that “the moral or legal justifiability of these reasons for abortion has never been accepted by a significant majority of people in this country” (p. 39). A more absolute moral statement that follows is rendered somewhat ambiguous by this heavy reliance on societal opinion (p. 40). The authors also reject the woman’s rights argument because “most people” have trouble accepting that the unborn, “however they are characterized, are entitled to no legal
the authors are able to confront the claim of women to an individual right to choose abortion in two relatively short paragraphs (pp. 40-41).

The consensus argument is persuasively presented and, particularly as applied to the genuinely thorny moral and legal questions involved in abortion, is bound to have strong appeal. Moreover, few would doubt that there generally is a strong relationship between law and "the moral order of society." But the authors completely ignore the concerns that always compete with social consensus as the basis for law; they do not explain why social consensus should prevail in the abortion context.

Democracies exist to implement majority rules and to protect minority and individual rights. Many claim that the moral dilemmas involved in abortion should be resolved by the affected woman, not by majority rule, and that the right to choose should receive legal protection. Others claim that the fetus is a person who deserves virtually absolute protection against a woman's choice. Perhaps both claims should be rejected, but neither can be rejected on the sole ground that most people disagree. If they could, no individual rights would be protected against transient majorities, and we would always be governed by what "most members of society at the time consider" to be just (p. 207). The success of such a view would undermine the Bill of Rights just as much as the development of the abortion right of privacy.

While some would contend that the claim for natural or individual protection" (pp. 40-41). This tendency is nondiscriminatory: "As a matter of moral reasoning, a rape- or incest-abortion exception may be opposed on the ground that two 'wrongs' . . . do not make a right . . . . But most people are not mere rationally and are persuaded by the human/emotional factor." (P. 36).

6. It should be observed, however, that the question of when, if ever, "the moral order of society" should control individual conduct that does not immediately threaten the rights and interests of others is a recurrent one among legal thinkers. See generally P. DEVLIN, THE ENFORCEMENT OF MORALS (1965); H.L.A. HART, LAW, LIBERTY, AND MORALITY (1962). The issue of abortion, of course, raises the preliminary question whether another individual's—the fetus's—rights and interests are threatened.

7. Indeed, the authors fail to elaborate their consensus theory. Yet "consensus" is a slippery word that admits of ranges and degrees. A consensus might be "broad," "strong," or "weak." It might refer to "a majority" or to "virtually everyone." As the authors acknowledge, the law sometimes can be in a state of flux precisely because there is no strong consensus as to what it should be, as it was during the pre-Roe period of abortion law reform (p. 208). While a case can be made that there is a strong national consensus against abortion on demand (p. 277 n.1), most of the authors' formulations of the consensus argument, as quoted in text, appear to suggest that it is sufficient that "most members of [American] society oppose legalization" (pp. 207-08). Moreover, the authors at one point express the unqualified view that "public policy on fundamental, controversial questions affecting the whole of society (such as the legality of abortion) should be established by the people or the elected representatives of the people" (p. 206). I therefore assume that the authors believe majority rule should govern all such questions.
rights has no basis in a legal world dominated by a philosophy of legal positivism,\(^8\) I confess to being a great believer in the concept of individual rights. If I were quite persuaded that a woman ought to enjoy a right of privacy that includes the right to choose abortion, I would not be much interested in whether there was a consensus—weak or strong—against the proposition. The stronger the consensus, of course, the more I might be inclined to consider whether my view was erroneous, particularly if the question was a difficult one.

Interestingly, when the present authors actually confront the woman’s alleged right, they reject it primarily because of the corresponding rights and interests of the fetus as a human life. Are they prepared to accept as “good” a law that comports with an emerging consensus, perhaps ten or fifteen years from now, that favors abortion on demand? Would such a view comport with their expressed concern “about the growing abortion epidemic and the evolving ethic of apparent disregard for unwanted human life”? (P. 10).

The authors compare the decision in *Roe* to the “judicial disaster” of *Plessy v. Ferguson*\(^9\) because the Court, in “approving direct and invidious racial discrimination,” had deviated from “the liberal ideals of the American judicial tradition” (p. 163).\(^10\) But can there be any doubt that an 1896 Supreme Court decision embodying the principles of *Brown v. Board of Educa-

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8. Legal positivism is the philosophy of law that focuses attention on the actual practices and rules of a legal system. A central tenet is the insistence “on the separation of law as it is and law as it ought to be.” Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 595 (1958). For a critique of this approach, see Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958). There has been of late something of a resurgence of legal interest by lawyers and philosophers in the moral and political philosophy of rights. See generally R. Dworkin, *Taking Rights Seriously* (1977); R. Nozick, *Anarchy, State and Utopia* (1974); J. Rawls, *A Theory of Justice* (1971). I do not believe, however, that all rights that deserve recognition as political rights are ipso facto judicially enforceable constitutional rights.

9. 163 U.S. 537 (1896). The comparison to *Roe* is presumably that in each case the rights of the powerless (blacks and the unborn) were sacrificed to the interests of the politically advantaged. The authors also point out that “pro-life” advocates frequently compare *Roe* to *Dred Scott v. Sanford*, 60 U.S. (19 Haw.) 393 (1857), the case in which the Supreme Court held that black slaves were not “citizens.” Those who make such comparisons, however, will hardly be comforted by the authors’ proposed compromise approach.

10. The criticism rings hollow when coming from advocates of rule by consensus. The “liberal tradition” of the American judiciary has been most eloquently expressed in the creative role it has played in expanding the scope of individual rights against governmental intervention during the last century. As it did in *Plessy*, the Court has frequently felt a tension between that tradition and the need to acknowledge the countervailing force of opposing societal consensus. For a superb general treatment of the tensions between liberal principle and political reality, see A. Bickel, *The Least Dangerous Branch* (1962).
tion would have been an immense departure from that era's social consensus on segregation? It is fair to say that Brown itself moved beyond any consensus about racial segregation and discrimination that existed in 1954. On that occasion, at least, the Court spoke as the national conscience, becoming the catalyst for the strong social consensus against racial discrimination that has emerged during the last twenty-five years.

IV. THE RIGHT TO CHOOSE

When the authors do confront the "right to choose" argument, they fail to acknowledge the dilemma presented by the ambiguous moral and legal status of the fetus. Thus, the book vacillates between the apparent view that a fetus should be viewed as a human being in every sense and the implicit acknowledgement that the fetus appropriately receives less legal protection than such a view arguably should entail. At one point, the authors assert that the woman claiming a privacy right to decide the abortion question without state interference is in no stronger factual or moral position than a slaveowner insisting on a similar right (p. 40). The woman is evading the fact that the fetus is a human being and that the state is merely coming between her and the decision to terminate that other life.

To be sure, the extreme argument that what is at stake is only a woman's right to control her own body, which takes no account whatsoever of the fetus, ignores or begs the crucial questions. Perhaps the slaveowner comparison is only a response to this extreme form of the argument. But

11. 347 U.S. 483 (1954). Ironically, one of the scholarly critics of Roe cited by the authors equally decried the "judicial legislation" he saw in Brown. R. Berger, Government by Judiciary 117-34 (1977). Cf. Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955) (raising doubts whether original intent of equal protection clause was to outlaw state-enforced racial segregation). We quickly learn that one person's "liberal tradition" is another's "judicial legislation."

