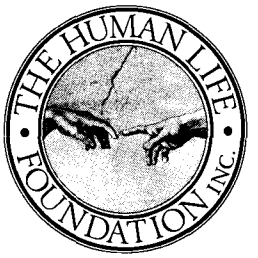
the HUMAN LIFE REVIEW



SUMMER 1979

Featured in this issue:

Also in this issue:

Wm. F. Buckley Jr. and Malcolm Muggeridge on "Modern Attitudes toward Life and Death"

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. . . about THE HUMAN LIFE REVIEW

"How long," asked a sympathetic but skeptical friend, glancing through our first issue (which we'd just handed him, back in early 1975), "do you think you can publish something like this?" Well, we answered, we were *sure* of the one he was holding; we hoped, on the strength of that one, to go on . . . indefinitely. Herewith our 19th issue, one short of five full years. Not bad, for a publication that set out to deal with subjects a great many potential readers prefer to ignore. And while a few issues have outsold others, the general trend has been such that, should the 20th issue materialize this fall, it will likely be sent to (and read by, we trust) more people than any previous one. We hope to make it appropriately spectacular.

This number continues what has become a pattern: without ever leaving our "life issues" — abortion, euthanasia, and so on — we again range pretty widely over a number of "related" questions; specifically, here, "Pluralism," slavery, marriage, etc. Also again, we mix our own articles with some selected from other sources. Professor John T. Noonan's contribution is taken from his new book, *A Private Choice: Abortion in America in the Seventies*, published earlier this year by The Free Press, a division of Macmillan Publishing Co., Inc. (866 Third Ave., New York City 10022). Professor Grover Rees' article first appeared in *National Review* magazine (150 East 35th St., New York City 10016). The Buckley-Muggeridge discussion is our own transcription from the original taping, but an "official" transcript is available — as are transcripts of all other "Firing Line" telecasts at $1 each from The Southern Educational Communications Association, (928 Woodrow St., P.O. Box 5966, Columbia, So. Carolina 29250).

As usual, we remind you that all previous issues of this review are also available, as are library-style bound volumes of the years 1975-78. For full information on how to order, see the inside back cover of this issue.

THE HUMAN LIFE REVIEW

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INTRODUCTION

PLURALISM AS IT EXISTS in American society; pluralism as seen from a partisan viewpoint; "single-issue" voters and what produces them; Congress and the Supreme Court; abortion as a "liberty"; as compared to slavery; marriage, euthanasia — all these and more we deal with in this issue. And yet, different as they are, these essays go well together, we think, because the authors (not to mention Messers. Buckley and Muggeridge, whose discussion complements the whole thing) are obviously informed by similar (call them traditional if you will) values.

Father Francis Canavan leads off, taking on the difficult job of explaining why it is so hard to prevent an avowedly "pluralistic" society — which ours certainly claims to be — from developing a strong Public Orthodoxy which ends up enforcing the beliefs (or lack of them) of a distinct minority. Historically, he points out, the pluralistic society has tried to resolve its inherent dilemma by "taking out of politics" those matters on which fundamental disagreement developed; often the Supreme Court has been, in our society, the chosen instrument for such attempts (e.g., slavery once, abortion now). But, asks Canavan; "Can it continue to resolve issues in this way in an era in which the serious disagreements are becoming both deeper and more numerous?" He doubts it, for we "no longer have the unity of a common religious tradition, or even the faith in the ability of reason to arrive at moral truth, that we should need in order to restore a rational and humane consensus on the moral foundations of our national life."

Miss Ellen Wilson also looks at pluralism, from the viewpoint of the abortion controversy. There, it seems, *anti*-abortion arguments offend against pluralist orthodoxy because they are *divisive*: to oppose abortion-on-demand is to impose a "single view" on everybody, whereas one can *favor* it without imposing on anybody's right to think as they please. Worse, it is alleged (as Miss Wilson describes it) "that anti-abortion conviction is an article of Catholic faith — and as such, as foreign to the mass of Americans as a monsignor's hat." And when it is asked how Catholics, who after all, make up (counting *all* of them, even the nominal — and pro-abortion —

ones) less than a quarter of the population, can impose their views on the majority, the answer is, as one syndicated columnist put it, that they draw auxiliary support in their "religious war" from "certain fundamentalist faiths." But Miss Wilson sees strong evidence of a "single view" among pro-abortion ideologues: they espouse a whole bag of ideas (legalized abortion being just one, however crucial) that add up to "ideologically-imperialist designs on the rest of the community. For the goal is not survival or coexistence, but purity, the generation of a new race of men from a new kind of society" — and "people wishing to new-mint society in such a way" are willing "to invoke legislative restrictions upon others' rights" because they "hold no strong commitment to that makeshift compromise of pluralism along which America has tightrope-walked these two centuries."

