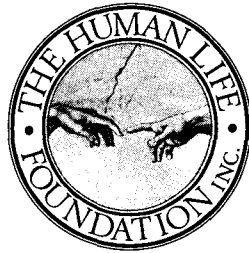


the HUMAN LIFE REVIEW



SPRING 1978

Featured in this issue:

Clare Boothe Luce writes A Letter to the
Women's Lobby

John T. Noonan, Jr. on Bogus Abortion Funds

Robert A. Destro, Esq. on . . . Government by Judiciary

Ellen Wilson on The Women's Magazines

M. J. Sobran on Fatherhood

Prof. Francis Canavan on Genetics, Politics, Etc.

E. von Kuehnelt-Leddihn on Homosexuality:
a Christian View

Also in this issue:

Michael Batten • Louis R.M. Del Guercio, M.D. • William F. Enos, M.D.
Albert E. Gunn, M.D. • Michael Novak

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. . . about THE HUMAN LIFE REVIEW

This is our 14th issue and, once again, we would remind you that all previous issues (not a single one "out of date," by the way — we write for the ages here!) are still available. You will find full information printed on the inside-back cover of this issue. As you will also note, Bound Volumes (for '75, '76 and '77), fully indexed, are also available.

Our readership continues to expand, and so do our press clippings (it is now routine to see ourselves quoted in newspaper columns, other journals, etc.), all of which is of course most gratifying to us. Even our mail (despite often controversial subjects we deal with) is increasingly favorable, and we thank all those who have taken the trouble to write us. (Most especially, we appreciate a recent letter from Archbishop Fulton J. Sheen, who assures us that he is a regular reader, and that ours is "one of the most profound reviews that come to my desk!").

The present issue contains material from other publications (and a commentary of a new book) and, as is our custom, we provide additional information here for the interested reader who might want to pursue such matters further.

Mrs. Luce's letter and the Women's Lobby letter to which she responded were inserted into the *Congressional Record* for March 7 by Congressman Henry Hyde (who added some notable comments of his own). Mr. Destro comments on Raoul Berger's *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Harvard University Press, Cambridge, Mass., \$15). Prof. Cañavan's article appears (along with a number of other very interesting ones) in "Fabricated Man and The Law," published by The Institute for Theological Encounter with Science and Technology in St. Louis. Sources for the articles by Drs. Del Guercio, Gunn and Messrs. Batten and Enos are given in the accompanying biographical material.

Finally, we attempt to answer all correspondence, and read all manuscripts, sent us. But our mail is becoming so heavy that we are not always able to supply all information requested, and we beg our readers' indulgence.

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INTRODUCTION

WE SEEM to have assembled here a rather “newsy” issue, which we hope the reader will find both informative and unusual (for us!). We begin with Mrs. Clare Boothe Luce, who always seems to make news, no matter the subject. In her first appearance in these pages (Winter '77) she took up the question of religion in regard to the abortion issue (her article provoked more commentary than any other we've run to date). Here, she holds forth on the proper (and the improper) nexus between abortion and Women's Rights. As usual, she knows whereof she speaks (Mrs. Luce is probably the best-known — and most effective — proponent of the Equal Rights Amendment anywhere), and she speaks eloquently. The controversy involved has of course been making headlines in the press in recent months, and what The Honorable Mrs. Luce has to say here may just make a few more. It certainly makes stimulating reading.

We follow with another article dealing with a current controversy: federal funding of abortions. Prof. John T. Noonan points out (with his usual attention to detail and the history of it all) that, whereas a considerable amount of the taxpayers' money has in fact been expended to pay for abortions, the Congress in fact enacted legislation specifically *not* appropriating such money — so where did the Treasury get authorization to disburse it? “These simple facts do not point to the commission of a crime,” says Dr. Noonan, but they “do point to the commission of possibly unlawful acts” as well as “possible conduct by higher officials of the government inconsistent with their sworn duty to uphold the laws and Constitution of the United States.” He thinks the Congress should investigate. Again, we doubt that you will want to miss this one. Nor the following article, by Robert A. Destro, Esq., who also deals with abortion and the Constitution.

Mr. Destro's starting point is the new book, *Government by Judiciary*, by the distinguished legal historian Prof. Raoul Berger (late of Harvard) who is himself no stranger to controversy: he just happened to bring out a previous book (*Impeachment: The Constitutional Problem*) in the midst of the Watergate trauma. And while his new book, appearing now in the midst of the abortion controversy, *avoids* that issue, its arguments, as Destro carefully points out, are remarkably *apropos*. (Mr. Destro too has previously appeared in our pages as the author of an impressive analysis of the Supreme Court's original *Abortion Cases* — see our Fall '76 issue.)

Having read all this (which we trust you will do), the reader may welcome the change provided by Miss Ellen Wilson (shortly to graduate from Bryn Mawr College, but already one of the most readable young writers we know). True, the abortion issue is not totally absent from her account of a holiday's reading of the “women's magazines,” but the article mainly treats

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with the enormous change in attitude of such publications toward the family in general, children in particular — and Motherhood. She writes: “It seems . . . that women’s magazines believe their readers are in the market for new values, or can be brought to that point . . . At any rate, publications which we once associated with aunts, grandmothers, and mothers now blithely discuss the pros and cons of homosexual priests and extramarital affairs.”

From Motherhood we move smartly on to Fatherhood, described in inimitable fashion by our Resident Expert, Mr. M.J. Sobran (who seems able to write on any subject whatever). This review is now 14 issues old, and Sobran has graced a baker’s dozen of them (he missed one because — an incorrigible *re-writer* — he only finished in time for the *next*) with his supple prose. He is in rare form here, e.g., pointing out that “Perhaps the most vivid illustration of how far the father has fallen is the fact that it is now unnecessary for a woman to obtain the consent of her child’s father before having it aborted — no matter whether she is married or not. . . . this raises a question of justice. Assume that abortion is perfectly justified in every case: does it follow that the man should be obliged to support a child whose very existence is no longer his responsibility?” One of the “evil things about abortion,” he concludes, “is that it arises, in many cases, from the dereliction of men who don’t want to be fathers. Surely it is no remedy to weaken the rights of men who do.”

Prof. Francis Canavan then brings us another discussion of a problem of growing concern: genetics. We recently read in the press that a “scientist” claims to have already “cloned” a new human. We don’t believe the story — but *can* it happen? And if it can, should it? Should all that Science can do be done? “The possibilities, if realized,” says Prof. Canavan, “would open up the prospect of shaping future generations of men.” So we had better decide beforehand, he says, what our *purposes* are. Given the proposition that “The only canon of technology is possibility,” it is up to philosophers to decide whether or not we “allow technological developments to run wild.” To us, there are few more interesting subjects of speculation than these peculiarly “modern” ones, and we hope you too are fascinated.

Another “modern” subject now much discussed is “The Problem of Homosexuality,” which Herr Kuehnelt-Leddihn takes on here. A frequent contributor, he is unique in his outlook on this and all other subjects (and regularly provokes commentary that ranges from the bedazzled to the mystified, not to mention the outraged!). He does not disappoint; he demonstrates again that even a subject as “thoroughly” discussed as this one has been in recent years is susceptible to a fresh treatment (albeit based on facts and insights available to those who read *everything*, as Herr Kuehnelt evidently does).

All these weighty matters touch, in both direct and indirect fashion, on the morals and ethics of the medical profession, which must treat with the human conditions (and their results) involved. Abortion especially has caused soul-searching among those who have sworn the Hippocratic Oath

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(as indeed it *should*), yet there seems to be remarkably little written, by doctors *qua* doctors, on the obvious dilemma. Our inquiries as to *why* usually meet with the response that medical professionals are “understandably reluctant” to discuss moral issues on which their brothers are so openly divided — a disturbing idea in itself, it seems to us. So we are happy to present here several examples of moral concern that we missed; you may be sure that we publish them here in the hope that they will produce, or inspire, more of the same. (We don’t expect the medical profession to be immune to moral ambivalence; however, a recent news story — reporting that abortions were performed on one bed in a “semi-private” hospital room in which the other bed was occupied by a woman waiting to give birth — suggests that the stricture “heal thyself” is applicable here.) All three touch yet again on abortion. The first, by Dr. Louis Del Guercio, wonders: What would Hippocrates think? The second, by Dr. Albert Gunn, asks: What did Hitler do? (Those are, of course, capsule descriptions; designed to pique your interest.) As it happens, both articles were first printed in journals mainly concerned with the end of *born* life, and written by doctors practicing in such fields (cancer and “critical care”) of medicine. The third (see Appendix B), by Messrs. Michael Batten and William Enos (the latter himself a doctor) discusses philosophically “the separation of the physician from the moral order” — which the authors conclude is the result of the same “scientific approach” to the Morals vs. Technology problem that Prof. Canavan is talking about . . . in short, this issue is not only “newsy” and varied, but “problem-integrated” as well.

Medicine is not the only profession increasingly caught up in abortion-related (you are forgiven if you begin to wonder what *isn’t* related to the abortion issue nowadays!) ponderings. We have several times in the past reprinted syndicated newspaper columns by the well-known philosopher-politician Michael Novak, and we conclude this issue (see Appendix C) with three more of them. We had just been impressed by a very recent one (in early April, on the “Waddill Case”) when Prof. Novak sent us no less than ten earlier columns (“ . . .thought these might interest you. . .”) he’s written on abortion-related matters in the past year or so — to those familiar with the column-writing trade, an unusual concentration on a single exigency. And indicative, we feel, of the growing relevance of what we discuss here. In the next issue, we promise to have more of the same.

J. P. MCFADDEN
Editor

A Letter to the *Women's Lobby*

Clare Boothe Luce

[*What follows is the text (printed here with the author's permission) of a letter from Mrs. Luce to Ms. Carol Burris, president of the Women's Lobby, Inc.; it was written in response to an earlier letter from Ms. Burris, which you will find in Appendix A in this issue.—Ed.*]

YOUR LETTER of December 19th, asking me for a contribution to the Women's Lobby campaign against anti-abortion Congressional candidates was buried under the Christmas and New Year's mail. It has now surfaced in my in-basket.

Having read it, *I must ask you to drop my name from the Women's Lobby list of sponsors. . .*

First, I do not care to be identified with a campaign that has already done so much to jeopardize the passage of [the Equal Rights Amendment]. If ERA fails to pass, as I now fear it will, a large part of the blame must fall on those misguided feminists who have tried to make the extraneous issue of unrestricted and federally-funded abortion the centerpiece of the Equal Rights struggle.

Secondly, I do not accept the extraordinary proposition that women cannot achieve equal rights before the law until all women are given the legal right to empty their wombs at will — and at the expense of the taxpayer.

I have been a supporter of ERA for 55 years. Indeed, I went to work in Washington for Alice Paul, the mother of ERA, the year the Amendment was sent up to the Hill.

ERA was conceived as a bill to wipe out, in one single stroke, all the laws on the books which denied equality before the law to women. In the past half-century, women have won many rights they did not have when ERA was dropped into the hopper. But even so, I believe that the passage of ERA would bring the evolutionary process of legal equality to completion.

If the Amendment fails to secure ratification, I very much doubt that Congress will vote to extend it seven more years of grace.

As you are a sincere and dedicated feminist, I owe it to you and the Women's Lobby to explain why I am for ERA and, at the same time, against legalized unrestricted abortion.

As you so well know, all of the democratic liberties and civil rights Americans enjoy under our Constitution — and indeed, the

Clare Boothe Luce, author, playwright, diplomat, and polemicist *par excellence*, is one of the best-known women in America.

Constitution itself — rest on the validity of a single proposition, which was first set forth in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness.”

Now on what facts or circumstantial evidence did the Signers base this extraordinary — and politically revolutionary — assertion? In 1776, anybody with eyes in his head could see that some were masters, others slaves; some were rich, others poor; some fair of form and sound of limb, others ugly, blind or crippled; some wise, and others fools from the cradle. Nothing in 1776 seemed *less* “self-evident” *in fact* than that “all men are created equal.” And nothing — *in fact* — is less self-evident today.

But “these truths we hold” were not based on evident facts about the human condition. They were based on philosophical and religious *truths* which transcended what people call “the realities.”

The American proposition that created the United States and the Constitution was based — the words of the Signers — on “The Laws of Nature and Nature’s God.”

The Founding Fathers reasoned thus: All men are born equal in one undeniable respect — they are all born equally human. (No man is any less human than any other.) All men have the same nature. It is in the very nature of Man — it is his “human nature” to desire (“among other things”) Life, Liberty and Happiness. (No man naturally desires to die before his time, to be the ‘creature’ or slave of another, or to live a life of suffering or misery.) Life, Liberty and the pursuit of Happiness were “unalienable” rights, because the desire and the need for them had been implanted by Nature, and Nature’s God in the minds and hearts of all men. A government that denied these natural human rights to its subjects was an unjust, unnatural and ungodly government. Furthermore, our Founding Fathers reasoned, Nature and Nature’s God had also endowed human nature with the capacity to *reason*. Man had the natural capacity to plan, guide and correct his own courses of action. Consequently, the Law of Nature and Nature’s God entitled all men to self-government.

I mention all this simply to remind you that the Natural Law (and the Divine Law) is the rock on which the Constitution was founded.

At this point, let me say that the case for the equality of all human beings can be rationally adduced from the Laws of Nature alone. It is not necessary to call on Divine Law or religion, to defend equal rights for women — or to attack unrestricted abortion.

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It is a self-evident truth that women are no less human beings than men, and that it is no less in their nature to desire Life, Liberty and Happiness. Women, being equally human, are equally endowed by Nature with the gift of reason. (A gift, by the way, that is best developed in them, as it is in men, by education in the intellectual disciplines.) All this being so, all women are equally entitled with all men to all the rights existing under the Constitution. The purpose of an Equal Rights Amendment to the Constitution is to guarantee that all women will enjoy these rights.

Now what does the Natural Law have to tell Americans about *sexual equality* and *abortion*?

Well, anybody who isn't altogether an idiot knows that what the Law of Nature has made unequal — or different — neither the laws of men, nor the desires of women, can make equal, or the same.

Men and women, who have the same human nature, have the same instincts for self-preservation. They display the same human (and animal) emotions — fear, hate, love, etc. They have the same procreative urge. They equally desire to “make love” with a member of their opposite sex. It is the Law of Nature that they should ‘pair-bond’ or mate.

But now we come to the stubborn and quite *unalterable fact*. Men and women are biologically different, or not equal, in respect of their reproductive organs and sexual functions. Nature made man to be the inseminator, woman to be the child-bearer. And the Laws of Nature decreed that the natural — and normal — consequence of the love act, or coitus, is the conception in the womb of woman of a new human being, who is “flesh of the flesh and bone of the bone” of both parents. It is natural — and normal — for the woman who conceives to carry her child in her womb to term, to give birth to her, and her mate's baby. Involuntary abortions, or miscarriages, are also natural, in the sense that they are nature's way of expelling naturally unviable fetuses from the womb of the mother. But voluntary miscarriages are not the norm of nature.

It is not the nature of all women to abort their progeny. If it were, the human race would have long since disappeared from the planet. It is natural and normal for women to bring their unborn children to term, and woman has a natural desire to do what nature intended. It is unnatural for woman to interrupt the natural process of pregnancy, in the only way she can do so — by killing the child in her womb.

Induced abortions are against the nature of woman. They are also against the nature of the unborn child, who, like all *living things*, instinctively desires to go on living. (Even a cockroach instinctively

tries to evade your lethal foot, and if you half-squash it, tries to crawl away for another second of life.)

There is no logical process of thought by which the unnatural act of induced abortion and the destruction of the unborn child in the womb can be deemed to be a natural right of all women.

Induced abortion is against the Law of Nature. There are, to be sure, a great many unnatural things which it is in human nature to desire and to do, even though they are against the Law of Nature. And Man, who was also endowed with the gift of free will, does many of them. Sodomy, homosexuality, (defined in the dictionary as “unnatural carnal copulation,”) adult sexual intercourse with infants, sexual sadism, masochism, are some of the sexual ways in which people go against the Natural Law, which designed the sexes to copulate with their adult opposites.

But of all the human acts that “go against nature,” the killing of a child by its own mother has — throughout human history — been viewed with the most revulsion.

The Supreme Court pointed out in its 1973 abortion decision that “the weight of history is on the side of abortion.” And that is true enough. But the Court failed to point out that the weight of history is not only on the side of abortion, it is even more heavily on the side of *infanticide*. The killing of helpless infants has been practiced in many societies, especially in impoverished, or overpopulated societies. The “weight of history” is also on the side of theft, murder, torture, war, and above all, tyranny. We ourselves are living in one of those tragic eras in history when the “weight of history” seems to be very heavily on the side of a great many obscene, cruel, violent and criminal acts which we would not like to see the Supreme Court legalize simply on the grounds that the “weight of history” is on their side. (If the Founding Fathers, who lived at a time when the weight of history was heavily on the side of tyranny, had followed the reasoning of the Supreme Court, they would have acknowledged the right of King George to abort the birth of America.)

Is there no other way to determine the rightness or wrongness of a man-made law than to refer it back to the Laws of Nature? Well, there is what Immanuel Kant called the test of the “categorical imperative.” The philosopher wrote, “There is . . . but one categorical imperative, namely this: *Act only on that maxim whereby you can at the same time will that it should become a universal law.*”

Consider, for example, the act of murder. Hate, fear, greed — the thirst for revenge, the desire for gain, as well as the desire for *justice*, are powerful human emotions that have again and again led people to commit murder. Indeed, the impulse to kill someone who is

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destroying one's liberty, or making one's pursuit of happiness impossible, is probably experienced sometime in life by everyone. One might argue that as these emotions and desires are natural, the law should recognize everyone's right to commit murder. Why, on the contrary, are laws against murder *universal*? Because anyone with a shred of common sense knows that *to grant a legal right is to recognize it as a right course of action*. But no one in his (or her) right mind has ever willed that everybody should be free to kill his neighbor.

Does the "right of abortion on demand for all women" pass the test of the categorical imperative? If abortion is a right to which all pregnant women are entitled, then it would be right (and not wrong) if all women aborted their fetuses. It would be the right course of action for all women to take. (There's this to be said for universal abortion. It would soon solve all the problems of mankind by ending the human species.)

Obviously, you do not believe — no one can believe — that abortion is a right course of action which *all women* should pursue. What you believe is that there is no danger whatever that all women will abort their children, because you *instinctively* know that it is not only natural for women to conceive, but natural for them to want to bear the children they conceive. And you think (do you not?) that all women have the right — the natural right — to bring their unborn children to term. And you think (do you not?) that anyone who interfered with this right by aborting a woman against her will would be guilty of a criminal action. What you *really think*, (if you stop to think) is that *some women, in some circumstances* should be given the right to abort their unborn children, and that for these women, in these circumstances, abortion would be a right course of action.

The great and historic case that men have made against women is that they are incapable of thinking logically. And logic now requires those feminists who believe that abortion is a natural and right course of action for *some women, in some circumstances*, to categorize the women, and describe the circumstances, in which the right to abortion is justified.

At this particular moment of history, the American public (and the Congress) are doing a much better job of *thinking about abortion* than the Women's Lobby.

A recent Gallup Poll shows that only 22 percent of Americans think that abortion on demand should be legal. The Gallup study shows that those who hold this view feel that a human fetus is not a "human being" until the *split second* of its birth.

CLARE BOOTHE LUCE

Only 19 percent think that abortion should be illegal in all circumstances. These believe that the fetus is a human being from the moment of conception, and that abortion is, in all circumstances, "murder."

But 55 percent — the majority — think that abortion should be legal, but only in *certain circumstances*. Of this majority, 77 percent would allow abortion during the first three months, providing the woman's life is endangered by the pregnancy. And 65 percent would allow abortion if pregnancy is the result of rape or incest.

A majority of those who would legalize abortion during the first trimester of pregnancy would disallow it in the second and third trimester, *except to save the life of the mother*.

And only 16 percent think that the fact the parents cannot afford a child is grounds for abortion at any time.

The capacity to think, (as opposed to the capacity to "feel") involves the ability to make distinctions. The American people, God bless 'em, seem to have it, in the abortion question. Clearly, the Women's Lobby doesn't.

I repeat, I wish to disassociate myself from your campaign to purge Congressmen who do not agree with your misguided efforts to make induced abortion a legal, normal and moral course of action for all women in all circumstances.

I do not doubt that these efforts will be repudiated by the American people. What I regret is that they will succeed only in wrecking the chances of ERA.

With kind personal regards — and from Hawaii, the first state to ratify ERA,

Aloha,

CLARE BOOTHE LUCE

Should Congress Investigate the Treasury's Funding of Abortion?

John T. Noonan, Jr.

IN 1976 Congress enacted an appropriations act for the Department of Health, Education, and Welfare, specifically *not* appropriating money to pay for elective abortions as part of Medicaid. A single federal judge ruled that, nonetheless, the Secretary of HEW must announce his willingness to pay for *all* abortions sought by Medicaid-eligible applicants. Following that ruling in October 1976 the Treasury paid out money to cover elective abortions obtained through Medicaid and continued to do so until late in 1977.

These simple facts do not point to the commission of a crime. They do point to the commission of possibly unlawful acts by the Treasury and to possible conduct by higher officials of the government inconsistent with their sworn duty to uphold the laws and Constitution of the United States. These simple facts point to the possibility of other facts whose existence can be established only by the process of a congressional investigation. Already enough is available to suggest that the Ford Administration was guilty of sabotaging the law on abortion funding and that the Carter Administration, while better, did not move quickly to repair the damage. Already enough is known to say that the funding of elective abortion during 1976-1977 occurred in breach of the Constitution itself.

The Constitutional Provision

The part of the Constitution violated is part of the organic law of the nation, that is, part of the Constitution which establishes the basic division of powers between the Executive, the Legislature, and the Judiciary, and gives the power of the purse to the elected representatives of the People. Article I, section 9, clause 7 reads, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." In those few and effective words control over federal expenditures is vested in Congress. Unless Congress makes a law appropriating money, no one has authority to draw money from the Treasury, and the Treasury has no authority to pay. Money can be drawn from the Treasury only in consequence of a bill appropriating the money.

John T. Noonan, Jr., a professor of law at the University of California (Berkeley), is a well known authority on constitutional law, and a prolific writer; his latest book, *The Antelope*, recounts a famous Supreme Court case (in the 1820's) involving recaptured slaves.

The meaning and importance of Article I, section 9, clause 7 have been repeatedly affirmed in a long line of decisions by the Supreme Court. The classic case is the 1850 decision of *Reeside v. Walker*, in which the widow of a post office contractor presented a case claiming she was owed money by the United States. No appropriations act had been passed to pay her. The courts declared themselves powerless to give her a remedy. For a unanimous Supreme Court, Justice Levi Woodbury wrote, "However much money may be in the Treasury at any one time, not a dollar of it can be used in payment of anything not thus previously sanctioned."¹ No appropriation meant no payment.

As recently as 1962 in *Glidden Co. v. Zdanak* Justice John Harlan, speaking for the Court, had occasion to reiterate the meaning of the constitutional provision. He wrote, "Article I, section 9, clause 7 vests exclusive responsibility for appropriations in Congress, and the Court early held that no execution may issue to the Secretary of the Treasury unless such an appropriation has been made."² In other words, no court had power to order the Treasury to pay what had not been appropriated.

The case which came closest to encroaching on this basic division of powers, but which ended in its vindication, was *Lovett v. United States*, decided by the Supreme Court in 1946. Robert Lovett, Executive Assistant to the Governor of the Virgin Islands, and two other government employees were suspected by the Un-American Activities Committee, and when the government refused to fire them, Congress in a deficiency appropriation act in 1943, barred payment of their salaries. The three continued to work for a short time and then sued for their compensation, claiming, respectively, \$1996, \$101, and \$59. The Court of Claims determined that they were owed the money, but left to Congress the decision whether money would now be appropriated to pay them.³ Affirming this judgment, the Supreme Court held that the salary prohibition had been an unconstitutional Bill of Attainder, forbidden by another clause of the same Article I, section 9 of the Constitution which forbids payment by the Treasury except in consequence of an appropriation. The Supreme Court held the prohibition invalid, but it did not attempt to appropriate the money itself. It followed the Court of Claims in leaving to the decision of Congress whether money would now be appropriated.⁴ The Supreme Court stopped at the limit of the constitutional power of the judiciary and did not cross it. *Lovett* became another case standing for the principle that the Treasury can only pay from an appropriation and only Congress can appropriate.

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How seriously this constitutional distribution of powers has been taken in the past may be illustrated by *Stitzel-Weller Distillery v. Wickward*, decided by the Court of Appeals for the District of Columbia in 1941. In the belief that the Agricultural Adjustment Act was constitutional, Stitzel-Weller paid over \$1,000,000 into the Treasury to be administered by the Secretary of Agriculture as part of the AAA. When the Act was declared unconstitutional, the distillery wanted its money back from the Treasury. It was a trust fund, the company claimed; the Treasury was a trustee; and when the trust failed, the money should be returned to its donor. The court thought the company had equity on its side, but the court also said it was helpless. It could do nothing to order the Treasury to pay because of the "constitutional rule, that 'No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law.'" ⁵

The Hyde Amendment

It was against the background of this unquestioned authority of Congress over the purse that the Hyde Amendment to the 1976-1977 appropriations act for HEW was enacted. The Amendment provided, "None of the funds contained in this act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." ⁶ As this language formed part of the appropriating act, it effected a non-appropriation of money for elective abortion.