12. On one hand, arguments based on the woman's privacy and liberty interests are summarily rejected for failing to recognize the corresponding interest of another human being, the unborn child. On the other, the authors are not troubled by the historically recognized exception for abortions to save the life of the mother. They acknowledge the legitimacy of the law's acquiescence in more modern exceptions for abortions to preserve the physical health of the mother, to prevent the birth of a child with a severe birth defect, or in a case of rape or incest (pp. 33-39, 207). But even with the stress the authors place on the statistical insignificance of the truly hard cases (pp. 33, 36), and despite their insistence that the hard case exceptions should be narrowly construed to avoid the "slippery slope" down to abortion on demand (pp. 34-36, 39-41), they cannot escape the fact that what the hard cases teach us about our attitudes toward the abortion decision is what makes the legalization issue so difficult.

13. The authors at other times certainly appear less than absolute that the fetus should enjoy the full legal status of a person, noting that "most people have more than a little trouble accepting the argument that the unborn, however they are charac-
the authors fail to acknowledge that the right to privacy argument can be developed without ignoring the presence of the fetus and that the slaveowner comparison can be viewed as just as extreme and question-begging as the view that ignores the fetus altogether. The situations of the woman and the slaveowner can be distinguished in at least two ways, both of which are illustrated by the recognition that the law may choose to subordinate the life of the fetus to the mother's interest in her own life. The "hard case" exceptions merely deepen our intuition of these distinctions. The legal issue of abortion largely turns on how relevant we believe these distinctions are to our judgment of the woman's claim.

The mother's life exception shows that, no matter how much they may speak of the right to life, most people do not, in fact, view the life of the fetus in the same way they view the life of a child after birth. Consider the hypothetical of a prematurely born child resting in an incubator. Two days after birth, it is determined that the mother will probably die unless she receives a small blood transfusion. The only available matching blood is that of the infant, but use of that blood would cause the infant certain death. I think most people would reject the suggestion that we would be justified in sacrificing the newborn child's life to ensure that of the mother. Similarly, few would find the hypothetical of a proposed infanticide of a seriously deformed baby to involve even a hard case that presented a dilemma for legal policy. And while many are sympathetic with the legal exception allowing a rape victim to choose abortion, almost no one would countenance the killing of a child merely because it was born as the result of a rape. If consensus were to be our standard, it appears clear that we would not equate fetal life with full personhood.

14. This hypothetical is suggested in Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 308-09 (1973). I am aware that thoughtful moral arguments have been advanced in justification of abortions to save one life (the mother's) rather than losing two. It is also my understanding that it is precisely this sort of dilemma that confronts the physician who must decide whether to abort the fetus to save the mother. It is equally true, however, that statutory exceptions have never been limited to such situations and that most people would justify abortions analogous to Professor Wellington's hypothetical.

I also acknowledge that the proposed distinction is itself based on an appeal to consensus. It says far less to the absolutist on the human life issue; it speaks mainly to those who advocate greater, but not virtually absolute, protection of fetal life. In short, the person who rejects the privacy claim out of hand because of the presence of the fetus but who accepts the hard case exceptions has some explaining to do. Even for the absolutist, the fact that 80% of the population is opposed to that position (p. 277 n.1) suggests the difficulties inherent in writing that position into the criminal law (p. 39). The authors' consensus argument may reflect that they are simply realistic absolutists.
The willingness to make the mother's life pre-eminent and to sympathetically consider the plight of women involved in hard cases reflects not only the differences people intuitively perceive between the status of the fetus and the child as human life, but also the differences that exist between the relationship of mother and fetus and the relationship of two independently existing human beings, including slave and slaveowner. The fetus not only depends on the mother for existence but exists only by remaining part—an increasingly intrusive part—of the mother. Normally, the mother submits to this intrusion to give the gift of independent life to the fetus. Our willingness to subordinate fetal life to that of the mother reflects our recognition that, like any person giving life-preserving aid to another, she should have the right to withdraw that aid to protect her own life. Ultimately, it may be in part their unwillingness to ask any person to sacrifice so much for another that enables many people to believe that abortion is justified when the mother's life is only threatened—even if the fetus could be saved instead of the mother.15

Similarly, the willingness of many to justify abortion to save the mother from serious physical harm reflects an inability to insist that her sacrifice be so extreme. The hard case presented by the rape situation is precisely that we are reluctant to impose, as a matter of law, the discomfort, intrusion, and emotional trauma involved in a forced pregnancy. The serious issue raised by these examples is whether it is consistent with the tenor of all our laws to insist that a woman complete any unwanted pregnancy. The authors' reliance on societal consensus to resolve the ultimate issue blinds them to the continuing debate as to the nature and force of the fetus's claim on the mother.

It does not appear that there is at present any other situation in law in which we require one human being to submit to the kind of physical intrusion and risks involved in pregnancy to preserve the life of another. It has thus been persuasively argued that the woman desiring an abortion is similarly situated to a host of persons upon which the law imposes no duty to sacrifice themselves for others.16 A striking example of the application of the legal principle against compelling aid is presented by the recent case in which a court refused to compel an individual to undergo surgery so that bone marrow could be transplanted to save his dying cousin.17 The court

15. At least one pro-life philosopher has contended that a general exception for abortion to save the mother's life is unjustifiable. B. Brody, Abortion and the Sanctity of Human Life: A Philosophical View (1975). Some have contended that the legal justification for the life-preserving exception is the "necessity" defense recognized in civil law. Whatever the merits of this claim in classical situations, the necessity defense cannot explain our willingness to choose to save the mother rather than the fetus.


reached that result even though a human life was at stake, the operation involved little risk, the prospect of permanent injury was slight, and the individual was the only possible source of aid.

There is, to be sure, room for debate whether the no-aid principle should even be viewed as applicable to a woman considering abortion or whether we may fairly distinguish her case. It can be objected, for example, that the individual refusing surgery to save his cousin’s life is engaged in an omission, while the woman seeking abortion appears to be engaged in an act against the fetus. The law frequently distinguishes between acts and omissions. The response is that the claim of the fetus is not truly similar to that of the victim of an aggressive act, whose interests may be protected by simply removing the would-be actor from the scene. The fetus is making a positive and substantial claim on the woman, much like the cousin’s positive claim that the individual submit to bone marrow transplant surgery.18

On the other side, it can be contended that viewing the woman’s abortion decision as a species of refusing aid assumes that the fetus has no stronger claim than an individual in peril to the use of the body that sustains its life. Is it absolutely clear that this is only the woman’s body when a child has been conceived in it? It can be said that the woman and the unborn child “share in the use of this body, both by the same sort of title, viz., that this is the way they happened to come into being.”19 By stressing the natural development of the fetus, one may also contend that, unlike the drowning swimmer, the fetus “requests” not intervention against the natural forces that threaten its life but forbearance from artificially causing its death.20 However formulated, the crux of the issue is whether the focus is

18. Regan, Constitutional Amendments on Abortion, 101 LAW NOTES 30 (1982). Consider the hypothetical of two shipwrecked swimmers trying to reach shore, one of whom in losing strength deliriously grabs the other about the neck. This hypothetical is suggested by Regan, supra note 16, at 1612. For the second to disentangle himself would require what appears to be an act against the other swimmer. Nevertheless, it seems doubtful that the law would punish the second swimmer for disentangling himself, even if his chance of carrying both to shore was rather good and the result of the act was certain death for his companion. While the disentangling required affirmative action, what is really involved is a refusal to give aid, not an act of aggression. It has thus been argued that the “central issue is whether the woman may reject the fetus’s positive claim,” and that this issue is “much more basic than whether, because of the special features of the case, the woman’s refusal to aid must be accomplished by seemingly active methods.” Regan, supra, at 30.

