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Commentary

The Root and Branch of *Roe v. Wade*

By root I mean the jurisprudential source, by branch I mean the ultimate outcropping of the famous abortion rights case, *Roe v. Wade*.[1] The root is of greater importance than the issue is. It reaches to every constitutional right and liberty. The branch illustrates what is possible once the law severs correspondence with reality.

Whoever has the power to define the bearer of constitutional rights has a power that can make nonsense of any particular constitutional right. That this power belongs to the state itself is a point of view associated in jurisprudence with Hans Kelsen. According to Kelsen a person is simply a construct of the law. As he expresses it in *The Pure Theory of Law*, even the apparently natural physical person is a construction of juristic thinking. In this account it appears that just as we personify a corporation for legal purposes so we personify natural physical beings. There are no independent, ontological existences to which we respond as persons. Personhood depends on recognition by the law.[2]

A corollary of that position appears to be what has always seemed to me one of the most terrifying of legal propositions: there is no kind of human behavior that, because of its nature, could not be made into a legal duty corresponding to a legal right. When one thinks of the vast variety of human behavior it is at least startling to think that every variation could be converted into legal duties and legal rights. The proposition becomes terrifying when one thinks of Orwell's *1984* or the actual conduct of the Nazi regime from which Hans Kelsen himself eventually had to flee.[3]

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1. Roe v. Wade, 410 U.S. 113 (1973).
2. H. KELSEN, THE PURE THEORY OF LAW 95 (M. Knight trans. 2nd ed. 1967).
3. *Id.* at 113. Kelsen was far from being a monster. Indeed, as the author came to know from experience in Berkeley in the 1960's, he was the most gracious of hosts. Attacks on his methodology for so ruthlessly emptying law of all values are not attacks on the human being whose own values were hostile to

There is one massive phenomenon in the history of our country that might be invoked to support Kelsen's point of view. That phenomenon is the way a very large class of human beings were treated prior to the enactment of the thirteenth and fourteenth amendments. When one looks back at the history of 200 years of slavery in the United States, and looks back at it as a lawyer observing that lawyers had a great deal to do with the classifications that made the phenomenon possible, one realizes that the law, in fact, has been used to create legal rights and legal duties in relation to human behavior that should never have been given a legal form and a legal blessing. To put it bluntly, law was the medium and lawyers were the agents responsible for turning one class of human beings into property. The result was that the property laws of the different states made it smooth and easy to transfer ownership of these human beings. The property laws resolved the questions that occurred at those critical junctions where humanity asserted itself either in the birth of a child to a slave or the death of the owner of a slave. The only question left open for argument was whether the human beings classified as property were realty or personality. In the inheritance cases the slave child was treated like the issue of an animal, compared again and again in legal decisions to the issue of livestock.[4]

Gross characterization of human beings in terms that reduced them to animals, or real estate, or even kitchen utensils now may seem so unbelievable that we all can profess shock and amazement that it was ever done. Eminently respectable lawyers were able to engage in this kind of characterization—among them Thomas Jefferson, who co-authored the slave code of Virginia, and Abraham Lincoln who argued on behalf of a slave owner seeking to recover as his property a woman and her four children who had escaped to the free state of Illinois.[5] Looking at such familiar examples and realizing how commonplace it was for lawyers to engage in this kind of fiction, we learn, I think, that law can operate as a kind of magic. All that is necessary is to permit legal legerdemain to create a mask obliterating the human person being dealt with. Looking at the mask—that is looking at the abstract category created by the law—is not to see the human reality on which the mask is imposed.

Masking of this kind even occurred in one case where the per-

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Naziism, slavery, and the other dehumanizations that could find jurisprudential shelter in his analysis of law.

4. *See, e.g.*, Hearne v. Roane, 1 Va. Ch. (Wythe) 90 (1790). *See generally* J. NOONAN, PERSONS AND MASKS OF THE LAW 39-43 (1976).