The Hyde Amendment was offered pursuant to House Rule XXI, "the Holman Rule," which permits amendments to appropriations bills on two conditions: (1) that the amendment be germane to the subject matter of the bill; and (2) that it "retrench expenditures." ⁷ The Hyde Amendment qualified on both counts. It was obviously germane to the purposes of the Medicaid part of the HEW appropriations. It retrenched expenditures by eliminating the money that would be paid for elective abortions.

In dozens of rulings on amendments offered under the Holman Rule, the House for over a century has taken the position that amendments so offered become, if accepted, part of the appropriations act. ⁸ They are not separate substantive legislation. If they are voted in, the appropriations act is limited by the words of amendment. When the amendment says "None of the funds contained in this act shall be used. . .," the appropriation act no longer contains an appropriation for the purpose for which "none of the funds" can be used. The formula used in a Holman Rule amendment is an explicit declaration that Congress is not appropriating for a use that might otherwise be thought to fall within the appropriation.

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After such an amendment has been accepted, no law exists by which an appropriation for this use has been made.

Judge Sirica's Ruling

The appropriations act containing the language of the Hyde Amendment became law on September 30, 1976. At once there was a rush by the pro-abortion party to the courts to have Hyde declared unconstitutional and to have the federal government commanded to continue paying for abortions. At the time the Supreme Court had not ruled on the question of abortion funding, and all the lower federal courts which had considered the question had held that a State was under a constitutional obligation to fund elective abortions for the indigent as part of the State's Medicaid program.⁹ It was not unreasonable for the pro-abortion party to expect a similar judicial response when it was a matter of federal rather than state funding.

There were, however, two obstacles to ordering the federal government to fund, neither of which was present when a State was the defendant. One was the explicit division of powers effected by Article I, section 9, setting a limit on the authority of the Executive and the Judiciary over the federal purse. The other was the ordinary requirement of equity jurisdiction. For an injunction to be issued immediately by a court, ordering someone to do or not to do something, there must be a finding by the court that "irreparable injury" will result to the party asking for the injunction unless the injunction is given. In other words, a court will not anticipate the result of a trial and order a defendant to act before the trial has been held unless such an order is necessary to preserve the status quo and prevent the injustice of the defendant causing injury to the plaintiff which cannot be remedied by an order entered after the trial.

In the case of abortion funding, "irreparable injury" was hard to show. Medicaid is a program in which the States and the federal government play a part. The States have the primary obligation of funding medical treatment. If the medical treatment is of a kind which falls within a federally-approved category, the federal government reimburses a percentage of the State's share. But a State's duty to provide medical services does not depend on federal reimbursement. If the federal government failed to reimburse a State for elective abortions, the State would still be in a position to pay for the abortions and, if there had been a constitutional duty to pay for them, that duty would have had to be discharged by the State. If the States did turn out to have some constitutional claim to reimbursement from the federal government, that intra-governmental claim could be settled after the litigation. No one would be denied an

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abortion because of the absence of instant federal reimbursement of a State.

The absence of irreparable injury was all the more conspicuous because of the way HEW financed Medicaid. Instead of reimbursing a State after the State had paid the bill, HEW “reimbursed” by paying three months in advance what it thought would cover the expenses of the State, with adjustments then being made in the light of what the State actually spent.¹⁰ When the Hyde Amendment went into effect, the States already had in hand three months’ advance funding for elective abortions.

The pro-abortion party sought an order from the federal District Court in Washington, D.C. requiring the Secretary of HEW to continue paying for elective abortions while the constitutionality of Hyde was determined. The case was heard by the Chief Judge of the District Court, John Sirica. He found no evidence of irreparable injury and dismissed the request for an injunction.¹¹

Judge Biunno’s Ruling

Simultaneously with the suit in Washington, the Planned Parenthood Association of Hudson County, certain doctors and one “Jane Doe” sued the Secretary of HEW in the federal District Court for New Jersey, also asking for an injunction against the enforcement of the Hyde Amendment. The case was heard by Judge Vincent Biunno.

Judge Biunno at once observed that the State of New Jersey was already under a federal injunction to pay for elective abortions. Whether the federal government reimbursed it or not, the State had been ordered to pay. Consequently, no showing of irreparable injury had been made, and for that reason alone Planned Parenthood’s case failed.¹²

Judge Biunno also made the more fundamental observation that the Constitution prevented the Treasury from paying out money which had not been appropriated. Congress had not appropriated money for elective abortions. Even if a federal judge were to hold Hyde unconstitutional and enjoin the Secretary of HEW from enforcing it, “the Secretary of the Treasury would remain bound to observe the Hyde Amendment and to refuse to draw any moneys out of the Treasury for payment of a federal share to a Medicaid State on account of elective abortions.”¹³ Judge Biunno had penetrated to the core the constitutional question. He saw that the federal judiciary had no power to appropriate money from the Treasury, and the Treasury had no power to pay money without an appropriation.

Judge Dooling's Ruling

A third suit was launched by the pro-abortion party against the Secretary of HEW in the federal District Court for the Eastern District of New York, in Brooklyn. The plaintiffs here were Planned Parenthood of America, the American Civil Liberties Union, the New York Health and Hospitals Corp., one indigent woman and one doctor. Harriet Pilpel, who was both a vice president of the ACLU and the general counsel of Planned Parenthood and had represented the Planned Parenthood affiliate in New Jersey, also represented Planned Parenthood here. The judge was John Dooling.

Judge Dooling did not make a final ruling on the merits of Planned Parenthood's case, but he gave an opinion that the plaintiffs seeking to enjoin the operation of the Hyde Amendment would probably prevail on the ground that the Amendment would be held unconstitutional. Judge Dooling adopted the argument of Planned Parenthood that, as the morality of abortion was disputed by "Godfearing people," the government would be required to be neutral. And "neutrality" meant the government should be on Planned Parenthood's side and pay for abortions! He ordered a trial on the merits of Planned Parenthood's case. In the meantime, he issued an order requiring the Secretary of HEW not to carry out the Hyde Amendment and to announce his willingness to "provide reimbursement provided to all Medicaid-eligible women by certified Medicaid-providers."¹⁴

Judge Dooling's order jumped over the two obstacles that had detained Judge Sirica and Judge Biunno. The State of New York, like New Jersey, was under a federal injunction to pay for elective abortions — an injunction issued by the same Brooklyn court on which Judge Dooling sat.¹⁵ There was no way this obligation depended on federal reimbursement. Judge Dooling closed his eyes to this point.

Even more startling, his order operated on the Secretary of HEW throughout the United States, although no showing had been made, except as to the State of New Mexico, that the States would not pay for the abortions the federal government did not pay. He did not attempt to explain how he could enter such an injunction for the entire country without such a showing of irreparable injury throughout the country.

On the fundamental constitutional issue of the division of powers between the courts and Congress, Judge Dooling cited *Lovett*, but either he had misread *Lovett* or counsel had miscited it to him. He wrote:

The language of the Act makes clear that Congress had appropriated what

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it judges sufficient money for carrying out Title XIX and that it has sought only to restrict the circumstances in which the funds could be used to pay providers of lawful abortion services. If that prohibition of use transgresses constitutional rights, it cannot be given effect. Payment of funds will follow, but not by an act equivalent to an appropriation.

He then cited *Lovett* as authority for setting aside “a section of an appropriations act.”¹⁶

In short, Judge Dooling, in direct conflict with Judge Biunno, thought the money for elective abortions had actually been appropriated but that the “use” of this money had been restrained by the Hyde Amendment. When the Amendment was set aside, the appropriated money could be touched. Mistakenly, he believed that *Lovett* had similarly set aside one section of an appropriations act and reached sums already appropriated. Mistakenly, he ignored the House’s own understanding of its legislative process: that a vote for an amendment to an appropriations act, forbidding use of appropriated funds for a given purpose, was a vote not to appropriate for that purpose.

The triumph of Planned Parenthood and its allies appeared to be complete. They had obtained from this single federal judge in Brooklyn an order binding on the Secretary of HEW throughout the land effectually thwarting the expressed will of Congress. What two federal judges had denied, a third had granted. Above all, they had gained what was precious where an appropriations act lasting only a year was concerned — time. They had the order preventing HEW from carrying out the act. As long as it stayed in force, time was on their side.

The Action of the Ford Administration’s Lawyers

The litigation involving Hyde took place in October 1976, the month preceding the presidential election. Gerald Ford, it will be recalled, was vocal in his campaign in his opposition to abortion, seeking to distinguish himself from Jimmy Carter by his support of a constitutional amendment directed against abortion. It might have been supposed from the presidential rhetoric that the Ford Administration would have taken vigorous steps to see Judge Dooling’s order was reversed. In fact, the Administration engaged in what can only be described as sabotage of Hyde.

What was imperative for the Administration to do — with time such a precious commodity — was to ask a higher court to stay Judge Dooling’s order. There were three grounds on which a stay could have been sought. First, there had been no showing of irreparable injury to the plaintiffs. Second, Judge Dooling had misinterpreted the Constitution. And third, his order and findings were in direct

conflict with those of Judge Sirica and Judge Biunno. In particular, Judge Biunno's opinion had informed the Secretary of HEW that a federal court had no authority to order the Treasury to pay out unappropriated money and that no money had been appropriated for elective abortions. Judge Dooling's order required the Secretary of HEW to act as if the appropriation had been made. Caught between two different lower courts, the Secretary of HEW had every reason to ask a higher court to resolve his dilemma and to do so quickly.

Instead of asking for a stay, however, the Administration's lawyers opposed granting one! Senator James Buckley had intervened in the case and, after Judge Dooling's ruling, had promptly appealed to the Supreme Court to stay the order. Robert Bork, the Solicitor General and William H. Taft IV, the General Counsel of HEW, filed a joint memorandum opposing Senator Buckley's request.¹⁷

Bork and Taft did tell the Supreme Court that they believed Judge Dooling's order was "erroneous," and they did note the two cases holding that no irreparable injury had been shown by the plaintiffs. But, astonishingly, they failed to raise the constitutional barrier to Judge Dooling's order, and they failed to inform the Supreme Court that Judge Biunno's decision had rested in part on the Constitution. As Judge Biunno's opinion was not yet in print, this failure to appraise the Court of its content was a serious act of non-communication.

These omissions paled to insignificance compared with what Bork and Taft stated affirmatively. They declared in their written memorandum that they could think of no irreparable injury that would come to the intervenors from a denial of their request for a stay.¹⁸ But the true issue was, What was the injury to the United States if the stay was not granted? Each day that Judge Dooling's order was in effect, elective abortions were federally financed. It was this evil to which the Hyde Amendment had been directed. It was this evil which was the irreparable injury of the United States, which the counsel of the United States ignored.

In a footnote Bork and Taft did discuss the interest of the United States, but only to quote and make their own a principal argument of the opponents of Hyde. They observed that any money spent in funding elective abortions "may be offset at least partially by the savings of monies that would otherwise have been expended for childbirth and post-natal care if women were to carry unwanted pregnancies to term."¹⁹ Here were the government's own lawyers making their own the argument of the opponents of the legislation they were supposed to be defending. It was this dollars and cents,

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cost/benefit, kind of reasoning that Hyde had rejected in the cause of saving human life. But thinking in the language of Planned Parenthood, Bork and Taft could not imagine that federal participation in taking human life was an irreparable injury to the government; they could only offer an economic calculation. Instead of making their own vigorous effort to correct John Dooling, they joined Planned Parenthood, their nominal opponent, in persuading the Supreme Court to leave his order in effect.

Adopting this do-nothing position, the government lawyers appeared tacitly to agree to this proposition: You may sue us in any federal court in the country. If you lose, try another judge. If you lose again, try again. Somewhere, you will find a federal judge who agrees with you. When you find him, we will be bound everywhere, no matter how many times we have won before. One judge's will will bind us; and we will let his order run as long as possible.

Indeed it was not until the Carter Administration had taken office that the federal lawyers even filed an appeal from Judge Dooling's order. The appeal was filed on February 11, 1977. And even then, no stay was asked for. The result was that Judge Dooling's order remained in effect.

On June 20, 1977, the Supreme Court decided that the States were under no constitutional obligation to pay for elective abortions.²⁰ The decision removed the premises of Judge Dooling's order without directly reversing him. With a feet-dragging slowness that formed a sharp contrast to the speed with which the injunction had been obtained, Judge Dooling on August 4, 1977 lifted the injunction in open court.

From October 22, 1976 to August 4, 1977, for over 10 months out of the normal 12 months of the life of an appropriations act, the quick decision of a federal judge in Brooklyn had ruled the entire country with the force of law, commanding that Hyde not be observed. A considerable share of the responsibility for this situation must be assigned to the government's lawyers.

The Action of the Treasury

Judge Dooling's order ran against the Secretary of HEW. It did not in words touch the Secretary of the Treasury, who was not before his court. If the Secretary of the Treasury knew the Constitution, he knew he had no authority to pay out money not appropriated by Congress. If he was familiar with the language of appropriations acts, he knew that Congress had appropriated nothing for elective abortions. If he needed judicial confirmation of his understanding of the law, he had the opinion of Judge Biunno that he was obliged to observe the Hyde Amendment.

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When the Hyde Amendment went into effect on September 30, 1976, the Treasury had already made the three month advance payment to the States for elective abortion. The Treasury was faced with the question whether it should keep on making such advances. Under both the Ford and Carter Administrations, the Treasury continued to make the advances in disregard of the appropriations act and the Constitution.

What A Congressional Investigation Might Learn

The facts that set out above establish a *prima facie* case of failure on the part of the Executive to obey the law and to uphold the Constitution. A congressional investigation should establish who were the persons primarily responsible for this failure. Who made the decision to oppose the request of a stay of Judge Dooling's order? Who made the decision not to ask for a stay on the part of the United States? Who made the decision that the Treasury should continue to pay despite the Constitution, the appropriations act, the New Jersey case? At what level of the Ford Administration were these decisions made? What reconsideration of these decisions was undertaken by the Carter Administration?

Congress would be investigating here a fundamental subject, the obligation of the Executive to carry out the law and to observe the Constitution. It would be examining how a determined bureaucracy can frustrate congressional intention. It would be looking at the President's sworn duty "faithfully" to "preserve, protect and defend the Constitution of the United States."²¹

The action of the bureaucracy was affected by Judge Dooling's order, but erroneous and even abusive of power as it was, that order did not itself require the Treasury to make payments; and a proper respect for the judicial function would keep Congress from calling Judge Dooling himself. It would, however, be appropriate for Congress to take note of the peculiar zeal the federal courts have shown in furthering the pro-abortion cause. A remedy for that partisanship could be found in legislation regulating or limiting the jurisdiction of federal courts in abortion cases. Such legislation was found to be necessary as to labor injunctions when the federal courts were seen as anti-union. A comparable body of cases now suggests that these courts are pro-abortion, and a remedy like the Norris-La Guardia Act may be necessary.

The most fundamental question which a congressional investigation must address is, How shall Article I, section 9, clause 7 be enforced? The Executive and the Treasury in particular are expected to read the Constitution and follow it; but if they don't, what follows?

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To make the Treasury officials personally liable for paying out unappropriated money seems to be a harsh and chimerical solution. Is it necessary that criminal penalties be added to the teaching of the Constitution? Is there a sufficient remedy in requiring the recipients of the illegally-paid moneys to make restitution? These questions are within the province of Congress to answer.

The issue of federal financing of killing human beings is as grave an issue as any government will have to face. The gravity of the issue is immeasurably compounded when the solution democratically reached by the People's elected representatives has been contaminated by the action of the Judiciary and the Executive. In examining how this contamination occurred Congress will be reasserting its commitment to the preservation of human life and undertaking the defense of its most basic constitutional power.

NOTES

1. 11 How. 271, 290 (1850).
2. 370 U.S. 530, 570 (1962).
3. 104 Ct. Claims 557 (1945).
4. 328 U.S. 303 (1946).
5. 118 F.2d. 19 (D.C. App. 1941).
6. Text in *McRae v. Mathews* 421 F.Supp. 533 (E.D.N.Y. 1976).
7. Lewis Deschler, ed., *The Constitution, Jefferson's Manual and Rules of the House of Representatives*, sec. 835.
8. Cannon's *Precedents of the House of Representatives*, 7, sec. 1643.
9. E.g. *Roe v. Norton* 408 F.Supp. 660 (D. Conn. 1975).
10. See William H. Taft IV and Robert H. Bork, *Memorandum for the Secretary of Health, Education, and Welfare in Opposition to the Application for a Stay Pending Appeal*, November 1976, filed in the Supreme Court in *Buckley v. McRae*, 91 S.Ct. 347 (1976).
11. *Doe v. Mathews* D.D.C. Civil No. 76-1835, decided October 2, 1976.
12. *Doe v. Mathews* 420 F.Supp. 865 (D.N.J. 1976).
13. *Ibid.* at 871.
14. 421 F.Supp. at 535.
15. *Klein v. Nassau County Medical Center* 409 F.Supp. 731 (E.D.N.Y.).
16. 421 F.Supp. at 541.
17. Memo cited at note 10, *supra*, p. 10.
18. *Ibid.*
19. *Ibid.*, footnote 9.
20. *Maher v. Roe* 45 U.S. Law Week 4787 (1977).
21. Constitution of the United States, Article II, sec. 8.

Some Fresh Perspectives on the Abortion Controversy

Robert A. Destro

[Professor Raoul Berger's new book, *Government by Judiciary*, is a significant contribution to the legal scholarship on the abortion controversy, says the author, who seeks to apply Berger's analysis to the subject he doesn't mention.]

When this Court decided *Roe v. Wade* and *Doe v. Bolton*, it properly embarked on a course of constitutional adjudication no less controversial than that begun by *Brown v. Board of Education*, 347 U.S. 483 (1954). The abortion decisions are sound law and undoubtedly good policy. . . . The logic of those cases inexorably requires invalidation of the present enactments. Yet I fear that the Court's decisions will be an invitation to public officials to approve more such restrictions. . . . When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless.¹

The foregoing statement by Justice Thurgood Marshall, dissenting in the welfare-abortion cases, *Maher v. Roe*,² *Beal v. Doe*,³ and *Poelker v. Doe*,⁴ might well have been extracted from the pages of Professor Raoul Berger's latest work: *Government by Judiciary*⁵ as a prime example of the judicial mind set which has prompted the federal judiciary to assume an ever-increasing role in the shaping of policies which govern everything from abortion⁶ to zoning.⁷ Justice Marshall's statement, as well as a concurring remark by his colleague Justice Blackmun,⁸ dovetails nicely with the essence of Raoul Berger's observations of a federal judiciary run amok with an exalted sense of its own power.

Professor Berger chooses the desegregation and reapportionment cases, *Brown v. Board of Education*⁹ and *Baker v. Carr*,¹⁰ as illustrative of his view that the judiciary has unconstitutionally usurped political and legislative power.¹¹ The abortion cases are not even mentioned by name,¹² notwithstanding the fact that they are the most recent example of "government by judicial decree on a national basis."¹³ They are, in fact, apologetically described (with the contraception cases) as a "comparatively innocuous use of judicial power."¹⁴

I will not attempt to discuss here, or otherwise elaborate on or criticize Professor Berger's major arguments. Rather, I will attempt

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to relate them to an area where his scholarship appeared to fail him: abortion. One can only speculate as to the reasons for such a glaring omission, but one may readily eliminate any possibility that the arguments raised are inapplicable or that the situation is any more tolerable because the Constitution and its legislative history do not mention abortion.¹⁵

The primary focus of *Government by Judiciary* is the Fourteenth Amendment, the source of many of the “rights” the Court has established over the years. It contains an exhaustive review of the debates and arguments which went into the passage and ratification of the amendment. It proves that the Fourteenth Amendment had a very limited function to perform: assuring the basic personal rights of life, liberty and property, and had nothing to do with political or “civil” rights such as “one man, one vote,” desegregation or abortion.

The book is already a controversial one, not so much for its conclusions, but for the subjects it chooses to illustrate their validity: race and voting. The involvement of the federal judiciary in these areas has become so common and so pervasive that the general public has come to take them for granted. Professor Berger is to be commended for his straightforward analysis of issues too long forgotten in the quest to assure governmental protection for the rights of minorities.

It is important to identify what both his book and this article are *not* about: social policies regarding the civil and political rights of minorities and women. The focus of each is allocation of political power between the federal judiciary and the states.

In an analysis of this type it is easy for the cynical reader to conclude that criticism of the Court’s exercise of power must, of necessity, be based upon a sense of displeasure with the result. Although the critic often has a result-oriented axe to grind, such is not the case with Professor Berger.¹⁶ His book is eminently readable, and a *must* for anyone who seeks to keep abreast of the shifting tides of power allocation in the federal system.

Simple examination of the federal judiciary’s record on abortion should suffice to demonstrate the identity of the growing problems in this controversial area of civil rights with those identified by Mr. Berger.

I.

The Fourteenth Amendment and Abortion

A. Background

The Fourteenth Amendment says nothing about abortion. The same can be said for the rest of the Constitution. Thus, one is left

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with the inquiry which is central to Professor Berger's analysis:

In a government of limited powers it needs always be asked: what is the source of the power claimed? 'When a question arises with respect to the legality of any power,' said Lee in the Virginia Ratification Convention, the question will be, '*Is it enumerated in the Constitution?* . . . It is otherwise arbitrary and unconstitutional.'¹⁷

Where then does the right to an abortion find its genesis? Mere invocation of the right to privacy does not go far enough, for Berger-style analysis demands to know the source of "privacy" rights too, and the Court's rationale is less than convincing:

The Constitution does not explicitly mention any right to privacy. . . .

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.¹⁸

Dissection of the foregoing statement demonstrates that the Court's abortion decision exhibits at least three of the same "usurpations" identified by Berger in the contexts of desegregation and voting:

1. Assumption of powers not delegated by the people;
2. Use of the due process clause and "latitudinarian" construction to create new constitutional rights; and
3. Action akin to that of a "Council of Revision."

B. Unconstitutional Exercises of Judicial Power

1. Assumption of power not delegated by the people: "When does life begin?"

Although the right of privacy is often cited as the foundation of the abortion cases, the Court itself did not rest its decision in *Roe v. Wade* on such dubious grounds. The real basis for the abortion decisions is a finding that the unborn were not "persons" protected by the Constitution:

The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. . . . If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment. . . . We. . . would not have indulged in statutory interpretation favorable to abortion in specified circumstances [In *United States v. Vuitch*, 402 U.S. 62 (1971)] if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.¹⁹

By the simple expedients of deciding that an unborn child is not a "person" entitled to constitutional protection and professing to safeguard the judicially-created "right to privacy" the Court sought

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to draw attention away from what it was really doing: deciding when life begins.

Although defenders of the Court's position point vociferously to the now-famous statement that

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.²⁰

But the Court decided that very question by holding that "by adopting one theory of life,"²¹ a state could not impinge on a women's rights, but that in assessing a *state's* interest, "recognition [could] be given to the *less rigid* claim that as long as at least *potential life* is involved the State [could] assert interests beyond the protection of the pregnant woman alone."²²

This type of analysis, taken together with the Court's later statement that the point at which the State had the option to protect unborn life was viability "because the fetus then presumably has the capability of meaningful life outside the mother's womb,"²³ and, thus, it had "both logical and biological justifications,"²⁴ was merely a convoluted way of saying that the theory which Texas *had* adopted — that the unborn were human beings deserving of legal protection²⁵ — was *without* logical or biological justification.

But where did the Court find legal warrant for such a decision? It had already disclaimed any right to decide the medico-legal question, but proceeded to do so anyway — the distinction between actual and potential life is a substantial one. Where was the power to decide the *Constitutional* question of "who is a person?"

If one accepts the Court's view that the history of the Constitution gives no clue regarding an intent to include the unborn, it is equally true that the framers never considered the question of whether or not the Court was empowered to exclude them in order to invalidate state laws prohibiting abortion. When the Court decides that a change in the law is mandated by the Constitution, the ruling is inflexible, for the only method of change is through the Constitutional amendment process. By deciding that abortion was a matter of Constitutional right, the Court attempted to remove the controversy from the political process and impose its own views of an acceptable solution to the problem. Similarly, the Court's extension of "personhood" to corporations²⁶ was a means through which a controversy of major proportion could be avoided during a period of rapid economic expansion.²⁷ In both instances the result was anger and frustration based on an inability to effectuate change through the normal

processes of democracy. The Civil War was fought, in part, because the Court excluded Negroes from Constitutional protection²⁸ and removed the slavery issue from the political process; and Justice Black complained that “the people were not told that they were [ratifying] an amendment granting new and revolutionary rights to corporations”²⁹ when he attempted to argue that corporations were not protected by the Fourteenth Amendment.

Both of the foregoing situations illustrate that the Court is perceived as an institution of limited powers, possessing only the authority expressly granted by the terms of the Constitution. Where the result of a decision is to remove powers held and exercised by the states when the Fourteenth Amendment was ratified, the constitutionality of the exercise of judicial power is suspect unless it expressly appears that the grant of the power exercised was considered during the debates and the ratification process. Otherwise, the Court has no jurisdiction to consider the question and must leave its resolution to the states. Organic changes in the Constitution are only permissible through the amendment process provided by Article V.³⁰

2. Use of the “Due Process” Clause and “latitudinarian” construction to create new constitutional rights: The “Right to Privacy”

Since the right to abortion is based at least in part on the Fourteenth Amendment concept that “liberty” (*i.e.* privacy) may not be deprived without “due process of law,” the abortion cases suffer from the same defect Professor Berger finds in other cases resting on the due process clause. In short, the basic criticism of substantive “due process” is that the Court has used it as a mechanism to strike down legislation with which it disagrees.

