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The Inaugural Development Fund Lectures: Scientific Liberalism, Scientistic Law

I

LECTURE ONE: THE USES OF EMPIRICISM AND THE USES OF FANATICISM

I would like to begin by thanking Dean Holland and the law school for inviting me to visit this lovely part of America to deliver the Inaugural Development Fund Lectures. Over the next two nights, I will be talking about the relationship between the liberal theory of constitutional law and ways of reasoning about moral and empirical propositions. In tonight's lecture, which I call The Uses of Empiricism and the Uses of Fanaticism, I will discuss the frequent preference of judges in constitutional cases to deal with empirical questions rather than moral ones and, when possible, to turn

* Professor of Law, Yale University. This Article is a revised version of the Inaugural Development Fund Lecture, delivered at the University of Oregon School of Law on February 8 & 9, 1990. An earlier version was presented to the Legal Theory Workshop at New York Law School. In addition to comments made on both of those occasions, I have had the special benefit of extended conversations and critiques from Bruce Ackerman, Enola Aird, Robert Blecker, Michael Perry, and Ruti Teitel. Suchma Soni provided very fine research assistance.

the latter into the former. Tomorrow evening I will analyze the particular difficulties that are posed when a constitutional law built on a preference for empirical questions confronts the very different epistemology that often flows from religious devotion.

My subject matter, I think, is especially appropriate for a lecture here in Oregon, because one of the cases that I plan to assess in tomorrow night's lecture originated in this state. I have in mind *Employment Division v. Smith*,¹ a case no doubt familiar to many of you. In *Smith*, two former employees of the State of Oregon insist that the first amendment's free exercise clause protects their right to use peyote, a controlled substance, as part of a religious ritual. The issues raised by the *Smith* case are fascinating and intricate,² but they are, as I say, for tomorrow's lecture.

Tonight's lecture is on a somewhat different point, and by way of introducing the evening's subject matter, I would like to take you on a small journey in space and time, ending up about two thousand miles to the east and just about a century into the past. No doubt most of you have heard a tale of some legislature somewhere in the country that once tried to set the value of the ratio of the circumference of a circle to its diameter, the irrational number known as pi, to 3. Whether that ever happened, I do not know, but according to Petr Beckmann, author of a wonderful little book entitled *A History of Pi*, something similar did occur in Indiana in 1897.³ I cannot tell the story with Beckmann's flair, and for those interested in the details of the tale, I recommend the book itself. But let me try to summarize.

Evidently, an Indiana physician, one Edwin J. Goodwin, had developed (or thought he had developed) a formula for computing circular area through a method known as squaring the circle. The multiplier used in Goodwin's formula was nowhere near an accurate approximation for the value of pi—it was too large by about a factor of three⁴—but he was apparently able to convince the legisla-

¹ *Smith v. Employment Div.*, 307 Or. 68, 763 P.2d 146 (1988), *rev'd*, 110 S. Ct. 1595 (1990).

² After these lectures were delivered, the Supreme Court of the United States ruled against the employee's free exercise claims. *See Employment Div. v. Smith*, 110 S. Ct. 1595 (1990).

³ *See P. BECKMANN, A HISTORY OF PI* 174 (1970). I should mention explicitly my debt to Beckman's remarkable book for first stimulating me to think about many of the issues discussed in this paper.

⁴ *Id.* Goodwin apparently intended a value of approximately 16 divided by the square root of three, *see id.*, which yields a number beginning 9.2376. The correct value of pi calculated to the seventh decimal place is 3.1415926.

ture that he had found the answer. He offered this answer to the state without charge, if the legislature would adopt his formula as law.⁵ Thus in January of 1897, a member of the Indiana House of Representatives introduced what was styled “A bill introducing a new Mathematical truth,”⁶ and provided in part:

It has been found that a circular area is to the square on a line equal to the quadrant of the circumference, as the area of an equilateral rectangle is to the square on one side. The diameter employed as the linear unit according to the present rule in computing the circle's area is entirely wrong⁷

As pointed out by Petr Beckmann, “rectangle” is almost certainly a misprint for “triangle,”⁸ but details of that sort are irrelevant to the present purpose. Suffice it to say that from that awkward beginning, the bill grew progressively more complex and as its complexity increased, it made less and less sense.⁹ The bill concluded with the observation that the inventor had solved “noted problems . . . long since given up by scientific bodies as unsolvable mysteries and above man's abilities to comprehend.”¹⁰

Arrant nonsense the bill might have been, but it nevertheless emerged from the Education Committee (to which it had been referred by the Committee on Swamp Lands), and subsequently passed the Indiana House by a vote of 67-0.¹¹ In the Senate, says Beckmann, the bill was sent to the Committee on Temperance (I don't know why; neither does Beckmann). That committee reported the bill favorably, and it might have passed the Senate, too, making Goodwin's formula the law of the state, but for the fortuitous intervention of a professor of mathematics from Purdue, who happened to be visiting the state legislature on unrelated business while the Senate was debating the bill. Warned by the professor, the legislature returned the bill to committee, where it died¹²—evidence, one might suppose, that Someone is Watching, a piece of

⁵ *Id.* at 174. “[O]thers would evidently have to pay royalties.” *Id.* If this purported escape from a responsibility to pay royalties for using Goodwin's formula played a part in the legislature's decision to consider the bill, then the action was doubly irrational: mathematical formulas are not patentable subject matter. See *Parker v. Flook*, 437 U.S. 584 (1978); *Gottschalk v. Benson*, 409 U.S. 63 (1972).

⁶ P. BECKMANN, *supra* note 3, at 174.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 175-77.

¹⁰ *Id.* at 177.

¹¹ *Id.*

¹² *Id.*

good fortune with which legislatures are rarely favored, and, when so favored, to which they all too often fail to attend.