19. Finnis, The Rights and Wrongs of Abortion, in THE PHILOSOPHY OF LAW 129, 149 (R. Dworkin ed. 1977). A closely related area of dispute is whether the presence or growth of the fetus should be viewed as invasive of the woman’s body, particularly where the presence of the fetus threatens the life or health of the mother, so as to raise the justification of self defense on behalf of the abortion decision. Compare Regan, supra note 16, at 1611-18, with B. BRODY, supra note 15, at 6-12.

20. Pro-life commentators believe that, apart from whether the fetus could initially claim a right to the use of the woman’s body, the “causal structure” of abor-
more properly placed on the woman’s autonomy or the uniqueness of the child’s claim.21

It is also true that the law has qualified the no-aid principle in circumstances in which persons have voluntarily undertaken to aid others. Since pregnancy most often results from a voluntary act, it can be contended that women should be viewed as having assumed the risk that they will be required to aid a fetus by completing the pregnancy.22 A great deal could be said about this issue, and in particular the extent to which a woman in our culture should be viewed as “choosing” pregnancy by engaging in sexual intercourse.23 Opponents of the right to choose, however, must in any case answer the claim that “in no other case do we impose burdens remotely approaching the burdens of pregnancy on such a slender basis” as “assumption of risk.”24

21. However one resolves the issue, it seems clear that the hardest questions posed for those who would analogize to the principle against requiring aid reflect the fact that abortion involves a decision to take action against a being growing according to its nature.

22. Regan, supra note 18, at 31. It should be noted that Professor Regan would recognize the state’s power to require a woman to choose abortion during the earlier stages of pregnancy. The claim to an abortion right later in the pregnancy would be met by an estoppel principle.

23. See, e.g., Regan, supra note 16, at 1593-95; Wellington, supra note 14, at 308.

24. Regan, supra note 18, at 31. A similar argument is that the relationship between woman and fetus—that of mother and child—justifies the burden we place on her in insisting that she complete the pregnancy. For comparison of the legal duty of parents to care for their children and the ways in which it is distinguishable from a legal duty to carry a fetus to term, see Regan, supra note 16, at 1597-98. The basic distinction is that the duties of parenthood are voluntarily assumed in the sense that parents forego the privilege of legally abandoning the child so that others may provide the needed care. The law generally recognizes a duty to continue aid where one’s assumption of the burden has likely induced others to forego providing the aid.
The foregoing is intended to suggest that any legislator must ask the crucial question whether the situation of a woman considering abortion is sufficiently distinguishable from the body of law recognizing the right of individuals to refuse to aid others to justify bringing the force of the criminal law to bear on her choice. In addition, the considerations outlined above are at least sufficient, in my view, to force us to consider not only whether we believe that a woman is morally justified in choosing to terminate an unwanted pregnancy, but whether it is fair to regulate her choice.

Finally, these arguments indicate that a woman’s privacy argument stands on much firmer ground than the slaveowner’s essentially nonsensical equivalent claim, for the issue may be viewed as whether we are willing, under all the circumstances, to compel a woman to subordinate her interest in controlling what happens to her body (her privacy interest) to the fetus’s interest in the use of that body. A reader of A Lawyer Looks at Abortion might never know that this significant and perplexing issue must be confronted.

V. THE SUPREME COURT

Perhaps the central thesis of A Lawyer Looks at Abortion is that the Supreme Court overstepped its bounds in striking down legislation prohibiting abortion. To establish this point, the authors rely on the “expert testimony” of judges and legal scholars who have criticized Roe and, in turn, present their own case against the decision (pp. 267 n.47, 223 nn.8-10). My concerns are that the lay reader is left ignorant of the expert opinions that can be produced on behalf of Roe and that even critics of the decision will not unanimously agree with the relatively broad arguments against the decision made by the authors. At stake are responsibly held, though differing, theories of the Supreme Court’s role in American life.

Leading constitutional scholars were among the critics of the analysis and conclusions in Roe. The decision unquestionably raises serious and troubling issues about the Supreme Court’s role as an arbiter of constitutional questions. But these authors write as though there is an overwhelming consensus that Roe was wrongly decided, asserting that “it would be a sad commentary on the state of the judiciary if . . . the Court was [not] willing to reconsider a ruling that had been so discredited” (p. 208). But

25. Many will point to the active method required to abort the fetus and to the fact that the woman’s voluntary act both creates the fetus’s claim and establishes a mother-child relationship, arguing that the abortion situation thus varies from any other conceivable case in which the denial of aid requires an act resulting in death. Whether combining of the elements confronted separately above warrants departure from the mainstream of law requiring such sacrifice of an actor’s claimed interests is a matter for judgment and careful consideration.

26. The authors cite to only a single authority defending the Roe decision (p. 268 n.58). Even then, they cite to a follow-up work by the same author repudiating the particular rationale under discussion without observing that the author nevertheless retained the view that Roe was correctly decided.
leading constitutional scholars have also defended the result in Roe, and there is a substantial body of professional writing, virtually none of which is acknowledged by the authors, on behalf of a constitutionally recognized right of privacy. These are large omissions from a work containing as much documentation as this one.

The authors' treatment of the reaction of judges is even more disturbing. They state: "In response to a survey by a political science professor in 1975 and 1976, 165 federal judges and 84 state court judges expressed their discomfort with the abortion decisions. Most judges in both samples labeled Roe massive 'judicial legislation'" (p. 163). The implication is that a rather strong consensus against Roe is shown among judges. The assertion is misleading. The numbers referred to pertain to the total number of judges surveyed and not, as the statement suggests, the number of judges who "expressed their discomfort with the abortion decisions." To be completely accurate, it should also be noted that, in fact, the responses of only 147 federal trial judges were deemed sufficiently valid to be used in writing the article. Moreover, the study stated that many, not most, of the judges criticized Roe. Finally, the precision with which the author of the study used "many" is suggested by his earlier statement that "a moderate number of state judges" and "about half as many . . . federal judges" had commented on the category of cases that included the abortion decision. It is impossible to tell whether the "many" used to describe Roe's critics is a term relative to the entire sample of judges or to the "moderate" number of judges who commented on the category to which the abortion decision belonged. The quoted article establishes little more than that some members of the federal judiciary disagreed with Roe.

The authors rest their thesis of judicial usurpation on the standard crit-

28. See, e.g., Karst, The Freedom of Intimate Association, 89 YALE L.J. 624 (1980). One of the authors has pointed out that over 140 articles and student pieces were published by legal journals during the three years subsequent to Roe. L. WARDLE, supra note 3, at xii n.7. With the help of a research assistant, I reviewed as many of these writings as were available. Of the 51 articles that clearly took a stand on the merits of the Court's approach in Roe, 30 were critical of the decision, while 21 wrote in defense. The balance consisted of 13 articles that were unavailable for one reason or another and a host of writings exploring the implications and ramifications of the decision.
29. The article cited is Caldeira, Judges Judge the Supreme Court, 61 JUDICATURE 208 (1977).
30. Id. at 211.
31. Id. at 212. That this was an editorial oversight, however, is confirmed by the accurate quotation of this source in Wardle, supra note 3, at 827.
32. Caldeira, supra note 29, at 212.
icism that Roe fashioned a specially protected constitutional right from values found outside the constitutional text (pp. 50-52, 157-64). The lay reader is thus told: "The word 'privacy' does not appear in the Constitution; neither does the word 'abortion.' Nothing in the text of the Constitution or in the history of its creation suggests that the states are powerless to prohibit or restrict abortion." (P. 159). The authors articulate the view that judicial review is properly restricted to the vindication of the values found in, or fairly derivable from, the text of the Constitution. But the reader is never informed that both sides of this larger debate over the legitimacy of judicial review that looks beyond constitutional text—the approach most recently described as "noninterpretivism"—have attracted extremely able advocates and adherents. Moreover, the authors also fail to provide even a hint as to the tensions between their criticism of Roe and their apparent support for a great deal of modern constitutional jurisprudence.

