

report PUBLIC JUSTICE

Fourth Quarter, 2006

Vol. 29, No. 4

Editor's Watch

Sandel and Nagel on Abortion

Last May, philosopher Thomas Nagel reviewed a book by Michael Sandel titled *Public Philosophy* in *The New York Review of Books*. In the October 5, 2006 issue of that journal (pp. 56-57), Sandel replies to Nagel and Nagel responds to Sandel's reply. The dispute is this: Sandel argues that reasoning about justice sometimes requires one to engage directly in substantive moral and religious matters, whereas Nagel believes that reasoning about justice can set aside or remain neutral toward the personal moral and religious differences of citizens.

Taking up the issue of abortion as an example, Sandel writes, "Notwithstanding their claim to be neutral on the moral status of the fetus, liberals [like Nagel] cannot defend the right to abortion without implicitly denying that the fetus is a person. . . . This is why Nagel is wrong to insist that the distinction between public and private morality can, by itself, decide the question. If abortion were tantamount to infanticide, it would not be a merely private choice. Where one draws the public/private distinction depends on how one resolves the underlying moral question."

Nagel contends that Sandel has misunderstood liberalism, which is more nuanced in its public/private distinction and is not without a substantive moral argument. Nagel, like John Rawls, wants to distinguish political morality from what he apparently thinks is the undifferentiated moralism of Sandel. Thus Nagel says that there is a *political*-moral reason to recognize "the deep divisions over the personal question [of abortion] without relying on one of the answers to it" as the basis for making the political judgment about abortion. Nagel shows sympathy, for example, with those Catholics who are morally opposed to abortion but who are willing to "defend the legal right to abortion."

Here is Nagel's summary of his position: "I presented a case for liberalism based on equal respect for our fellow citizens in the exercise of collective control over the

individual. But even if one accepts that argument, it remains an open question how much moral weight it will bear, particularly in the face of differences as stark as those about abortion. After all, liberal equality is only one value, however important, and there will inevitably be others too powerful for it to contain. If someone is really convinced on religious grounds that abortion is as bad as killing a child, the requirement of equal respect for his fellow citizens may be incapable of persuading him that he should refrain from imposing that conviction by law on others who do not share it. In that case the liberal argument for abortion rights would have reached its limit with him. Fortunately many opponents of abortion hold more nuanced views, including perhaps those Catholics who defend the legal right to abortion while holding that abortion is morally wrong."

While I believe that Nagel is on to something by wanting to distinguish a political-moral judgment from a personal moral judgment that is not political, the question remains as to Nagel's basis for distinguishing what is politically moral from what is personally moral, or economically moral, or educationally moral. Has he, in other words, really answered Sandel's criticism?

When Nagel acknowledges that there are those who believe abortion is murder, he acknowledges that their judgment, at least for them, is a political-moral judgment in addition to being a private moral conviction. Thus, when Nagel acknowledges that the liberal argument reaches its limit at this point he is, in essence, admitting that if a significant majority of the citizens (or perhaps of the U.S. Supreme Court) were to conclude that abortion is murder, they would be likely to impose restrictions on abortion as an "exercise of collective control over the individual." This would be quite proper, since "liberal equality is only one value." Nagel's only recourse in face of this majoritarian collective possibility is to give thanks ("fortunately") that up until now enough citizens and Supreme Court justices "hold more nuanced views" so that the collective will has not outlawed or restricted abortion in a way that Nagel thinks improper.

What, then, does Nagel's political-moral argument add up to? Not much more, it would appear, than a recognition that a majority of the collective can *decide* what is politically moral. What he wants, of course, is for the collective to continue to impose the law of freedom for abortion, which he thinks restrains the collective from imposing the moral convictions of any private person on everyone. Nagel's preference is for a collective will that insists that decisions about abortion are *only* private moral decisions. His preferred political-moral outcome, then, is for the collective to allow people to do what they believe is personally moral about abortion: those who oppose it don't have to abort their unborn; those who favor abortion can have abortions without interference from the collective will. But this judgment works only on the supposition that the morality of abortion truly is an entirely personal one and that even in public law an abortion decision should be recognized as an entirely personal one. But since Nagel's view is that the political collective is simply the sum of all free individuals, he has nothing really to say about what ought to be morally normative in the political sphere

except that the majority of the collective will decide what it is. Therefore, Nagel has no political-moral basis for judging whether freedom of abortion or restriction of abortion is the right decision for government to make. Nagel can argue for his personal preference, but his is just one free individual's personal-moral preference among others, and the majority will decide what most of the collective want. This, in essence, is a "political morality" without any delimitation of the state's normative responsibility. Nagel works, as a good liberal, with only free individuals and the collective. Thus, his attempt to distinguish a political morality arising from collective judgments adds up to nothing because he has no basis for recognizing the distinct identity and responsibility of the state—the political community of citizens under government—which is a different kind of *institutional* reality than a family, a university, or a business corporation.