Well, all right. Let me summarize the story from the viewpoint of what we might call a liberal materialist; that is, a devotee of both liberal political theory and natural science.¹³ The Indiana statute defining the circular area was plainly a bad law—bad in the sense that it reflected a misunderstanding of mathematics. The inventor, Dr. Goodwin, was a crackpot who nearly hoodwinked the Indiana legislature into doing something foolish because of a general ignorance about science. Only through the intervention of a mathematics professor as *deus ex machina*, was the state saved from its own folly. In liberal terms, then, the story's ending is a happy one.

Had there been no intervention, would the statute (which, for convenience, we might call the Circular Area Act) have been unconstitutional? One might suppose that if the Supreme Court's minimum rationality test has any bite, this might be the rare instance of a wholly irrational statute that should be struck down. Still, if one accepts Ronald Dworkin's gentle correction, for which there is much to be said, that what lawyers call the rationality requirement really only asks that the state offer a plausible argument in support of the challenged policy,¹⁴ the state's claim that the legislators *really believed* in the correctness of Dr. Goodwin's formula might be sufficient. After all, the argument against the statute is simply that the legislature erred, and a mistake in analysis is not the same as a constitutional violation.

Or is it?

My claim in tonight's lecture is that the matter is not so clear. In cases involving subjects as diverse as prison conditions, reproductive freedom, and school desegregation, our constitutional courts have shown what might be called a preference for counting rather than reasoning. With troubling but increasing frequency, the courts have framed constitutional questions in ways that permit them to point out the legislature's errors in analysis rather than condemn the legislature's moral vision.

A good example of what I have in mind is *Rhodes v. Chapman*,¹⁵

¹³ Some readers have objected to my linking of "liberal" and "materialist" in this fashion. By way of clarification, I shall explain that I am being descriptive, not pejorative. My reference is to the liberal who is guided in *empirical* evaluations by natural science.

¹⁴ R. DWORKIN, *LAW'S EMPIRE* 382 (1986); cf. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

¹⁵ 452 U.S. 337 (1981).

decided by the Supreme Court of the United States about nine years ago. In *Rhodes*, the Justices ruled that the State of Ohio did not violate the eighth amendment's ban on cruel and unusual punishment when it housed two or more inmates in cells built for one. But the principal dispute between the majority and the dissent was over the interpretation and significance of the findings of social science and medical researchers on the effect of prison crowding. The members of the Court, then, were not arguing over constitutional text, structure, or history. They were not even arguing over morality. They were arguing over the empirical evidence. They were counting, not reasoning.

This preference for talking about things that are measurable mimics a more general difficulty with liberalism as a moral theory. Ever since the Enlightenment dethroned God—or at least, the concept of God—as the ultimate source of knowledge, liberal theory has faced the authority problem. The idea of the Enlightenment was to make human reason supreme; but somewhere along the way, reason proved to be a bit too shabby, too indeterminate, too unpredictable. At the same time, one of the proudest products of human reason—natural science—seemed to offer the authoritative basis for knowledge that liberalism needs if it is to preserve the crucial distinction between facts and values.

The trouble was that whereas God had provided authority for both knowledge about the physical world and knowledge about morality (and indeed, in some theological visions, there is no distinction between the two), natural science could provide a level of certainty only about knowledge of the physical world. What then to do about moral knowledge?

One plausible answer is to avoid moral debate, and to muddle instead. American society has been in a moral muddle for a long time, however, and the result has not always been moral goodness. At the metaethical level, unfortunately, any effort to do more seems to end up with people talking past each other. Arthur Leff may have been right—napalming babies *is* bad—but he was surely right as well to note that somebody, somewhere, will answer *Sez who?*¹⁶ The possibility of moral dissent does not by itself eliminate the possibility of moral truth, any more than the possibility of scientific dissent eliminates the possibility of scientific truth. But our nation's pluralistic, sometimes relativistic, approach to moral questions does

¹⁶ Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1230.

make government action based on moral consensus difficult, and sometimes impossible.

The natural science model, however, offers a potential solution to the problem of moral authority. That answer is scientism. If moral questions can be made to look like scientific questions, then the authority problem is seemingly solved. If our moral or legal dialogue can be made to look like scientific dialogue, then we are not illegitimately imposing our moral beliefs. We are not even discussing them; we are simply doing what the facts require of us. So dominant has the scientistic model of reasoning become that people who work out moral conclusions in other ways are treated as though they ought to be embarrassed by their lack of erudition.¹⁷ Remember Spiro Agnew's famous line? (Remember Spiro Agnew?) He said, "You don't learn about poverty from people who are poor, but from experts who have studied the problem." Agnew was ridiculed, but in that one sentence he captured the essence of the scientistic way of thinking. If you want to make a public policy proposal, it's a good idea to have something empirical on which to rest it.

Take as an example the matter of whether drivers should be required to wear safety belts, and the implications for tort law when they do not—a point on which the Oregon Supreme Court not long ago decided two important cases, *Dahl v. Bayerische Motoren Werke (BMW)*¹⁸ and *Morast v. James*.¹⁹ Advocates of mandatory seatbelt requirements stress the potential savings, in lives and money, using these measurable, materialistic effects to sidestep, rather than refute, the libertarian moral arguments of their opponents.

The scientistic solution matters not only for moral dialogue but for constitutional dialogue as well, because in the United States, for good or for ill, constitutional adjudication represents perhaps our most important forum for broad-based, public moral debate. But in an unfortunate reflection of developments in liberal theory, scientism is slowly conquering our constitutional dialogue, which means, of course, that it is infecting our moral dialogue as well. In tonight's lecture, I shall not attempt a detailed analysis but rather will

¹⁷ Something similar has happened in legal scholarship, with the unsettling move from an emphasis on the reasoning of the text to an emphasis on the erudition of the footnotes. Cf. Balkin, *The Footnote*, 83 NW. U.L. REV. 275 (1988) (a sometimes whimsical critique of footnoting).