Even if the right of privacy were the basis of the right to abortion, there is no constitutional warrant for striking down state legislation under its aegis because “[t]he detriment the State would impose upon the pregnant woman by denying [the] choice [of abortion] altogether is apparent.”³¹ The Court itself admits that the “right to privacy” is not mentioned in the Constitution, so where does the power to alter state law because it conflicts with such a right come from? Professor Berger answers the question with a question that contains its own answer:

With [Thomas C.] Grey, I consider the question whether the Court may ‘enforce principles of liberty and justice’ when they are ‘not to be found within the four corners’ of the Constitution as ‘perhaps the most fundamental question we can ask about our fundamental law,’ excluding only ‘the question of the legitimacy of judicial review itself.’³²

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He also professes agreement with John Hart Ely's view that the Court "is under obligation to trace its premises to the charter from which it derives its authority," for if a principle is not rooted in the Constitution "it is not a Constitutional principle and the Court has no business imposing it."³³

The language and history of the Constitution clearly do not support the concept of a judicial tribunal which is empowered to invalidate, in whole or in part, the laws of every state because its holding "is consistent with the relative weights of the respective interests involved, with the lessons and example of medical and legal history, with the leniency of the common law, and with the demands of the profound problems of the present day."³⁴

'The people,' averred James Iredell, one of the ablest of the Founders, 'have chosen to be governed under such and such principles. They have not promised to submit upon any other.' . . . We must therefore reject, I submit, Charles Evans Hughes' dictum that 'the Constitution is what the Supreme Court says it is.' No power to revise the Constitution under the guise of 'interpretation' was conferred on the Court; it does so only because the people have not grasped the reality — an unsafe foundation for power in a government by consent.³⁵

Professor Berger spends considerable time and effort in Chapter Eleven of his book proving that, notwithstanding current orthodoxy which claims that the meaning of "due process" is "vague" and, therefore, susceptible to varied meanings,

Whether one can determine 'precisely' what due process meant, however, is not nearly so important as the fact that one thing quite plainly *it did not mean*, in either 1789 or 1866; it did not comprehend judicial power to override legislation on substantive or policy grounds.³⁶

The import of such a statement in view of the Supreme Court's invalidation of the abortion laws of all fifty states on the grounds that the states' interest in protecting fetal life was not sufficiently "compelling" in the Court's view to sustain their validity is unmistakable. If the Court's actions were taken on grounds which can be described as other than substantive or policy-related, one is hard pressed to determine what they are in light of the following:

Those [lower federal courts] striking down state [abortion] laws have generally scrutinized the State's interest in protecting health and potential life and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy.³⁷

For *any* federal judge to "scrutinize" state interests and "conclude" that the legislative policies based on them are not justifiable and that "liberty" is "broad enough" to include abortion is the essence of judicial usurpation of the legislative function—a result clearly not

contemplated when the concept of due process found its way into Constitution:

The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; *they can never be referred to an act of the legislature.*³⁸

3. *Action akin to that of a "Council of Revision"*

In deciding that the decision to have an abortion was constitutionally protected, the federal courts invoked both the Ninth and Fourteenth Amendments.³⁹ The propriety of employing the Fourteenth Amendment for such a purpose has already been discussed and found wanting; the use of the Ninth Amendment points even more clearly to the penchant of the federal courts to revise the Constitution according to their personal predilections. The Ninth Amendment provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

But, as Professor Berger aptly notes, the fact that "certain non-enumerated rights are 'retained by the people,' it does not follow that federal judges are empowered to enforce them."⁴⁰ Although the Ninth Amendment was strenuously argued to be the basis of a "right to abort,"⁴¹ neither the Supreme Court nor the lower courts considering the issue addressed the point raised by Professor Berger. Rather than address the contention that "the Ninth Amendment was intended to protect against the idea that "by enumerating particular exceptions to the grant of power to the Federal Government," those rights which were not singled out were intended to be assigned' to it,"⁴² the federal judiciary and the supporters of abortion law revision focused on the Amendment as a repository of rights waiting to be tapped.⁴³ By adopting most of the arguments raised by Cyril C. Means in his 1971 Symposium Article entitled, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right about to Rise from the Nineteenth Century Legislative Ashes of Fourteenth Century Common-Law Liberty?*⁴⁴ the Court tacitly accepted Means' theory that the federal courts could revise state laws found to be outmoded or otherwise out of step with the times.⁴⁵

That such a revisionary power was not contemplated is underscored by Professor Berger's reliance on Alexander Hamilton:⁴⁶

That [Hamilton] meant to leave no room for displacement of [the] 'intention' [of the people] by the Justices is underscored by his scornful dismissal of the notion that 'the courts on the pretense of a repugnancy may substitute their own pleasure [for] the constitutional intentions of the legislature.'⁴⁷

Yet the single-minded dedication of most federal courts to the pro-

tection of the newly-created right to abortion is evidence that the courts themselves have lost sight of the constitutional boundaries of their *own* power.

II.

Conclusion

If there is any doubt that the federal courts have become “Councils of Revision,” such doubts may be set at rest by an examination of the heavy-handed techniques employed by the federal courts in dealing with the ever-increasing crush of abortion-related litigation.

—When the mayor of St. Louis declared that public hospitals in that city would not provide elective abortions, he was held liable for attorneys fees because his acts were “in bad faith,” notwithstanding the support of the citizenry of St. Louis.⁴⁸

—Virtually every federal tribunal ruled that states must allocate tax revenues for elective abortions.⁴⁹

—A single federal judge forbade compliance with an express Congressional limitation on the expenditure of federal funds (the so-called “Hyde Amendment”)⁵⁰ notwithstanding an express Constitutional directive that “no money shall be drawn from the Treasury, but in consequence of appropriations made by law.”⁵¹

—Cities and states may not impose safety regulations on abortion clinics which perform first trimester abortions, no matter how reasonable.⁵²

—A city may not zone abortion clinics into use categories appropriate to their business because such laws are not, in the court’s view, “zoning” laws, but rather prohibited “anti-abortion” laws.⁵³

—Preliminary injunctions are granted enjoining the enforcement of abortion clinic safety standards without evidentiary hearings.⁵⁴

—Every section of a challenged abortion statute is invalidated, including those clearly constitutional and separable, because the judge does not care to perform “delicate surgery” on the statute⁵⁵ or “rewrite” it.⁵⁶

—An ongoing state prosecution of a physician who performed an illegal third-trimester abortion is enjoined because the state acted in “bad faith” by founding an indictment on the fact that the baby was born alive and died twenty days later. The rationale: the baby was not “viable” because it died.⁵⁷

—A single federal judge has been asked to rule that congress-

sional anti-abortion legislation establishes “one religious view” and free federal funds for abortions.⁵⁸

—Parents may not stop the performance of abortions on their minor children, notwithstanding their ability to demand the opportunity to consent to other medical procedures.⁵⁹

—A father may not prevent the abortion of his unborn child because the state is powerless to defend his right.⁶⁰

—A public hospital must hire abortionists if the staff will not perform them.⁶¹

—Legislators are sued for acting in “bad faith” by enacting abortion-related regulatory legislation.⁶²

The list goes on and the situation is fast reaching the point where the filing of a constitutional challenge to newly enacted legislation touching on abortion is a matter of ritual. Legislators must be lobbied to authorize defensive litigation because the hostility of the federal courts makes defensive tactics both expensive and doomed to failure from the start.

These factors, taken in combination with the willingness of some judges to impose personal damage awards against elected representatives for “bad faith” (*i.e.*, anti-abortion) actions, have resulted in the near paralysis of the state, local and federal legislative processes by the federal judicial oversight. Like Professor Berger, this writer can only ask: By what right?

NOTES

1. *Beal v. Doe*, 432 U.S. 438, 461-62 (Marshall, J. dissenting).

2. 432 U.S. 464 (1977).

3. 432 U.S. 438 (1977).

4. 432 U.S. 519 (1977).

5. R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, (Cambridge: Harvard University Press, 1977). [hereinafter Berger]

6. See, e.g., *Abortion Coalition of Michigan v. Michigan Dept. of Public Health*, 426 F. Supp. 471 (E.D. Mich 1977); *Mahoning Women's Center v. Hunter*, No. C76-2034 (N.D. Ohio, May 25, 1977).

7. See, e.g., *Fox Hill Surgery Clinic, Inc. v. City of Overland Park, Kansas*, No. 77-4120 (D.Kan. filed Nov. 9, 1977); *West Side Women's Services, Inc. v. City of Cleveland*, No. C77-1112 (N.D. Ohio filed March 1, 1978). (on motion for preliminary injunction)

8. 432 U.S. at 462-463:

The result the Court reaches is particularly distressing in *Poelker v. Doe*, [432 U.S. 519], where a presumed majority, in electing as mayor one whom the record shows campaigned on the issue of closing public hospitals to nontherapeutic abortions, punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of the devil-take-the-hindmost. This is not the kind of thing for which our Constitution stands.

* * * * *

There is another world “out there” [a political one—*Ed.*], the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us.

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9. 347 U.S. 483 (1954).
10. 369 U.S. 186 (1962).
11. Berger at 407-418.
12. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).
13. Justice White, dissenting, called the cases “an exercise of raw judicial power.” *Doe v. Bolton*, 410 U.S. 179, 221 (1973).
14. Berger at 392. The reference quotes Justice Harlan for the proposition that the reapportionment cases are a “much more audacious and far-reaching [example of] judicial interference with the state legislative process . . .” “than the so-called “privacy” cases.
If Professor Berger actually intends to say that the “right to privacy” gives the federal judiciary the right to revise the federal constitution and state legislation, he is inconsistent. If he actually agrees with the position taken by Professor Ely in “The Wages of Crying Wolf: A Comment on *Roe v. Wade*,” 82 *Yale L.J.* 920 (1973) reprinted also in *The Human Life Review*, Winter 1975, Vol. 1, No. 1; see Berger at 285 & N. 7, his omission of any explicit reference to the abortion cases is curious.
15. See, generally, Berger, Chs. 16-21.
16. See, generally, Berger, Ch. 23.
17. Berger at 407, quoting 3 Elliot 186 (emphasis in original).
18. *Roe v. Wade*, 410 U.S. at 152-153.
19. *Id.*, at 156-57, 159.
20. *Id.*, at 159.
21. *Id.*, at 162.
22. *Id.*, at 150 (initial emphasis added).
23. *Id.*, at 163.
24. *Id.*
25. *Thompson v. State*, 493 S.W. 2d 913 (Tex. Crim. App. 1971) *vacated and remanded*, 410 U.S. 950 (1973) (pursuant to *Roe*).
26. *Santa Clara County vs. Southern Pacific RR*, 118 U.S. 394, 396 (1886).
27. *C.f.*, Berger, pps. 105-9. In these pages, Berger discusses the so-called conspiracy theory of the 14th Amendment, which argues that the Framers had concealed some of these purposes from the voters while seeking ratification of the amendment.
28. *Dred Scott v. Sandford*, 60 U.S. (19 How) 393 (1857).
29. *Connecticut General Ins. Co. v. Johnson*, 303 U.S. 77, 86 (1938) dissenting opinion) *quoted in* Berger at 71 n. 7.
30. See Berger at 317-337.
31. *Roe v. Wade*, 410 U.S. at 153.
32. Berger at 283-284 quoting “Do We Have an Unwritten Constitution?” 27 *Stanford L. Rev.* 703 (1975).
33. *Id.*, at 285 & n. 7.
34. *Roe v. Wade*, 410 U.S. at 165.
35. Berger at 295-296 (footnotes omitted).
36. *Id.*, at 193-194.
37. *Roe v. Wade*, 410 U.S. at 156.
38. *The Papers of Alexander Hamilton* 35 (H. C. Syrett and J. E. Cooke, eds., 1962) *quoted in* Berger at 194 & n. 4 (emphasis by Berger).
39. See note 18 *supra*.
40. Berger at 388.
41. See, e.g., Means, “The Phoenix of Abortional Freedom: Is a Penumbra or Ninth Amendment about to Rise from the Nineteenth Century Legislative Ashes of a Fourteenth Century Common-Law Liberty?” 17 *N.Y.L. Forum* 335 (1971).
42. Berger at 389 & n. 66.
43. See, e.g., *Doe v. Bolton*, 410 U.S. 179, 209 (Douglas, J., concurring).
44. 17 *N.Y.L. Forum* 335 (1971).
45. Means viewed abortion as a matter of common law right and felt that it was incorporated into the Ninth Amendment as an “unenumerated” right. For a detailed criticism of Professor Means’ views and

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- conclusions see Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," 63 *Calif. L. Rev.* 1250 (1975), reprinted in part in *The Human Life Review*, Fall 1976, Vol. II, No. IV.
46. *The Federalist Papers*, No. 78 at 506, 507 quoted in Berger at 395.
 47. *Id.*, at 395.
 48. *Doe v. Poelker*, 515 F.2d 541 8th Cir. (1975), *rev'd*.
 49. E.g., *Doe v. Poelker*, 515 F.2d 541 (8th Cir 1975) *rev'd* 432 U.S. 519 (1977); *Maher v. Roe*, 408 F.Supp. 660 (D. Conn 1975), *rev'd and remanded* 432 U.S. 464 (1977); *Doe v. Rampton*, 366 F. Supp. 189 (D.Utah 1973).
 50. *McRae v. Califano*, No. 76 Civ 1804 (JFD) E.D. NY (1976) (preliminary injunction).
 51. U.S. Const. Art. I. §7.
 52. See, e.g., *Mahoning Women's Center v. Hunter*, No. C76-203Y (N.D. Ohio filed May 25, 1977) (elevator capable of transporting stretcher, RH immune globin); *Fox Valley Reproductive Health Care Center v. Arft*, No. 78-C-28 (E.D. Wis. filed March 8, 1978) (informed consent, notice to parents of procedures performed on minors) (preliminary injunction).
 53. *Fox Hill Surgery Clinic, Inc. v. City of Overland Park, Kansas*, No. 77-4120 (D. Kan. filed November 9, 1977) (on motion to intervene). But see *West Side Women's Services, Inc. v. City of Cleveland*, No. C77-1112 (N.D. Ohio filed March 1, 1978) (preliminary injunction denied).
 54. E.g., *Fox Valley Reproductive Health Care Center, Inc. v. Arft*, No. 78-C-28 (E.D. Wis. filed March 8, 1978).
 55. *Id.*, at p. 8 (slip opinion).
 56. *Mahoning Women's Center v. Hunter*, *supra*.
 57. *Floyd v. Anders*, No. 75-1481 (D.S. Carolina filed Nov. 4, 1977).
 58. *McRae v. Califano*, No. 76 Civ 1804 (JFD) (E.D. N.Y.) (amended complaint filed January 4, 1978).
 59. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).
 60. *Id.*
 61. *Poelker v. Doe*, *supra*.
 62. E.g., *Fox Hill Surgery Clinic v. City of Overland Park, Kansas*, *supra*; *Fox Valley Reproductive Health Care Clinic v. Arft*, *supra*.

the descriptive blurb accompanying it and realized that my suspicions had been justified: "Instead of bringing husbands and wives closer together, children more often drive them apart by creating new tensions or serving as a battleground for old ones."

Clearly this wasn't representative of the Erma Bombeck, none-of-these-socks-match *genre*. Instead, it was a serious, even earnest offering of "what family-life experts have learned during the past few years: Children tend to detract from, rather than enhance, the closeness between a husband and wife. In fact, a couple's satisfaction with marriage and with each other drops sharply soon after their first child is born."

In one sense none of this was new to me. I have never been a parent, but even as a child I entertained suspicions that parenthood, though a blessed state, might not always be a blissful one. The difference — the problem — lay in the *tone* of the article more than the content. The authors appeared to lack a personal stake in the situation which they described so impartially, so scientifically. After checking off each loss which parenthood entailed, they confided the final judgment to the good sense of their readers. In my mind's eye I saw a cellophane-wrapped child stamped with the legend: "Warning: Children Are Hazardous to Your Marriage."

Redbook's September issue revealed similar preoccupations in an even more "scientific" format: a questionnaire asking: "How Do You Really Feel About Having Children?"² The "really" in the title lets the cat out of the bag. *Redbook* recognizes that traditionally, we have assumed that most women want children. But *this* study will make no such assumptions: this inquiry will burrow deeper and perhaps (fingers crossed?) bring to light startling revelations. The editors explicitly compare past and present options and attitudes in their introduction: "Traditionally, a woman has her first child shortly after marriage . . . But today as never before, having children is regarded not as a duty but as an option to be freely chosen." *Redbook*, addressing its attention to women "in their prime child-bearing years," wishes to discover "How happy will a child make you?"

Now, all this talk about whether mothering is fun, and whether the role of mother crucially interferes with that of wife and person is, I think, relatively new to the traditional women's magazines. And once I had awakened to the change, I began to wonder whether *this* shift in perspective coincided with others of an equally "progressive" stripe. What were women's magazines saying about today's touchy issues, and why? A brief submersion into recent issues of *McCall's*, *Good Housekeeping*, and *Redbook* seemed the best way to find out.

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It is not now as it hath been of yore. In olden days — before *Roe v. Wade*, perhaps — abortion was neither widely discussed in the women's magazines, nor warmly countenanced. Today, *McCall's* can evaluate "The New Abortion Rulings (What They Really Mean)"³ without seriously considering what they "really mean" to the unborn victims. The author assumes that she and her readers share a consensus on the "real meaning" of The Hyde Amendment and the June 20 Supreme Court ruling, and this is how she expresses it: "Safe, professionally performed abortions may thus be largely limited to women who can afford to pay, and poor women may again have to resort to back-alley practitioners or self-administered abortions — or give birth to unwanted, unplanned children they cannot care for." Qualified government funding of abortions is not enough for her; she finds fault with "the less restrictive Senate version" of Hyde because "poor women in many states will almost certainly find it hard to get an abortion."

Yes, yes, you say, these arguments are quite familiar to us. But consider the *provenance* in this case: these are not quotations from *Ms.* or the *New York Times*, but *McCall's* magazine, the birthplace of Betsy McCall paper dolls.

November's *McCall's* brings us still another "Do I Want a Baby?"⁴ article. The caption reads: "Unlike their mothers and grandmothers, today's young women do not see having children as their obligation — or even, necessarily, their goal." The abortion article presents a chilling commentary to this one: we have just been told that a woman who does not want her unborn child should be allowed to disburden herself of this obligation — and should receive Federal money to boot. It is grimly humorous that this same November *McCall's* carries a piece entitled "To Save A Child."⁵

Women's magazines have adopted a "progressive" stance toward other issues besides motherhood and abortion. Each of them opened the International Women's Year with editorials on the necessity for getting the Equal Rights Amendment passed. Here the questionable wisdom of the recommendation is less important than the rhetoric of the sales pitch. The less-than-flattering characterization of the opposition dispels the notion that the authors write for Total Woman trainees.

Redbook offered an extreme example of mudslinging in an article called "Why Nice Women Should Speak Out for ERA."⁶ President Carter's daughter-in-law, the "nice woman" who wrote the article, described the Stop ERA organization as "supported by groups of the kind that for years have opposed all progressive legislation. They have been against women's suffrage, the income tax, the

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United Nations, civil rights legislation, Social Security, detente, Medicare and laws to prevent child abuse.”

The suspicion that young Mrs. Carter is intentionally insulting her readers is untenable: at the very least, social restraints (“good manners”) prevent most people from abusing others to their faces. No, Mrs. Carter is abusing Stop ERA members behind their backs — she does not believe that a significant part of her audience opposes the ERA. This belief is startling whether or not it is well-founded.

Admittedly, *Redbook* is an extreme case. It is the Young Turk of the traditional women’s magazines (though from a *Ms.* perspective it coyly declines to follow its premises to their logical conclusions). *McCall’s* is slightly more sedate in its criticism of anti-ERA “forces.” The author of an article entitled “What American Women Want”⁷ is content to dismiss them as, “by their own admission, diametrically opposed to women’s equality.” She introduces the abortion question only to lament its polarizing effect on the women’s movement.

And there are other articles exploring once-forbidden territory, articles approving once-condemned practices. There are discussions of adultery and sexual liberation, vasectomies and women priests. I don’t mean to reduce all of these to the same level: clearly, some are matters of great consequence, and others are comparatively trivial. But for my present purposes, they all fall into the same category — the set of all issues once ignored or condemned by women’s magazines, and now made welcome by them. But are there other common factors as well? Can we come to understand how the Edith Bunkers of America forged such a bond with the Gloria Steinems?

I can think of one characteristic of women’s magazines which, once run amok, might have brought them to their present state. It is the myth of the happy ending.

Recall the *Redbook* questionnaire which asked, “How happy will a child make you?” Surely there is something simplistic about the formulation of that question; it is not so much wrong as woefully inadequate to the meaning of childbirth and parenthood. Yet, that is just the sort of question which these magazines revel in. And the “pursuit of happiness” philosophy, a pursuit fueled by the myth of the happy ending, influences the structure as well as the theme of almost every article and story. The classic paradigm is the romantic love story, and *Good Housekeeping*, the matron of women’s magazines, still makes room for one of the *genre* in each issue. *McCall’s* and *Redbook* have almost completely discarded the sentimental romance in its pure form and now publish “realistic” fiction. Yet, in most of these true-to-life dramas, only the definition of “hap-

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piness,” the desired goal, has been changed: the narrative curve still charts an upward progress from darkness into light. Often a marital breakup opens the story now, and we accompany the heroine to new love and/or self-fulfillment.

Nonfiction follows the same pattern. *Redbook* regularly features accounts by young mothers or single women on topics like “How I Combined Marriage and a Career” or “Living Single and Loving It.” *Good Housekeeping* straight-forwardly names a similar feature “My Problem and How I Solved It.” The same magazine undertook a survey to determine how happy its readers were, and was pleased to discover that almost all of those responding were happy, though some were happier than others.⁸

Articles about social and political movements also reflect a comic rather than a tragic view of life. Accounts of the women’s movement are always accounts of the *progress* of the women’s movement. The next-to-last-paragraph may introduce some *pro forma* qualifications (“Much still needs to be done”), but the concluding sentence inevitably achieves the proper note of optimism.⁹ Even therapist Wardell B. Pomeroy’s treatment of “The New Sexual Myths”¹⁰ concludes with a vision of ineluctable, though asymptotic progress:

I see our attitudes and beliefs about sex not as a pendulum swinging back and forth on a stationary clock, but more as a train that moves forward slowly, stops, backs up a bit, and then moves forward slowly again. Its progress is uneven but inexorable . . . Hence the new myths, to my mind, are not as far from the truth as were the old myths, and so we are closer to the “right track” than we have ever been. However, to continue the metaphor, there is so much still to learn about sex that I am afraid we will never pull into the station and be all the way home.

An unswerving faith in happy endings, personal and historical, renders the believer incapable of coping with failure, imperfection, and ugliness. Unfortunately, these three make up a good part of “real” life, and that is where the trouble lies. The spouse who is limping along in a less-than-perfect marriage feels injured in a double sense: he is being swindled out of his “promised” portion of happiness.

That is a functional, achievement-oriented view of marriage, and it is also, I think, a peculiarly American view — not universal among us, but a home-grown heresy even so. Soap opera characters refer to it when they say (as they do with tiresome frequency), “We’ve got to make this marriage work,” as though they were talking about a defective can opener. And when in due course frustration or the prospect of greener pastures terminates the effort, the couple excuse themselves by saying: “The marriage just didn’t work.” There are as

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yet no Consumer Protection Agencies to guide those in the market for wedded bliss.

Functional considerations and a concern for getting good value also magnify the burden of caring for a retarded or handicapped child, or an elderly parent. Those nurtured on the happy ending shrink from the seeming unfairness of it all — from the ugliness and the inefficiency of the defective. Hence one explanation for the distinctively American appeal of euthanasia and abortion, institutionalization and divorce. All are ways of banishing the imperfect, the ugly, and the inconvenient from life.

The irony is that failure and unpleasantness *are* unavoidable aspects of life, and the attempt to deny them can only make life less pleasant and less beautiful for others. Dr. Watson Bowes, criticizing the recent fad for home births, points out the effect upon the innocent:

Parents make all sorts of sacrifices for their children, yet some are willing to subject their babies to this kind of risk just because they want childbirth to be a 'beautiful trip.' It's not beautiful for the baby. Whether it's done at home or in the hospital, birth is tough for all babies, and they deserve all the help they can get.¹¹

The myopia which insists upon fashioning happy endings for one's own life story, no matter how great the fallout of unhappiness among family and friends, may often be unintentional, but it is nevertheless selfish. And it is not a realistic way of coping with one's own life either: the natural curve of life itself is not comic, but tragic, moves not upward, but downward, and the process of aging is not a progress in the Utopian sense. Some hardier formula for living is needed than "And they lived happily ever after."

Perhaps my observations on the metamorphosis of women's magazines and what this portends seem unnecessarily gloomy. Even if the magazines reflect the mythmaking impulse which I have described, are the readers necessarily implicated?

Well, yes and no. There are still many signs that the "developing consciousnesses" of the writers are developing more quickly than those of their readers. After all, 1977 was the year *Good Housekeeping's* readers shocked sensibilities by preferring Anita Bryant to all others in the Woman of the Year poll. True, *Good Housekeeping*, as the stodgiest of the women's magazines, is most likely to cling to what some would consider obsolescent paradigms of behavior. But even *Redbook* finds room for articles which contemplate marriage and children with benevolence. "Is Married Still Better?"¹² asked Judith Viorst a few months ago — and she decided that it still outshone the alternatives.

On Fatherhood

M. J. Sobran

TOCQUEVILLE observed that the American father enjoyed less respect than his European counterpart, and it is commonplace that American popular drama depicts Father as a comical and somewhat feckless figure. To be sure, there is a great deal of affection for this father, and for life with him. Tocqueville thought that on the whole the American family was a healthy thing, and he thought the informality between fathers and sons allowed a degree of warmth less easy to achieve in Europe.

