In This Issue

The five articles in this issue of *Law and History Review* all address decision making. The first two examine the history of reproduction in the United States, focusing on medical decision making and changing strategies of abortion advocacy in the 1960s and 1970s. The next two analyze public and judicial decisions about the proper role of administrators and judges in the modern liberal state. Our final article revisits the famous Clandestine Marriages Act of 1753, which supposedly provided parents more control as decision makers over the marriages of their minor children.

Our first article by Leslie Reagan analyzes an innovation in malpractice law—now known as "wrongful birth" and "wrongful life" suits—through a close reading of trial transcripts and surrounding legal, medical, and popular media materials. These suits first arose in the early 1960s in the midst of the German measles epidemic when the nation feared the disease and its "crippling" effects on the developing fetus. The trial record exposed much of medical practice, physician-patient communication, and ideas about disability, but it also suppressed crucial information. Analyzed in conjunction with media sources and the social record, these suits reveal the complex and subtle ways in which reputations, religion, race, and class entered medical decision making about providing medical care, in these cases, therapeutic abortions. Finally, this article provides a new perspective on the cultural and parental attitudes toward children with disabilities in the 1960s.

In our second article, Mary Ziegler examines how the national debate over abortion changed in the 1960s and 1970s. She highlights that pre-*Roe,* policy-based arguments were an important component of abortion advocacy. One such argument described abortion as a method of population control, designed to cut welfare expenses, reduce pollution, or cut illegitimacy rates. *Roe,* however, moved the balance in the abortion debate away from policy-based arguments, including those related to population control, toward rights-based arguments. Before *Roe,* supporters of population control, now not associated with pro-choice advocacy, were willing to support abortion reform. In turn, pro-life activists emphasized the threat that population control might pose to African-Americans, and some African-Americans who supported abortion after *Roe* opposed abortion

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reform when, before the decision, abortion was thought of as population control. *Roe* thus helped to change the rhetoric and coalitions that defined the abortion debate. Ziegler thus concludes that a judicial decision like *Roe* can help to reshape coalitions and advocacy.

Our third article, by Daniel Ernst, reminds us that elections matter. In the latter half of 1938 administrative procedure was at the center of political debate in New York State. In August a constitutional convention adopted, subject to ratification in the fall, a provision to permit courts to determine for themselves the facts underpinning the adjudications of state agencies. In October John Lord O'Brian's bid to unseat U.S. Senator Robert F. Wagner became a referendum on the procedures of his legislative offspring, the National Labor Relations Board. The controversies revealed divisions in the legal profession and the party system that would ultimately determine how the bureaucracies of the 1930s were incorporated into the American legal and political order. Trial lawyers in the New York State Bar Association and "Old Guard" Democrats and Republicans pressed for heightened judicial review. They were opposed by Wall Street lawyers and liberals in the state Republican Party who preferred to make agencies' procedures more like those of the courts. As Ernst demonstrates, the election returns in November showed the political superiority of this "procedural Diceyism" and affected the subsequent history of party competition, the sociology of the legal profession, and the New Deal.

Our fourth article, by Gerry Rubin, takes us across the Atlantic to examine the application of the judicial neutrality doctrine in Britain in the1950s. He explores a number of controversial episodes concerning judicial "free speech," including the refusal of Lord Chancellor Simonds in 1954 to permit the experienced judge advocate, Lord Russell of Liverpool, to publish, while a serving judicial officer, his well-known book, *The Scourge of the Swastika*. In the following year the Kilmuir rules, that is, formal instructions effectively forbidding the judiciary from engaging with the media, were issued by Simonds's successor as Lord Chancellor. Rubin shows that such episodes represented the "Last Hurrah" for a distinctive era in modern judicial history when the autonomy of law from politics had been assumed, when judicial free speech had been perceived as constitutionally dangerous, and when judicial reasoning had been dominated by judicial restraint. Beginning in the 1960s these articles of faith were losing vital ground to competing values and approaches. By the 1980s there was a new recognition of the "politics of the judiciary," judicial activism, and an entitlement to judicial free speech. The incidents analyzed by Rubin revealed the problematic nature of judicial free speech and served as the formative stages in the gradual mutation of the judicial neutrality doctrine in Britain.

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In our final article, Rebecca Probert dispels the conventional wisdom about the Clandestine Marriages Act of 1753, which has viewed the law as absolute in its requirement that parental consent be given to the marriage of any minor, and that the period during which it was in force marked a distinctive epoch in English legal history. Yet, as she reveals, even after the Act the absence of parental consent did not invalidate a marriage in all circumstances, and there were a number of ways in which parental control could be avoided. Moreover, both the earlier canon law and the legislation that in 1823 replaced the 1753 Act also required parental consent, even if its absence did not render a marriage void. Viewed in context, she contends, the 1753 Act was both less drastic and less distinctive than has been assumed, and the extent to which a minor's choice of marriage partner might be constrained varied considerably according to class and gender.

As always, this issue concludes with a comprehensive selection of book reviews. We also encourage readers to explore and contribute to the ASLH's electronic discussion list, H-Law, and visit the society's website at http://www.hnet.msu.edu/~law/ASLH/aslh.htm. Readers are also encouraged to investigate the *LHR* on the web, at www.historycooperative.org, where they may read and search every issue published since January 1999 (Volume 17, No. 1), including this one. In addition, the *LHR*'s web site, at www.press.uillinois.edu/journals/lhr.html, enables readers to browse the contents of forthcoming issues, including abstracts and, in almost all cases, full-text PDF "pre-prints" of articles. Finally, I invite all of our readers to examine our administration system at http://lhr.law.unlv.edu/, which facilitates the submission, refereeing, and editorial management of manuscripts.

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