¹⁸ 304 Or. 558, 748 P.2d 77 (1987).

¹⁹ 304 Or. 571, 748 P.2d 84 (1987). *Dahl* and *Morast* have subsequently been overruled by statute. See OR. REV. STAT. § 18.580 (1989).

try to give examples of the infection itself, and, in so doing, to illuminate some of the ways in which the virus of scientism weakens the moral claims of liberal theory and the claims to legitimacy of liberal law.

A. *Fanatical Morality*

I want to return to Indiana and the Circular Area Bill, but I want to view it through the glass of a more recent controversy that bears some similarities. So let us leave the nineteenth century, move forward in time some eighty years, and take what is surely a familiar case. Just about a decade ago, a young lawyer named Stephen Galebach published an article in the *Human Life Review* explaining how, in his view, Congress could overturn *Roe v. Wade*²⁰ through the simple expedient of enacting a statute that would define human life as beginning at conception.²¹ This, he said, was an invitation left open by the Supreme Court's frank confession in *Roe* that the Justices were unable to find any societal consensus on the beginning of life. According to Galebach, this confession provided important support for the majority's conclusion. Using its authority under Section 5 of the fourteenth amendment, said Galebach, the same authority that had supported, for example, the Voting Rights Act of 1965, Congress could fill in the holes, granting rights where the Court had discovered none.²²

In 1981, a Human Life Bill was introduced in the Senate, and hearings were held before the Subcommittee on Separation of Powers of the Committee on the Judiciary. (Whatever your views on the bill, I think you will agree that the name of the committee that considered it is at least an improvement.) The subcommittee set itself the task of learning whether, as a matter of scientific definition, human life could be said to begin at conception.

Both sides—by which I mean pro-life and pro-choice forces—called witnesses from among scientific researchers, and other witnesses as well. The supporters of the Human Life Bill introduced evidence that, in their view, tended to show that as a matter of shared scientific understanding, human life begins at or close to conception. The bill's opponents argued that the start of human life

²⁰ 410 U.S. 113 (1973).

²¹ Galebach, *A Human Life Statute*, 7 THE HUMAN LIFE REV. 3 (1981).

²² I analyze Galebach's constitutional argument, as well as the arguments of his critics, in Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986).

is not a scientific question at all; or, failing that, that the scientific evidence relied on by the bill's supporters was bad science. The subcommittee, by a 3-2 vote, reported favorably on the bill. But, perhaps unsurprisingly, it died in the larger Judiciary Committee, which never formally took it up.

I would suggest to you that the liberal materialist summary of the effort to create a statutory definition of when human life begins would be identical to the liberal materialist summary of the effort to create a statutory definition of π —a scientifically ignorant legislature, etc., etc.—with the important distinction that in the case of the Human Life Bill, the liberal critic might add the observation that the proponents were *fanatics*, trying to impose their narrow moral vision on others. In the world of contemporary political conversation, imposing one's moral vision on another is of course a considerable offense, about as bad as the offense, in the world of liberal theory, of imposing on another one's vision of a life well lived.

What I want to focus on, however, is the reason that the proponents of the Human Life Bill are considered fanatics, whereas the proponents of what I have called the Circular Area Bill are merely misguided. After all, one could readily generalize the two cases as involving legislative enactments based on particular factual assumptions. The Indiana legislature might really have believed the new means for calculating the circular area to be more accurate than the old. The Senate subcommittee that reported the Human Life Bill might really have believed that human life begins at conception.

So, what are the distinctions? Well, in the first place, the Human Life Bill, because it impinges on a fundamental right, is far more likely than the Circular Area Bill to be found unconstitutional. But of course it is possible to write the Circular Area Bill, too, in a way that impinges on rights; for example, by making it a crime to teach any other formula for computing circular area.²³ Besides, mere unconstitutionality is a positivist claim and seems unlikely to adequately explain the reason that the Circular Area Bill generates amusement, whereas the Human Life Bill generates outrage.

A second distinction has to do with the politics of the two pieces of legislation. No one who hears the story of the Circular Area Bill believes that the Indiana legislature was actually up to any moral mischief—the legislators are presumed to have been sincere—so ignorance and confusion are adequate explanations for what hap-

²³ Cf. *Epperson v. Arkansas*, 393 U.S. 97 (1968) (establishment clause grounds); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (privacy grounds).

pened, and the intervention by a professional mathematician ended the matter.

The Human Life Bill, on the other hand, is seen as a smoke-screen, morality masquerading as science. According to the liberal critique of the Human Life Bill, the supporters did not really care what answer science might offer to the question of when human life begins or, indeed, whether science even has an answer. The supporters of the Human Life Bill, then, are seen in the liberal critique as moral fanatics who are unable to obtain enforcement of their moral views in the liberal state. Therefore, they style their morality as science in the hope of making their views palatable.

Let me return once more to the Indiana legislature and the Circular Area Bill. No fanaticism here, not at least on the record as it appears; just a mistaken understanding of mathematics. But suppose now that we have an additional bit of information. What we now learn is that the Indiana legislature is controlled by adherents of a religion—let us call it Faith A—that follows a sacred text that includes an ancient description of the computation of circular area; a description, as it happens, identical to the one upon which Dr. Goodwin happened. If we further learn that Faith A requires its adherents to live their lives in accordance with all parts of the sacred text, including the formula, the case of the Circular Area Bill suddenly becomes quite different, and quite similar.

In terms of the bill's actual effect, nothing whatsoever has changed merely because we now believe that a religious motivation was lurking behind it. But in liberal constitutional analysis and the contemporary version of liberal moral analysis, that religious motivation makes all the difference. Now, suddenly, the legislators (and for all we know, Dr. Goodwin as well) are not merely ignorant—they are superstitious! More to the point, they are fanatical: they are using the guise of mathematics to write into law a tenet of their religion.