Perhaps nothing separates us from the older European experience so much as this. Our own ancestors might sing of the “Faith of Our Fathers,” but that kind of veneration is difficult for us to feel toward *our* fathers. It is hard for most of us even to imagine the awe formerly inspired by patriarchs — Abraham, King Lear, Old Karamazov are nearly as alien to us as Confucius. Patronyms — Odysseus Laertides, Nikita Sergeivitch — are all but incomprehensible. A last name among us is not a symbol of tribal identity, any more than a first name is an honorific link with a patron saint. Pop Freudianism had a great vogue here, but Oedipal theory never had much resonance: the typical American father problem is not an oppressive atavistic presence brooding over the weak psyche, but simply the absence of the father.

American boys are supposed to be trained for independence. This is making a virtue of necessity. They are going to be independent anyway. By their mid-teens they are too mobile and, often, too wealthy to be controlled. What can the American father threaten to do to his disobedient son? Precious little — for there is little he can withhold. Fathers may be important formative influences, but they are not terribly important as sources of identity and status. The American father bequeaths no title, no tribal authority, and very little property. We are a nation of self-made men, and most sons can acquire much more than they have any prospect of inheriting.

Moreover, we have no powerful tribal traditions to speak of. Social authority is, as the sociologists say, bureaucratized, rationalized, made abstract and functional. Genealogy does not connect us to any fount of sacredness. There is little motive to revere a father, or any other human being: the very words “reverent” and “pious” are apt to

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On the other hand, we shouldn't delude ourselves into thinking that the progressive run of articles neither reflects nor affects women's attitudes. If such views were totally abhorrent to their readers, surely the writers would soon be searching for more receptive markets. Force-feeding unpopular opinions to one's public is a hazardous enterprise with an often-deleterious effect upon subscriptions.

It seems likely that women's magazines believe their readers are in the market for new values, or can be brought to that point. Perhaps they are right. At any rate, publications which we once associated with aunts, grandmothers, and mothers now blithely discuss the pros and cons of homosexual priests and extramarital affairs. I don't think the happy ending will do for this article, and so, in the interests of realism, I offer my mother's old standby instead: "Things don't always work out the way you want them to."

NOTES

1. Marcia Lasswell and Norman Lobsenz, "How Children Can Hurt a Marriage," *McCall's*, Sept. 1977, p. 161.
2. "A Redbook Questionnaire: How Do You Really Feel About Having Children?" *Redbook*, Sept. 1977, p. 117.
3. Lucie Prinz, "The New Abortion Rulings (What They Really Mean)," *McCall's*, Oct. 1977, p. 111.
4. Claudia Dreifus, "Do I Want a Baby?" *McCall's*, Nov. 1977, p. 203.
5. Bradford Dillman, "To Save a Child," *McCall's*, Nov. 1977, p. 104.
6. Judy Carter, "Why Nice Women Should Speak Out for ERA," *Redbook*, Oct. 1977, p. 118.
7. Louise Kapp Howe, "What American Women Want," *McCall's*, Nov. 1977, p. 198, p. 200.
8. Jonathan Freedman, Ph.D., and Gay Norton, "GH's Happiness Survey Results," *Good Housekeeping*, Sept. 1977, p. 82.
9. Lousie Kapp Howe provides a good example in "What American Women Want":
As they form new alliances to work for the legislation they want, and push candidates of their own sex and persuasion, women may finally become a resounding political force.
10. Wardell B. Pomeroy, Ph.D., "The New Sexual Myths," *McCall's*, Oct. 1977, pp. 102, 106, 234.
11. Elizabeth Jean Pascoe, "How Women Want to Have Their Babies," *McCall's*, Oct. 1977, pp. 109-110.
12. Judith Viorst, "Is Married Still Better?" *Redbook*, Jan. 1978, p. 74.

The Ineluctable Happy Ending

Ellen Wilson

“OUR FAILURES only marry.”

So the T-shirts boast at Bryn Mawr College. They quote M. Carey Thomas, first dean of the college, second president, and feminist legend *par excellence*. Those in the know will tell you that Miss Carey’s precise words were “Only our failures only marry,” but most popular of all is this bastardization: “Only our failures marry.” None of these versions reflects the reality, of course: our alumnae don orange blossom and beget educable daughters in adequate numbers, thank you, and the greater part of the faculty decline celibacy. Yet something of our feminist foreparent remains, an enduring if dubious legacy.

Pervading the academic atmosphere and as conspicuous as the Gothic grey stone is an ambivalent attitude toward marriage, family, and domesticity. Bryn Mawr distrusts — and to a degree resents — the demands which such social institutions devolve upon women. “Education,” says Thomas More (in “A Man for All Seasons”) “is a delicate commodity,” and who wishes to endanger those Latin verbs by exposing them to dirty diapers and “Sesame Street”? We are a clearheaded lot, in our own way, and we see that yoking family and career can make for an uncomfortable ride. And so maternal urges pose a threat to “achievement-oriented” students’ notions of how their post-baccalaureate lives should proceed.

I have a warm regard for marriage and family life — after all, I owe my own existence to it — but extended exposure to academic airs has a debilitating effect upon these emotions in me too. That is one reason why I look forward to the change of scene during vacations: to the sight of aunts and uncles, cousins and grandparents, and above all to that configuration of protons and electrons which constitutes my own atomic family. I depend upon these R-and-R sessions for a restoration of mental balance. And women’s magazines, as domestic as a Johnson Wax shine, assist in the cure. That is why I felt not only shocked but betrayed by the discovery that a quiet revolution had taken place while I wasn’t looking.

September’s *McCall’s* carried an article entitled “How Children Can Hurt A Marriage.”¹ Something in that title — the almost cheerful air of acceptance, perhaps — put me on my guard. Then I read

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be a bit derisive; to call a book “irreverent” is to recommend it, not to censure it. We worry very little about what our ancestors might have thought about us: we fear the judgment not of our fathers, but of our children; not of the past, but of the future. This has given a strange new meaning to the word “history.” The admonitory rhetorical question we ask ourselves is now something like “What will history say?” Conservative societies worry about betraying a heritage: a liberal one worries about betraying a hypothetical future.

The sense that the nature of things is not fixed and can be remade inevitably changes our conception of everything, including time. The past ceases to be something to be cherished and commemorated; tradition becomes “the dead hand of the past,” rather than something in which we jointly participate with antecedents and posterity. Continuity no longer is felt as a moral and metaphysical urgency. Conventional presumptions become disreputable prejudices. A holiday becomes an occasion of indulgence rather than of holiness; as when we shift an honored President’s birthday for our convenience. After all, the whole idea of honoring something is that we are willing to be inconvenienced by the duty of paying our respects: and by decreeing that Washington was born on a Monday we really cease to honor him.

The point of all this is not to condemn the changes, but simply to point out that they have occurred, and that they have resulted in certain losses, which may or may not be justified by the gains. One way or the other, we should be conscious of what we are doing and undergoing.

Margaret Mead has pointed out that the capacity for childbearing gives women a built-in social role, while a corresponding role must be invented for men. For women, as Freud notoriously remarked, “biology is destiny”; while men, in Sartre’s phrase, are “condemned to be free.” Motherhood is a biological role, and every society has it, but fatherhood is a social role which every society must re-invent. As a result, there are great variations in male roles. Some primitive societies don’t even recognize that copulation is the cause of reproduction, and the role of men varies accordingly. Our society increasingly repeals the causal link between coitus and birth, and this too has changed the meaning of sex — and the experience of what it means to be either a man or a woman. Women too are free now; whether condemned or privileged to be free, free they are.

The conventions of fatherhood have enormously intricate consequences. In most societies the paternal line has been the source of the individual’s (which is to say the individual man’s) rank. Military and economic achievement have been the main modes of achieved

rank, but even these achievements have usually proved to some extent hereditary. Men have often been able to claim glory by tracing themselves back to some glorious ancestor — even a god. Lines of descent have at times loomed large even in egalitarian America, particularly in New England — where, ironically, an “upstart” line like the Kennedys has now been transmuted into an aristocracy.

Not only honor, but disgrace may be attached to bloodlines. Bastardy has been a matter of shame in many societies — mostly, I think, in middle-class societies, where it has been uncommon, thanks to a broad and universally applied standard of sexual morality to which all are expected to conform. In aristocratic societies, where ranks vary widely and there are sexual as well as other social privileges, it is treated more matter-of-factly. And where rank is hereditary, as Samuel Johnson noted, it is accepted on all sides as accidental without strong moral implications. A nation of self-made men tends to be a moralistic nation. More accurately, it tends to be moralistic about individuals rather than about classes. Americans tend to resist the idea of making judgments about classes, because they like to deny that classes really exist. This means not only social and economic strata, but tribes, races, and, in a sense, even sexes. In the quasi-official American ideology, only individuals — “citizens” — really exist, and the model of free and equal citizens supplants collectivities in law and manners. There are no “superiors” here, except functionally; and increasingly we address even our bosses by their first names, signifying the essential national camaraderie.

It is generally overlooked that the great American institution is the individual. Of course it is odd to talk this way, but that is because we don't think this way: the individual, for us, is not an institution, but an irreducible fact, isn't he (or she)? But the individual is always a physical fact without necessarily being a locus of morals and rights. Other societies demand the subordination of the individual to any number of other things: for most of the human race the individual has been only a component of larger social realities, and one by no means sanctified with individual rights of religious freedom, free speech, unlimited sexual freedom, and so forth: the degree of freedom enjoyed has always been a function of rank. In many ways, of course, this is still true even in America, a fact that is a source of endless scandal to mainline egalitarians. And so we abound in levelling crusades with respect to race, wealth, sex, and age. Even discriminations based on height have been censoriously noticed. One philosopher, Peter Singer, has argued for a kind of equality for animals; though, like those who lowered the voting age, he has been forced to draw the line at shrimps.

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Let us consider what in America has become an especially touchy matter: race. Since the nineteenth century, with the rise of biological and anthropological inquiry, race theory has become naturalistic, and the concept of race has been broadened and magnified. Earlier, however, a race was merely a sort of figure of speech, so that Dr. Johnson could refer casually to "the race of writers." This made sense when the term meant, loosely, a line of descent, including an inherited status and occupation.

In earlier times, a "race," in this sense, was a narrow thing, much like a tribe or a nation (from *natus*, born). It meant something you belonged to by birth. A Roman dignitary might trace his ancestry to a god. The Hebrews traced theirs to Abraham. Aristocrats had proud pedigrees. This kind of membership in a larger ancestral group carried with it religion, culture, whatever social authority one had, and ascribed traits — positive traits in the eyes of members, mostly negative ones in the eyes of outsiders, so that tribal or racial cohesiveness had functions it no longer has for most of us. The racial prejudices we frown on had their uses too — largely defensive, since life depended to a great extent on group survival. As Margaret Mead has observed, the fear of miscegenation reflects a sense of the precariousness of intricate cultural patterns. It also reflects the unsophisticated perceptions of tribes which, looking outward, see non-members as animal, sub-human, because they lack the ritual competence (in Erving Goffman's phrase) of members: competence, that is to say, in the cultural ways of the group, which the group itself erects as its measure of humanity. We now term this ethnocentrism, but it would be unwise to adopt a posture of simple condescension to it, since it is based on the insight that the capacity for cultural participation is the mark of humanity. Ethnocentrism, properly speaking, means supposing that there is only one test (that of one's own culture) for this capacity.

So even racial prejudices reflect a positive and genuine conservative impulse: the desire to maintain the integrity of tribal modes. In simpler times there was a certain point in assuming that members of other races were threats to this integrity: it was often a simple fact. With the rise of individualism and the ideal of citizenship, however, prejudices of this kind became obsolete as safeguards, and became merely negative prejudices "against" rather than obverse of group loyalty. Pluralism began by assimilating all groups, so long as they ceased affronting each other with open claims of superiority and exclusive privilege. Humanity ceased being composed largely of "barbarians," "foreigners," "savages," and "goyim," and became the "human race." The very word "humanity" came to mean something

positive, an equal-opportunity race, universal, with open admissions. Everyone was a member; nobody could *not* be a member. The jealous and sacred conditions of group membership became discreditable “barriers.” Hereditary blessings became unfair “accidents of birth.” In a sense, Hitlerism was a desperate and monstrous last stand for genealogical triumphalism: hence the violence of its appeal and opposition at a historical watershed.

What all this means is that fatherhood — and by extension descent — no longer confers authority. One’s line no longer vouchsafes special dignity or access to truth; no longer commands loyalty; is no longer a legitimate source of pride. One may be “proud of his heritage,” but that really means that he needn’t be ashamed of it, rather than that he may vaunt himself above others on account of it. And as social welfare undertakes the material responsibilities for child care, the old necessity for fathers is considerably weakened.

If lineage, particularly on the father’s side, is no longer sacred, there is no obvious reason why fathers should have special authority regarding children. A new verb, “parenting,” expresses the de-sexing of parental roles. Perhaps the most vivid illustration of how far the father has fallen is the fact that it is now unnecessary for a woman to obtain the consent of her child’s father before having it aborted — no matter whether she is married or not. Many feminists hold that she has no obligation to inform him of her decision to abort. Apart from the question whether the child has any rights, this raises a question of justice concerning the father. Assume that abortion is perfectly justified in every case: does it follow that the man should be obliged to support a child whose very existence is no longer his responsibility? Is the decision that he shall be compelled to subsidize a biological accident to be made by someone other than himself?

The answer to these questions is by no means obvious, though *ceteris paribus*, it would seem that he should have some say, if not over whether a woman undergoes an elective abortion, then over the consequences to himself. There is at least an obvious inconsistency between holding that a fetus is merely part of a woman’s body, hers to dispose of at will, and holding simultaneously that her will may impose on him the obligation to act as if it were partly *his* body. Grant that she may control her own body; may she also control his? Should her biology be his destiny? She is free to abort; what is he free to do? So far the autonomy of the woman in this area seems not to co-exist with an equal autonomy for the man: he succumbs and falls into the orbit of hers. Apparently the feminists would say to the man what anti-abortionists have said to the woman: “You should have controlled your own body at the critical moment; having failed to do

so, you must pay the natural consequence.” The woman decides, not only whether she shall be a mother, but whether he shall be a father. By depositing a small quantity of semen he has to a degree subjugated himself to her will.

All kinds of counterarguments are conceivable; but they come oddly from the kind of individualist credo that justifies feminism and especially the right to abort in the first place. If the fetus has no individual value beyond what the mother chooses to give it, then the father evidently should have no more responsibilities than he has rights. He is otherwise in almost the opposite position from the Roman paterfamilias, who had discretion to kill even a full-grown child without legal penalty. Whatever such a system may be called, it is not one of individual liberty.

As so often happens, the new feminism has gone from demanding equal rights to demanding special prerogatives; in a word, privileges. Of course all demands for privilege in modern America are made in the name of equality, and especially in the name of rectifying past wrongs, but that hardly means that what is demanded is not privilege. In an odd way, the new feminism represents not only the flowering of individualism, but even, in some respects, the resurgence of tribalism.

Feminists nowadays are in the habit of talking as if women’s suffrage and other rights had been wrested from men by force. But this is hardly plausible. It was, after all, men who voted to let women vote. Nor was this an act of sheer magnanimity (or chivalry) on the part of men. Women’s suffrage was resisted by as many women as men (as the Equal Rights Amendment is), because it was rightly perceived not so much as a shift of half the political power from one sex to the other, as a fundamental alteration in the principle of social organization. Previously men had been the legal heads of families, even if few of them had any great social stature outside the family. It was the father who, like the shadow of the tribal paterfamilias, voted on behalf of the family, as its virtual representative in public affairs. The reason women were given the vote was not that people decided that men were violating women’s rights and interests; if men had been conspiring against women with any determination, after all, they would hardly have chosen to enfranchise them. The real reason was that it was generally felt to be a kind of indignity to women as free and rational adults for them to be represented by others, even their own husbands. And a man who voted to let his wife vote did not consider that he was freeing her from his bondage; he thought that he was simply honoring her individuality. The sexes were not at war, and there were no demands for reparations in the form of “affirmative action.” Such notions of sex as a relevant factor in public life were

actually being filtered out: women's suffrage was a modernizing movement, an act of "differentiation" that separated biological identity from political identity. The "little woman" became a full-fledged "citizen."

This is an important distinction between the old feminism and the new kind, which tends to emphasize sexual identities to the detriment of men. The old was Protestant and individualist, abstracting political "souls" from feminine bodies. The new, while still driven by many of the same ideals, also has a more Jewish flavor, and hence a quasi-tribalism. Even the epithet "pig," never a typical symbol in Protestant invectives (except Milton's), expresses this element. Nor are collective derogations in the Protestant mode. Catholic women too (especially disaffected Catholics) are in evidence; like Jewish women, many of them have a generalized resentment against men and the subjection of women to the role of child-bearers. Big families are disappearing in America: people of all three faiths now regard familial satisfactions as less important than individual ones. It takes considerable nerve, bordering on gall, to insist that sexual intercourse — what Catholic moral theology calls "the conjugal act," because it constitutes the sacrament of matrimony — must be "ordered to procreation." To say such a thing is to blaspheme against that American god, the individual.

It is not mere flippancy or derision to speak of the individual as a "god." This does not mean that the individual has any supernatural powers, merely that he is a locus of value, an "ultimate term" in our rhetoric (to use Richard Weaver's phrase). Many of the forceful terms in our public discourse refer to the model of the freely-choosing individual: autonomy, self-determination, liberation, and so forth. In this sense we might say that sexual intercourse is now, so to speak, "ordered to autonomy," to the "fulfillment" of the participating individuals. Some would say that we are merely hedonistic — that sex is really ordered to pleasure. But this would be to oversimplify, because pleasure too is ordered to, and justified in terms of, autonomy.

It is not the rise of women that has weakened paternal authority, but the rise of the individual. If men wanted full power over women and children, they could probably have it. But, on the contrary, they have systematically — and for the most part willingly — forsaken it; because they recognize the principle of autonomy as sovereign; as universal; as their own. Accepting it, they have accepted the consequences. Men, *qua* men, have abdicated. Nobody has forced them to do so; the fact needn't be deplored, but it should be acknowledged, along with the reason they have abdicated. It has been

virtually a religious process, a progressive subordination of traditional male authority to a charismatic principle. And of course many people think that men themselves are better off for the changes.

America has a long tradition of declarations of independence, and few Americans want to be George III. This has meant a long succession of social fissions in the name of liberty (under whatever synonym). But finally the governing principle (what Weaver calls the “tyrannizing image”) has been the individual. In America even collectivity movements, if they are to gain a large following, must appeal to individualism. The anti-abortion movement itself has adopted the language of individual rights rather than the terminology of the “integrity of the conjugal act” that one would expect if, as its foes insist, it were a “reactionary” Catholic movement.

The notion that one’s individual being may inhere in larger social bodies, or that one must subordinate himself to an order of reality larger than the individual self, is increasingly hard for Americans even to grasp, let alone take seriously. Even the science of sociology remains suspect here by its very nature, because it views people under the aspect of more or less predictable classes rather than as free (and hence unpredictable) individuals. The sociologist has his own answer: as Talcott Parsons has put it, modern society has “institutionalized” individualism. One proof of this is that less modernized societies than our own, like Vietnam, Russia, and Brazil, have in their various ways rejected the autonomous individual we have tried to propagate among them as a bit of foreign tissue.

This is surely an interesting fact — and, from the viewpoint of the individualist ideology, an odd one. We have been taught by Hobbes, Locke, Rousseau, and perhaps Kant and Mill to think of the individual as the “natural” unit of society. How is it that less advanced — and presumably more “natural” — societies have been less hospitable to this unit? The reason is that the autonomous individual is not a reality in any “state of nature” yet discovered. On the contrary, primitive societies are nearly always authoritarian (and male-dominated). Individualism is a late bloom of civilization. It is only when a society is highly refined and sophisticated that it can entertain individual “rights” sustained by the entire social structure. The state-of-nature philosophers themselves were creatures of remarkably advanced cultures. It was only when the private contract had been long established that men could imagine that all of society had its origin in a “social contract.”

Individualism did not antedate civilization. It is the froth of civilization. Of course everyone professes to know better than Locke that such a state never existed in nature. (Actually Hobbes had

admitted as much.) But, just as fundamentalist and literal interpretations of the Bible have given way not to simple unbelief but to a rarefied liberal Christianity, with theologians like Rudolf Bultmann distilling a Christian essence from the residue of facticity, so modern individualism continues to hold that somehow the individual is “real” and society merely “conventional.”

But of course this is a fatal reduction. The interrelations of individuals (which is all that “society” means) are as real as the existence of individuals. Indeed, no individual could exist unless at least two other individuals had interacted biologically; and hardly one could have survived without the systematic support of others. Most important, no one can have “rights” unless others recognize, respect, and defend such rights. There can be no genuine right that does not presuppose a viable social order.

In a sense, abortion is the test of individualism. If we realize that every individual is essentially dependent on society, we can construct (or rather perfect) a social order that fosters genuine individual rights. But the doctrine that the genetically unique human being in the womb may be killed at another’s whim, however this doctrine is disguised in the rhetoric of liberty or self-determination for those others, is a false and self-contradictory conception of freedom. It is like speaking of the liberty of the slave-owner. It really means privilege: the “right” under law of one person to violate the right of another.

One test of a right, after all, is whether it can be universalized and reconciled with other rights. The “rights” asserted by the new feminism seem to have been formulated willfully, without consideration for either those of fetuses, whose humanity is denied, or for those of fathers, whose humanity is, however grudgingly, admitted. The phrase “women’s rights” means more than it purports to mean. Most people assume that it means simply the extension of human rights to women, when in fact it means the extension of special rights to women as a privileged class — at the expense, if need be, of the rights of others outside that class. Hence this feminism is not altogether in Parson’s language a universalist movement, but a regression to particularism. Its rhetoric is progressive and humanitarian, but its substance is reactionary and anti-human. It makes unqualified claims for self-serving values without regard for the competing claims of other values, or the rights of other people. And the best evidence of its essential inconsistency and even hypocrisy is its on-again, off-again admission/denial of the relation between a man and his child.

In a sense, there is no turning back from individualism. Civilized people have recognized that we are all related to each other, and that

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each is therefore special by virtue of membership in the whole. It may be wearisome to repeat that no man is an island, and it may seem fresh and daring to assert that every woman is an island; but a philosophy that denies even the most intimate of human relations — those among spouses, parents and children — is hardly a philosophy of the sacredness of irresponsibility, not only in its derogation of duty, but in its indifference to the things that really do make people respond to each other morally: love, the sense that a part of one's self is invested in others who are close to one. Human dignity means not that everyone is important to himself, but that he is likely to be — and ought to be — precious to someone besides himself. One of the evil things about abortion (as we are often reminded) is that it arises, in many cases, from the dereliction of men who don't want to be fathers. Surely it is no remedy to weaken the rights of men who do.

Genetics, Politics and the Image of Man

Francis Canavan

CERTAIN DEVELOPMENTS in human biology, and in particular in genetics, raise the vision of man as the future director of his own evolution — of man, therefore, as “creating” himself. If these developments continue and are carried through, they will pose serious problems for many branches of thought. I discuss here those that will arise in legal and political theory. I shall, however, address myself directly to that topic at no great length because I think that the determinative questions for legal and political theory are at bottom philosophical and theological and must be discussed on that level. But before we come to the problems, let us first set forth in very summary fashion the developments that will raise them.

One is the separation of procreation from sexual intercourse. In one sense, this is already accomplished by contraception, with abortion as its backup. But these procedures assume intercourse and try to eliminate procreation by preventing conception or, failing that, by aborting the child conceived. The procedures we are at the moment contemplating aim, rather, at the reproduction of human beings independently of normal intercourse and/or gestation.

This result can already be achieved by artificial insemination. Another possibility is artificial in ovulation, by which a fertilized ovum is implanted in a woman’s womb, to be carried through by her to birth. Parthenogenesis, by which the ovum is stimulated to begin the process through which the embryo is formed, but without fertilization by male reproductive cells, has been induced in lower animals; perhaps it can be accomplished in women as well. It may also be that all or part of the process of generating human beings can be carried out in artificial wombs, outside any woman’s body. Finally, and most fantastic, there is cloning, by which exact copies of an animal are reproduced. It has been done with frogs, and, possibly, could be done with human beings, too; if so, from one Einstein we might get ten more.

These possibilities, if realized, would open up the prospect of shaping future generations of men. By using sperm and ova banks, artificial insemination and in ovulation, or even by cloning, we could multiply and pass on to posterity the genetic characteristics of those

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men and women whom we regard as our finest and our best. If, in addition, we succeed in molecular manipulation of the genes themselves, we may hope to produce a race of supermen who will transcend humanity as we have known it until now. We may also be able to synthesize life artificially, perhaps even to produce human or superhuman beings to order in the laboratory. There is even some discussion of the possibility of crossing human genes with those of other species to produce modified human beings with certain desired characteristics useful, for example, in prolonged space travel.

There are also vistas for what Albert Rosenfeld calls "the control of the body, brain, and behavior, through electronics, drugs, and cybernetics."¹ Control of the brain, Jean Rostand comments, is the most important factor in directing man's future evolution: "It is obvious that this improvement which we contemplate making in the human being, this 'super-humanizing' modification, must bear on the cerebral apparatus."² That is to say, while controlled evolution would effect many of man's physical characteristics, its essential goal would be to raise the quality of his brain and therefore of his mind.

In the meantime, we may expect to make progress in prolonging life by replacing worn-out organs with transplanted or artificial ones. There is some discussion, too, of freezing living human bodies for resuscitation in the future.