As it happens, abortion also cuts across another dogma of pluralism: that no politician should ever be judged on a "single issue" — voters should choose the lighter shade of gray, no matter how black individual dots may be. Professor Grover Rees eloquently explains why, for some voters, this is impossible — why a single drop of black, on a given issue, can blacken everything (much as, once, a single drop of black blood produced a Negro). The conservative journal *National Review* first published Rees' article some months back. Readers' response was heavy, and heavily in support of Rees. We think our readers will understand why after reading this remarkable article. A friend of ours calls it, a "total statement" of the anti-abortion case.

We next have another newcomer to our pages, Professor Basile Uddo, who spies some very strange antics in the handling of abortion by the courts. He discusses the matter of parental consent, showing how tangled that issue *vis a vis* abortion has become; since he wrote this article, the Supreme Court, last July 2, "settled" the Massachusetts case Uddo cites with a badly-split (4-4-1!) decision that makes what you will read here all the more interesting. He also takes up a problem raised by court stays against enforcement of the so-called Hyde Amendment (which, as is well-known, cuts off Federal abortion funding in all but a few specified cases): the courts, he argues, are ordering the spending of funds *not* appropriated; thus, constitutionally speaking, such funds do not exist, and Uddo thinks the Congress should take note of this fact.

Professor John T. Noonan Jr. is a regular contributor, as well as one of the nation's most knowledgeable experts on the abortion question. Thus it is no surprise that he has recently published a new book on the subject. We present two chapters from it here. We hope the reader will want to read the whole thing for himself (for information, see the inside front cover of this issue). One reviewer calls Noonan's book "undoubtedly the best . . . so far generated by the abortion dilemma" because it contains the questions "both sides will have to answer." We agree.

Yet another new contributor, Professor Patrick Derr, takes up a familiar

question, i.e., the relation of arguments for abortion to those once advanced for slavery. But if Derr is not breaking new ground, he certainly reshapes the arguments in striking fashion. His own conclusion is that analogies between the arguments are so complete that, in effect, they form one argument "with multiple applications." By the way, he also concludes, from the evidence, that the abortion "disagreement" is "*not* at base a religious disagreement," nor a logical or even merely rhetorical one, but rather a metaphysical problem. We don't hear much about metaphysics these days — nor get articles like this one.

We don't mean to suggest that metaphysics is a lost art. Anyone familiar with the voluminous writing of our old friend Herr Erik von Kuehnelt-Leddihn knows that, for him at least, the metaphysical pervades all. He demonstrates this once again in his latest essay, which sets out to look at the institution of marriage from a Theist's viewpoint, but ends up being a wide-ranging commentary on the human condition in general. The reader will note that, although the essay is not unduly long, it is followed by 68 footnotes. As usual, Herr K-L's notes are full of additional information that brings out the full flavor of his erudition. And as a final fillip, he has found a quote from D.H. Lawrence that may well surprise you (it did us).

We finally come to what may be our *piece de resistance*, a transcript of a recent television discussion between Malcolm Muggeridge and William F. Buckley Jr. (i.e., a kind of trans-Atlantic Title Match of civilized discussion). The subject-matter is exactly the kind of thing that most concerns this journal. It reminds us that television *does* produce memorable and important stuff, but it is often more than the "viewer" can take in at a single sitting. By happy coincidence both gentlemen involved here speak as well as they write (and *vice versa*), so the fault is easily remedied, and the reader can enjoy the whole thing at his leisure. But of course no transcription can provide the (in this case delightful) feel of the event. Or explain the little mysteries that always crop up: here for instance, just at the end, Muggeridge was about to discuss "transplants" when the technician signaled "10 seconds." Old pro that he is, he switched in mid-sentence to the poetry that amusingly and neatly finished off the program. But the substance you have here, and we think you'll thoroughly enjoy it.

We have added an item (Appendix A) which may surprise — and please — our regular readers, as well as (Appendix B) an interesting letter commenting on the Abortion Debate (between Professors Sullivan and Hasker) in our Spring issue. Mr. Breig, a professional writer himself, makes a point that is, for many, *the* point in the whole controversy. But of course no single point can end that Great Debate, or any other we deal with here, so you will find more again in our next issue.

J. P. MCFADDEN
Editor

The Dilemma of Liberal Pluralism

Francis Canavan

THIS ARTICLE PICKS UP where an earlier one in this review[1] left off. I must therefore beg the reader's indulgence for a brief resume of what I said there in order to explain where I am going now. In the earlier article I dealt with the so-called "Church-State issue" in regard to abortion. It is a violation of the constitutional separation of Church and State, so it is charged, to oppose legalized abortion or the public funding of abortions, because it is an attempt to impose the theological beliefs of some upon others who do not share them. This argument fails, I said, on one of two grounds. Either it pretends that legal questions are not moral questions at all, or, while conceding that legal questions involve moral judgments, it insists that the only moral judgments that are admissible in the public forum are purely secular ones, i.e., the judgments of citizens who have no religion. But neither view will stand up under analysis.