Following a pattern set by others, the authors use the shibboleth of "substantive due process" essentially as a substitute for analysis of why the Court's invocation of non-textual values was unacceptable. They are from the school of thought for which it is sufficient criticism of Roe to say that it bears an analytical relationship to the generally discredited line of cases in which the Supreme Court intervened against social and economic legislation on behalf of the values of laissez faire capitalism (pp. 50-51). This

33. This view has its fair share of articulate supporters. See, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971); Linde, Judges, Critics, and the Realist Tradition, 82 YALE L.J. 227 (1972). See generally R. BERGER, supra note 11.

34. Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703 (1975). See also J. ELY, DEMOCRACY AND DISTRUST (1980).

35. A number of Roe's critics have written as though the analytical framework for the decision was clearly distinguishable from a typical first amendment case, notwithstanding that the incorporation of first amendment values into the "liberty" protected by the fourteenth amendment is equally "substantive due process" and equally noninterpretivist. See, e.g., J. NOONAN, JR., A PRIVATE CHOICE 20-32 (1979); Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920 (1973); Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 SUP. CT. REV. 159. Cf. Grey, supra note 34, at 711-12.

In apparent recognition of the force of Professor Grey's observation on the noninterpretivist basis for incorporation of the Bill of Rights into the fourteenth amendment, Professor Ely has more recently taken to contending for incorporation of the Bill of Rights through the privileges and immunities clause, as long advocated by Justice Black. J. ELY, supra note 34, at 22-30. Indeed, Ely argues for a revised reading of The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), so that all nine justices are seen as accepting the protections of the Bill of Rights as among the privileges and immunities of all citizens. J. ELY, supra note 34, at 196 n.59. To date, the Supreme Court has not accepted either view.

36. To be sure, the authors briefly allude to criticisms of Roe's failures in justifying its result by means of a fair use of precedent or the articulation of a sufficiently general controlling principle (p. 164), but this supplemental criticism is window-
charge of “Lochnerizing” is deemed the end of the argument.

The reader never learns, however, that *Lochner* has taught varying lessons to its many critics, the largest number of whom are not true interpretivists. Some students of *Lochner*, for example, would object that the authors grant apparent approval to substantive due process in its only slightly less free-wheeling aspects. We sometimes forget that one of the *Lochner* era’s leading articles criticizing the importation of substantive rights into the “liberty” protected by the due process clause made primary reference to applying the first amendment to the states by that technique. If *Lochner* counsels against importing values from outside relevant text, the large body of first amendment jurisprudence must go, not merely *Roe*. The present authors fail to insist on taking that step (p. 51).

One of *Lochner*’s leading critics, Judge Learned Hand, became an opponent of the double standard of judicial review under which the Supreme Court continued to apply strict judicial scrutiny to state action impinging on Bill of Rights guarantees after abandoning rigorous scrutiny of economic and social legislation. This double standard had its origins not in the text dressing. The authors obviously believe that the Court’s resort to substantive due process is sufficient grounds for criticism.

37. The term comes from *Lochner v. New York*, 198 U.S. 45 (1895), the leading economic substantive due process case.

38. See, e.g., R. Berger, *supra* note 11, at 193-221 (rejecting substantive due process, root and branch).

39. See Warren, *The “New” Liberty under the 14th Amendment*, 39 HARV. L. REV. 431 (1926). Cf: Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (“Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.”).

40. L. Hand, *The Bill of Rights* 31-55 (1958). It is significant that the debate over the double standard rests on the implications of traditional concerns that the Court show appropriate deference to other branches and levels of government and not on a repudiation of its role in checking arbitrary or excessive governmental acts. Even the rational basis test, involving minimal judicial scrutiny, requires the Court to determine that the end sought is “legitimate” and that the legislative means bear a rational relationship to that end. Some commentators have questioned whether the Court has been unduly deferential toward economic and social legislation that appears to reflect a bowing to interest groups or a disfavoring of a particular economic group. See, e.g., Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

When the question is framed in terms of how deferential courts should be to legislative judgments, two points emerge. First, it becomes clear that we are striving to avoid judicial invasion of appropriate legislative policy-making, but that we are not precluding the possibility that courts will find legislation unconstitutional even though it does not violate a specific constitutional provision. Thus even Justice Rehnquist, the only present member of the court who uniformly opposes recognition of non-textual fundamental values through the due process clause, has stated
of the Constitution but in Justice Stone’s famous Carolene Products\textsuperscript{41} footnote. The authors refer approvingly to the Carolene Products doctrine (p. 162), but if the lesson of Lochner is that courts should defer to rational legislative judgments, we should question the entire body of case law—and it is a chunk—that rests implicitly on Justice Stone’s formulation. In any event, John Hart Ely, the most lucid and thorough-going proponent of a Carolene Products theory of judicial review, acknowledges that the theory cannot be sustained on the basis of a purely interpretivist model.\textsuperscript{42}

Finally, some proponents of noninterpretivism acknowledge Lochner’s deficiency only as a vision of what ought to rank fundamental in the American scheme of liberty.\textsuperscript{43} The same criticism has been advanced against Roe,\textsuperscript{44} but the authors focus almost exclusively on the institutional question of the Court’s role. One unfortunate consequence is that the reader never learns that the decision’s critics cut across the entire spectrum of views on the doctrine of substantive due process.\textsuperscript{45} The ultimate result is that a non-specialist reader of A Lawyer Looks at Abortion is guided to reject as illegitimate a judicial method that characterizes much of modern constitutional jurisprudence without being brought to understand that the acceptability of the abortion decisions does not necessarily turn on the legitimacy of the Court’s method.

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that the state probably could not meet the more deferential due process test if it prohibited abortions to preserve the mother’s life. Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting). Justice Rehnquist’s opinion shows that we are speaking of matters of degree and judgment, not a prohibition against basing constitutional judgments on non-textual values. Second, we are reminded that we are discussing only the amount of deference a court should grant the legislature, not the validity of the principle that as a nation we are constitutionally committed to enacting only laws designed to meet public needs while recognizing the just interests of all affected groups. In short, a corollary of the presumption of constitutionality is the duty of legislators to give independent consideration to claims that the proposed legislation goes beyond the proper bounds of legislation. See Brest, The Conscientious Legislator’s Guide to Constitutional Interpretation, 27 STAN. L. REV. 585 (1975). That duty is in tension with the authors’ reliance on consensus as the key to resolving such claims.

42. J. Ely, supra note 34.
43. See, e.g., L. Tribe, American Constitutional Law § 8-7 (1978).
44. See, e.g., A. Cox, The Role of the Supreme Court in American Government 113-14 (1976).
45. Critics cited in the book’s notes include a scholar who rejects any form of substantive due process (R. Berger, supra note 11); a scholar who would limit intensive judicial review to situations in which democracy is not working (J. Ely, supra note 34); and a scholar who believes that substantive due process may include non-textual values but that the Court failed to justify its result in Roe (A. Cox, supra note 44). See also Wellington, supra note 14.
PSYCHOLOGY AND TRIALS: SOME DISTURBING INSIGHTS

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The thesis of the book The Lawsuit Lottery³ is that personal injury litigation depends at least as much on artifice, and even deception, as on research and logic. In many instances, a favorable judgment depends not on the strength of a party’s case but on the skill with which the attorney practices the “tricks of the trade.”⁴ The trial lawyer’s work is a blend of substance and illusion, and it is often the latter that wins the case.