Both examples involve efforts to transform moral views from an unacceptable to an acceptable form without altering their essence, an effort I shall refer to as the move from *fanatical morality* to *empirical morality*. The pro-life movement is the modern model of fanaticism in the liberal sense. A fanatic is someone who is difficult or impossible to convert to another moral position through a process of dialogue—in particular, dialogue about natural science, a point to which I will return. Naturally, this definition includes people

whose morality is based on religious beliefs, but it includes many other people too.

The liberal state favors empirical morality, which is my term for modern law's homage to the Enlightenment. The epistemological point of the Enlightenment was to alter the nature of authority, to replace God alone with human reason. Liberal psychology since Kant requires a division between facts and values: facts are observations about the world, values are moral propositions that we apply to those facts. Everyone who is not a fanatic, of course, agrees on what the facts are, or (perhaps more importantly) on how facts are to be found. The empirical moralist is willing to be persuaded, in light of these agreed and obvious facts, to change her mind. Consequently, another way of stating the devotion to empirical morality is this: it represents a preference for moral propositions that are stated in ways that lead to testable factual propositions.

This suggests a third distinction between the Human Life Bill and the Circular Area Bill: epistemology. The Indiana legislature, as I have said, simply made a mistake. But the supporters of the Human Life Bill were using scientific language to bolster a conclusion reached on other grounds. Even before undertaking any legislative drafting or any scientific investigation or any hearings, they already knew when human life begins. The source of their knowledge is not important now, although I will come to that. What does matter is that the source was not materialist science.

It might be useful in this connection to quote the question raised by Jeffrey Stout in the introduction to his very fine book on justification after the Enlightenment, *The Flight from Authority*. "Do we, then, have any knowledge?" he asks.²⁴ His concern is whether, in a post-Enlightenment world in which the authority of God is no longer available as a justification, we can be sufficiently sure of anything to the extent that we can say we know it. He is worried about the possibility of an infinite regress of justifications needing justification, an epistemology that finally swallows itself.

I would not of course contend that liberalism has reached that point, but it is certainly true—I think I am correct that no major liberal theorist dissents—that none of the fundamental principles of liberal reasoning can be justified without looking outside the principle itself. So, for example, Rawls' original position needs a justification apart from one flowing from the original position, Ackerman's

²⁴ J. STOUT, *THE FLIGHT FROM AUTHORITY: RELIGION, MORALITY AND THE QUEST FOR AUTONOMY* 8 (1981).

neutral dialogue needs a justification outside of neutral dialogue, and so forth. Although I will have nothing further to say about justification just now, I ask the listener to keep the question in mind, because I plan to return to it at the conclusion of tomorrow night's lecture. For the rest of this evening, however, I would like to talk about empirical morality.

B. Empirical Morality

It is empirical morality, then, that has come to dominate liberal dialogue and, by extension, liberal law. Empirical morality is couched in terms of appeal to values so over-arching that no one would dispute them. The battle, then, becomes one over facts. Public moral debate is extraordinarily difficult in the United States. People react with horror to any suggestion that morality is about to be imposed by one individual or group on another. (Never mind that we impose morality all the time; I am thinking here of practical politics.)

In constitutional law, which is the place where our moral battles tend to be fought, matters are in some ways better but in some ways far worse. Part of this is the Supreme Court's fault. Over the past few decades, through sweeping judgments that render one side of the moral argument out of bounds because unconstitutional, the court has preempted discussion on a series of moral questions. It's much easier to avoid moral argument when you have the Constitution on your side, and much easier as well to dismiss your morally minded opponent with a casual, "Oh, come on, that's unconstitutional"—appealing, you see, to one of our transcendent moral norms, the respect for law, and placing the opponent who insists on continuing the argument in the position of advocating disrespect for law, and therefore playing the role of the fanatic.

Remember the old lawyer's joke? If you don't have the law on your side, argue the facts; if you don't have the facts on your side, argue justice? Well, the scientistic approach to moral argument, and, by extension, to constitutional argument, is like that, too. Justice—the end-product, if you will, of liberal theory—is treated as a second-best (or perhaps third-best) subject of argument. Only fanatics make a lot of noise about morality; the smart, reflective liberal, however, makes an empirical case.

Moral and constitutional dialogue of this sort seems easier for liberal courts to stomach. The liberal judge is not supposed to impose her own moral judgments (or, for that matter, the moral judg-

ments of the litigants), but she can certainly sort out the facts. Even though many open-ended constitutional provisions appear designed to invite a degree of moral reasoning, the mediating force of scientific liberalism insists that the appeal to morality be resisted, and that the litigants instead find ways to transform the moral/constitutional dispute into an argument over the facts.

Does this seem a little strong? I hope not, because I think the problem is an important one. Consider, for example, the natural extension of the Circular Area Bill: the scientific creationism legislation that keeps cropping up in various corners of the Bible Belt. The most fascinating aspect of the litigation over creationism, and of the public argument as well, is that while liberal critics try and often succeed to paint the creationists as fanatics—people who don't care about the facts—the creationist effort at scientism has had a very important success. When the cases are litigated, the opponents of the legislation always produce evidence that the creationist theory is false.

Why is this a victory for creationists? Because on the model that I have mentioned, one need not debate with the fanatic in empirical terms. Rather, one dismisses the fanatic on grounds of an imposition of morality. So, one might think that in the case of teaching creationism in the public schools alongside evolution—the “equal time” requirement that is the centerpiece of the creationist legislative strategy—the reviewing court would find a religious motivation and say, “End of case.”