Much of this, it must be admitted, smacks of science fiction, and it is hard to know how much of it to take seriously. On the one hand Albert Rosenfeld says: "In sober scientific circles today, there is hardly a subject more commonly discussed than man's control of his own heredity and evolution."³ On the other hand Dwight J. Ingle of the University of Chicago offers a more cautious and probably more realistic view when he says:

The public is sometimes told by science writers and by a few scientists that it will soon be possible to control the molecular structure of genes and tailor the genetic endowment of man. It is also imagined that physicians of the near future will be able to engineer the developing individual toward perfection by physiological and embryological intervention at the molecular level. Such predictions are presently fanciful, not impossible if sufficient time is allotted to man's future, but surely not imminent.⁴

For our purposes here, however, it will be enough to consider the basic questions raised by these scientific developments *if* they should take place, without venturing a guess on whether or when they will do so. The first question to be confronted is that of purpose: not *how* to control human evolution, but *why* and for what goals. To this question science and technology have no answer. As the late John Courtney Murray, S.J., once remarked: "The only canon of technology is possibility." If technology can do something, it will do it

because it knows no other norm. If we are not willing to allow technological developments to run wild, then we must govern the application of scientific knowledge to present and future human beings by norms derived from other sources. These norms will depend on the goals that we judge it right to strive for.

The question of goals has not, of course, escaped notice. Albert Rosenfeld asks: "What are people for? What are our human goals and values? What ought they to be?"⁵ Jean Rostand understands that his proposal to produce the superman raises the question:

... at what kind of superman will it be right to aim? In what direction are we to steer evolutionary progress? What should be our ideal of the individual and society? Agreement might be easily reached on the criteria of intellectual superiority, but to what can we appeal in order to establish those of moral superiority?⁶

And Paul Ramsey, the eminent Protestant ethicist, comments:

Doubtless the ethics of the future will not be the same as the ethics of the past. But the *sine qua non* of any morality at all, of any future for humanism, must be the premise that there may be a number of things that we *can* do that ought not to be done. Our common inquiry must be to fix upon those things that are worthy of man from among the multitude of things he is more and more capable of doing. Any other premise amounts to a total abdication of human moral reasoning and judgment and the total abasement of man before the relentless advancement of biological and medical technology.⁷

"Those things that are worthy of man." Not everything that men can do is worthy of them, not even when intended as means to the improvement of the human species. There is an ethics of means as well as an ethics of ends or goals, and the two are correlative. Therefore, Ramsey explains, as the Christian

goes about the urgent business of doing his duty in regard to future generations, he will not begin with the desired *end* and deduce his obligation exclusively from this end. He will not define *right* merely in terms of conduciveness to the good end; nor will he decide what *ought to be done* simply by calculating what actions are most likely to succeed in achieving the *absolutely imperative end* of genetic control or improvement.

The Christian knows no such absolutely imperative end that would justify any means. Therefore, as he goes about the urgent business of bringing his duty to people now alive more into line with his genetic duty to future generations, he will always have in mind the premise that there may be a number of things that might succeed better but would be intrinsically wrong means for him to adopt. Therefore, he has a large place for an ethics of means that is not wholly dependent on the ends of action. He knows that there may be a great many actions that would be wrong to put forth in this world, no matter what good consequences are expected to follow from them — especially if these consequences are thought of simply along the line of temporal history where, according to the Christian, success is not promised mankind by either Scripture or sound reason. . . . He will ask, What are right means? no less than

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he asks, What are the proper objectives? And he will know in advance that any person, or any society or age, expecting ultimate success where ultimate success is not to be reached, is peculiarly apt to devise extreme and morally illegitimate means for getting there.⁸

Ramsey here appears to be rejecting, not teleology, but utilitarianism. Norms depend on goals, as was said above. But the goals must be those appropriate to man taken as an integral whole, and the means for achieving them must be consonant with man's whole given constitution. We may not abstract any single goal, however good in itself, and pursue it by means, however useful, that violate other aspects of that which constitutes human beings as human. What the latter may be is open to discussion. But enough has been said to suggest that the key question is our image of man.

What do we think man is in his essential humanity? Our answer to that question will depend on our judgment of the goals that it is proper for him to pursue and the means by which he may properly pursue them. We shall, moreover, seek the answer through the disciplines of philosophy and/or theology, with such aid as sciences like psychology and anthropology can offer. Legal and political theory take their premises from them.

The fact is that the problems to which legal and political theory address themselves are important but subordinate ones. Briefly, they would seem to be capable of being grouped under the following questions: What are the permissible goals which public policy may promote through genetic engineering and related technologies? What means, if any, should law bar as not worthy of man? Who shall make the relevant decisions about scientific experimentation with human beings or human genetic material? To what extent should the decisions be left to scientists and physicians, or to individual "patients," insofar as they are persons capable of rational consent? To what extent should public authority assume control? The answers that a society gives to these questions will derive ultimately, as was said above, from its philosophical and/or theological conception of what man essentially is.

But what man is in his essential humanity is a question that contemporary society is ill-equipped to deal with and ill-disposed to admit as a meaningful question. We repeat endlessly that we believe in the sanctity of the individual human being. But we find it difficult to explain what there is about human beings that makes each and every one of them the object of such veneration. One reason for the difficulty we experience is, curiously, our very individualism.

Liberal thought, from its beginnings in the seventeenth century, has stressed man's individuality more than his common humanity,

his personality less than that which makes him *this* person and no other. Liberal legal and political theory, consequently, has tended to be a theory of individual rights and of a civil society founded to protect those rights.

The rights of men, in classical liberal theory, were conceived of as natural rights conferred on man by his Creator. Today, as our faith in natural rights or, for that matter, in the Creator, wanes, the rights of the individual are identified more and more with his desires. The individual, it is assumed, has a right to do what he wants and to live as he pleases, provided only that he does not harm others. This assumption, of course, immediately raises the question, what is meant by "harm" to others. We tend increasingly to limit it to direct, tangible and physical injury. Hence the argument, for example, that if it cannot be proved that pornography incites to crime, there is no ground on which it can be legally banned.

Behind this kind of reasoning lies a doubt whether there is any ascertainable human nature or any objectively valid norms of human conduct derived from that nature. Man is conceived of as an individual will — a conception fully compatible with identifying "will" with a bundle of appetites or drives. The individual is truly himself to the extent that his actions are voluntary and proceed from within himself; to the extent, therefore, that they are not dictated by other and alien wills.

Respect for the dignity of the individual thus means respect for his right to follow his own will (which may be nothing more than his desires). Conversely, it means that his dignity is violated when other people impose any norms of conduct on him other than those required to safeguard the existence of society or to protect the equal rights of other individuals. Justice William O. Douglas, late of the U.S. Supreme Court, gave classic expression to this point of view in dissenting from a decision of the Court that upheld a conviction for publishing obscene material. He said:

Some of the tracts for which these publishers go to prison concern normal sex, some homosexuality, some the masochistic yearning that is probably present in everyone and dominant in some. Masochism is a desire to be punished or subdued. In the broad frame of reference the desire may be expressed in the longing to be whipped and lashed, bound and gagged, and cruelly treated. Why is it unlawful to cater to the needs of this group? They are, to be sure, somewhat offbeat, nonconformist, and odd. But we are not in the realm of criminal conduct, only ideas and tastes. Some like Chopin, others like "rock and roll." Some are "normal," some are masochistic, some deviant in other respects, such as the homosexual. Another group also represented here translates mundane articles into sexual symbols. This group, like those embracing masochism, are anathema to the so-called stable majority. But why is freedom of the press and expression denied them? Are

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they to be barred from communicating in symbolisms important to them? When the Court today speaks of “social value,” does it mean a “value” to the majority? Why is not a minority “value” cognizable? The masochistic group is one; the deviant group is another. Is it not important that members of those groups communicate with each other? . . . But if the communication is of value to the masochistic community or to others of the deviant community, how can it be said to be “utterly without any redeeming social importance?” “Redeeming” to whom? “Importance” to whom?⁹

For Justice Douglas, as for a multitude of other opinion-shapers today, all norms of sexual behavior are only expressions of the “values” of the majority or of minorities, and all values are subjective. To impose such norms by law, therefore, can only be an act of arbitrary will. The tendency of the liberal mind is to extend this principle to as many areas of behavior as possible, not merely to the realm of sexual conduct.

I am aware that the above is not an adequate presentation of liberal democratic theory today; it is only an abstraction of one strand of liberal thought. But it is an important and an influential one. Its significance for our topic is that liberalism, in its eagerness to protect the individual’s rights, tends to subjectivize all human values and thus relentlessly to destroy any criterion by which to distinguish valid claims of right from invalid ones. Pushed far enough, it means that anything done to an individual is done rightfully, if only he consents to it, because there is no other standard by which to judge what may and what may not be done to human beings.

Paul Ramsey alludes to this view when he says:

Man is an embodied person in such a way that he *is* in important respects his body. He is the body of his soul no less than he is the soul (mind, will) of his body. There are more ways to violate a human being, or to engage in self-violation, than to coerce man’s free will or his rational consent. An individual’s body, including his sexual nature, belongs to him, to his *humanum*, his personhood and self-identity, in such a way that the bodily life cannot be reduced to the class of the animals over which Adam was given unlimited dominion. To suppose so is bound to prove anti-human—sooner than later.¹⁰

Ultimately one must fear that even individual consent will cease to be regarded as a prerequisite for genetic engineering. The consent of the individual who is to be improved or even “created” by the engineering can hardly be asked because he either does not yet exist or exists at a very early stage of development. The consent of his parents hardly matters, and may not be obtainable, if they are mere anonymous donors of sperm and ova. The only wills that will then be involved will be those of the genetic engineers or of the public authorities who control them. But, since liberal emphasis on individual will as the substance of human rights will have destroyed all

other criteria of judgment, the scientists and the authorities will have no standard but their own wills by which to judge what kind of human beings they want to produce. Liberal individualism will then have proved to be the ultimate enemy of the sanctity and integrity of the individual.

Another and probably deeper reason why the contemporary mind is ill-equipped to deal with the question of man's essential humanity is the analytic mentality and the reductionism that have characterized so much of science since the sixteenth century. In a paper read at the General Session of the 50th Annual Meeting of the Federation of American Societies for Experimental Biology in Atlantic City, N.J., on April 13, 1966, A.C. Crombie of All Souls College, Oxford, explained:

The simple mathematical program begun successfully by the Greek geometers was carried to its triumph by classical physics in taking over the whole realm of phenomena that could be analyzed into functional relationships with a small number of variables, ideally reduced to two. The discovery that there is such a realm was an insight of genius brought to maturity by the generations from Galileo to Newton. . . . In whatever subject matter, the aim of classical physics over its whole range was the discovery and conquest of the realm of mathematical simplicity with few variables, with the suggestion that this was the only realm there is.

Analysis resolved a whole realm of phenomena into functional relationships. Reductionism was the suggestion that this was the only realm there is.

As distinguished from mathematical simplicity, Crombie calls the biology of the individual organism the realm of organized complexity and remarks that this

subject matter has imposed on physiology its characteristic program: to find out how an organism works by taking it to pieces and trying to put it together again from knowledge of the parts. The program developed into a search for simpler and more and more general structures and processes from which to reconstruct theoretically not only one complex original but, by means of systematic variations, the whole range of known or possible types of original.

Lying behind the program was a mechanistic conception of nature, the world seen as a vast machine. Crombie states its significance for biology in these terms:

The strategic commitment by Kepler and Descartes and their contemporaries to the mechanistic hypothesis of nature as a whole opened new worlds for discovery in the biology of the individual organism for two reasons. In the first place, encouraged as Descartes tells us himself by the various kinds of machines by that time working in Europe and by the evident success of scientific mechanics, the mechanistic hypothesis ruthlessly committed physiology, in advance of making any observations to asking only one kind of question. This defined the immediate problems to be solved and

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gave a program for research in the realm of organized complexity; in a world assumed to be simply a system of mechanisms this was to look for the particular mechanisms concerned in each case—in other words to treat the whole living body as a dead machine. It also made explicit the method foreshadowed in one of Leonardo da Vinci's most pregnant dicta: to understand is to construct.

Biology, of course, did not stop with this static conception of nature. Crombie explains the advance made over it in the “second realm of biology, the science of populations.” This, he says,

is distinguished in logical structure by its method of explaining its subject matter as a product of statistical mechanisms. To biology it has offered above all a method of explaining the development of ordered complexity by statistical mechanisms operating through time. . . . The essence of the change was a new use of time to account for both natural and social order and in consequence a new conception of order itself. . . . The essentially new idea was to apply the mechanistic model to the biology of populations in a new form making the order of nature and society a succession of states not of pre-established harmony but of statistical equilibrium developing through time.

Thus, when Darwin and Wallace came along in the nineteenth century, “they were able to work with an established commitment to a realm in which it was natural to look for statistical mechanisms as the explanations of economic, social and biological change.” But it is to be noticed that the conception of nature is still mechanistic.

Floyd Matson explains the significance of the mechanistic view of nature for our conception of the human. Copernicus, he says,

had dislodged man from the center of the universe; it remained for the Galilean-Newtonian revolution to remove him from the universe altogether. Through the inexorable reduction of all knowable reality to the dimensions of objective mechanism, the gap between the knower and the known, between the subjective self and the world, came to be the measure of the distance between appearance and reality.¹¹

Consequently, as he points out, man was removed from the universe, “except as insensitive body, or more accurately as mechanism.”¹² Or, as he puts it in another passage, “man had disappeared from the world as *subject* in order to reappear as *object*. Mind itself was dissolved into particles in motion by the neutralizing solvent of the new physics.”¹³ By the eighteenth century, for such materialists as Holbach and La Mettrie, “the human organism was to be regarded as an automatic clock. . . . A knowledge of the clockwork was all that was necessary to comprehend the full range of human behavior.”¹⁴

The dream inspired by the scientific revolution of the sixteenth and seventeenth centuries was that of predictability and control of nature and it led many to the thought “that the profits might be great indeed, were men to possess the universal knowledge which

could unlock the great machine and expose its secret mainsprings.”¹⁵ This vision was inevitably applied to man himself as part of nature, even as early as Thomas Hobbes, with whom, according to Matson,

the mechanical philosophy came fully of age; and its major ramifications over the next three centuries are nearly all foreshadowed in his works. His theory of knowledge, in its tough-minded rejection of metaphysics and its insistence upon semantic precision, anticipates present-day logical positivism; his psychology contains the mechanistic outlines of behaviorism; and his political philosophy presents a systematic portrait of that totally rationalized new order toward which the vision of modern behavioral scientists has turned no less irresistibly in the unending quest for certainty, predictability and control over the anarchic realm of politics and human affairs.¹⁶

Nor did the discovery of the element of time in biology radically change the mechanistic image of man. Atomic individualism and organic collectivism contended with each other to dominate social thought throughout the nineteenth century and were generally thought to be irreconcilable. Matson none the less remarks:

Both contending philosophies were sincere in their belief that they were faithfully applying the principles of Newton and Darwin; and in one particular, at least, they were in complete accord. . . — both perspectives were fundamentally at one in their assumptive *image of man*. . . . In short, still more convincingly than had been possible in the past, the theory of organic evolution subjugated man to nature and its mechanical laws.¹⁷

Matson concludes his first chapter with this passage from the biologist Ludwig von Bertalanffy:

We have seen how the mechanistic view projected through all fields of cultural activity. Its basic conceptions of strict causality, of the summative and random character of natural events, of the aloofness of the ultimate elements of reality, governed not only physical theory but also the . . . viewpoints of biology, the atomism of classical psychology, and the sociological *bellum omnium contra omnes*. The acceptance of living beings as machines, the domination of the modern world by technology, and the mechanization of mankind are but the extension and practical application of the mechanistic conception of physics.¹⁸

The “mechanization of mankind” is, to be sure, not the whole story. Part II of Matson’s book is devoted to the movements in modern thought that run contrary to it and tend toward repairing “the broken image” of man. Yet the mechanistic view of man is still influential and, it is my belief, underlies the conception of man as indefinitely malleable and manipulable. It is the reason why we can conceive of breaking down the ultimate molecule of life, DNA, and can, as a recent writer has put it, engage in “research which creates combinations of DNA from organisms that do not normally ex-

change genes in nature,” with “the future prospect of deliberately altering the inherited characteristics of human beings.”¹⁹

One can reply, of course, that we can conceive of doing this because, in fact, we can do it or at least are on the verge of being able to do it. But this answer misses the point, which is that a purely reductionist and mechanistic conception of nature makes it possible for us to conceive of doing things to human beings, or with human material, that an idea of man’s essential humanity would forbid us to do. The analytical and reductionist mentality, ruthlessly applied, destroys any image of man that could guide and direct our use of genetic science. When that happens, legal and political theory, as well as ethics, are left without a compass.

The mechanistic hypothesis rests ultimately on a nominalistic metaphysics. In this philosophy, reality *is* its elements, organized in patterns produced by the blind operation of natural forces or imposed by conscious human choice. Missing is the notion of natural wholes with their own natural forms that transcend and are more real than the elements that they organize; there is nothing in natural entities that commands respect and imposes moral norms.

Physics and chemistry have taught us that we can reduce natural substances to their elements and reconstitute them as plastics. The thought inevitably has occurred that, within the limits of physical possibility, we may do the same with living organisms, including the organism we call man. The question then is: What kind of plastic or fabricated man do we want? In a nominalistic and mechanistic philosophy of nature, there is no answer to that question to be derived from the given nature of man. For human nature, like all other parts of nature, is merely a range of possibilities to be exploited by human wills. Nominalism cannot accommodate the conception of human nature as a coherent structure of potentialities with its own given teleology. Yet it is only the latter conception that can tell us which kinds of interventions in man’s physical and genetic structure are in line with his truly human potentialities.

There is among political theorists today, particularly among the younger generation, a growing awareness that political theory depends on premises drawn not only from epistemology but also from metaphysics.²⁰ There is no consensus, so far as I have been able to observe, on the metaphysics upon which political theory should be based, merely a new willingness, as the positivist dream fades, to recognize that it must be based on some metaphysics, i.e., some coherent view of the nature and structure of reality. We must hope that this awareness and willingness will continue to grow. For the questions raised by recent and projected developments in human

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biology make the quest for a valid metaphysics and a sound image of man all the more urgent, and not least for legal and political theory.

NOTES

1. Rosenfeld, Albert, *The Second Genesis* (Englewood Cliffs, N.J.: Prentice-Hall, 1969), 8. Most of what precedes has been summarized from this source.
2. Rostand, Jean, *Can Man Be Modified?* (New York: Basic Books, 1959), 78-79.
3. *Op.cit.*, 9.
4. "The Biological Future of Man," *Chicago Today*, III, 2 (Spring 1966). Since I have seen this article only in a mimeographed reproduction, I cannot give the proper pagination.
5. *Op.cit.*, 223.
6. *Op.cit.*, 100.
7. Ramsey, Paul, *Fabricated Man: the Ethics of Genetic Control* (New Haven and London: Yale Univ. Press, 1970), 150-151.
8. *Ibid.*, 30-31.
9. *Ginzburg v. U.S.*, 383 U.S. 463, 489 (1966).
10. *Op.cit.*, 87.
11. Matson, Floyd, *The Broken Image* (New York: George Braziller, 1964), 20.
12. *Ibid.*
13. *Ibid.*, 29.
14. *Ibid.*, 30.
15. *Ibid.*, 21.
16. *Ibid.*, 23.
17. *Ibid.*, 36-37.
18. *Ibid.*, 45.
19. Griffin, Bryan, "Genetic Engineering: the Moral Challenge," © *The Human Life Review*, III, 3 (Summer 1977), 31.
20. See for example, Almond, Gabriel A., and Genco, Stephen J., "Clouds, Clocks, and the Study of Politics," *World Politics*, XXIX, 4 (July, 1977), 489-522, which begins with this line: "In its eagerness to become scientific, political science has in recent decades tended to lose contact with its ontological base."

The Problem of Homosexuality: A Christian View

Erik von Kuehnelt-Leddihn

IN ORDER TO understand the problem of homosexuality in its social and political implications more fully, it is necessary to bear certain frequently-overlooked basic facts in mind. For instance, the very nature of sexuality and love (two very different phenomena) make it imperative to distinguish clearly between homosexuality and homoeroticism. We must remember that sex has a variety of functions, among them the ability to *express* love. Yet, while closely *neighbored* in our psyche, sexuality and erotic love are not made of the same stuff at all. On the other hand, the affections, too, are forms of love,¹ so is friendship, and so is the highest form of love, selfless charity (*agape*). The sex drive in us seeks *gratification*, the various forms of love, however, aspire *union*, which is something entirely different. In love we give ourselves, in sex we seek pleasure, although erotic sex tries primarily to attain the pleasure of the beloved partner. In an ideal marriage all forms of love come into play,² and so does sex (which might even become an act of friendship or charity toward a partner who is a friend rather than a “lover”). But sexual acts can also be expressions of either pure selfishness or even hatred... as in some cases of rape.³ And they can have the character of a solitary vice without a partner.

In spite of their very different nature, there is a certain but not necessary connection between sexuality and Eros (intersex love, “infatuation”); it is possible that a man loves a woman without really “desiring” her, or that he craves for her physically while actually despising her . . . which partly explains the existence of prostitution and their customers alike. (Only the “true lover” is respected or at least arouses sympathy.) Among women, who are more integrated and natural than men (who are abstract and artificial), the separation between sex and Eros is relatively rare, hence the suspicion that the adultress truly loves her lover. The not-too-infrequent dichotomy between sexuality and Eros is put into high relief by the fact that men are sometimes homosexual heteroerotic, or lean toward certain forms of homoerotic love while leading normal sexual lives, either state of affairs being much less frequent among women. André Gide, the great French writer, was a homosexual who dearly loved women,

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above all his wife with whom he had no sexual relations whatsoever. His marriage went on the rocks only when his wife, in desperation, burnt his love letters to her which he probably wanted to see published at some later date.⁴ He was, incidentally, outraged when somebody insinuated that in his sex life he played the role of the *passive* partner.⁵ A somewhat similar case is that of Harold Nicolson and his wife, Vita Sackville-West. Both were bi-sexual but, at the same time, profoundly in love with each other. Having read the descriptions of Vita's permanent Lesbian passions,⁶ one is amazed at the scenes accompanying their separation in Iran (where Nicolson served at the British Legation while Vita had to return to England). Yet unless we are given a very biased story, Harold may have been simply homosexual whereas Vita was homosexual as well as homoerotic and able to divide her love between Harold and a number of women.

The percentage of genuine male homosexuals is usually given as between 2 and 4, but among these the psychologically-conditioned are the overwhelming majority. The born homosexuals, who can be considered to be freaks of nature, form a tiny fraction and in spite of the fact that even they sometimes desire to be healed, there is practically nothing one can do to help them. Needless to say, they present a grave theological problem. Apparently they suffer from a *prenatal* hormonal disorder which can be inherited.⁷ According to one source, the only "cure" would be to unsex them through an operation, whereupon they could be made to "learn" (by assimilation) heteroerotic attitudes. However, in the case of well over 90 percent of male homosexuals the failing (and a failing it is) is psychological in its origins and can therefore be treated by psychiatrists. Of course, success can never be guaranteed and there is no absolute consensus about the causes for this psychologically-conditioned type of homosexuality. That its roots are to be looked for in early childhood memories, in the relationships with father, mother, and siblings and/or in experiences at the time of puberty can hardly be doubted. If the patient has truly the will to be healed (which is by no means always the case), the chances of success are, as a rule, better.

Yet, there are homosexuals who, in spite of their unavoidable sufferings, are proud of their condition. In modern civilization, as in some periods of antiquity, there is a tendency to regard homosexuality with a certain awe. Medical treatments used to be favored for it, whereas now the prevailing opinion is that it is just a "normal" weakness and already one finds a growing inclination to regard these unfortunates as superior human beings. This is made plausible by the cases of outstanding artists, though they were mostly bi-sexual rather

than homosexual . . . Shakespeare, Oscar Wilde, Leonardo da Vinci,⁸ Michelangelo. (Lesser spirits like Frederik II of Prussia, Platen von Hallermünde, Tshaikowsky, Tennessee Williams, Walt Whitman or Wittgenstein seem to have been unequivocally homosexual.)

Let us nevertheless state right now that, whereas wild beasts *apparently* never show homosexual leanings⁹ (domestic animals do), homosexual or, rather, homoerotic phases are not rare in otherwise healthy men and women and that the homosexuals' claim that human beings are all bisexual "anyhow" is not entirely without substance. It is precisely this fact which renders a "legitimization" of homosexuality in state and society so dangerous and pernicious. The reader should understand me well: I am not pleading for legal persecution of "consenting adults," which, it should be borne in mind, has never been on the law books of otherwise not-permissive regimes: Salazar, Franco, Pétain, Mussolini, the Greek "Colonels" — none persecuted homosexuals. However, it *could be* that homosexuality is a graver problem in Northern Europe and in North America than in the European South where the Catholic Church has always taken a very grave view of the matter.¹⁰ But the respective governments did not feel at all obliged to persecute everything the Church or even society considered sinful, not least because in these countries Church, State, and Society were always at odds — hence the phenomena of anti-clericalism and political anarchism unknown in Northern Europe.¹¹ The persecution of individual homosexuals has never resulted in the suppression of this lamentable evil and has merely increased the opportunities for blackmailers.¹² Homosexuality flourished in England and in Prussian intellectual and army circles. But in Russia, on the other hand, it was always treated with a genuine sense of horror.¹³ Moreover, we know of "emergency homosexuality" where, in the absence of a female (or, conversely, a male) presence, the sexual drives, feelings and cravings are directed toward the same sex. This is, above all, the case in prisons¹⁴ and among sailors.¹⁵ It also constitutes a grave problem in boarding schools (especially in the British Public Schools¹⁶) because there the juvenile homoerotic drives ("crushes") often become habit-forming, thus giving to sexuality a permanently wrong orientation. Sometimes the phenomenon finds its way into monasteries as well,¹⁷ and, given the character of Moslem society with its separation of the sexes, it is there a deep-seated disorder. Misogyny is a powerful aid to the spreading of male homosexuality as well as of homo-eroticism.