Some highly successful attorneys carefully stage testimony—not to bring out the truth, but simply to have maximum impact on the jury. Witnesses, as well as the parties themselves, are manipulated to bring out the partisan point of view. One successful attorney who represents defendant insurance companies goes to great lengths to confuse the jury as to the true identity of the defendant. During a trial involving accidental death at a construction site, he sat with the nominal defendant in the case, the construction supervisor, whom he had dress in work clothes. The plan was to make the jury think that it was the supervisor, a sympathetic figure, who would suffer from an adverse judgment, not the wealthy and powerful insurance company with whose funds the jury would certainly be more liberal.⁵ During the Patty Hearst trial, defense lawyer F. Lee Bailey had his client wear oversized clothes to minimize her glamor and give her a pathetic appearance.⁶ One prominent plaintiffs’ lawyer does not allow his client to appear in court except on the day he testifies. As he explains,

A jury should not be allowed to become too familiar with a client—sitting in the same room with him for several weeks conditions the jury to live with the plaintiff’s infirmities and to accept

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4. Id. at 29-83.
5. Id. at 31.
6. Id. at 40.
them. I don’t want my client to be a friend of the jury, but an abstraction.\footnote{Id. at 32.}

*The Psychology of the Courtroom*, a series of essays by various social scientists, edited by psychologists Norbert L. Kerr and Robert M. Bray, is a critical review of current research bearing on the psychology of trials. Psychology is a crucial discipline because many of the most fundamental assumptions underlying courtroom trials are psychological (p. 2). Decision-making powers are entrusted to juries; it is assumed that they are able to understand their task, overcome their prejudices, judge witness credibility, and collectively apply the law to reach an equitable verdict. It is also commonly assumed that the adversarial system has certain advantages over other systems in that it motivates parties to present all relevant evidence and enhances the fairness of trials.

Many of the studies presented in *The Psychology of the Courtroom*, however, suggest that these and other assumptions behind so much trial practice fall far short of the truth. Indeed, psychological factors often seem to preclude a fair, rational trial outcome. Many of the studies in the volume seem to corroborate the thesis of *The Lawsuit Lottery*: personal injury litigation is chaotic and often dependent on factors irrelevant to the real issues of the case.

The findings in the book may not be uniformly convincing because much of the research consists of simulation studies, such as trials with students as mock jurors, rather than studies of an actual courtroom environment. While simulation studies are often justly criticized, they can, in the editors’ eyes, scarcely be uniformly dismissed.\footnote{See Monahan & Loftus, *The Psychology of Law*, 33 ANN. REV. PSYCHOLOGY 441-75 (1982). Compare the response of Kerr and Bray to criticism of simulation methodology (pp. 304-08).} It is also true that many of the studies in *The Psychology of the Courtroom* concern criminal trials, not personal injury litigation. Many of the issues studied, however, are substantially the same in both kinds of trials: the adversary system, the effectiveness of juries, the type of observation called for, the reliability of witnesses, and the psychology of judging. Both criminal and personal injury litigation are particularly characterized by emotional appeals.\footnote{See J. O’Connell, *Ending Insult to Injury: No-Fault Insurance for Products and Services* 6-7 (1975).} Criminal defendants and personal injury plaintiffs are often lonely, pathetic figures. They often face large impersonal institutions—the state, in the case of criminal defendants, and large manufacturers or insurance companies, in the case of personal injury plaintiffs. Another important similarity is that both kinds of trial result from sudden, unexpected, and often violent acts or occurrences.

On the most basic level, some characteristics of the adversary system itself may preclude a rational trial outcome, as suggested in the essay on the
psychology of procedure by psychologist E. Allen Lind\textsuperscript{10} (p. 13). The adversary system often introduces information biases. One simulation study suggests that an attorney who represents the party having the weaker case is likely to expend extra effort in preparation. When the case is presented in court, it will appear more balanced than it really is (pp. 21-22). Another simulation study suggests that testimony of witnesses who are first interviewed by a partisan attorney tends to be biased in favor of the party that the attorney represents. Testimony of witnesses interviewed by an impartial attorney, however, is comparatively objective (p. 22).

In the adversary model, the two parties must take turns presenting evidence. Studies suggest that hearing first one side of a story, then the other, gives rise to additional bias. Most studies indicate a "recency effect"—facts presented more recently have more influence on subjects' conclusions about a case than facts presented earlier. The party presenting its evidence last thus seems to have an unfair advantage (p. 25). True, the recency effect is limited, but in a way that presents a different bias. When subjects are asked to form opinions about other individuals, the party presenting evidence first has the most influence. Therefore, in trials where the character of a party or the credibility of a witness is at issue, the jury will apparently tend to be biased in favor of the view presented to them first (pp. 25-26).

In their essay on jury selection, Valerie P. Hans\textsuperscript{11} and Niel Vidmar\textsuperscript{12} show how difficult it is to assemble an impartial jury (p. 39). Jury panels from which jurors are selected are supposed to be representative cross-sections of their communities. There is some evidence that representative juries might be better fact-finders than homogeneous juries, although the research is not conclusive (pp. 42-43). Another argument in favor of representative juries is better supported: they help make the verdict and the legal process in general acceptable to all segments of the community. But, given the rationales for representative panels, the procedures for assembling panels fall far short of achieving them. Most communities use voter registration lists as their primary source of panel members, but these lists usually underrepresent several groups, especially young people, racial minorities, and the poor (p. 45). There are also indications that people may even fail to register to vote solely because they do not want their names to be used for jury panel selection.\textsuperscript{13}

Voir dire selection may not much improve the chances of selecting an impartial jury. The assumption that juror bias can be uncovered during cursory questioning is based on what is asserted to be an outdated model of psychology that does not recognize the existence of unconscious bias (p. 55).

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\textsuperscript{13} J. O'Connell, supra note 3, at 85.
The court may be unable to discover bias if the juror himself is unaware of it. According to one study, "Voir dire was grossly ineffective not only in weeding out 'unfavorable' jurors, but even in eliciting the data which would have shown particular jurors as very likely to prove 'unfavorable.'" (P.66). This distortion is attributed in part to the observed lawyers' practice of spending only twenty percent of their voir dire time asking questions designed to identify biased jurors and eighty percent on "indoctrination," i.e., "commenting on points of law, preparing the jurors for trial, forewarning jurors about negative pieces of evidence, and ingratiating themselves with jurors" (p. 66).\textsuperscript{14} Another study suggested that lawyers' use of peremptory challenges to try to exclude unfavorable jurors had no impact on the verdict in nine or ten of the twelve trials studied (p. 67).\textsuperscript{15} Further, the study found great differences among attorneys in the effectiveness with which they exercised peremptory challenges to create favorable juries (pp. 67-68).