That is not, however, what the courts do. Instead, they spend considerable time analyzing the evidence that creationism is bad science.²⁵ And bad science it may be, at least by the standards of materialist science, which requires theories that are testable and, ultimately, provable in the natural world.²⁶ But by treating the cases in this fashion, the judges set up a fascinating paradox. Suppose that what the putative fanatics wanted to teach turned out to be *good* science? Would the courts permit it to be taught? If the answer is no, then the effort to refute creationism by denying its factual base is a huge waste of judicial resources. We must therefore assume that the answer is yes. Yes, the courts would permit a religiously motivated legislature to teach creationism were creation-

²⁵ The most painstaking effort occurred in *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982); see also *Edwards v. Aguillard*, 482 U.S. 578 (1987).

²⁶ See, e.g., *GOULD, HEN'S TEETH AND HORSE'S TOES* 254-62 (1983) (discussing how creationism fails this test).

ism better science than it is—a proposition that would imply that the only thing that the adherents of Faith A did wrong in the Circular Area Bill was compute the value of pi badly.

Nevertheless, consider the consequences if the problem with creationism is that it is both religiously motivated and wrong, rather than one or the other. If both are required before creationism can be struck down, then the court is in the business not of exercising its comparative advantage in deciding on the law, but rather of making a potentially difficult decision about scientific fact. So although the opponents of creationism win battle after battle, the creationists may be winning the war, because the courts are treating the cases as though what matters is the empirical basis for the claims that creationists make. Although the creationists have so far lost the cases, they have succeeded in transforming an argument over imposition of religious belief into an argument over the facts; that is, they have transformed fanatical morality into empirical morality. That success hints at the advantage of empirical morality: unless the judges are lying, if the facts should turn out to be different than previously thought, your side might later win.

Similarly, the effort by the gay rights movement to portray homosexuality as innate rather than chosen can be viewed as a response to the pressure of empirical morality. The innateness claim has the advantage of inviting equal protection scrutiny of restrictions on conduct that can be seen as disadvantaging a particular sexual preference. However, as a constitutional, or for that matter a moral issue, it is difficult to see why it ought to matter whether sexual preference is, as the name implies, a choice or whether it is something innate. Surely the privacy argument in support of free sexual relations between consenting adults is straightforward, both as a moral matter and as a constitutional one.

I realize that the Supreme Court has already rejected that argument in *Bowers v. Hardwick*.²⁷ But *Bowers* is a difficult decision to defend on doctrinal grounds, at least if one takes *Griswold v. Connecticut*²⁸ to mean what it says. In *Griswold*, remember, the Court overturned Connecticut's anti-contraception law in large measure because (in the Court's view) its enforcement required gross violations of marital privacy. The Justices seemed to envision a sort of sexual legitimacy police force breaking into "the sacred precincts of

²⁷ 478 U.S. 186 (1986).

²⁸ 381 U.S. 479 (1965).

marital bedrooms.”²⁹ That, the majority argued, the Constitution had to forbid.

Well, *Bowers* isn't much different, is it? Again, the sexual legitimacy police would have to be unleashed to enforce Georgia's anti-sodomy statute. Obviously, the precincts wouldn't be marital, but the police might not know that until they arrived and undertook the search. Besides, even if the jump from marital precincts to those housing unmarried significant others seems a bit far, surely it is not as far as the jump from the privacy of consenting adults in the marital bedroom to the privacy of doctor and patient in the obstetrician's office—the jump that the Court endorsed in *Roe v. Wade*.³⁰ In other words, if *Roe* follows from *Griswold*, then, it seems to me, *a fortiori*, *Bowers* is wrongly decided.

Now of course, one may respond that *Roe* is wrong. It is certainly true that the jump from *Griswold* to *Roe* is difficult to defend on doctrinal grounds, a point admitted even by some of its staunchest defenders. And lately the Justices have shown every sign of backing away from the rule of *Roe*.³¹ But even if *Roe* were overturned, it would still strike me as true that the jump from *Griswold* to the opposite result in *Bowers* is a very small one. To be sure, one might argue in response that *Griswold* itself is doctrinally unjustified, and, indeed, it is not as easy as some of *Griswold*'s defenders suppose to point to its constitutional moorings.³² But as long as *Griswold* is the law of the land, surely an anti-sodomy statute must stand on weaker footing than an anti-abortion statute.

As I said, however, the Supreme Court has already rejected all of this. The constitutional right to privacy does not extend to all sexual acts between consenting adults and, in particular, does not extend to acts constituting sodomy between adults of the same sex. That is unhappy law, but that is what the law is. So I suppose that the move toward an equal protection argument is unsurprising. Still, the possibility of an equal protection strategy brings me back to my point about the pressures of empirical morality. In order to bring the sexual *acts* of adults of the same sex within the ambit of the equal protection clause, it is necessary to envision the law as a

²⁹ *Id.* at 485.

³⁰ 410 U.S. 113 (1973).

³¹ See *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989).

³² Making this argument is, however, a political risk, as Judge Bork discovered. See REPORT OF THE SENATE JUDICIARY COMMITTEE, ON THE NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT 30-36 (1987).

discrimination against individuals for their innate characteristics rather than for their actions. Thus, the scientistic claim is made that a homosexual or heterosexual preference is inborn, or at least that a predisposition is inborn. If the claim is correct, then to discriminate on the basis of homosexual acts is the same as discriminating on the basis of the inborn predisposition.

Not a bad theory, once one accepts the premise. (Of course, one must also accept that the predisposition is not only inborn but normal, i.e., not psychologically deviant, but one who accepts the premise should have no difficulty with this corollary.) The trouble is that the premise is an empirical one. One may perfectly well assert that the predisposition to homosexuality is inborn, but once it is asserted, it is a proposition about the world, and may be either true or false.

If the constitutional case rests on a proposition that is either true or false, then the case is refuted if one refutes the proposition. If the moral case rests on the same proposition, then anyone unconvinced of the proposition will be unconvinced by the moral case. Or, to put the matter the other way, when a claim of right rests on a claim that is empirically falsifiable, then the right necessarily vanishes if the empirical claim is falsified.