5. *See, e.g.*, J. NOONAN, *supra* note 4, at 50-54 (Jefferson); Chroust, *Abraham Lincoln Argues a Pro-Slavery Case,* 4 AM. J. LEGAL HIST. 299, 299-308 (1960).

sonhood of Blacks was put directly to the Supreme Court of the United States—*The Antelope*,[6] a case that takes its name from a ship captured off the coast of Georgia in 1821. Aboard were 281 Africans about to be brought into the United States as slaves. Federal law made it a felony to import slaves and prescribed that the President should rescue any Africans found in that condition and arrange for them to return to Africa. President James Monroe was about to carry out this law when agents representing Spanish and Portuguese slave traders claimed in federal district court that the Africans were Spanish and Portuguese property. They alleged that their principals were trading peacefully off the coast of Africa when their property had been captured by pirates who then illegally attempted to bring the property into the United States. This illegality, they asserted, should not taint their title. Please give us back our property, they asked.[7]

The United States District Attorney in Savannah, Richard Wylly Habersham, took the position that every one of the rescued African men and women was just as free as Americans would have been if they had been washed upon the shore of Algiers or Morocco and claimed by slave traders there. He put the argument directly to the district court that these were human beings that were not to be disposed of as property. The district judge disagreed as to the majority of persons before him and ordered them turned over to "their" owners; a small number, found to have come from an American ship, were freed. On appeal, the circuit court found the main problem to be how to distinguish between the Africans from the American ship and the Africans from the Spanish and Portuguese ships. The court resolved the problem by ordering a lottery to determine who was free—an eminently sensible solution if animals or other goods were being disposed of.[8]

The main issues were put before the Supreme Court of the United States in 1825. One group of lawyers, led by Francis Scott Key, pointed to the human reality, arguing that here was flesh and blood, that these Africans could not be treated like things or disposed of by a game of chance. Another group of lawyers, led by Senator John MacPherson Berrien, argued just as earnestly that only property was before the Court. The Supreme Court found that some of the Africans were people and some of the Africans

6. 23 U.S. (10 Wheat.) 66 (1825).

7. *See generally* J. NOONAN, THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS (1977).

8. *Id.* at 44 (Habersham's position); 57-60 (judgment of the district court); 65 (lottery).

were property.[9]

Three years later, after a period during which the status of which African was a person and which African was a thing was again litigated in the circuit court and the Supreme Court itself, 120 Africans were freed and thirty-seven became the property of Congressman Richard Henry Wilde of Georgia. Even with the most obvious kind of evidence before the Court as to the humanity of the class affected by the law, the justices of the Supreme Court had been capable of applying one category of law to one set of persons that left them free and another category—a mask—to a very similar group that left them enslaved in perpetuity.[10]

A much more familiar case of the same kind is *Scott v. Sanford*.[11] Here the black plaintiff attempted to assert his right to freedom in the federal court. The Supreme Court held that the federal statute that should have made him free was an interference with the property rights guaranteed by the Constitution to his owner. The Court applied the due process clause of the fifth amendment—gratuitiously reading into this clause a concept of substantive due process—and held the statute invalid. The property mask dropped over Dred Scott was the means by which the Constitution was brought into play. As James Buchanan, the President at the time, happily put it, the Court had achieved "the final settlement" of the question of slavery in the Territories.[12] It was a final settlement curiously like Adolph Hitler's "final solution" of "the Jewish question" in Germany.

Buchanan's description, of course, was inaccurate. The Supreme Court could not resolve an issue that so fundamentally divided the nation. The legal mask was shattered by the Civil War. The thirteenth and fourteenth amendments were adopted. The legal profession forgot about its participation in molding the mask that made slavery possible. It is only in our time that the analogy seems vital.

Kelsen's jurisprudence makes *The Antelope* and *Dred Scott* defensible decisions: according to it, there is nothing intrinsic in humanity requiring persons to be legally recognized as persons. The relevance of Kelsen's reasoning was acknowledged in a modern case, *Byrn v. New York City Health and Hospital Corporation*,[13]

9. The Antelope, 23 U.S. (10 Wheat.) 66, 66 (1825) (arguments and judgment).
10. The Antelope, 25 U.S. (12 Wheat.) 550 (1827). *See also* J. NOONAN, *supra* note 7, at 135 & 151 (noting the number freed and the number enslaved).
11. 60 U.S. (19 How.) 393 (1857).
12. James Buchanan, *Third Annual Message to Congress*, 4 PAPERS OF THE PRESIDENTS 3085-86 (J. Richardson ed. 1913).
13. 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), *appeal dismissed*, 410 U.S. 940 (1973).