\begin{footnotesize}
\footnote{14. The authors summarize the results of a study by Dale Broeder: From posttrial interviews with jurors, Broeder concluded that with a few notable exceptions, these indoctrinational strategies were generally unsuccessful. But it should be stressed that Broeder's conclusions were based on rather unsystematic observation of the voir dire proceedings and retrospective posttrial interviews; thus, the conclusions have obvious limitations.}
\footnote{15. The authors describe the results of a study on the effectiveness of the juror challenge system: It is usually impossible to know how effective lawyers' challenges are, since prospective jurors who are challenged never get to vote in the jury room. In their ingenious experiment, however, Zeisel and Diamond arranged for the challenged jurors in twelve criminal cases to serve as shadow jurors who remained in court throughout the trial and voted at the trial's conclusion. The information about the challenged jurors' votes, in conjunction with the knowledge obtained by posttrial interviews of the real jury's valid vote, allowed Zeisel and Diamond to "reconstruct" what the vote of the jury would have been without peremptory challenges. Comparing the reconstructed jury's vote with the real jury's vote allowed them to estimate the lawyers' effectiveness in using peremptory challenges to create more favorable juries. Zeisel and Diamond reported that in 7 of the 12 trials, the effect of the lawyers' challenges were minimal; the verdict of the reconstructed jury and the real jury were likely to have been identical. In the remaining five cases, however, the difference in first ballot votes of the two juries were more substantial, and in two or three of these cases might well have resulted in a different verdict. In all five cases the real jury was less likely to convict the accused than was the reconstructed jury. [P. 67]}\end{footnotesize}
Since the early 1950's, some attorneys have been experimenting with "scientific" jury selection (p. 68). For example, a poll may be conducted in the community where the trial is to be held. Persons are asked demographic questions, such as age, occupation, education, and political affiliation. They are then asked about their attitudes toward the case at hand. Demographic factors that seem linked to favorable attitudes toward the case are used in constructing a model of the most favorable juror, and attorneys then try to find jurors to match the model during voir dire (p. 70). Conversely, a model "bad" juror—one to be avoided—is also constructed. Defense attorneys have generally been quite successful in the publicized criminal cases in which scientific jury selection has been used, like the Joan Little trial (p. 69), but most research indicates that success in these cases should not be attributed to scientific jury selection. Most of the trials at issue involved charges of criminal conspiracy, which are difficult to prove under most conditions, and the prosecution evidence was generally quite weak (pp. 72-73). In addition, Hans and Vidmar suggest that a lawyer who goes so far as to use scientific selection methods probably works exceptionally hard on all aspects of the case and the lawyer's diligence alone might be responsible for the trial outcome (p. 73).

In another essay, psychologists Francis C. Dane and Lawrence S. Wrightsman bring together research that indicates that juries may be influenced improperly by extralegal characteristics of the defendant and the victim (p. 83). Although more research is needed, the authors point to evidence that the gender of the criminal defendant may have an inappropriate influence. Gender may, for example, interact with the type of crime and the defendant's general attractiveness. In a study of a simulated burglary charge, women were handed shorter sentences than men when both were portrayed as attractive, while women and men received equivalent sentences when both were portrayed as unattractive (p. 90). It is clear that attractive criminal defendants tend to be more leniently treated than unattractive defendants (pp. 101-04), unless attractiveness could have facilitated the crime, as in the case of fraud (p. 103). Jurors are less likely to convict defendants of the same race as themselves and more likely to convict defendants not of the same race (pp. 104-07). To some extent, jurors who perceive themselves as having attitudes similar to those of the criminal defendant are likely to treat him relatively leniently (pp. 107-08).

Another factor that Dane and Wrightsman believe calls for more study is the socioeconomic status of the criminal defendant. Some research suggests that criminal defendants of higher socioeconomic status are viewed by jurors as more trustworthy and less deserving of blame than those of lower

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18. The authors cite one study that examined civil cases. It concluded that "attractive litigants won their cases more often than less attractive litigants, but only in cases with exclusively male juries" (p. 101).
status (p. 92). Another simulation study manipulated perceived socioeconomic status of the defendant; jurors saw defendants they perceived to be of high socioeconomic status as less guilty (p. 93).

Findings concerning what Dane and Wrightsman term the criminal defendant's "moral character" clearly indicate its influence. For example, the jury is responsive to its own extralegal perception of the criminal defendant's responsibility. One simulation study indicates that jurors are more likely to convict when they know that the defendant has been found guilty of other offenses in the past (p. 96). A jury is less likely to convict if the defendant had an accomplice or if he did not plan the crime himself (pp. 96-97).

On the subject of eyewitness testimony, Steven Penrod, Elizabeth F. Loftus, and John Winkler examine testimony in light of the four stages of information processing (p. 119). They conclude that "eyewitness reliability is a problem that is systematic in nature" (p. 122).

The first stage of information processing is perception. It is well established that distortions in perceptual judgments are common. One early study indicated that subjects tend to overestimate distance and duration of events but tend to underestimate the size of filled spaces, such as furnished rooms (pp. 122-23). Such distortions can be very significant. In one study, subjects overestimated a criminal defendant's height by an average of eight inches; in another, subjects overestimated the length of a film by a factor of three (p. 123). Yet accurate perception by witnesses of distance and time can obviously be crucial to accident litigation. In a trial involving an automobile accident, for example, witnesses are often asked the crucial question whether a driver was speeding. But to judge speed, the witness would under most circumstances have to judge the distance traveled by the car during a fixed period of time—a judgment apparently very difficult to make accurately (p. 123).

The second stage of information processing is encoding. A number of factors affect the accuracy with which information enters the memory system or is "encoded." In a classic experiment by Ebbinghaus, subjects' memory of nonsense syllables, as one might expect, improved in proportion to the number of times they were exposed to them (p. 124). Another unsurprising factor is the length of time the witness is exposed to the event; statistics have confirmed that memory improves in proportion to the length of time that subjects are exposed to voices and various kinds of pictures, including pictures of faces (pp. 124-25). The kind of event to be recalled also influences the accuracy of memory. In one early study, memory for mun-

19. The results of archival studies (actual trials as opposed to simulated studies), however, indicate no relationship between criminal defendants' socioeconomic status and either conviction rate or length of sentence (p. 92).
20. Assistant Professor of Psychology, University of Wisconsin.
21. Professor of Psychology, University of Washington.
22. Associate Social Scientist, Rand Corporation, Santa Monica, California.
dane facts, like details about a building where the subjects met or weather conditions a week earlier, was shown to be quite inaccurate (p. 126). Conversely, another study indicated that unusual scenes were more likely to be remembered than ordinary ones. Research also indicates that stationary objects are less likely to be remembered than moving ones (p. 126). To some degree, memory improves as an event becomes more stressful, but memory is undermined as the event becomes excessively stressful. One study indicates, for example, that completeness of crime victims’ descriptions of their assailants is inversely proportional to the level of violence involved in the crime and the extent to which the victim was injured (p. 127).

In addition to event characteristics, a number of witness characteristics have also been proved to influence the accuracy with which information is processed. One powerful influence is the witness’s expectation, which in criminal cases may be shaped by stereotypes of “criminal” appearance and personality characteristics, and in all cases by cultural and personal expectation. A classic study in this area showed a marked inability among subjects to identify such unexpected objects as a red ace of spades (p. 130). Information that must be “deeply processed” is more likely to be remembered by the witness than information requiring only shallow processing. For example, subjects called upon to judge likeability and honesty of persons based on their photographs are more likely to be able to identify them later than subjects who had been called upon to determine the gender of the persons in the photographs (p. 139). Memory can also be improved if the event is “rehearsed” after its occurrence—as, for example, when the witness reports it promptly to the police (pp. 133-34).