This, you will recall, is the criticism that has always been leveled against the Supreme Court's opinion in *Brown v. Board of Education*.³³ At the time that *Brown* was decided, the "equal but separate" rule of *Plessy v. Ferguson*³⁴ was the accepted formulation for deciding the constitutionality of particular instances of segregation. The entire litigation strategy leading to *Brown* involved a series of cases in which anti-segregation lawyers would argue not that *Plessy* was wrong, but that in the case before the Court, the separate facilities maintained for black and white were not actually equal.³⁵

In *Brown*, the Justices faced the dilemma of making their opinion palatable to a nation not yet convinced that segregation was an evil. Thus, as its basis for the conclusion that *Plessy* misconceived equal protection, the *Brown* Court drew a prior conclusion that *Plessy* misconceived the harm caused to victims of segregation. How did the *Brown* Court know that *Plessy* got the matter wrong? Because "[w]hatever may have been the extent of psychological knowledge" at the time that *Plessy* was decided, the Court's view of the psychol-

³³ 347 U.S. 483 (1954).

³⁴ 163 U.S. 537 (1896).

³⁵ See R. KLUGER, *SIMPLE JUSTICE* (1975).

ogy of segregation was "amply supported by modern authority."³⁶

As proof the Justices appended the famous footnote 11, which listed a series of social science studies bolstering the Court's psychological understanding.³⁷ The opinion was immediately attacked by critics who claimed the studies were wrong, and no wonder; the Court was practically inviting such a critique. For the implication of footnote 11, if one takes the opinion seriously, is that if better studies came along suggesting that segregated black children developed and adjusted as well as or better than integrated ones, *Brown* ought to be reversed. And if after that, new studies pointed back toward footnote 11's original conclusion, then the original rule ought to be reinstated. And so on and so on, with everything turning on the current state of psychological understanding. In this way, at least as a constitutional matter, the Justices managed to transform racial segregation from an oppressive horror into an error in analysis.

That point, of course, is one that legions of critics have already made. What the critics have missed, however, is that the Justices were hardly alone in preferring to argue over the facts rather than argue over values. Indeed, the field of race relations provides another unsettling example. Consider the common understanding of racial stereotyping. Stereotyping, we are told time and again, is irrational. It is the irrational attribution of characteristics to particular individuals based on generalizations about the groups to which they belong. Or, as Gordon Allport put it in *The Nature of Prejudice*, racial prejudice is "an antipathy based upon a faulty and inflexible generalization."³⁸

But (as I have argued elsewhere), if the problem with racial stereotypes is overinclusivity, then the condemnation of thinking in stereotypical terms carries little normative content.³⁹ It is, rather, a condemnation of sloppy thinking. The message of the dismissal of stereotypes as irrational is "Don't use them because they don't work"—an essentially empirical critique. The trouble is that the stereotyper might conclude, on the contrary, that racial stereotypes *do* work, or at least that they work as well as other generalizations one makes to simplify life. Or, to put the matter more formally, a particular individual might conclude that the benefits of stereotyp-

³⁶ *Brown*, 347 U.S. at 494.

³⁷ *Id.* at 494 n.11.

³⁸ G. ALLPORT, *THE NATURE OF PREJUDICE* 9 (1954).

³⁹ See Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 429-39 (1988).

ing (principally lower search costs) outweigh the costs (the potential loss of value, discounted by the likelihood that the value will in fact be present).

This might seem an odd way to think about racial stereotyping, but the condemnation of stereotyping on the ground that it is irrational really does invite a listener to respond, "Well, it works for me!" And unless an empirical refutation is available, the critique of stereotyping fails. So it turns out that the *Brown* Court was simply thinking the same way that many people think about racial matters: empirical evidence is the key to deciding whether particular instances of what others might consider racism are actually right or wrong. There is, then, no value choice, in *Brown* or in the condemnation of racial stereotyping, except for the value holding that sloppy analysis is bad. And that is what I mean by empirical morality.

Again, think back on *Roe v. Wade* and the question of when human life begins. Remember what the majority said about the claim that the fetus was a person within the meaning of the fourteenth amendment? The Court wrote: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."⁴⁰ Now, quite apart from the fact that the conclusion of the sentence hardly follows from the premise—a point argued convincingly by Robert Bork⁴¹—look at what the Court has done. It turns out that the moral question is subsequent to a prior empirical question: is the fetus human? If it is, then there is no right to an abortion. No wonder there was an effort to pass a Human Life Bill! For, the suggestion of this sentence is that *Roe v. Wade* was not, after all, about the right to end a pregnancy; it was about whether the fetus is human.

Of course, one may object that the question of when human life begins is not an empirical one. But that is a non sequitur. For as Daniel Callahan has pointed out, no matter what definition of human life one offers, the definition will require some empirical input—and at that point, the question becomes an empirical one.⁴²

⁴⁰ *Roe*, 410 U.S. at 156-57.

⁴¹ *The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Judiciary Committee*, 97th Cong., 1st Sess. 308-16 (1982) (testimony and prepared statement of Robert Bork).

⁴² Callahan, *The Role of Science in Moral and Societal Decision Making: The Human Life Bill as a Case Study*, in *DEFINING HUMAN LIFE: MEDICAL, LEGAL, AND ETHICAL IMPLICATIONS* 314, 316 (M. Shaw and A. Dondera eds. 1983).

This point, I think, was missed by those who criticized the Human Life Bill for trying to be scientific about something that is not scientific. Of course there is no scientific answer to the question "When does human life begin?" But once a definition is proffered—a human being is a fetus that is viable, or a human being is a fetus that can react to pain stimuli, or a human being is a fetus after birth—choose whatever you like—scientific researchers can clearly provide information that will help give an answer.

This is how the theory of *Brown* is linked to the effort to overturn *Roe* on the ground of fetal humanity. Both turn out to rest on empirical moral visions. For the argument that abortion is wrong because the fetus is human, like the argument that segregation is wrong because it is harmful, collapses if the empirical premise turns out to be false.