decided a year before the Supreme Court decided *Roe v. Wade*.[14] In *Byrn*, Robert Byrn was appointed guardian *ad litem* of an unborn child and asserted that child's constitutional right not to be aborted. His position was rejected by the majority of the Court of Appeals of New York, speaking through Judge Charles Breitel. Breitel quoted Kelsen explicitly to support his position that it was a policy determination of the state whether legal personality should be recognized or not. It was, Breitel stated, "not true that the legal order corresponds to the natural order."[15] Breitel did not go as far as Kelsen's statement that natural persons were juristic creations—Breitel seemed to assume that there might be natural persons—but he left the recognition of natural persons to the legislature. As New York, at this time, had already enacted a fairly radical abortion law, he held that the legislature had conclusively made the decision that left the unborn child outside the class of recognized humanity.

The dissent, written by Judge Adrian Burke, objected to this jurisprudence. In Burke's view the reality of a person before the law was not dependent on a determination by the state. He contended that the state had no constitutional power to classify a group of living human beings as fit subjects for annihilation.[16] He insisted that if the state could make that kind of classification, it became the source of all legal rights. He observed that all the protections of the Constitution meant nothing if you or your group could be classified by the state so that you fell outside the class of human beings protected by the Constitution.

Roe v. Wade itself, decided a year later, was profoundly ambivalent—indeed, to speak bluntly, it was schizoid in its approach to the power of the state to determine who was a person. The opinion was schizoid because the Court wanted to invoke rights that were not dependent on the state—the Court was trying to find a measure by which to invalidate state statutes. The precedents that the Court found to authorize it to act in this area of law were all cases that treated family rights as having a natural basis superior to the law of the state. The cases involved included *Meyer v. Nebraska*[17] and *Pierce v. Society of Sisters*,[18] recognizing a superior right of parents to educate their children; *Skinner v. Oklahoma*,[19] recognizing that a man has a natural right to procreate and so cannot be

14. 410 U.S. 113 (1977).
15. Byrn v. New York City Health & Hosp. Corp., 31 N.Y.2d 194, 202, 286 N.E.2d 887, 889, 335 N.Y.S.2d 390, 393 (1970).
16. *Id.* at 209, 286 N.E.2d at 893, 335 N.Y.S.2d at 399 (Burke, J., dissenting).
17. 262 U.S. 390 (1923).
18. 268 U.S. 510 (1925).
19. 315 U.S. 535 (1942).

arbitrarily sterilized by the state; *Loving v. Virginia*,[20] where the natural right to marry was invoked in the course of invalidating a miscengenation statute; and *Griswold v. Connecticut*,[21] where the rights of the married were also asserted, in this case to hold unconstitutional a statute prohibiting the use of contraceptives.

All of these cases rested on the supposition that the family rights being protected were those of persons, and that these persons could not be unmade at will by the state. The natural law fundament of these decisions was camouflaged by their being couched in constitutional language; but the constitutional content was derived from nowhere except the natural law as it had taken shape in the traditions of the United States. At the same time that it invoked such precedents in *Roe*, the Court, when treating of the unborn, felt free to impose its own notions of reality.

In one passage the Court spoke of the unborn before viability as "a theory of life,"[22] as though there were competing views as to whether life in fact existed before viability. The implication could also be found that there was no reality there in the womb but merely theories about what was there. The Court seemed to be uncertain itself and to take the position that if it were unsure, nobody else could be sure. In another passage the Court spoke of life in the womb up to birth as "potential life."[23] This description was accurate if it meant there was existing life with a great deal of development yet to come, as one might say a 5-year-old is "potential life" meaning that he or she is only potentially what he or she will be at twenty-five. The Court's description was inaccurate if the Court meant to suggest that what was in the womb was pure potentiality, a zero that could not be protected by law. To judge from the weight the Court gave the being in the womb—found to be protectable in any degree only in the last two months of pregnancy—the Court itself must have viewed the unborn as pure potentiality or a mere theory before viability. The Court's opinion appeared to rest on the assumption that the biological reality could be subordinated or ignored by the sovereign speaking through the Court.