Many of the factors affecting encoding of information are clearly relevant to accident litigation. Generally, accidents only occur once and occur quickly, so the witness is only exposed to them for a very short length of time. It is true that accidents are by definition extraordinary, but the surroundings or circumstances of the accident may be quite mundane, especially immediately prior to the accident. In an auto accident, for example, the actual collision might be remembered accurately, but the mundane yet critical details—such as whether a light was red or green—might be forgotten. An accident would probably be considered stressful for any witness,

23. For example, Keeton and O’Connell have noted:

[T]hough unplanned, a traffic accident of any severity is nevertheless attention-catching, and . . . once attention has been focused, details that otherwise would have been forgotten are fixed in the memory. But the point is not that traffic accidents are too commonplace and unplanned to attract attention. Rather, the point concerns the contrast between the distinctive, attention-catching results of smashed cars and people, on the one hand, and the commonplace details of the prelude to the collision, on the other. Indeed, the attention-catching nature of the resulting damage to person and property may inhibit rather than facilitate one’s memory of the preceding events. Neither his perception or his memory is likely to be focused on the kinds of details that are asked for in the trial of a traffic
but the character and circumstances of witnesses vary so widely that an accident that would be only moderately stressful to one witness would be excessively stressful to another. A particularly insensitive witness's memory might be aided by the stressfulness of the accident while another's might be impaired, and a jury might be unable to tell the difference. Finally, given the brief length of time a witness is likely to be exposed to an accident, there is probably not enough time for the "deep" processing that supposedly enhances accuracy.

The third stage of information processing is remembering, or storage of information, and it is as vulnerable as the first two. It has long been known that witness accuracy declines with the passage of time (pp. 135-36). In addition, "interference" can reduce witness accuracy. For example, asking a witness misleading questions about an event before he testifies may undermine his memory of the event. In one study, subjects were shown a videotape of an auto accident and were immediately asked how fast the car was traveling "when it passed the barn." One week later, a significant minority of subjects reported that they saw a barn in the film—though, in fact, there was no barn (pp. 136-37). The factors affecting memory in this third stage are also highly relevant to accident cases. There is often a wait of years between the time an accident is witnessed and the time of trial when events must be recalled, given the ponderously slow pace of litigation.

The fourth stage of information processing is recall, or retrieval of information. The way questions are asked may well affect witness accuracy at this stage. For example, estimates of the speed at which two automobiles were traveling when they crashed into each other varied significantly depending on whether the terms "collided," "bumped," "hit," or "contacted" appeared in the question (p. 139). The form the questions take can also influence recall accuracy. In one study, responses to definite questions ("Did you see the dog?") proved less accurate than the responses to indefinite questions ("Did you see a dog?") (p. 138). In another study, subjects viewed films of an automobile accident and then were asked questions that called either for free narrative ("What happened?") or controlled narrative

accident case. It may be suggested, in answer, that this argument applies to all negligence cases. But rarely in other areas of daily experience are ordinary human beings in command of such highly dangerous machinery. . . . [T]he danger stems from the fact that both the masses and the speeds of cars exceed those of any other machines with which we work. Perhaps the constant exposure to this danger dulls the sense of peril and the significance of the details of its creation. Or perhaps the mind intuitively finds other facets of these traffic incidents more significant and memorable than those details on which claims adjusters and lawyers focus in preparing and trying negligence cases. In any event, it is rare in human experience that so much is made to depend upon details that no one involved can clearly recall.

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(“Describe X”). Free narratives were found to be more accurate but less complete than controlled narratives (pp. 138-39). Like the third stage, then, the fourth is vulnerable to manipulation by persons who know how to ask misleading questions.

The problem of eyewitness unreliability is compounded by the undue weight that jurors tend to give eyewitness testimony. In one study, a mock armed robbery incident was described. Of subjects who were exposed only to circumstantial evidence, eighteen percent convicted. But of subjects who heard an eyewitness account in addition to the circumstantial evidence, seventy-two percent convicted. A third group of subjects was given discredited eyewitness testimony and circumstantial evidence. They were told that the eyewitness had very poor vision and was not wearing glasses at the time of the incident. Still, the third group convicted at a rate only slightly lower than the second—sixty-eight percent (p. 54-55).

In an essay on witness credibility (p. 169), communication professors Gerald R. Miller24 and Judee K. Burgoon25 cite studies that demonstrate what jurors understand to be clues that indicate lying. These include “less eye contact, more tension and nervousness, slower responses to questions, excessive gesturing and swallowing, increased nonfluencies, greater ‘stiffness,’ unnatural smiles or ‘tight’ faces, squinting and adaptor behaviours such as scratching the head” (p. 180).26 But in fact, juror accuracy in detecting lies is quite low. The authors cite seven studies dealing with subjects’ accuracy in detecting deception (p. 184). In five of the studies, subjects were accurate on average only about half the time. Even in the study showing the highest rate of accuracy, subjects were incorrect about one-third of the time. From these studies, the authors conclude:

Observers are not very successful in detecting deception perpetrated by relative strangers . . . . Observers in most . . . . studies would probably have done as well had they flipped a coin to determine if the communicator/deceivers were lying . . . . [The research appears to] paint a discouraging picture concerning jurors’ ability to make accurate assessments [of lying]. [P. 186]

Moreover, research indicates that subjects tend to feel quite confident about their assessments of deception and truthfulness even when they are wrong. “Translated to the courtroom environment, this finding raises the specter of jurors evaluating a witness’s veracity inaccurately while remaining very certain of the correctness of their evaluations.” (P. 186). One explanation for the low level of accuracy in detecting deception is that the behavior that the subjects associate with lying, supposedly the product of the desire to deceive, can also arise from the stress that anxious or involved witnesses would naturally feel in a courtroom (p. 186).

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26. The authors do not define “nonfluency.” We take the term to mean the use of inaccurate, inappropriate language.
In his essay on the individual juror, psychologist Martin F. Kaplan\textsuperscript{27} examines the impact of bias on a juror's decisions (p. 197). Some studies indicate that biases themselves are systematically related to general personality traits. For example, favorable attitudes toward the death penalty appear linked to "dispositions toward stringency," i.e., a tendency to be conservative compared to liberal, or authoritarian compared to egalitarian. This results in attitudes more stringent toward punishment of criminals and toward law enforcement. Jurors with favorable attitudes toward the death penalty are more likely to convict (p. 202). Bias has also been linked to factors more transient than general personality. In one study, mock jurors subjected to a number of annoyances by the judge, "including unnecessary and irrelevant remarks and conferences and obnoxious lectures about courtroom decorum and rules," were more likely to rate the defendant guilty (pp. 203-04). Another observation suggests that jurors reporting a personal dislike for the defense attorney may be more likely to convict (p. 203).

Turning to other sources of juror bias, Kaplan examines criminal defendants' characteristics, pretrial publicity, and inadmissible evidence. From the studies in these areas it may be tentatively inferred that these factors—at least pretrial publicity and inadmissible evidence—bias jurors in inverse proportion to the reliability and validity of admissible evidence. In the absence of strong admissible evidence, then, jurors may well be influenced by bias stemming from various extralegal sources such as pretrial publicity and inadmissible evidence (pp. 206-11).

Kaplan also outlines an important paradox inherent in the prevailing view of the jury's role, i.e., that the jury is not necessarily expected to follow the strict letter of the law but may use discretion in applying the standards of the community.\textsuperscript{28} This view of jurors, according to the author, "departs from the notion that they are to come to the trial with a 'blank mind' and an impartial attitude" (p. 210). Legal thinking, writes Kaplan, has yet to resolve the question whether this inroad into the policy of jury impartiality is desirable (p. 210).