Are the homosexuals really as happy in their state of mind and their feelings as they sometimes claim to be? They certainly are deprived of joys and satisfactions of which they have no more concrete

notion than a blind person has of color or a deaf one of the beauties of music. Their relationships are rarely satisfactory because, as a rule, they are of a fleeting nature. Lesbians, on the other hand, seem able to establish somewhat more permanent alliances, though they are more prone to jealousies and "in-fights." Both types, however, are missing an entire dimension of life (which they can neither experience nor understand¹⁸) and are therefore, whether they realize it or not, strangers — unpopular strangers — in this world. Dr. Marcel Eck, a French psychiatrist, wrote in an essay on sex: "I should also like to lay stress on the homosexual inferno in which there is never a real dialogue, never a seeking for complementary values in love, but always only a seeking of oneself through identification or idealization. I do not want to stray too far from the subject, but it is nevertheless thanks to the misery of the homosexuals who confided in me that I have understood the richness of a healthy and well-balanced sexuality, and thus I pray every day for those whom Sodom has not spared."¹⁹

Is there no guilt in yielding to homosexual drives? In this matter it is impossible to make generalizations. Taking into account our potential (or actual) bisexuality and our freedom of will, of assent and dissent, one cannot but concede a certain amount of truth to the words of Ernst Jünger: "Perversions are not deviations in the narrow sense of the term — they are elements within us, mastered but effective, and now set free. In our dreams they frequently rise from their dark recesses. The deeper these forces are immured under the pillars of our being, the greater the hostile amazement, the indignation if, like a magician, nature shows them up in their purity and makes them visible. Then the snake emerges from its hole. Hence also the terrifying thrill felt in a big city hit by the news of a lethal sex crime. At that moment everybody feels the bolts rattling in his own underworld. Herein also lies the aberration of certain physicians who try to protect the evil-doer, as a sick person, from justice — which would be acceptable if it were not a sickness present in all of us which becomes visible in him and which only iron can cure."²⁰

In Dr. Eck's analysis we find a valuable clue to the homosexual's "identifying" and "self-seeking" tendency. Dr. Hans von Hattingberg, too, emphasizes the autistic character of the homosexual (of either sex) who has no enthusiasm for otherness,²¹ and the same thought is expressed by Hans Giese (himself a homosexual) who described the homosexual as autistic, infantile, adverse to adventure, a person who encounters in the other sex "the alienness of the world."²² And this explains also the "modernity," the "timeliness" of the homosexual wave. There are two very basic drives within us:

the craving for sameness, present in the various forms of animal collectivism, from the ant heap to the wolf pack, and the desire for otherness and change, which is purely human. At times we are in the mood to meet and converse with people of our own age, sex, class, religion, political taste, manners and mannerisms, at others we feel curiosity and the desire to mix with those who are different. The urge to travel feeds from this romantic instinct: to see entirely new landscapes, to hear the sound of other languages, other melodies, to taste strange foods, to admire other architectures. Yet, our age is essentially hostile to diversity, hence the sudden excited chatter about "pluralism." One always emphasizes what is lacking: poor people never cease to speak about money, hungry people about food, lonely people about affection, and so forth.

We must remember that equality, the great socio-political ideal of our age, is narrowly related to identity (sameness).²³ Democracy,²⁴ Socialism and Communism all emphasize various forms of equality, racism militates against people who are different and so does ethnic nationalism. Thus the dislike for the uneasiness about class differences have gone so far that, according to reliable polls, more than four-fifths of the populations in "progressive" nations claim to belong to the "middle class." The pride in being a nobleman, a patrician, a *grand bourgeois*, a proletarian or a peasant (classes and estates idolized at various times in various ways) has vanished almost completely. The National Socialists were racists, nationalists and socialists at the same time.²⁵ Before the French Revolution the radical differences between human beings were an accepted fact, though it was freely admitted that our differences here on earth, our inferiorities and superiorities, change their character on the other side of the grave.²⁶

Yet, the modern state tries to treat us all in the same way;²⁷ not Ulpian's *suum cuique* ("to everybody his due") is the guiding idea in our legal domain, but "Equality before the law." To be different — to think, speak, or look differently — has become a crime in a century which has achieved an unparalleled record in exiling, jailing or exterminating those with whom we cannot "identify." Modern industry, based on the mass production of identical objects for the mass-man, has replaced the individualistic arts and crafts. This is the age of the "regular guy," of the "ordinary decent chap." Thus we should not be surprised to see that the male-female bi-polarity, too, is vanishing. With the appearance of long-haired men swinging handbags and women in grey flannel suits, the adventure of building a romantic bridge between the sexes falls flat. A cultural pattern without true juxtapositions emerges. We also must bear in mind

that sex, no less than Eros, has had its own, rarely realized plasticity. Fashions and fads have an enormous influence on our sexual and erotic drives. In an age when fleshy women are declared to be desirable, the lean ones will be out of luck. At the time of Rubens a female like "Twiggy" would have hardly attracted enthusiastic suitors. Looking through European periodicals of the late 19th century we find an abundance of advertisements for pills promising anything but a reduction of weight. Skinny women evoked horror. And men seem to have had problems in developing impressive beards. (The ads for drugs fostering hirsuteness showed ladies turning in disgust from men with feebly developed beards or none at all.) Today the hermaphrodite seems to emerge as the aspired type, the "unisex" sartorial fashions being a concrete expression of this trend. And since intra-sexual tastes can be formed by "public opinion" and the adaptability of sexual and erotic tastes being what it is, we have to envision the possibility that homosexuality will spread — as it did in Ancient Greece, in Athens no less than in Sparta.²⁸

In an earlier article (HLR, Fall 1977) I said that in the English-speaking nations there is a very definite trend toward a separation of the sexes at the adult stage,²⁹ that women, once they are married, lead rather isolated lives and that one must honestly ask oneself whether American or British males like women in *general* — or only in particular, which means primarily sexually and erotically. In lengthy investigations about friendships between outstanding men and women I found very few examples in Europe's far North or far South. They appear mostly in a broad area extending from France to Russia. (Even there such friendships are more frequent in the upper than in the lower social layers.³⁰) It is quite possible that Puritan influences in the North and Islamic ones in the South are responsible for this phenomenon.

The rift between men and women in English society was already keenly felt by Johanna Schopenhauer, mother of the philosopher and a novelist of renown in her time. This North German lady from Danzig, who resided largely in Hamburg, was startled by the social separation of the sexes and the male lack of interest for women as fellow human beings.³¹ One should compare her impressions, dating back to 1806-1807, with those of two Americans, Dr. Benjamin Rush,³² a Founding Father who knew France under the Ancien Régime, and Randolph Bourne who stayed in Western Europe in the 1913-1914 period.³³ Both were convinced that women were more loved and appreciated, and played a greater role, in France than in either England or America. As for prerevolutionary Russia, for-

eigners were usually impressed by the women whom they sometimes considered superior to the men.³⁴ (This strong position of women was destroyed by the Russian Revolution, just as the French Revolution has jolted the status of women in France.)

Indeed, English women frequently sense that, in general, men are not particularly keen about them. Rosamond Lehmann lets one of her heroines say: "Englishmen dislike women: that is the blunt truth of it."³⁵ Here not only a Puritan past or Victorian inhibitions come into play, but also the homosexual-homoerotic trends in the Public Schools which, until very recently, have fashioned and formed Britain's "ruling class" not really in an aristocratic but, rather, in a collectivistic, upper-middle-class spirit.³⁶ This impact has been widely commented on by English authors. The account of one of them, recommending homosexual teachers for boarding schools and speaking in an affirmative, almost praising manner about institutionalized homosexuality in such schools, leaves the "outsider" truly stunned. That writer takes it for granted that, later in life, the boys will turn to women.³⁷ Well, some will and some won't.

The United States has culturally and politically always followed British patterns — many of them, at least — but it would certainly be a mistake to draw rigid analogies. Simone de Beauvoir, however, has reported the lack of male-female friendships in America (even among married couples) and the isolation of women.³⁹ Sigrid Undset was appalled by "hen parties." Edith Wharton, in her novel *The Custom of the Country* (1913), described the aloofness, if not hostility, of American men in their relations to women and a similar account came from David L. Cohn in his *Love in America*.⁴⁰ The "Public School" (in the form of the Prep School) plays only a very minor role in American life, but the human landscape⁴¹ of the United States has probably always been overshadowed by a dread of homosexuality.⁴² American tourists are amazed to see Russian or Italian men kissing each other (or Continental fathers kissing their sons), gestures which, in their eyes, are reserved to the gentle sex. Foreigners in America often have the impression that men there *emphasize* their masculinity, whereas women are not so keen to display their feminine qualities. Yet, what comes naturally is never emphasized — only those traits which can be doubted.

Of course, not only psycho-cultural, but ideological implications too, are contained in the drive for "public recognition" of homosexuality. In spite of the fact that homosexuals are *still* under considerable pressure in the USSR (a survival of deeply-ingrained Russian concepts⁴³), the positive attitude towards them is definitely a leftist, i.e., "identitarian" factor coupled with a certain moral

libertinism. This combination we have frequently witnessed in the past either as a mass-libertinism of a more or less nihilistic character, or as a totalitarian synthesis entailing complete control of brawn and brain while granting total liberty to the body from the navel downward.⁴⁴ Such an attitude (giving free reign to all normal and abnormal drives) is characteristic of ages with diminishing religious convictions, as Dr. Gregory Zilborg has pointed out.⁴⁵ In other words: to fight their inclination, those who tend toward homosexuality need the "moral support" not only of society and culture, but also of a firm faith. The state, in turn, has the moral duty to protect society, whose very foundation and life cell is the family. In this domain the *bonum commune*, the common good of the entire community, is at stake. Totally heterosexual and hetero-erotic persons will not easily recognize this problem since they consider themselves immune to such temptations, but the psychologist, the sociologist, the historian have to take a more skeptical attitude. Those who firmly believe in a total separation of state and religion (or Church, if you prefer), should also face the fact that religion is, after all, one of the most distinguishing elements between man and beast and that the state has a *material* interest in the preservation of religion without which man sinks back into some sort of nihilistic barbarism. Without a religious background⁴⁶ there can be no ethics *binding in conscience*. This is best illustrated by the legal school whose guiding spirit was Oliver Wendell Holmes Jr., a school which still dominates the American scene. To Holmes killing-murdering was evil only because it conflicted with a local view on the subject (it was condemned by a man-made "positive" law). Needless to say, he could not find a cogent argument against Lesbian practices either.⁴⁷

There is, moreover, a possibility that Lesbianism might become a greater menace to state and society than male homosexuality, and this for a number of reasons, one being the fact that it causes less revulsion among men and, whatever mental reservations one can make, we are still living in a patriarchal society where male opinions have greater weight.⁴⁸ Another reason is that women drift more easily into Lesbianism than men into homosexuality. In spite of statistics, this is the confirmed view of certain authorities.⁴⁹ In modern, progressive societies with high medical standards women greatly outnumber men⁵⁰ and in our "oversexed" age this creates a psychologic pressure on women who, in Kinsey's parlance, have to look for "outlets." Moreover, our mores and manners favor mutual female intimacies; whereas two men living together attract a certain attention, two females in the same circumstances create no sensation

whatsoever. It is equally true that an occasional homosexual experience has not the same traumatic effect on women as it has on more or less normal men.⁵¹ In order to see the problem in all its perspectives, we must also keep in mind the factors which foster Lesbian attachments: the female fear of the male body⁵², the fear of pregnancies, the fear of loneliness and, last but not least, the greater purely carnal pleasure which Lesbian sex acts procure.⁵³ Given the enormous, morbid emphasis on orgasmic gratification which characterizes our age, why should all women insist on male partners? Although the male homosexual is not necessarily hostile to women and frequently enjoys their company (and their confidence⁵⁴), Lesbians, as a rule, become man-haters⁵⁵ and this contributes to the "battle of the sexes" which is not necessarily a figment of the imagination. This is especially true of the United States where the Women's Lib Movement promotes "Lesbian Rights" and where self-professed Lesbians are to be found in leading positions.⁵⁶ As a matter of fact, action has already been taken to create an atmosphere of "warm understanding" for male and female homosexuals not only among the broad public but in the schools as well — the emphasis being on homosexuality as something "normal." Adolescents should be prepared to "choose their life-style."

The answer to the homosexual problem is not easily found, especially for the Christian. He has to bring the scientific facts (as made available by research and analysis up to the moment) and Revelation under a common denominator. He has to coordinate reason and faith and must not allow himself to be influenced by mere sentiments. Above all, he has to avoid an emotional answer in either direction. To him the very existence of homosexuality is a result of the Fall, of Original Sin, which brought such grave disorder into our world. Man after the fall is *spoliatus gratuitis, vulneratus in naturalibus*, "deprived of his extraordinary gifts and wounded in his nature," he is physically mortal and subject to defects as, incidentally, is the rest of Creation.⁵⁷ Yet, while we should realize that the earth cannot be transformed into a paradise and remains essentially a Vale of Tears and a place of trials, we have to struggle against the evils resulting from the revolt of Adam and Eve. Homosexuality is in the realm of feeling what madness is in the domain of reason (or sin in the field of ethics). There are insane people in this world and they should evoke our compassion; we should help them in every possible way. But it would be sheer folly to declare madness natural, normal, or desirable, or simply one way of life equal to any other. A homosexual is admittedly not *geisteskrank* (ill in his mind), but he is nevertheless *gemütskrank*, i.e., an emotional invalid and there-

fore we must say “no” to this failing which finally colors large sectors of his mind.⁵⁸ With all the human respect due to them, we must prevent homosexuals from spreading their infirmity. And they very often tend to do just that — above all, because they want to extend their charmed circle, to reaffirm themselves and their leanings and to make themselves “statistically” more acceptable.

While only a few are the victims of a pitiless fate, most of them are the products of a tragic start in life: among these some cling to their deviation, while others try to rid themselves of it. One thing, however, is certain: the problem of mastering one’s appetites faces each and all of us, whether normal or abnormal. (In our civilization this is more difficult to achieve at the age when marriage does *not yet* represent a solution.) From a Christian point of view, it would be a complete mistake to say that homosexuals have a right (“like anybody else”) to “self-realization.” If we were not fallen creatures we might possibly have such a right but, subject to Original Sin, we have to “become somebody else,” to divest ourselves of the Old Man and to put on a New One. As St. Paul insisted, we must practice *metanoia*, which means change of mind as well as repentance. On top of it all, it would be a great mistake to think that homosexuals yielding to their vice are happy in their “pursuit of happiness.” Male homosexual attachments are, as we said before, rarely lasting and characterized by a specific kind of sterility.⁵⁹

A truly Christian state and society (which, admittedly, so far never existed except as an aim) will not burn homosexuals on the stake, as was unfortunately done centuries ago. (It was also done to those who practiced bestiality, and to sorcerers and heretics.⁶⁰) St. Augustine rightly told us to kill errors, but to love our fellow men.⁶¹ Despite the hard fact — only reluctantly admitted by some — that homoerotic drives are by no means rare in puberty,⁶² nor bisexual tendencies among adult men and women, any propagandizing and glorification of homosexuality as a standard form of human relations (deceptively “handy” and “easy” because devoid of responsibilities and consequences) is not only unethical, but also an attack against the Common Good. A short but excellent analysis of the true nature of the homosexual problem in its social dimensions is found in George F. Gilder’s *Sexual Suicide*.⁶³ Surely, homosexuality has no right to the market place.

It rarely represents a true fatality. By the grace of God and thanks to wise treatment, many have recovered.⁶⁴ But there must be a definite, general will to reduce the homosexual danger. A healthy society will almost automatically act in this sense but, as Anton Bednarik said, “the new sexual morality is a scurrilous mixture of

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different perversions: autism, homosexual leanings and the antics of the impotent voyeur have entered some sort of symbiosis.”⁶⁵ Under these conditions one cannot easily be optimistic as far as the social drives are concerned. Only a religious revival can bring a radical change.

But in the meantime state and society can go to the dogs biologically and psychologically. J. D. Unwin stated in so many words that, in the struggle between nations, those who cling to chastity will, in all likelihood, keep the upper hand⁶⁶ — last but not least, we shall add, because they try to keep intact the family which promiscuity and homosexuality (as well as the war between the sexes and the tension between the generations) tend to destroy. The family, after all, consists of men and women and of different age groups; it is a delicate, vulnerable, heterogeneous organism. Ernest Renan, surely not a paragon of orthodox Christianity, said succinctly: “What gives one people the victory over another, who has it to a lesser degree, is chastity.”⁶⁷ These words are as valid today as they were yesterday and will be tomorrow. Does chastity imply “repression”? Indeed it does, but, as Freud told us, every higher culture rests on repression.⁶⁸

NOTES

1. The affections are the loving relationships of a “natural” order between the members of the family (in the narrower and wider sense). We owe this classification to C.S. Lewis; cf., his *The Four Loves* (London: Geoffrey Bles, 1960), pp. 42-68.
2. Even love of oneself. See Ephesians 5:28.
3. An American soldier said openly that “you kill a man, but you rape a woman” as manifestation of hatred; cf., Martin Gershein, *Destroy or Die, The True Story of Mylai* (New Rochelle: Arlington House, 1971), p. 35.
4. Cf., Jean Schlumberger, *Madeleine et André Gide* (Paris: NRF-Gallimard, 1958). Julien Green, *Académicien* and noted French author of American origin is a professed homosexual but very much subject to hetero-erotic feelings. Cf., for instance his *Partir avant le jour* (Paris: Grasset, 1963), pp. 323-324.
5. In the Islamic world the homosexual raping of a man is an act of the greatest indignity. It has been repeatedly practiced against Europeans. Thus also at the termination of the Algerian War. In Modern Greek the expression for “passive homosexual” is one of the worst injuries.
6. Cf., Nigel Nicolson, *Portrait of a Marriage* (London: Weidenfeld and Nicolson, 1973), pp. 207-209.
7. Cf., *Brockhaus-Enzyklopädie* (Wiesbaden: F.A. Brockhaus, 1975), Vol. 23, p. 655.
8. On the other hand the homosexuality of Leonardo da Vinci has also been very much doubted. For instance, cf., Erich Neumann, “Kunst und schöpferisches Ungewusstes,” in *Umkreisung der Mitte* (Zürich: Rascher, 1954), pp. 25-26.
9. This naturally can change in captivity. Degeneracy comes with domestication. Cf., Irenäus Eibl-Eibesfeldt, *Liebe und Hass* (Munich: Piper, 1970), p. 112.
10. Sodomy and bestiality are in the Catholic catechism: “Sins crying to Heaven for vengeance . . .” on a par with murder, retaining just wages and persecution of widows and orphans. In the earlier centuries simple fornication (though not adultery) was no obstacle to receiving Holy Communion. This change came much later due to the more rigoristic influence of the Irish monks who had missionized most of Central and Western Europe.
11. Not only the Pope had protested against the execution of Sacco and Vanzetti, but also Salazar and Mussolini. The remains of Vanzetti were finally brought to Italy and Luigi Rusticucci published

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- in Naples a book entitled *Tragedia e supplizio di Sacco e Vanzetti* (Naples, 1928) whose preface was written by Arnaldo Mussolini, brother of the *Duce*. The profound anarchical drives of the Catholic nations were also evident to Hegel who stated bluntly that with the Catholic religion no rational Constitution is possible. (*The Philosophy of History*, London: Colonial Press, 1900, pp. 448,f.f.)
12. Even when, in the past, homosexual practices could be punished by law in Britain, the blackmailers were convicted, but the names of their victims were kept secret.
13. The Marquis de Custine, when his vice became known in Russia, was ill-treated by Russian society. His anti-Russian book, *Russia in 1839*, was, as George F. Kennan had pointed out, his revenge. Cf., *The Marquis de Custine and His Russia in 1839* (Princeton University Press: Princeton, 1971).
14. Latin American governments, for instance, admit very private visits of wives (and female friends) to prisons. The Franco government gave similar privileges to political prisoners.
15. Cf., the passages in Herman Melville's *White-Jacket* (London: Constable, 1922), pp. 473-474.
16. Yet this vice often carried over into the universities. Malcolm Muggeridge in his memoirs speaks of a homosexual atmosphere in Cambridge; cf., his *Chronicles of a Wasted Time* (London: Collins, 1972), Vol. 1, p. 78. On perversion in Harrow (a leading Public School), cf., the remark of Robert Bruce Lockhart in his *Diaries 1915-1938* (New York: Macmillan, 1973), p. 216. Also Kenneth Walker, *The Psychology of Sex*. (Harmondsworth: Pelican, 1949), p. 132.
17. The same thing can be said about seminaries; here too we have the case of a homoerotic (rather than homosexual) danger. Cf., for instance Monsignor (later Cardinal) Antonio Bacci's novel *Candele che si spengono* (Rome: Belardetti, 1953), p. 47.sq.
18. This much has also been admitted by Hans Giese in "Das homosexuelle Syndrom" printed in *Psychopathologie der Sexualität* (Würzburg: F. Enke, 1962), p. 419.sq.
19. Cf., Docteur Marcel Eck, "Propos sur la sexualité" in *Qu'est-ce que l'homme?* (Semaine des Intellectuels Catholiques), November 3-17, 1954, (Paris: Pierre Horay, 1955), p. 110.
20. Cf., Ernst Jünger, *Strahlungen* (Tübingen: Heliopolis, 1949), p. 182.
21. Dr. Hans von Hattingberg, *Über die Liebe: Eine ärztliche Wegweisung* (Munich-Berlin: Lehmann, 1940), pp. 73-76.
22. H. Giese, *op. cit.*, p. 263. "Das andere Geschlecht." This term Giese took from Arnold Gehlen. It should be mentioned here that Giese was finally murdered by a "young friend."
23. On the "identitarian" and "diversitarian" drives, cf., my *Leftism: From de Sade and Marx to Hitler and Marcuse* (New Rochelle: Arlington House, 1974) pp. 15-20.
24. When Thomas Mann switched from a German nationalistic view with Prussian undertones to republican democracy he published an interesting pamphlet entitled *Von deutscher Republik* (Berlin: S. Fischer, 1923). There Mann invoked Walt Whitman as crown-witness of republican democracy and at the same time referred to his homosexuality. Whitman's deviation has been amply confirmed by Oscar Cargill, *Intellectual America* (New York: Macmillan, 1941), pp. 548-549 and Donald Webster Cory, *The Homosexual in America* (New York: Greenberg, 1953), pp. 163-277. Cory can be described as a spokesman of American homosexuals in the middle of this century.
25. In spite of a very harsh treatment of homosexuals in the Third Reich there can be no doubt that this leaning was very strong among the intellectual and organizational founders of the Party. Ernst Röhm, the leader of the Storm Troopers (*SA*), was a noted homosexual and so were many of his friends. The Police President of Vienna in the late 1920's thought that the young *SA* men were largely homosexuals. One of the most important forerunners of the National Socialist movement was Hans Blüher, a promoter of the *Wandervogel*-movement. Cf., his *Die deutsche Wandervogelbewegung als erotisches Phänomen* (Berlin, 1912). The preface was provided by Dr. Magnus Hirschfeld, a noted homosexual sexologist. Far more outspoken was his *Die Erhebung Israels gegen die christlichen Güter* (Hamburg: Hanseatische Verlagsbuchhandlung, 1931) in which Blüher attacked the Jews for poking fun at gentile homosexuals. He was convinced that only "Leagues of Men" (*Männerbünde*) can truly establish political entities!
26. Our medieval churches and cathedrals featured (inside, above their western entrances) fresco-paintings dramatizing the Day of Judgment. But on the left, among those going to Hell, we find popes, emperors, kings, burghers, monks, and nuns—just as we find them on the right side among those who will be saved. *Mutatis mutandis* such paintings would be unimaginable in "modern democracies."
27. As an administrative measure this is naturally less expensive. Jacob Burckhardt thought the modern State will take the views and needs of the majority as its measuring rod and then treat brutally the rest according to these norms. Cf., his letter to F.S. Vögelin, February 15, 1863. In *Jacob Burckhardt, Briefe zur Erkenntnis seiner geistigen Gestalt* (Leipzig: Kröner, 1936), p. 274. Herein also lies the dialectical character of the political tragedy of the homosexuals who in spite of their frequent leftist enthusiasm are jailed in the USSR, but went scot-free in Mussolini's dictatorship.
28. Walter Schubart thought that the "Apollinian Greek" tended towards a parallelism which was