The conflict, visible in *Roe v. Wade* between a natural law response to human reality and a Kelsenite freedom in recognizing human reality, was resolved in the Kelsenite direction in the cases that followed. In *Doe v. Israel*[24] the federal courts considered a

20. 388 U.S. 1 (1967).
21. 381 U.S. 479 (1965).
22. Roe v. Wade, 410 U.S. 113, 162 (1973).
23. *Id.* at 163.
24. 358 F. Supp. 1193 (D.R.I.), *aff'd* 482 F.2d 156 (1st Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

statute recognizing the personhood of the unborn child in Rhode Island. The American Civil Liberties Union attacked the statute and persuaded the federal courts to hold it invalid. The courts actually took the position that Rhode Island's statute was frivolous, that a single federal judge could hold the statute invalid, and that the judge need not even hear the biological evidence supporting the statute. The Supreme Court had determined who was the bearer of rights. A federal judge now did not have to look at the physical realities. Evidence that the unborn were not zeros was not to be permitted.

Similarly, in *Floyd v. Anders*[25] a small black boy had been aborted, but had survived abortion and had lived for twenty days before dying, apparently as a result of what he had suffered during the abortion. The state of South Carolina, adopting the common law that if a child survives an abortion but dies of the wounds, the offense is murder, prosecuted the doctor who had performed the abortion. The doctor sought to have the federal court enjoin the prosecution. Granting the injunction, Judge Clement Haynsworth observed that the Supreme Court had determined that the fetus in the womb is "not alive."[26] This was a remarkable statement for a senior federal judge to make, as though whether one was alive or dead could be conclusively determined for a whole class of human beings by a ruling of the Supreme Court. Judge Haynsworth's view, one might say, exaggerated a bit, but his opinion is a reading of what *Roe v. Wade* meant to a responsible federal judge. The implication of his reading was that the Supreme Court was the ultimate arbiter of life and death in the very fundamental sense of being able to say who was alive to assert rights.

In *Danforth v. Planned Parenthood of Central Missouri*,[27] the Supreme Court itself opted clearly for the Kelsenite position. A Missouri statute had given fathers a part in the abortion decision. The Court ruled that the statute was unconstitutional. Speaking for the Court, Justice Blackmun reasoned that it had already been determined that the state had no power to intervene in the abortion decision. Therefore, he concluded, the state had no power that it could delegate to fathers. His assumption was that the state was the only source of rights. That a father might have rights independent of delegation from a state was not treated as worthy of consideration or mention.[28]

If the rationale of *Danforth* had prevailed in the earlier parental right cases they would have been decided very differently. If the

25. 440 F. Supp. 535 (D.S.C. 1977), *vacated*, 440 U.S. 445 (1979).
26. *Id.* at 539.
27. 428 U.S. 52 (1976).
28. *Id.* at 67-72.

state is the source of all parental rights, then the state must be able to curtail those rights and to take away its delegation of them. A state could refuse to delegate its right to education to the parents. Only by recognizing rights superior to the state did the natural law precedents invoked by *Roe v. Wade* have intelligibility.

The progeny of *Roe* have confirmed the Kelsenite reading of *Roe* that there is no reality that the sovereign must recognize unless the sovereign, acting through the agency of the Court, decides to recognize it. This view would be psychologically incomprehensible if we did not have the history of the creation of the institution of slavery by judges and lawyers. With that history we can see that intelligent and humane lawyers have been able to apply a similar approach to a whole class of beings that they could see—that they were able to create a mask of legal concepts preventing humanity from being visible. A mask is a little easier to impose when the humanity concealed, being in the womb, is not even visible to the naked eye.[29]

Kelsenite logic permits the judges at the apex of a system to dispense with correspondence to reality. The highest court is then free, within the limits that the society in which it functions will tolerate, to be inventive. It may, as the Supreme Court of the United States has sometimes thought, be constrained by the language of the Constitution and the purposes of its makers. Or, as has also sometimes happened, the Court, viewing itself as the final expounder of the Constitution's meaning, will exercise its inventiveness in creating new constitutional doctrine not dependent on text or purposes. Such doctrine—fantasy in the service of ideology—is "the branch" of *Roe v. Wade*. What then becomes possible was illustrated in 1983 by *Akron v. Akron Center for Reproductive Health*.[30] In this case a whole set of constitutional requirements were created on behalf of the claims of an abortion clinic, named with Orwellian aptness, a center for "reproductive health."