Still, it is important not to overlook in all of this the fact that the weakness of empirical morality sweeps both ways. Consider that most of the pro-choice movement would reply to the fetal humanity argument with "But the fetus isn't human!" That answer, of course, is subject to the same constraints as the pro-life answer that I have been discussing. It turns a legal or moral argument into what is effectively an empirical one. For once the pro-choicer defines human life, there is the risk of new scientific evidence that the fetus fits the definition—or perhaps that many newborn children do not. Naturally, it is possible to change the definition once new evidence shows that the old one does not support the claim, and in the abortion area this seems to be a regular habit of both sides.

But if the decision about what facts matter changes as new facts cast doubt on the prior moral conclusion, it is easy to see that the empirical claim is not driving the moral judgment. Rather, the moral judgment is driving the empirical claim. What I mean is that very often the factual propositions are disguises for the real debate. Oddly reluctant to join issue on the basic moral questions, the advocates argue about the facts instead.

Consider, for example, the recent study from Baltimore purporting to show that among inner-city teenagers who are sexually active, those who have been pregnant and had abortions tended to do better in school and in various other social measures, including self-esteem, than those who carried pregnancies to term or, for that matter, than those who have never been pregnant at all.⁴³ Pro-life

⁴³ See *A Study of Teenagers Hints Gain for Those Having Abortions*, N.Y. Times, Jan. 25, 1990, at A21, col. 1.

groups immediately attacked the study as biased and shoddy, just as pro-choice groups have long attacked studies purporting to show that abortion is more psychologically harmful than childbirth. Few in the debate seem to care very much what the best scientific answer is. Most participants, I suspect, make up their minds about which studies to trust without even glancing at them, in keeping with the old adage that the work that is least biased and most careful is the work that supports the observer's side.

Why do people carry on this way? Have they learned nothing from the argument over footnote 11 of *Brown*? Why can't pro-lifers be satisfied with saying, "Abortion is wrong even if the fetus is not human and even if the pregnant woman is better off aborting"? Why can't pro-choicers say, "No woman should be forced to carry an unwanted fetus even if the fetus is human and even if the woman would be harmed more by the abortion than by carrying the pregnancy to term"?

There are, I would suggest, two reasons. Each of them is related to the way that we frame moral questions in our post-Enlightenment confusion and, by extension, the way that we frame legal ones. The first reason, and the more attractive, is that both sides in such an argument are appealing to a transcendent moral norm and need the facts to bolster their claims to the norm. Imagine, for example, that the following norms are widely accepted in our society:

- (a) The killing of innocent human life is wrong except in the most extreme circumstances.
- (b) People have the right to choose beneficial medical procedures, but not to choose harmful ones.

If these are widely shared norms, then the arguments over fetal humanity and the harm, if any, done to the woman by abortion are obviously in competition to satisfy the norms. But this is not wholly adequate as an explanation, for the pro-lifers and pro-choicers are not really battling over these norms except in public. They would not insist on slanting the evidence this way or that (or insist on doubting evidence that cuts the other way) unless driven by moral visions entirely independent of the transcendent norms that I have mentioned. And those moral visions must be that abortion is right—or wrong—*without regard to fetal humanity or harm to the pregnant woman*.

I said that there were two reasons that the combatants in the abortion battle so often prefer to talk the language of science rather than the language of morality. The second reason is that they have

no choice, because if they debated morality, they would be talking past each other. In a morally pluralistic nation like ours, it is often difficult to carry on public moral dialogue, because people begin from so many different premises. Among the purposes of liberal theory is to find a way to mediate the dialogue that liberalism needs if it is to remain a coherent theory of politics, rather than just a theory about desirable ends. One way in which some liberal theorists try to mediate the dialogic difficulty is to impose on public dialogue a requirement of "rationality." For the moment, neither the definition of nor the justification for rationality matters. I will discuss both a bit toward the end of tomorrow evening's lecture.

The point I would like to make now is that in constitutional analysis, and therefore in most of our moral debate, the idea of rationality as a mediating force has been transformed into the idea of science as a mediating force. Scientism is the whole game; the constitutional battle goes to the side that produces the more convincing expert evidence. So it is unsurprising that pro-choice and pro-life forces argue so vehemently over empirical matters that have nothing to do with their actual moral dispute. For their actual moral dispute is one that liberal dialogue cannot resolve. It is also one that constitutional courts almost certainly will not resolve, except by empirical means. Just think of *Roe v. Wade*'s "resolution": trimesters, viability, harm to the pregnant woman. All of it is the language of empirical morality, and all of it, like the analysis in *Brown*, is open to empirical challenge.

Now, you might be wondering why any of this matters. After all, even if constitutional judges are showing a bias toward answering empirical questions rather than moral ones, we don't really want them answering moral questions, do we? And besides, at least if we get the empirical evidence straight, we will have the facts before us and can argue about their significance, right?

Unfortunately, matters are never quite as simple as we would like. The first point—that constitutional judges should not in any case be making moral judgments—is readily disposed of. It is certainly true that the liberal ideal of the objective judge holds that the province of morality is the province of the legislature, and the judge's role is to test the legislature's moral judgment against the requisites of the Constitution. We all know, however, that our judges all too rarely fulfill that ideal. When a judge fails to separate her personal moral sentiment from her constitutional analysis, the least we can ask is that she be kind enough to let us know it.

Furthermore, when judges treat constitutional questions as empirical inquiries, they often are still making moral judgments; they are simply hiding them. To go back to the example of *Brown v. Board of Education*, it is difficult to imagine that the Justices who treated the inquiry as empirical were doing so out of an unbiased search for constitutional meaning. Surely it is more likely that the Court was bolstering its moral judgment that segregation is wrong with the empirical claim that segregation is harmful.