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- "anti-trinitarian" and even lacked bi-polarity. Hence the rise of homosexuality. Cf., his *Religion und Eros* (Munich: C.H. Beck, 1941), pp. 128, 141. Kierkegaard reasoned that homosexuality in ancient Greece was largely due to lacking *intellectual* rapport between men and women. Cf., his diary notice X-3-A-536 in *Die Tagebücher* (Düsseldorf: Diederichs, 1970), Vol. 4, p. 130. Sir Galahad (pseud. for Dr. Eckstein), *Mütter und Amazonen* (Munich: Albert Langen, 1932), pp. 184-190 emphasizes the strongly homosexual (and Lesbian) character of Sparta, but we have to bear in mind (as Professor E.N. Tigerstedt in *The Legend of Sparta in Classical Antiquity* told us) that our notions about Sparta are largely mythological. Antonio Freire in "Eros Platónico e Agape Cristã" in *Revista Portuguesa de Filosofia*, XXV, 3-4 denies the allegation that Plato was a homosexual (though he could have been homoerotic) and cites in support of his thesis *Symposion*, 206, 217, the *Republic*, 403, and the *Laws*, 636 and 838-839. Later the homosexual fad invaded Rome. Cicero still spoke with contempt about this alien, Greek importation in his *Disputationes Tusculanae*, IV, 30.
29. In the United States, however, the mixing is greatest in the adolescent stage where the young male is subject to a mother, a female teacher and a girl friend of the same age (which means that she is far more mature). This triple female domination lays the ground for a later misogyny. Towards mid-life one drifts apart.
30. This situation is obvious. A friendship always not only rests on a parallelism of tastes and convictions (*idem velle et idem nolle, ea est amicitia*), but also on a give and take. Where such an exchange cannot take place (on an intellectual, spiritual or artistic level) sex enters and fills the scene.
31. Cf., Johanna Schopenhauer, *Reise durch England und Schottland* (Stuttgart: Steingrüben Verlag, 1965).
32. Cf., *The Selected Writings by Benjamin Rush*, Ed., D.D. Runes (New York: Philosophical Library, 1947), pp. 379-385.
33. Cf., Randolph Bourne, "Letters to Mary Messer and Alyse Gregory," in *Twice a Year*, No. 2 (Spring-Summer, 1939) and No. 5 (Spring-Summer, 1941). These letters were written in late 1913 and early 1914.
34. This was the impression of "Jennie," the mother of Winston Churchill, but even more so of Maurice Paléologue. Cf., Ralph G. Martin, *Jennie: The Life of Lady Randolph Churchill* (Signet Books: New American Library), Vol. I, p. 235 and Maurice Paléologue, *La Russie des tsars pendant la Grande Guerre* (Paris: Plon, Nourrit, 1921), Vol. 2, p. 297.
35. Cf., Rosamond Lehmann, *The Ballad and the Source* (London: Albatross, 1947), p. 135.
36. This was brought out well by Robert Westerby in *Voice from England* (New York: Duell, Sloan and Pierce, 1940), pp. 33-34.
37. Cf., Kenneth Ingram, *Sex-Morality Tomorrow* (London: Allen and Unwin, 1940), pp. 149-151.
38. Cf., Simone de Beauvoir, "L'Amérique au jour de jour," in *Les Temps Modernes*, Vol. 3, No. 31, pp. 1820-1822.
39. Cf., *Time*, August 9, 1943, p. 43.
40. Cf., David L. Cohn, *Love in America* (New York: Simon and Schuster, 1943).
41. A preparatory school in Britain, however, is a school for boys in the 8 to 12 or 13 bracket. Public Schools are referred to as "Colleges."
42. This opinion one also finds in Geoffrey Gorer, *The American People: A Study in National Character* (New York: W.W. Norton, 1948), p. 129.
43. Khrushchshyov, who loathed modern art, treated the independent artists at a trial exhibition in Moscow as bourgeois homosexuals who ought all to be locked up. To equate modern art either with Communism or homosexuality is also an error of many "squares" in the Western World. In these equations there is only one grain of truth: sexual deviation seems to be really more frequent in the higher social layers.
44. The Marquis de Sade was one of the moral-intellectual forerunners of the French Revolution (in which he played a not inconsiderable role) who represented both aspects: moral nihilism on a materialistic basis and democratic totalitarianism leading to the Jacobin terror. He was decidedly bisexual.
45. This noted psychoanalyst wrote about "the relationship between the intensification of manifest homosexual drives whenever religion shows signs of losing its hold on a given civilization." Cf., his *Mind, Medicine and Man* (New York: Harcourt, Brace and Co., 1943), p. 302.
46. Although I believe in the existence of a Natural Law, I am equally certain that it cannot be recognized without the light of Faith. It is therefore useless in discussions with strict non-believers. I will realize that my stand conflicts with a large part of an optimistic Catholic tradition.
47. This was his reaction in reading Radcliffe Hall's *The Well of Loneliness*. It is not at all surprising when we think that he considered the "sacredness of human life . . . a purely municipal idea of no validity outside the jurisdiction" and that he saw no reason for attributing to a man "a significance different in kind from that which belongs to a baboon or a grain of sand." Cf., O.W. Holmes Jr., in *The American*

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Law Review, Vol. 5 (1871), p. 534, and *The Pollock-Holmes Letters*, Ed. M. de W. Howe (Cambridge: Cambridge University Press, 1942), Vol. 2, p. 36.

48. British Law in the past condemned male but not female homosexuality, not least because Gladstone did not dare to bring up the subject to Queen Victoria. Gilbert Bartell tells us in *Group Sex* (New York: Signet Books) that Lesbianism is rampant in group sex, but that male homosexuality is frowned upon.

49. Cf., Gerhard-Heinrich Ritter, *Jugend und Eros* (Stuttgart: Klett, 1950), p. 51 and Jakob Wyrtsch, *Gerichtliche Psychiatrie* (Bern: Haupt, 1955), p. 213. Interesting are fairly old American statistics to be found in Katharine B. Davis, *Factors in the Sex Life of Twenty-two hundred College Women* (New York: Harper, 1929), p. 247. Of 1200 unmarried women, 293 admitted sentimental attachments and 234 Lesbian practices; 312 of them clearly recognized the sexual character of their relations.

50. Originally female mortality was much higher. In Central Europe's Neolithic Age men died, on the average, at around 28, women at around 22. Medicine has created this great reversal. In underdeveloped countries the old order still survives, and men form the majority.

51. There are authors who believe that women are basically bisexual like Charlotte Wolff. Vide her *Psychologie der lesbischen Liebe* (Hamburg: Rowohlt's Taschenbuch, 1973), p. 45. (The original appeared under the title *Love Between Women* at Duckworth, London 1971.) Here we get a rather grim and depressing picture of the Lesbian world, a picture as negative as that offered by Miss Jess Stearns in *The Grapevine: A Report on the Secret World of the Lesbians* (London: Muller, no date), p. 255.f.f. How women easily drift into homosexual relationships—but only temporarily, in and out—is described by Jenny Fabian and Johnny Byrne in *Groupie* (London: New English Library, 1969) and Fay Weldon, *Female Friends* (London: Heinemann, 1974). A testimony to bisexuality also comes from Hannah Tillich (the widow of the "progressive" theologian) in her amazing autobiography *From Time to Time* (New York: Stein and Day, 1973). Ritter (*op. cit.*, p. 51) is also convinced that women are more easily seduced homosexually than men.

52. Cf., Simone de Beauvoir, "La Lesbienne," *Les Temps Modernes*, Vol. 45, pp. 997 and 1001. No wonder if you look at the female problem of sex life, even within marriage, as depicted by Lucius F. Cervantes, S.J., *And God Made Man and Woman* (Chicago: Regnery, 1959), pp. 66-80.

53. Normal, heterosexual intercourse does not give to women the greatest orgasmic satisfaction. Cf., also Betty and Theodore Roszak, *Masculine-Feminine* (New York: Harper & Row, Colophon Books, 1969), p. 204. The oriental harems, needless to say, are hotbeds of Lesbianism. Cf., N.M. Penzer, *The Harem* (London: Spring Books, 1965), pp. 219-221.

54. In Robert Ruark's rather autobiographic novel *The Honey Badger* (New York: McGraw-Hill, 1965) we encounter the homosexual Francis Hopkins who becomes a ladies' confidential friend. A similar view is expressed by Ernst Jünger, *op. cit.*, p. 68.

55. Cf., Simone de Beauvoir, "La Lesbienne," p. 1030. A rising man-hatred among women in the United States coupled with Lesbianism was noted by a French Exile. Cf., *Moreau de St. Mery's American Journey 1793-1798*, translated and edited by Kenneth and Anna M. Roberty (Garden City: Doubleday, 1947), p. 280 and *passim*.

56. No wonder, when we hear that "Lesbianism can be political." Cf., Shere Hite, *The Hite Report* (London: Talmy Franklin, Ltd., 1977), pp. 275-277. In the International Women's Year meeting in Houston (1977) this feministic congress adopted a pro-Lesbian platform. Male homosexuality too has its profound political implications.

57. And, therefore, the whole relationship between the sexes, individually and collectively, is vitiated. This is even true of those aspects of our lives (be they biological or psychological) we deem to be "normal." As to the nostalgia of creation—so imperfect after the Fall—for its final redemption see Romans 8: 18-23. Keeping all this in mind we can understand the outcry of Germaine Greer: "Nature is not a triumph of design." Cf., her book *The Female Eunuch* (New York: McGraw-Hill, 1971), p. 42. Writing my book on inter-sex relations, *Das Rätsel Liebe: Materialien für eine Geschlechtertheologie* (Vienna: Herold, 1975) I had to work with the concept of Original Sin nearly all the time.

58. A typical and rather obvious example would be Keynesian economics. Lord Keynes, who was a homosexual, answering the question where his economic theories in the long run would lead to, simply answered: "In the long run we're all dead." This is the language of a man without progeny. On the homosexual character of Keynes, cf., David Gadd, *The Loving Friends* (London: Hogarth Press, 1974). Keynes had affairs with Duncan Grant and then with Lytton Strachey. Yet homosexuals also had influence and power elsewhere. There were homosexuals on the Prussian Court in the time of Wilhelm II, and Bismarck told us that homosexual intrigues in Prussia existed already way back in 1835. Cf., Otto Fürst von Bismarck, *Gedanken und Erinnerungen* (Stuttgart: Cotta, 1898), Vol. 1, p. 6.

59. As Havelock Ellis has pointed out, homosexuality is frequent among artists, probably because it combines male creativity with a female sensitivity. Yet among the truly outstanding painters in the last hundred years I would not know of a single genuine homosexual (last, but not least, because he would be lacking in a specific human dimension).

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60. Here it ought to be borne in mind that the Inquisition was founded to locate and identify the Albigensians (Cathars). This was an ecclesiastic body serving as theological experts for the state at the sovereign's invitation. It functioned only in a few countries, but had a start at the sovereign's invitation. It functioned only in a few countries, but had a start in southern France where the Albigensian (Cathar, Bogomilian) sect condemned all carnality and therefore, above all, marriage. The result was a collapse of morality and a phenomenal rise of homosexuality—a real menace to state and society. Since the sect was of Bulgar and Bosnian origin, the Serb word *Bugarin* became *bougre* in French and *bugger* in English where it retained to this day the connotation of homosexuality (though not in French!). It was this homosexual challenge which in the Church started centuries of intolerance, but it ought to be pointed out that the Inquisitors had only the right to enforce minor punishments. It was always the state which carried out the death penalty. See the chapter on the Inquisition in the *Cambridge Medieval History*, vol. VI.

61. Cf., Augustinus, *Contra litteras Peteliani*, III.

62. This view is almost generally accepted, among others by Oswald Schwarz, cf., his *The Psychology of Sex* (Harmondsworth: Penguin, 1949), pp. 45-52; Marc Oraison, *Vie chrétienne et problèmes de la sexualité* (Paris: Lethielleux, 1952), pp. 184-195.

63. Cf., his *Sexual Suicide* (New York: Bantam Books, 1973), pp. 45-46.

64. Evelyn Waugh was in his younger years a homosexual. This much is evident partly from his diaries, partly from his biography. Cf., *The Diaries of Evelyn Waugh*, Ed., M. Davie (London: Weidenfeld and Nicolson, 1976) and (Sir) Christopher Sykes, *Evelyn Waugh, A Biography* (London: Collins, 1975), p. 48.

65. Cf., Karl Bednarik, *Die Krise des Mannes* (Vienna: Molden, 198), p. 135.

66. Cf., J.D. Unwin, *Sex and Culture* (New York: Oxford University Press, 1934) and *Abstract Sexual Regulations and Human Behavior* (London: Williams & Irongate, 1933), p. 107.

67. Ernest Renan, *La réforme intellectuelle et morale* (Paris: Calmann-Lévy, 1884), p. 53.

68. Which is furiously contested by Herbert Marcuse in *Eros and Civilization* (Boston: Beacon Press, 1955), *passim*. On the other hand, Freud's theory of "sublimation" of the sexual drive is contested by most psychologists and sexologists. Thus by Oswald Schwarz, *op. cit.*, p. 23; Kenneth Walker, *op. cit.*, pp. 87-91; Schubart, *op. cit.*, pp. 213-214; C.G. Jung, *Wirklichkeit der Seele* (Zürich: Rascher, 1947), p. 126. Diversion or deflection would be another matter.

Triage in Cold Blood

Louis R. M. Del Guercio

FIFTEEN YEARS ago, the popular and influential anthropologist Margaret Mead spoke at a meeting of the Rudolph Virchow Medical Society in New York. The title of her talk was “From Black and White Magic to Modern Medicine.”¹ She belongs to that elite and select group of scientists who are the darlings of the news media because of their ability to forecast relevant issues and to describe the essential features of scientific theory in concise terms.

Her talk that evening dealt with the historical perspective and significance of the Hippocratic Oath — she decried the fact that physicians didn’t understand just how important that oath was to society and to the practice of medicine. Now remember, she spoke in those innocent days during the time of Kennedy’s Camelot, before the college revolts and while abortionists were still being hunted by the police.

Before Hippocrates, the hapless patient could never be certain when he hired a doctor for some white magic that one of his enemies had not paid to dispatch him with black magic. Patients were vulnerable, and if physicians were allowed to make choices regarding the power to cure and the power to kill, being mortal, they could be corrupted. Reverence for, and confidence in the physician dates from that historic separation of the power to kill and the power to cure, stated clearly and concisely in the Hippocratic Oath. The singular goal of the physician was to treat patients for their illness or injury and the Hippocratic practitioner abjured all forms of moralizing, politicizing, and economizing at the patient’s expense.

Back in 1962 Margaret Mead had detected a certain haughtiness and disdain for that ethical code which had reassured the public for almost 2500 years. Most schools had already abandoned the recitation of the oath at graduation and when she warned that “It is important for the lay public to develop ways of maintaining at all times and in all places, the physician’s commitment to life” she must have had an inkling that we were heading in the wrong direction.

When physicians began to deviate from that primary goal, they

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lost stature and credibility and the politicians stepped in to fill the ethical vacuum with regulations. Every single one of the vows of the Hippocratic Oath is today being consistently and systematically violated by doctors. Even the sexual seduction of patients is now considered a debatable issue by psychiatric associations. The medical profession allowed itself to be debased without a whimper by the judicial profession in 1973, but of course, for some, the abortion profits were enormous. This moral headstand did not go unnoticed by the laity and gained us little respect. The professional secrecy part of the Hippocratic Oath is also passe — by Federal fiat and state decree, junior level bureaucrats nose through our patient records at will.

As a profession, we have been totally lacking in courage and have not fought against the destruction of our ethical heritage by the politicians. Is this a great loss or had the Hippocratic Oath outlived its usefulness? To paraphrase Clemenceau, “medicine had become too important to leave to the physicians.” Instead of the Hippocratic Oath we now have the Federal Register with regulations numbering in the millions. Each hospital is now subject to the tender mercies of 170 regulatory agencies and the cost of compliance is enormous. Can the government substitute for the conscience and courage of the individual physician?

Remember, the most notorious atrocities of medical research were government programs — whether in Nazi Germany, or the Willowbrook, or Southern syphilis studies in the United States.² We learned from the Watergate episode that the Federal government can absolve *no one* of responsibility or accountability. The buck stops with us.

For over 2500 years, the sanctity of human life has not been a negotiable or debatable issue for physicians. We gave up the power to kill, and if the politicians want the job done because of overpopulation, let them get the Army to do it. It seems as if every other article in the *New England Journal of Medicine* these days speaks of “non-persons,” “creatures,” and “unconscious vegetables”³ which are code words for that ex-patient on the other end of the unplugged plug. What happened? Didn't he pay his medical insurance premiums? No, we all pay them whether we like it or not. It's just that there isn't enough money any more. We are putting 8.3% of our Gross National Product into medical care — terrible, that's almost *half* what we spend on booze, tobacco and entertainment. We physicians *must* acquiesce and compromise our ethical principles under pain of — not death, not imprisonment but worse — non-payment. Doesn't any doctor ever do anything for nothing any more?

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It is estimated that the total cost of complying with all federal regulations is over 130 billion dollars. This is far greater than the total cost of all medical care in America, including the great nursing home rip-off — the cost of which should not have been categorized under medicine but under recreation, for the surviving relatives who couldn't be bothered with the old folks.

We critical care physicians should not apologize for the high costs of our services. The kidney people fought with tooth and claw in Washington to free themselves and their patients of enforced "triage in cold blood." They won the fight and those creepy "death committees" went out the window.

The National Health Planning and Resources Development Act of 1974 is better known as the "passengers-flying-the-plane law." Consumer dominated groups with absolutely no requirement for, or manifestation of, medical competence or understanding decide where the money goes.

Cronyism and political bias have become major factors in the allocation of funds. Doctors have shown that they will give up any moral principle in order to dine at the Federal trough. If it's a federal program it must be OK, is not a valid argument for discarding a 2500-year-old promise to society.

But how can we reverse this process if our goal is to treat and not to talk? The answer is that good therapy always surfaces and cannot be suppressed by bureaucrats. Witness: the coronary bypass explosion, and artificial kidneys for anyone who needs them regardless of age or associated disease. No one who has paid taxes and insurance premiums is willing to become a social martyr and give up even a one in 100 chance of a cure, no matter how expensive! If we continue to save all lives as best we can and disregard political enforcement of economic triage, the public will support us as it did the nephrologists. As critical care physicians, we must keep trying heroic forms of treatment in desperate situations without intimidation by nihilistic Federal regulations. Justification for our actions stems from Roman Legal Codes and English Common Law — *ex necessitate rei* — from the necessity of the case.

With the Medical Device Amendments of 1976 we are faced with onerous and stringent regulations with severe punitive overtones which will shut off the development of new devices for human therapeutic use. The Swan-Ganz catheter, intra-aortic balloon pump, artificial kidney and even volume-controlled respirators all would be impossible to develop and market today. Even if we could prove the therapeutic value of new devices without risk, there are those in power who would deny us their aid on purely economic grounds.

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Howard Hiatt, Dean of the Harvard School of Public Health and HEW advisor stated publicly, "Proof of effectiveness, by itself, cannot justify the unlimited spread of costly new technology."⁴

My premise is that the public *expects* us to *fight* for our professional duty to deliver optimum care. That, in the mind of the public, means saving lives, not killing with kindness. Paying a doctor to help a terminal patient die is nonsense — like paying the weatherman for winter to come. Thanatology is just jargon for kindness and sympathy to those in desperate straits. It is nothing new and does not improve with psychoanalysis.

The public wants medical progress to *reduce* the need for sympathy and if we must go underground to develop necessary new technology or if we must bootleg research costs denied by the bureaucrats, it won't be the first time that medicine was forced to ignore public authority for a greater good. I am old enough to remember paying for a research project with my *own* money. Do any of us have *that* kind of a commitment to research anymore?

The ecological-environmentalist view of technology as a tyrant and man as a victim of the machine is creeping into the politicians' mind as a way of reducing costs. This is fallacy — medical costs can only be reduced by increased efficiency through improved technology.

Sir Peter Medawar, Nobel laureate, deplors this new "medical luddism." Luddism was a violent political movement which sprang up during the Industrial Revolution to destroy factories and mills which were a threat to hand labor. According to Medawar "the fear is rather that mechanized medicine diminishes man by depriving him of the chance of making a dignified exit of the kind that people still alive *believe* to be coveted by those on the point of dying."⁵

That tiresome phrase "Death with dignity" is meaningless. Tubes and respirators or the actions of doctors and nurses could never reduce the dignity of the dying patient, no more than the death of Christ on the Cross was undignified.

Death for the critical care physician is the vacuum into which are drawn his errors of diagnosis, judgment, and technique. It may also be the result of his lack of courage to try what might be risky to his malpractice rating.

There comes a time for every profession when the practitioners must "screw their courage to the sticking place" to resist external threats to their code of ethics. The very first aphorism of the Corpus Hippocraticum has particular relevance for critical care today: "Life is short, and the art long; opportunity is fleeting; experiment perilous,

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and judgment difficult.” Courage is still a necessary virtue in medicine.

Triage — deciding which patients to give up on — in the heat of battle or the din of natural disaster is one thing; but triage in cold blood because some politician has other ideas of what to do with our insurance premiums or tax money is unacceptable and must be resisted at all costs. Hippocrates recognized the necessity of such assurance to patients in the fifth century before Christ. Once we as physicians start making decisions regarding who is or is not worthy or deserving of our best efforts, we revert to black and white magic. Physicians will then see again fear in the eyes of their patients — not fear of pain or fear of death but fear of the *physician*. It has happened in our lifetime before and because of the nature and costs of our practice, we intensivists are the first to feel such pressure to bend our principles. We must also be the first to resist.

NOTES

1. M. Mead, “From Black and White Magic to Modern Medicine,” *Proc Rudolf Virchow Med. Soc. City NY* 22:130, 1963.
2. L. Alexander, “Medical Science Under Dictatorship,” *New England Journal of Medicine* 241:39, 1949.
3. J. Lachs, “Humane Treatment and the Treatment of Humans,” *New England Journal of Medicine* 294:838, 1976.
4. H.H. Hiatt, “Too Much Medical Technology?” *Wall Street Journal*, June 24, 1976.
5. P.B. Medawar, “Thoughts on Progress,” *Hospital Practices*, 107, 1976.

On Medical Ethics

Albert E. Gunn

THE CHIEF problem of ethics (medical ethics being only a part of a more general inquiry) has always been finding a rule or principal of conduct. Many of the greatest minds in history have worked on finding such a rule or justifying its absence. A principal pre-occupation of most religions in recorded history has been the rightness or wrongness of human action. One of the most striking weaknesses in the contemporary debate over medical ethics is the lack of a basic yardstick against which the rightness or wrongness of the physician's actions can be measured. There is no general agreement among physicians and ethicists as to what should be the ethical determinant of what doctors should or should not do in a particular situation.

It would be convenient if we, as physicians, could only look to some unquestioned authority to make these decisions for us. At the present time, however, this does not appear to be a workable option, and, in fact, a surrender of moral authority to an outside institution would present a real danger. Some, for instance, might think the court's or the state's approval might assure the rectitude of a certain course of action, but if a universally accepted judgment on morality has developed in our times, it is that what occurred in Nazi Germany was wrong. Here, the government permitted and, at times, actively participated in some of the worst medical crimes in history. This should dispose of any lingering hope that reliance on the state for ethical guidance would be a satisfactory method of solving thorny moral dilemmas. Of course, some who are enamored of our own ever-encroaching centralized federal government might argue that Hitler and his associates were a recognizable aberration quite distinguishable from our present benign democratic government with its vigilant press and overseen by courts dedicated to protecting individual rights, etc., etc. This approach has a surface plausibility, but its fallacy can be demonstrated in a number of ways.

First, the Nazi intervention into the medical sphere was not an extraneous intrusion into the medical tradition and laws of Germany. On the contrary, it was, in some respects, a fulfillment of trends that

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had begun before the National Socialist Party was more than just the musing of a visionary. In 1920, a psychiatrist, Alfred Hoche, and a jurist, Karl Binding, published *The Release of the Destruction of Life Devoid of Value*. They developed the idea of "absolutely worthless" human beings and presented as a solution to this problem the killing of those who cannot be rescued and whose death is urgently necessary. It has been noted that the arguments then advanced for killing gave prominence to the economic factors, "namely the cost of keeping these patients alive and caring for them."¹

Such concepts provided a climate of acceptance for what came later. What is important here is not that such speculations were universally accepted by the medical profession, but rather that they were not universally condemned by that profession. Dr. Leo Alexander, expert witness for the prosecution at the Nuremberg trials and well known for his psychological studies of Nazi war criminals,² noted the important role played by these theoretical precursors of the "final solution":

Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. It started with the acceptance of the attitude basic in the euthanasia movement that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. But it is important to realize that the infinitely small wedged in lever from which this entire trend of mind received its impetus was the attitude toward the non-rehabilitatable sick.³

There were those such as the Bonnhoeffers, father and son, who fought these early experiments in mass killing among the mentally retarded, but the awful tragedy was that the medical profession as a whole did not stand and fight a government run amok, but rather cooperated in such a fashion as almost to suggest enthusiasm for its ghoulish enterprises.

Next, we might pass to the none-too-edifying lessons to be learned from our own constitutional history. Taking an example from what is said of the jury trial, I am fully in agreement with the proposition that the American Constitution, although it has many faults, is probably the best method of government yet devised, but our understandable pride in our form of government should not blind us to its shortcomings. For instance, Article I, Section 2 of the United States Constitution provides:

Representatives and direct taxes shall be apportioned among the several

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states which may be included within the Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed *three fifths of all other persons* (emphasis added).

Thus, the Constitution *on its face* euphemistically recognized the existence of slavery. In case there was doubt as to the status of the “other persons” mentioned above, Chief Justice Taney of the Supreme Court clarified their position by holding with six of his colleagues that slaves were chattels, which, for some purposes, classified them in the same category as brooms or cuspidors. *Dred Scott vs. Sanford* ruled that the black man could never be a citizen in the whole sense; thus, the Supreme Court was not off to a flying start in the area of human rights, and there have been similar lapses down through the years. *Buck vs. Bell*⁴ would provide a handy precedent for the defendants at Nuremberg to cite in their cases, and the Supreme Court, far from trying to sweep this unfortunate decision under the rug, compounds its error by citing the case with approval in more recent decisions.⁵ The confinement of Japanese-Americans in concentration camps is another instance in which the constitution and the courts were not the protectors of individual rights that we would have liked them to be.