In *Akron* the only justification that Justice Powell, writing for the Court, gave for the main holdings was *stare decisis—Roe v. Wade* would not be reexamined. He acknowledged that *stare decisis* was "perhaps never entirely persuasive on constitutional questions."[31] In fact, *stare decisis* has "often" been rejected by the Court, reversing itself and discarding its own interpretation of the Constitution as mistaken. Still, Justice Powell made the case swing on the precedent, declaring roundly that *stare decisis* "is a doctrine that demands respect in a society governed by the rule of

29. *See* J. NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 153-62 (1979).
30. 103 S. Ct. 2481 (1983).
31. *Id.* at 2487.

law. We respect it today, and reaffirm *Roe v. Wade*."[32]

Curiously enough, however, in the course of *Akron* the Court itself discarded one constitutional precedent. In *Gary Northwest Indiana Women's Service, Inc. v. Orr*[33] the Court had specifically upheld a law requiring hospitalization for abortions performed in the second trimester. In *Akron* this precedent was silently set aside and it was not stated to be unconstitutional to require such hospitalization.[34]

The reason the Court gave for not following precedent on this constitutional point was that current medical statistics showed that second trimester abortions were not unreasonably dangerous to the women undergoing them. The statistics employed had been published after the trial court had heard the case. The implication of the opinion was that, in order to conform to constitutional requirements, any statute governing abortion would have to adjust constitutionally to the latest medical information.[35]

Looked at from one aspect this approach can be seen as ultimately subversive of *Roe v. Wade* itself. This approach called the Court back to a consideration of realities not controlled by judicial fiat. In a famous dissent, Justice Brandeis, arguing for overruling a line of bad constitutional precedents, declared that the Court should bring itself "into agreement with experience and with facts newly ascertained, so that its judicial authority may, as Mr. Chief Justice Taney said, 'depend altogether on the force of the reasoning by which it is supported.' "[36] The roots of *Roe* are severed if the Court is willing to bring itself into agreement with experience and have its authority depend on the force of its reasoning.

In *Akron*, however, the Court, in general, held to the basic logic of *Roe* and discovered new dimensions of the Constitutional protection for abortion. The Akron ordinance required a person seeking an abortion to wait for twenty-four hours. Twenty-four hours was found to be too long. Justice Powell called it "arbitrary and inflexible."[37] The requirement violated the Constitution.

In the so called "Abortion Funding Cases," Justice Powell, writing for the Court, had said the state had a traditional and judicially-recognizable interest in encouraging childbirth.[38] The

32. *Id.*
33. 451 U.S. 931 (1981), *aff'g* 496 F. Supp. 894 (N.D. Ind. 1980).
34. City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481, 2497 (1983).
35. *Id.* at 2496.
36. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412-13 (1932) (Brandeis, J., dissenting) (quoting Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849)).
37. City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481, 2503 (1983).
38. Maher v. Roe, 432 U.S. 464, 478 (1977).

state's interest shrivelled to almost nothing when a mere twenty-four hour waiting period was too great a burden on the person seeking an abortion. Beyond any constitutional theory and beyond any jurisprudential considerations, the holding of *Akron* appeared to reflect a good deal of impatience with anything in the way of the victory of an ideology. Impatience was satisfied by constitutional inventiveness, unrestrained by the text or the purposes of the Constitution.

A further holding of *Akron* was that the city could not require that a physician give counselling to the abortion seeker; the most the law could require was that some "qualified" delegate of the doctor provide counselling.[39] It was extraordinary that the Constitution could be found to speak so precisely as to what psychological advice could or could not be made available. The holding was also interestingly inconsistent with the general implication of *Roe v. Wade* as to the importance of the family physician.[40] In *Roe* the physician was treated as an heroic figure, one on whom the abortion seeker could depend; but when an attempt was made to build upon this deference to the doctor in a way that the Court found restrictive of the abortion liberty, the Court's deference was swallowed up by its desire to extend the liberty as widely as possible.