Jury deliberations are examined in an essay by Gerald Stasser,\textsuperscript{29} Norbert L. Kerr,\textsuperscript{30} and Robert M. Bray\textsuperscript{31} (p. 221). Jury deliberations may be subject to a number of influences that can interfere with rational disposition of a case. Selection of the jury foreman is often influenced by irrelevant factors such as sex and position at the jury table, as well as by occupational status and prior experience as a juror (pp. 223-24). Although the authors draw no conclusions about the influence of the foreman on the jury's decision, research clearly shows that foremen tend to talk more than other jurors (p. 226), which may or may not give them an added degree of influence.

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\textsuperscript{28} See also J. O'Connell, \textit{supra} note 3, at 88.
\textsuperscript{29} Associate Professor of Psychology, Miami University (Ohio).
\textsuperscript{30} Associate Professor of Psychology, Michigan State University.
\textsuperscript{31} Research Psychologist, Research Triangle Institute, North Carolina.
Further, there are marked differences in the level of participation among individual jurors (p. 225). Those who talk the most, and who therefore perhaps wield the most influence, tend to be male, well-educated, of relatively high occupational status, and to sit at the ends of the jury table (pp. 226-27). Whether any of the factors linked to higher levels of participation are relevant to rational disposition of the case has not been established (p. 227).

While more research is needed, it is possible that other, perhaps irrational, factors influence not only the organization and deliberation of the jury but also the outcome of the trial. If, at the beginning of deliberations, the majority believes a criminal defendant is not guilty, it is highly likely that the majority will prevail. The majority is less likely to have its way if it believes that the criminal defendant is guilty (pp. 236-37). This bias, of course, is not necessarily irrational. On the other hand, the "information exchange process . . . [may be] merely a front disguising the operation of more subtle normative processes" (p. 252). "Thus, a juror favoring [a] guilty [verdict] who encounters several other jury members who favor acquittal might experience a discomforting threat to his or her self-perception of fairmindedness." (P. 250). The authors believe that both informational and normative processes are at work in deliberations (p. 250). To the extent that normative processes are at work, outcomes are still at least partially determined by arguably irrational factors.

An essay on the psychology of judging by Anthony Champagne and Stuart S. Nagel (p. 257) suggests that judges often are influenced by factors other than the issues directly involved in the cases before them. Judges’ group affiliations—i.e., religious, ethnic, and political—play a role in their selection as judges (p. 260). Political party affiliation is particularly telling in predicting how a judge will decide cases (p. 264). Democratic judges tend to decide cases more liberally than Republican judges. To a lesser extent, other variables such as organizational affiliation, class background, religion, and tenure have also been correlated with liberal voting tendencies (pp. 264-65). One study examined voting patterns of federal judges in draft evasion cases and found that judges who had draft-age sons tended to be

32. The authors note that studies are inconclusive as to whether the foreman's tendency to talk more than other jurors makes him more influential (p. 233). But for a study equating more talk by a juror with more influence, see J. O'Connell, supra note 3, at 101.

33. Associate Professor of Political Science, University of Texas (Dallas).

34. Professor of Political Science, University of Illinois.

35. See also J. O'Connell, supra note 3, at 108-09.

36. By "liberal," the authors seem to mean, among other things, bias in favor of the defendant in a criminal case and bias in favor of the plaintiff in a civil case. See Goldman, Voting Behavior on the United States Court of Appeals Revisited, 69 AM. POL. SCI. REV. 491, 492 (1975).
more severe in sentencing draft evaders than those who did not (p. 265). Another study, examining voting of Southern federal district judges in race relations cases after Brown, found that the judges most likely to be pro-integration were Republican, more cosmopolitan than segregationist judges, and far less likely to have held state political offices (pp. 265-66).

Another influence is judicial attitude, which is seen as being formed by judicial background. One early study noted marked disparities in the rate at which New York City magistrates dismissed cases before them. The overall conviction rate for public intoxication cases, for example, was ninety-seven percent. Yet one judge dismissed seventy-nine percent of those cases. One judge dismissed almost no disorderly conduct cases while another dismissed eighteen percent and another, fifty-four percent (p. 265). The researcher concluded that these disparities could be explained only by differences in attitudes among judges, noting that “the process of judicial decision is determined to a considerable extent by the judges' views of fair play, public policy, and their general consensus as to what is right and just.” (P. 268).

Additional research suggests the importance of courtroom interaction between judges and attorneys and judges and juries. One study found that the most important influence on the setting of bail is the prosecutor's recommendation. Recommendations of defense attorneys were less influential but still important (p. 270). Champagne and Nagel infer from this study how much judges are dependent on attorneys. Regarding interaction between judges and juries, the authors note that “it is well known to trial attorneys” that “juries have a mind of their own” (p. 270). One study suggests that juries readily ignore judicial instructions (p. 270).

If much of The Psychology of the Courtroom confirms what is known intuitively, the book is nonetheless a comprehensive yet succinct review of the efforts that have been made to study courtroom psychology scientifically. Sustained research in the field began only relatively recently, in the 1950's, and many aspects of the psychology of the judicial process remain to be investigated. But the picture that emerges from The Psychology of the Courtroom is unmistakable: litigation is influenced and often controlled by factors that are irrelevant to a rational, fair trial outcome. Much depends on which party speaks first and which speaks last. Methods for excluding biased jurors are often ineffective. Characteristics of the defendant that have nothing to do with guilt or liability, such as gender, socioeconomic status, attractiveness, and race often are influential. Eyewitness testimony is sub-

37. In addition to the present work, several other books have recently been published on the psychology of the adjudicative process. Among them are C. Bartol, Psychology and American Law (1982); M. Greenberg & R. Ruback, Social Psychology of the Criminal Justice System (1982); J. Loewen, Social Science in the Courtroom (1982); M. Saks & R. Hastie, Social Psychology in Court (1978); New Directions in Psychological Research (P. Lipsitt & B. Sales ed. 1982); The Trial Process (B. Sales ed. 1981).
ject to numerous influences that render it highly inaccurate. It is difficult for jurors to accurately assess witness credibility. Irrational factors appear to influence jury organization, deliberation, and possible trial outcome. Judges may be influenced by their group affiliations, such as political party and religion, and their general attitudes.

The picture that emerges, then, is clearly corroborative of the thesis of *The Lawsuit Lottery*—that the outcome of lawsuits is determined by very irrational factors as well as by reason and fairness. In addition, the two books complement each other. Each has a different emphasis. The focus of *The Psychology of the Courtroom* is on the most basic assumptions underlying our system of litigation: its adversary nature, the competence and impartiality of jurors, the effectiveness of testimony, and the impartiality of judges. The emphasis of *The Lawsuit Lottery* is less on the system itself than on its uncertainties and abuses. But ultimately one is struck by how *The Psychology of the Courtroom* maps the fertile fields giving growth to those uncertainties and abuses. One is struck again at the accidents of litigation in accident litigation.

But what is the alternative to the courtroom? All the vicissitudes of trials are, after all, hard to dispense with in criminal cases—and many civil cases as well. We can hardly punish people criminally without exhaustive exhumation and examination of the applicable facts and laws; a similar situation arises when the question is whether to burden a party to a contract with the costs of an alleged breach threatening either party’s solvency. The adversary system seems as good as, if not better than, any other means of resolving the merits of such cases. But at least as to accidents involving personal injuries, alternatives in the form of insurance arrangements such as workers’ compensation and no-fault auto insurance can dispense with the need for most litigation.38 *The Psychology of the Courtroom*, without explicitly doing so, points to the wisdom of those insurance-based alternatives to litigation.