In this respect, even though Sandel is willing to appeal to morality and religion as a ground for political decisions, he recognizes better than Nagel does that the judgment that abortion is murder necessarily locates that judgment in the public-legal realm and not only in the personal-moral realm. It does so not only as an indirect outcome of a decision by a majority of the collective. It does so by the very nature of the political-moral argument. In other words, if an act is murder, it is an act that government is responsible to do something about it: to try to stop or to punish it. And if Nagel disagrees with the argument that abortion is murder, it is because he believes that abortion is not murder other than in the minds of those individuals who hold a personal-moral conviction that it is so. For Nagel, then, abortion can become an act of murder only if a majority of the individuals of the collective manage to impose what Nagel considers their personal moral convictions on everyone. But for Nagel to evade Sandel in this manner is to undermine his own insistence on a distinct mode of political-moral argument. For, from Nagel's point of view, there apparently are no distinctively political-moral arguments but only personal moral convictions that can become collectively imposed when the collective decides to impose the personal moral convictions of its majority that makes up that collective.

What is needed here, I would argue, is something that neither Sandel's nor Nagel's mode of argument makes possible. Sandel, unlike Nagel, believes in some kind of moral community whose identity cannot be reduced to the sum of the individuals who make it up. Sandel, in other words, appears to be a communitarian who resists the reduction of all human bonds to the contractual actions of unfettered, self-defining individuals. But what he needs is an argument that explains why the government of a political community has the responsibility to permit or restrict abortion precisely because such action is a public-legal-moral responsibility and not only a personal one.

To make my point, consider a different issue—education. Some parents may, as Catholics, believe strongly that their children should be educated in a Catholic school but may also believe that other parents should have the same political freedom to educate their children in secular, Muslim, or Jewish schools. Here the important distinction is between the public-moral argument for equal treatment of all parents and

school-age children, on the one hand, and the judgment that parental-moral responsibility for children may be carried out in diverse educational ways.

Now, one might ask, isn't that precisely what Nagel is arguing for? Doesn't he want government to treat all individuals equally and allow each to decide whether she wants to exercise the abortion option or not? No, Nagel has no political-moral basis for deciding whether government bears any responsibility for either permitting or outlawing abortion, or for establishing either a unitary school system or a pluralistic school system. All he can say is that the collective decides. On his terms, in other words, one political outcome of education law could be that a majority would require all children to attend Christian schools, even though Nagel would personally oppose that. Or another possibility is that the collective could require that all children attend secular schools and disallow all religious schools. Or perhaps Nagel favors the system we now have that permits parents to choose schools as they wish, but directs all public funds only to government-run schools. Yet in any of these cases, Nagel has no political-moral way to make an argument for any of these systems other than to state his personal preference and hope that the majority of individuals who constitute the collective will agree with his personal views and impose them as the collective will.

I, on the other hand, would contend that the reason government should allow parents to choose schooling appropriate for their children and then give equal public treatment (including funding) to all such choices is because I believe, on the one hand, that parents, not government, are chiefly responsible for raising their children and, on the other hand, that government is chiefly responsible to assure equal public-legal treatment of all families and schools—institutions that are neither governmental nor merely contractual collectives reducible to the will of individuals. When it comes to the life of the unborn, in contrast to the matter of education, however, life and death decisions belong by their very nature to the public-legal responsibility of government, not to parents. If government allows citizens the freedom to decide whether they will or won't have abortions, it is giving up its responsibility to protect life and to prohibit the taking of life. It is not necessary that we first settle the question of whether the unborn are persons with standing before the law. One need only argue that the procreation of children is a life-giving process that should not be interfered with unless some exceptional reason for abortion can be found. In other words, the benefit of the doubt should always be on the side of life and the life-generating process. It is something like the argument for justifiable warfare. Government should always stand on the side of upholding life and resisting or punishing any act of murder. A decision by government to go to war, therefore, must be made on solid grounds of why, under certain circumstances, the only way it can protect the life of the innocent is by using force to stop those who are murdering the innocent. There is no room for public-legal pluralism with respect to abortion as there is with respect to parents choosing from among a variety of schools.

Nagel is correct that we need to distinguish political morality from purely personal morality and morality in general, but he offers no mode of public-legal argument that is distinct from summing up the personal-moral preferences of individuals that constitute the collective. Sandel is correct that it is not really possible to make certain judgments about

justice and law without dealing with certain moral and religious matters. But Sandel does not clearly enough differentiate the public-legal-moral judgments from personal moral judgments or morality in general. What we need are sound reasons for distinguishing the different kinds of responsibilities that belong to different kinds of institutions and communities, including the political community and its government. Only within the framework of a richer view of human responsibility lived out in differentiated societies can we satisfactorily conclude arguments about who is responsible to do what. Nagel's liberal individualism and Sandel's morally sensitive communalism are insufficient for this task

—The Editor[©]

* * *