Most strikingly of all, *Akron* held that there could not be a legal requirement that a women seeking an abortion be informed that the being she wished put to death was a child, that the child was alive, and that the child was human. The Court treated this information as prejudicing the choice of whether to abort or not—as a kind of unfair interference with free choice. The ordinance was bad because it was designed "to influence the woman's informed choice between abortion and childbirth."[41] The holding went beyond the Kelsenite jurisprudential root and any mainline theory of constitutional interpretation. It was, indeed, the invention of a kind of censorship by the Court itself.

The logic of *Akron* in this respect, if taken just a little further, is that a state university or a city high school should not be permitted to teach biology. The facts that would have been provided to a woman under the Akron ordinance are the same kind of facts that would be provided in a modern course in biology. Such a course

39. City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481, 2502 (1983).

40. *See* Roe v. Wade, 410 U.S. 113, 165-66 (1973).

41. AKRON, OHIO, CODIFIED ORDINANCES NO. 160-1978, § 1870.06 (1978), *quoted in* Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1206 n.5 (6th Cir. 1981). Justice Powell in his opinion for the Court does not mention the specific information about the child's humanity, but holds the whole section invalid. City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481, 2499-2500 (1983).

would inform its students of the unique chromosomal composition of the child that distinguishes the child as male or female and as animal or human. If student's looking at a genetic sample under the microscope could not recognize the number, the shape, and the bonding patterns of the chromosomes—if they could not say whether the genetic specimen came from a simian being or from a human being—they would fail the course. Information enabling them to answer correctly might also "influence" their choice of abortion or childbirth.

A final provision of the Akron ordinance was that "the remains of the unborn child" be "disposed in a humane and sanitary manner."[42] The Sixth Circuit Court of Appeals found the word "humane" impermissibly vague in a criminal statute.[43] The ordinance could, the court said, mean to "mandate some sort of 'decent burial' of an embryo at the earliest stages of formation . . . ."[44] Justice Powell quoted this analysis and agreed; humane and sanitary burial was beyond the comprehension of a reasonable doctor.[45]

In this conclusion one can observe in the most concrete way the Court's discomfort before reality. The Court cannot uphold a requirement of humane burial without conceding that the being who is to be buried is human. A mask has been placed over this being. Even death cannot remove the mask.

The Court's denial of reality stands in contrast with what Andre Gide has written on the humane burial of an unborn child:

> When morning came, "get rid of that," I said naively to the gardener's wife when she finally came to see how everything was. Could I have supposed that those formless fragments, to which I turning away in disgust was pointing, could I have supposed that in the eyes of the Church they already represented the sacred human being they were being readied to clothe? O mystery of incarnation! Imagine then my stupor when some hours later I saw "it" again. The thing which for me already had no name in any language, now cleaned, adorned, beribboned, laid in a little cradle, awaiting the ritual entombment. Fortunately no one had been aware of the sacrilege I had been about to commit; I had already committed it in thought when I had said get rid of "that." Yes, very happily that ill-considered order had been heard by no one. And, I remained a long time musing before "it." Before that little face with the crushed forehead on which they had carefully hidden the wound. Before this innocent flesh which I, if I had been alone, yielding to my first impulse, would have consigned to the manure heap along with the afterbirth and which religious attentions had just saved from the void. I told no one then of what I felt. Of what I tell here. Was I to think that for a few moments a soul had inhabited this

42. AKRON, OHIO, CODIFIED ORDINANCES NO. 160-1978, § 1870.16 (1978).
43. Akron Center for Reproductive Health v. City of Akron, 651 F.2d 1198, 1211 (1981).
44. *Id.*
45. City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481, 2504 (1983).

> body? It has its tomb in Couvreville in that cemetery to which I wish not to return. Half a century has passed. I cannot truthfully say that I recall in detail that little face. No. What I remember exactly is my surprise, my sudden emotion, when confronted by its extraordinary beauty.[46]

If the Court could respond to Gide and understand what humane and sanitary burial is, it might also perceive the reality of the extraordinary beauty of each human being put to death in the name of the abortion liberty and concealed from legal recognition by a jurisprudence that substitutes a judge's fiat for the truth.

46. A. GIDE, LAST JOURNALS 95 (R. Stookey trans. 1979).