Parenthetically, we might add here the observation of others that a democracy is capable of villainy that would be unthinkable to a dictator. Whatever is done in a democracy is done “in the name of the people,” an effective method of stifling criticism. The tyranny of the many may be worse than the tyranny of the few.

Recently, the Supreme Court decided several cases relating to abortion. These decisions have stirred up a controversy that shows no sign of abating. Although often thought of as a sectarian debate, as time goes by (and more persons express themselves on the issue), the more complex and interesting become the alignments of those on both sides of the argument. For instance, Archibald Cox made the following comment on these high court rulings:

... The opinion (*Roe vs. Wade*) fails even to consider what I would suppose to be the most compelling interest of the state in prohibiting abortion: the interest in maintaining that respect for the paramount sanctity of human life which has always been at the center of western civilization ... not merely by guarding “life itself,” however defined, but by safeguarding the penumbra, whether at the beginning, through some overwhelming disability of mind or body, or at death.⁶

In Germany, things have come full circle, as that country’s highest court recently refused to legitimize abortion on request, thus placing the Federal Republic in opposition to the trend in many other countries.

The point of this review of some of the abortion controversy shows that the deep rift opened by recent Supreme Court decisions has not been healed. The medical profession cannot look even to our own government and courts in settle questions of medical ethics.

Lately, journalists of both the printed and electronic media have taken on the role of the conscience of our society. Extensive investigations reveal new moral outrages, which are duly made known to the public. Aroused public opinion causes action and, in a certain sense, this provides for some type of moral opinion. The moral outrage of newspapers and other mass media can be rather selective at times. We know much about Dachau and Lidice but less about Katyn, Deir Yassin, or the holocaust of the Armenians at the hands of the Turks. This selectivity may not be altogether purposeless. We recall the words of Virgil: *Crimine ab uno disce omnes* (learn from a single crime the nature of all [*Aeneid II. 65*]). By focusing on the terrible details of one manifestly tragic instance of man's inhumanity and brutality to his fellow man, we learn much. This microscopic examination in one case can be used as a paradigm to better understand others. *The Diary of Anne Frank* is a book of universal experience, and the emotions it contains could have as well been those of an Armenian teenager or an Arab girl at Deir Yassin. Whatever the reason for their intermittent character, sporadic bursts of moral outrage cannot provide a sure or adequate basis for medical-ethical decisions. The newspapers publicize with outrage the sterilization of some American Indians and then allow the proposed sterilization by force of a whole sub-continent to go by virtually without comment.

Kierkegaard feared that ethics would become a branch of statistics. It is appropriate to recall that numbers are not real but are constructs of the mind. They are man's servant, not his master. Numbers are meant to describe, not to rule. Medical ethics is not the Varsity Rag; everyone may be doing it, but that really does not matter. Perhaps the physician-defendants at Nuremberg thought there was safety in numbers, but, as they stood in the dock awaiting sentence, they may have had good cause to revise their opinions on such assurance. We also found in the judgments at Nuremberg that there is an underlying law relating to man which applies irrespective of the laws of nations. American physicians should reflect on the fact that the prohibition of ex post facto laws contained in the Constitution (Article I, Section 9) can be amended to provide for trial for crimes not illegal at the time of commission. At Nuremberg such legal technicalities were not allowed to stand in the way of judgment and punishment. Scientists and physicians must keep in mind that medical ethics is not an opinion poll but relates to unchangeable and binding standards of conduct.

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In regard to statistics, we might recall the words of Benjamin Disraeli: "There are three kinds of lies: lies, damned lies, and statistics." These do not form the best foundation for a code of moral guidance.

Physicians, then, are in a precarious position: They can be held accountable for what they do, and they cannot rely on the state, their profession, or the aggregate of other's conduct to help them. Each and every physician ultimately must make his own decisions on what is ethical and what is not and expect to be judged by those decisions. He cannot delegate this to anyone else. It is in helping physicians to do this thinking that the contemporary medical-ethical debate can be helpful. By following these discussions, doctors will see the issues framed and have the advantage of the arguments pro and contra put forward by others. This requires the widest type of discussion and dissemination of a diversity of opinion. True, we will have to suffer the good with the bad. Some of what passes for medical-ethical discussion could serve as the underpinning for an intellectually pretentious Einsatzgruppen, but this is not reason to close down the debate. Unlike the German experience, we hope these opinions will be seen for what they are and condemned. The value of this process lies in this ongoing investigation of the parameters of scientific and medical conduct. As always, the consensus is to be rejected as controlling. The place of consensus, if it has any at all, is in the prudential and pragmatic order, and pragmatism is the very antithesis of ethical principle. Utilitarian formulations only have a place in providing a reference point for condemnation.

There is a degree of urgency that underlies the process of arriving at medical-ethical conclusions. This is underlined by the frightening, infernal vision conjured up by Bertrand Russell over 40 years ago:

Christian ethics is in certain fundamental respects opposed to the scientific ethic which is gradually growing. Christianity emphasizes the importance of the individual soul and is not prepared to sanction the sacrifice of an innocent man for the sake of some ulterior good to the majority. Christianity, in a word, is unpolitical, as is natural since it grew up among men devoid of political power. The new ethic which is gradually growing in connexion with scientific technique will have its eye upon society rather than upon the individual. It will have little use for the superstition of guilt and punishment, but will be prepared to make individuals suffer for the public good without inventing reasons purporting to show that they deserve to suffer. In this sense it will be ruthless, and according to traditional ideas immoral, but the change will have come about naturally through the habit of viewing society as a whole rather than as a collection of individuals. We view the human body as a whole, and if, for example it is necessary to amputate a limb we do not consider it necessary to prove first that the limb is wicked. We consider the good of the whole body a quite sufficient argument. Similarly the man who thinks of society as a whole will sacrifice a member of society for the good of the whole,

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without much consideration for that individual's welfare. This has always been the practice in war, because war is a collective enterprise. Soldiers are exposed to the risk of death for the public good, although no one suggests that they deserve death. But men have not hitherto attached the same importance to social purposes other than war, and have therefore shrunk from inflicting sacrifices which were felt to be unjust. I think it probably that the scientific idealists of the future will be free from this scruple, not only in time of war, but in time of peace also. In overcoming the difficulties of the opposition that they will encounter, they will find themselves organized into an oligarchy of opinion such as is formed by the Communist Party in the U.S.S.R.⁷

Who will say that some of this "scientific ethic" has not already insinuated itself into contemporary life? How important it is in an age in which "life boat" theories and "triage" are openly discussed to be vigilant that the utilitarian views described by Russell, which were the basis of so much evil in Germany, do not again gain ascendancy?

NOTES

1. F. Wertham, *A Sign for Cain: An Exploration of Human Violence* (New York: Oxford University Press, 1976), p. 161.
2. K. Mitzner, "The Growing Scandal of Abortion," *Ideas*, Vol. 3, no. 1, 1971, p. 38.
3. L. Alexander, "Medical Science Under Dictatorship," *New England Journal of Medicine* 241:44, 1949.
4. *Buck v. Bell*, 274 US 200, 1927.
5. *Roe v. Wade*, 410 US 113, 1973.
6. A. Cox, *The Role of the Supreme Court in American Government* (New York: Oxford University Press, 1976), p. 30. See also: B. Brody, *Abortion and Sanctity of Human Life: A Philosophical View* (Cambridge, Mass.: MIT Press, 1975).
7. B. Russell, *The Scientific Outlook* (New York: W. W. Norton, 1931), pp. 234-235.

APPENDIX A

[*The following is the complete text of a letter sent by the Women's Lobby, Inc., to its own supporters; the Lobby's letterhead lists, among its "Board of Sponsors," a number of prominent American women, including the Honorable Clare Boothe Luce. Mrs. Luce's reply is printed elsewhere in this issue. Mr. Henry Hyde (mentioned in the letter) read both this letter and Mrs. Luce's reply into the Congressional Record (March 7, 1978, p. E1061).*]

Women's Lobby, Inc.

December 19, 1977

DEAR WOMEN'S LOBBY DONOR,

During the past six months the Congress has voted more than a dozen times on how to limit Medicaid abortions. The House would impose a complete ban regardless of the effects of the pregnancy on mother or child, but this position was modified to accommodate the Senate. The Senate language allows for rape, incest, or danger to the life of the mother, where abortion may be necessary.

On December 7, a compromise was reached. It allows poor women to have abortions under Medicaid if two doctors certify that the mother will suffer serious physical health damage because of the pregnancy. It also allows for "medical procedures" in cases of rape or incest promptly reported to a law enforcement agency or public health service. This provision still leaves thousands of poor women scrounging, begging and borrowing money to gain the same rights guaranteed to any middle class woman. It is an appalling situation. Unfortunately, it will not be easily changed.

For the last year, the Lobby has had one full time staff person working solely on the abortion issue. During the crucial first Votes, we roamed the halls, spent hours in the Senate receiving room and the lobby of the House chamber, just calling Members off the floor to discuss the issue. It was a frustrating experience. We discovered that abortion has made our legislators silly and irrational.

One usually liberal Congressman explained that when his two year old daughter saw a photo of a xygote in *Newsweek*, she pointed and said, "Baby, baby." Her father voted against abortion. Another Congressman extolled his love for the little lambs and colts that romped through the fields during his childhood farm years as the reason he could not vote yes on abortion.

Our opposition is highly organized and well financed. They have a telephone network across the country to call in support at a moment's notice. When our Representatives come home, it is these right-to-lifers who greet them at the airport with signs saying "Abortion is Murder."

Women's Lobby has decided that it is time to combat this campaign with one of our own. We are targeting 6 to 10 anti-abortion leaders in Congress for their 1978 elections. Our abortion lobbyist, Carolyn Bode, will go to

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each district to organize women, talk to the press, and build support. We want to give them a fight they'll remember. So far, we've targeted Rep. Silvio Conte (R, Mass), Rep. Carl Pursell (R, Mich) and Henry Hyde himself.

To do this, we need your support. We have to expand our budget next year, so we need your regular contribution and a special one for this campaign. We also need your suggestions for people in your area who are vulnerable who should be targeted.

The Administration will not help, Secretary Califano will not help, only you can give hope to poor women — and to all women — so we can choose abortion.

CAROL BURRIS
President

APPENDIX B

[The following are excerpts from an article titled "Questions of Authenticity in Situational Ethics," which appeared in *The Cancer Bulletin* (reprinted with permission from *The Cancer Bulletin*, Vol. 29, no. 4, 1977; Copyright© Medical Arts Publishing Foundation, Houston, Texas). The authors are Michael Batten, M.A., a guest lecturer at the New School for Social Research in New York, and William F. Enos, M.D., an associate professor at George Washington Medical School in Washington.]

It has been said that 30 or more years are required for an idea — a philosophical idea — to enter the popular mind. This puts World War II existentialism with its subjective applications just about on schedule. That is, the body of thought developed by such persons as Sartre, Camus, and Jaspers has been translated into popular perceptions through mechanisms as diverse as *Time* magazine and the Sunday pulpit. "Doing your own thing" as a style of life represents one outcome of this popularization. Situational ethics as a guide for resolving moral problems is another, more serious result. It is important for anyone interested in medical-moral problems to understand the principles operating behind this subjective system of thought to make judgments on the validity and applicability to moral issues arising from medical situations.

The traditional approach to medical ethics is that there exist objective norms — directed by religion, the natural law, and philosophy — which serve as criteria and guides for resolving moral situations. Comparatively few physicians were concerned with the intellectual disputes set off by Descartes, Kant, and others who challenged the reality of the objective order and the very concept of objectivity. Problems arising in the medical-moral order still could be analyzed on common ground against a given medical-moral code.

Times have changed, however. The separation of the physician from the moral order and moral decision-making pertaining to the medical situation is an outcome of the increasingly scientific approach to medicine. A physician has come to be regarded almost by definition as removed from moral issues surrounding any given medical situation. He has become a mere technician who applies medical science within a situational framework. Moral consequences are not, supposedly, his concern if he is to accomplish medical ends in the treatment of individuals. Much is now happening, however, to change this perspective. The advance of medical technology, the rise of medical-legal issues, and the ascendancy of subjectivity itself have managed to change the rules for medical ethics.

Technology, a word derived from Greek, means literally the "know-how to make." There is no overflow from the word that suggests value or significance of either what is made or the process by which the objective is made. Indeed, the engines of industry by which the air we breathe is polluted or the instruments of medicine by which lives are saved are

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almost frightening. It is as if once invented, technology takes on an inexorable course of development independent of the intentions, evaluation, and assessment of the makers. In sum, the means become the end, whatever the apparent goodness of either.

The ability to save life at the extremes of the life cycle — birth and death — sums up the impact of medical technology. Intrauterine manipulations of Rh factors in pre-born human beings illustrate one technology. The variety of techniques to support and continue life almost indefinitely represents another. The new technologies have raised medical-moral issues that can neither be brushed aside nor resolved easily by traditional principles. What constitutes life? When does it begin? When does it cease? What new responsibilities are imposed on medical professionals by the new technologies and the new questions? Questions once considered pretty much resolved have been reawakened by the technological means to cure. Whereas there was harmony of agreement, now there is dispute and discord.

* * * * *

An even more serious medical-legal-moral issue arises from the Supreme Court ruling in *Roe vs Wade*. The court places the final decision-making responsibility for second- and third-trimester abortions on the mother in consultation with her physician. By this relegation, the physician is assumed competent to interface with moral and deeply psychological issues. A physician who has no particular moral code or religious belief may give one type of counsel. One with strong beliefs may give an opposite counsel. A crisp, professional briefing on abortion by the doctor clad in his white coat can easily signal sanction and approval to women considering abortion. Although the consultation is supposed to be strictly medical, the spillover into the moral sphere is real and compelling. Physicians are forced into the role of moral counselor whether they like it or are prepared for it. The Supreme Court has shifted moral decision-making to the physician, ready or not.

The pornography cases decided by our courts indicate the dominance of subjectivism in the United States. Standards of what is obscene, immoral, or legal vary from Cincinnati to Los Angeles. The onus for determining standards rests with representative jurors from different communities. The outcome of this process is that because no one can define common standards, the distinctions between right and wrong, licit and illicit, legal and illegal become irretrievably blurred. Faceless individuals, on the basis of subjective feelings, perceptions, and tasks, become the arbitrators of what is good or bad. Even the parameters of regulatory law, so rigorous in many areas, fail to provide moral standards or limits. In such a society, a convicted murderer with suicidal tendencies, pleading for execution, becomes a folk hero. We have traded off a moral code for an amoral code without recognizing the differences or the consequences.

As a result of this contemporary phenomenon, doctors and other

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medical professionals are caught in a bind. As “free” individuals, they must adhere to their personal moral standards and codes, but they are under social pressure to accommodate themselves to those of their patients and society in general. In 1944, a physician in Germany could participate in genocide with legal sanction; in America, he would have been a murderer. In 1977 in America, a physician can perform an abortion with legal sanction; in Germany, he would be a murderer. We have come 360 degrees on the moral compass.

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[The following are three examples of a dozen syndicated newspaper columns by Michael Novak on abortion and related questions since November, 1976, beginning with the most recent one, on the Waddill Case. All are © Copyright, The Washington Star Syndicate, Inc., 1976-7-8, and reprinted here with permission.]

The Murder Case of Dr. Waddill

(April 1, 1978)

It is no help to live on illusions. Which is why the small minority of Americans in favor of unrestricted abortion is in deep political and moral trouble. Public revulsion is growing — and the murder trial of Dr. William B. Waddill in Orange County, California, shows why.

On March 2, 1977, it is alleged, Dr. Waddill tried to abort the infant of an eighteen-year-old girl. His saline solution failed to cause the internal destruction and skin damage it was supposed to, and the infant survived. A nurse found the two-and-one-half pound infant breathing, moving, and making weak cries, and took it to the nursery stubbornly alive.

When Dr. Waddill was so informed, he is reported to have told the hospital staff “not to do a goddam thing. Just leave the baby the hell alone.” When he arrived at the hospital, according to testimony, Dr. Waddill asked to be alone with the baby. However, a pediatrician, Dr. Ronald J. Cornelsen, came to the nursery where, he later testified, he saw Dr. Waddill make four separate attempts to strangle the baby. Dr. Waddill complained aloud: “I can’t find the goddam trachea [windpipe],” and according to testimony pressed so hard that the baby’s head snapped up into a “v” position.

Still failing at his task, Dr. Waddill, according to testimony, spoke of injecting potassium chloride, or filling a bucket with water to drown the tiny girl. Dr. Cornelsen persuaded him that an autopsy would find him out. Only after days of anguish did Dr. Cornelsen report his colleague.

The Supreme Court decision of 1973 permits abortion on demand. This child was between 29 and 31 weeks along in gestation — a good seven months. At the murder trial, Dr. Waddill’s lawyers have complained that what was legal in the womb is, oddly, being charged as murder outside the womb. This doesn’t, they say, make sense.

In addition to the murder charge, Dr. Waddill is being sued by the dead infant’s mother for \$17 million because she had no opportunity, she claims, for informed consent. She had not been told, she says, that she could give birth to a live baby.

Informed consent is the pillar of free choice. Surely, those who are “pro-choice” are in favor of informed consent. The requirement of informed consent is at the heart of the ordinance recently passed in Akron, Ohio.

More and more feminists are becoming appalled at the realities of abortion. Like the U.S. military describing air raids on Vietnam, pro-

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abortionists have tried to use a sanitized, euphemistic language to hide what actually happens in abortion. Like the few early protesters against that war, "Feminists for Life" and other activists are beginning to make the realities known. They are awakening the nation's conscience.

"Women Exploited" is one such feminist group. Leader Sandra Haun testified before the Pennsylvania legislature: "The members of our organization have all had an abortion and have come to realize, too late, that our decision was wrong. We were encouraged and pushed into a hasty decision that now we find impossible to live with. We were lied to and deliberately misinformed."

The campaign for abortion has up until now depended on ignorance and euphemism — and also on the passion to do away cheaply with the poor before they become expensive. Like the hawks on Vietnam, this well-financed and lavish campaign benefited by having the establishment behind it. Gradually, from the grass roots, the citizenry is being aroused; the establishment is wavering. When the reality finally gets pictured on television — as the war was — the tide will shift with even more force than it already has.

It is an illusion to believe that resistance to abortion is based on religion. It is, in fact, based upon biology, nature, and common sense. All one has to do is look with one's eyes upon what is being aborted. It is not a "mass of cells." It is a living organism, with every appearance of a child. It resists its own death. It struggles. Granted its own fundamental rights, it will live, grow, and be born — not by faith but by nature itself.

This issue will not die. Not all the taxpayers' millions of Planned Parenthood can long cover up reality. Take this issue to the people. Let the people choose, ye advocates of pro-choice.

And Now Abortion for the Aged?

(November 20, 1977)

The deepest, most deadly struggle of our times has gone unreported. It is the enduring war of middle-aged adults against children and the aged.

Advertising is set up to appeal to middle-aged adults, because they have (1) money to spend and (2) their remaining years to spend it on. The world of our imagination — have you noticed? — is increasingly a world inhabited by unencumbered middle-aged adults trying to be happy.

No wonder that ours is the Age of Abortion. Millions of children are now "unwanted." No wonder that ours is the Age of Collapsing Social Security. Young adults don't wish to care for their parents, they want Uncle Sam to do it.

The middle-aged are pushing infants and old people out of the center of life, in order to occupy the territory. "The pursuit of happiness" is the cardinal principal of middle-aged life. Who would think of opposing it? The Buddha says "Life is suffering." Jesus said, "Take up your cross and follow me." But neither the Buddha nor Jesus impresses the middle-aged

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of our civilization. We seek self-fulfillment, happiness, and self-realization. The world owes it to us.

Children, it is obvious, are a drag upon our capacity to control our own lives. Parents and old people, too, cannot be allowed to intrude too much upon our busy and important lives.

Malcolm Muggeridge, that British curmudgeon, always disrupting our conventional wisdom, wrote recently in "The Human Life Review" that the logic which justifies abortion leads inexorably to the logic of euthanasia. It represents, in effect, the cruel logic of middle-age: eliminate the "unwanted" at both extremes. In logic, it is called "the principle of the expanded middle."*

Now that the Social Security system is collapsing, it is suddenly apparent that supporting the aged is going to cost a lot of money. That will, soon enough, lead our most sensitive philosophers to the perception that the aged are not, after all, needed, or wanted. Their social utility has diminished. After a while, the most daring minds will soon discern that old people are not really happy. Why should they be condemned to a life of second-rate housing, and the painful feeling of being "unwanted?" It would be more human to abort them. What is good enough for fetuses should be good enough for the aged.

Actually, Kurt Vonnegut has already written a short story about the "abortion parlors" of the future. He calls them "suicide parlors." These are clinics for the abortion of human life at, say, 70. Older citizens will be led on guided tours of plush, carpeted, comfortable suicide parlors, where in pleasant surroundings we will all be told (when our turn comes) how painless modern methods are, how comfortable the surroundings can be, and how "fulfilling" is the experience of choosing the time and manner of one's own death. These will not be, we will be told, "death houses" but rather "houses of choice." Their attendants will not be "anti-life" but only "pro-choice."

Humanism, we will be told, has extended its frontiers, courageously bringing even death under its dominion. We will be told that suicide is the highest patriotic act. Dying for one's country, we will be told, is supremely noble. Not only will it save our fellow citizens considerable money and concern. Not only will it solve a grievous social problem. It will expand our own horizons of choice. Everyone will benefit by our selflessness.

Courses on "death and dying" in the universities will take on a practical function. They will establish the propaganda of readying one's own psyche for the ultimate act of freedom, when our time comes.

Medals will be awarded, posthumously, to the members of the families of those who generously do away with themselves, who asked not what their country could do for them, but what they could do for their country.

In this morbid light, one can better appreciate the sudden resurrection of the politics of the aged. Sensing the fate that awaits them in a middle-aged society secretly committed, in principle, to the elimination of "un-

*See *The Human Life Review*, Fall 1977.

wanted" forms of life, the aged are arising in inarticulate protest to defend themselves. Despite all propaganda to the contrary, the aged wish to continue living. Like the middle-aged, they love life. They are at least as happy as the middle-aged, and certainly they are as wise.

Those of us who are opposed to abortion, because it represents an unthinking attack upon the principle of life and upon the boundaries of the living, have reason to rejoice in the new determination of the aged to live, and move, and have their being. "Life is mine," saith the Giver of Life. God is not the God of the middle-aged alone.

How Placidly They Accept Aborting So Many Black Babies

(November 14, 1976)

Some time ago, my distinguished and thoughtful colleague, Carl T. Rowan, wrote a column (*Star*, Oct. 10) on abortion that made me think — and seek out further information.

According to a fact sheet on abortion prepared by Zero Population Growth, in 1974 (the latest figures available) almost 33 per cent of all abortions occurred among women 19 years old or younger. (Women under 25 had two-thirds of the abortions.) Black women had 29 per cent of all abortions. Finally, 73 per cent of all abortions occurred among the unmarried.

Far more than I had realized, abortion is disproportionately a problem of the young, the black, and (overwhelmingly) the unmarried.

Two things surprised me in these figures. First, the shock of contemplating the estimated one million abortions in 1975 still affect me. For those who do not believe that abortion is a form of killing, of course, there is no moral shock.

Many who are sympathetic to the lives of the mothers have no sympathy at all for the children who would have been. Cruelty to the mothers troubles them, cruelty to the unborn less so. Put otherwise, the act of imagination required for recognizing the human rights of those within the womb is not as highly developed as concern for the needs and desires of their mothers.

Secondly, it surprises me that black leaders so easily go along with the abortion rate among black women. When 15 per cent of the population has 29 per cent of the abortions (I allow for the larger percentage of black women in the age cohort 25 and under), the black population suffers, it seems, disproportionate population loss. In addition, it suffers a disproportionate share of the psychological effects of abortion upon mothers and upon other children. The power to abort is power over life and death of a special kind.

Approximately 300,000 blacks were aborted last year: 1.3 per cent of the population of blacks. A staggering figure.

The extent of extra-marital pregnancies among women, white and black, indicates a tremendous breakdown in religious values and practice. Among teen-agers alone, Mr. Rowan notes, more than a million became pregnant.

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Of these, more than 300,000 had abortions. Over 730,000 abortions among unmarried women occurred last year.

These figures show that abortion is preeminently a way of preventing childbirth for pregnancies out-of-wedlock. Abortion is primarily a device for coping with the unwanted consequences of not following ancient codes of morality. It is a massive means of overcoming the consequences of a massive change in ethics. The use of contraceptives has not caught up with the changes in ethics, especially among the young.

It remains that 27 per cent of abortions — almost 270,000 — occurred among married women. About 33 per cent occurred among women over 25. About 67 per cent occurred among white women (including Spanish surname).

A tremendous amount of lobbying goes into extending the range of legal abortions. The Planned Parenthood Federation is extensively supported by tax-exempt money, and so are most of the organizations it lists as lobbying for legal abortion. The list fills three pages.

It is ironic that those who oppose abortions are concerned about the potential offspring of those who don't. One could understand them protecting the rights of their own unborn children. Why should they care about the potential offspring of others?

With only a little effort, I can imagine a polemical situation the reverse of the one we have now. Who now defends the rights of unborn black children? Suppose that abortion were perceived as a racist social program disproportionately aimed at blacks. Who then would be accused of genocide?

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