This leads to the second set of objections: Isn't it a good thing to decide what the facts are? Aren't constitutional judges who prefer counting to reasoning doing us all a favor?

My answers are yes and no. Yes, it is good to know the facts. No, the judges are not doing us a favor. The principal difficulty with treating constitutional questions as empirical is not, as you might think, that somebody might come along next year with a new set of studies proving that segregation does more good than harm. No, the principal difficulty is that someone might come along next year who denies that psychological studies are the way to determine whether harm has occurred. Someone might come along next year and say—as the group sometimes known as the race critical scholars might argue—that segregation is harmful if the segregated say that it is harmful.

Now, you might say, what's so radical about that? Why not judge the harmfulness of segregation by asking people?

Perhaps nothing is wrong with doing it that way; although, bear in mind that this critique would bar any important role for social science. No psychological studies, no sociological observations, just the massed voices of the oppressed. That would be the way in which the courts would decide the harmfulness.

Of course, someone might come along and say, "No, no, the right way to judge the harmfulness of segregation is to ask the segregators, who after all are the majority." And at this point we might all put on our Herbert Wechsler hats and ask what neutral principle exists to tell the court that the relevant judgment on whether segregation is harmful is the judgment of the segregated or the segregator.⁴⁴ I would suggest that unless the court has already made up its mind that segregation is harmful, no neutral principle exists. (Which is not the same as saying that a neutral principle is what is needed.) And even though Wechsler was critical of the reasoning of

⁴⁴ See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

Brown itself, I think it was the fear that a neutral principle did not exist that led the *Brown* Court to dump the whole matter in the lap of "neutral" social scientists, and, in that way, as I have already suggested, turn the constitutional assault on segregation into a delicate chastisement for sloppy analysis.

But I use the term "neutral" advisedly. If you thought that you detected quotation marks in my voice, you were right. I am wary of the word not because I suspect social scientists of harboring or perhaps nurturing prejudices that bias their statistics. I am wary of the word because the neutrality of the social sciences, like the neutrality of the natural sciences, exists only within a particular way of looking at the world.

No doubt you're wondering what I mean. Let me try to make the point by example—in fact, by returning to what I said earlier about the morality of the fanatic. Let's pick a hypothetical fanatic and call him the Ayatollah Khomeini. And let us further say, still speaking hypothetically, that he has sentenced to death a mythical author, whom we might call Salman Rushdie, and that the Ayatollah's disagreement with Rushdie revolves around a hypothetical book. Let's call it *The Satanic Verses*.

Now, what is it that makes the Ayatollah a fanatic? It can't be that he has sentenced Rushdie to death: four out of five Americans think death sentences are just fine. And it can't be that he has sentenced Rushdie to death for what Rushdie thinks or writes, because although that is not a very liberal way to behave, it is certainly a common enough occurrence on this unhappy globe. No, if the Ayatollah is a fanatic, the reason must have something to do not with the death sentence as such, but with the justification for the death sentence. The death sentence, if it was a death sentence, was meted out on explicitly religious grounds. And that is what makes the Ayatollah, in liberal terms, a fanatic.

You see, we are back where we started: the fanatical moralist is the moralist who is not amenable to reason and, in particular, who is not amenable to facts as the liberal sees them. Many people who are religiously devout derive at least large parts of their world view from an epistemology that is very different from the materialist epistemology on which empirical morality depends. So the problem with thinking of scientism as a neutral mediating force is that the effort to turn moral questions into empirical ones actually devalues some modes of thinking—particularly the religious mode—that many millions of Americans may consider superior.

The current liberal message to people whose moral judgments have religious roots is that they are not welcome in public dialogue until they start speaking the same language as everyone else. I am not even sure that this is good constitutional law. I am quite sure that it is morally problematic, and that the inability of liberalism to accommodate (at least so far) the resurgence in religious faith is perhaps the greatest contemporary threat to liberalism as a political theory. In tomorrow night's lecture, I will sketch a few of the reasons that I fear for the future of liberalism.

In this evening's remarks, I hope that I have at least convinced you of two things: first, that constitutional courts prefer to turn moral questions into empirical ones when they can, and, second, that this tendency reflects the way that science has replaced God as an authority figure in moral dialogue. Whether or not you agree that the trend is problematic, I hope that you at least agree that the trend exists.

Before ending for the evening, I would like to build a bridge to tomorrow night's subject by muddying the waters a bit further. No doubt many of you are aware of the cases involving Jehovah's Witnesses and blood transfusions. As you may know, Jehovah's Witnesses believe that a blood transfusion from one human being to another violates the Old Testament's ban on eating human flesh. (Well, actually it's also in Acts, but it comes from Leviticus, so we can call it Old Testament.) To eat human flesh, according to the Witnesses, is to lose, perhaps forever, the possibility of salvation.

As the Jehovah's Witness understands God's law, moreover, the issue is not whether the blood transfusion is given against the recipient's will, but whether the recipient is, at the time of the transfusion, actively protesting. This is the reason that Jehovah's Witnesses will sometimes try to impede the physical access of medical personnel to an unconscious Witness: lack of consciousness is no defense. This is also the reason that Witnesses try to make the decision on behalf of their children: a child cannot be trusted to protest adequately.

The machinery of law has not been particularly impressed with the Jehovah's Witnesses' arguments. There are many cases in which courts have allowed transfusions to save the lives of unconscious Witnesses, even though the patient might have indicated a desire while conscious not to be transfused. In every decided case that I have found in which Jehovah's Witness parents have tried to prevent their children from being transfused, the court has ruled for

the hospital, and the transfusion has proceeded in the face of parental objection.

Now, if you will recall, the stated basis for the objection is that eternal salvation will be lost if the transfusion is received. The query which I would like to leave open until tomorrow night is this: Is the statement "If I am transfused, God will refuse me eternal salvation" a statement of fact or a statement of a value?

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End of First Lecture