My own conclusion was "1) that the most important legal questions — and, in some ultimate sense, probably all legal questions — have a moral dimension and involve moral issues; 2) that therefore moral views on what the law ought to be cannot be excluded from public debate merely because they are moral views; and 3) that no moral view can be excluded from public debate merely and solely because it is held as a theological conviction or because it is taught by a church." Nonetheless, as I also said, determining the relationship between law and morality in a pluralistic and democratic society is a difficult task. I only urged that "we drop the simple-minded pretense that the First Amendment and the separation of Church and State" have already performed the task for us.

There remains, however, the problem of the pluralistic society. The United States is such a society and contains a large and growing multiplicity of belief and value systems, both religious and secular. More significantly, this country is a pluralistic society operating on liberal principles and this, as I hope to show, renders our problem acute to the point of being a genuine dilemma.

Francis Canavan, S. J., is Professor of Political Science at Fordham University. This article is the text of a paper given at the conference on Liberty and Equality in America (sponsored by the Intercollegiate Studies Institute) at the University of Houston on April 21, 1979.

I do not mean to imply that those who call themselves liberals are somehow more truly American than those who call themselves conservatives. Both liberals and conservatives operate within the same political system and are in agreement on its basic principles. But those principles are, despite their subsequent modifications, those of classical liberal political theory as it has come down to us from the seventeenth century. In that sense, it can be said that almost all Americans are liberals. Certainly, Barry Goldwater's *The Conscience of a Conservative* would have been more accurately entitled if he had called it *The Conscience of an Old-Fashioned Liberal.*

Now, liberalism was and is a response to the problem of pluralism. Whether liberalism was the only possible response, or the best response, is open to question. But the problem, at least, was real enough. The Reformation had replaced religious unity with a multiplicity of churches and sects. The Enlightenment and the revolt against Christianity created even deeper divisions in modern societies. The problem of modern politics thus became that of governing societies composed of people of significantly different beliefs.

The liberal solution was, in the first instance, to take religion out of politics. But the solution of necessity went much farther than a mere separation of Church and State or (what came to the same thing) a mere subordination of religion to politics in the way in which that was eventually done in Great Britain. The liberal state, which in time became the liberal democratic state, took as its goal the maintenance of an impersonal order of law within which individuals could pursue their private goals in peace and security. As Thomas L. Pangle has put it, liberal democracy is "the regime devoted to the principle that the purpose of government is the securing of the equal right of every individual to pursue happiness as he understands it," and this view "has for two centuries dominated the life and thought of the West."[2] The right to pursue one's own happiness is freedom, equality is the guarantee of the same right to everyone, and freedom and equality are the basic principles of the regime. "Liberals" and "conservatives" dispute over the balance between the two, but the principles of the regime are beyond dispute.

This, however, means more than that religion has become a private matter, one's choice of which the regime will protect as it protects all private rights, but which will not be a public purpose of the regime as such. Under the liberal regime, morality, art, philosophy, all views of the goals of human life, all conceptions of human excellence, all

become matters of private, not public judgment. The public goal, which is the purpose of the political order, is limited to the maintenance of equality in freedom.[3]

There are obvious advantages in the liberal solution to the problem of pluralism. It takes men's deepest interests and highest values out of the political arena and thereby moderates political strife by confining it to matters of secondary importance. The liberal state does not aim high. It holds forth no vision of human excellence, as did the *polis* dreamed of by Plato and Aristotle. It offers no prospect of eternal salvation, as did the *res publica Christiana* of the Middle Ages. But because it aims low, the liberal state can be sure of hitting its mark. All it needs is the assurance that its citizens can be sufficiently enlightened to see that their personal interests are in the long run best served by loyal support of the regime and obedience to the impersonal rule of law.

The inherent thrust of the liberal regime, therefore, is to remove from politics any issue that has become too deeply divisive of the citizenry. Politics, of course, is always concerned with issues on which people are divided: if there is no division of opinion, there is nothing for the political process to deal with. Thus, for example, slavery is not a political issue in the United States today. But some issues divide people so acutely that the political process cannot handle them. If they are allowed to remain political issues, they may lead to civil war, as the slavery issue eventually did in the last century.

That is why the U.S. Supreme Court is sometimes tempted, not always with happy results, to take certain issues out of politics by declaring that the Constitution has already settled them. So it did in the *Dred Scott* case in 1857 (19 Howard 393), when it ruled that the Federal government simply lacked the authority to prohibit slavery in the territories. So it did again in *Roe* v. *Wade* in 1973 (410 U.S. 113), when it decreed that the States lacked the authority to prohibit or limit abortion. Both were efforts by the Court to remove what it perceived to be neuralgic issues from politics.

What the Court did in a peculiarly heavyhanded way in these two instances was only what a liberal regime always tends to do. Wars have been fought over religion: let us then establish freedom of religion. (Whether this requires a formal separation of Church and State is a secondary question; the exercise of religion is just as free in Great Britain as in the United States.) Certain moral issues split the people into hostile camps: let us leave them to individual decision or,

at most, to political decision at the local level, as we did by repealing the Eighteenth Amendment. A wide variety of views on all subjects prevails in a pluralistic society: let us guarantee freedom of expression to all of them and so remove the temptation for any group to suppress opposing views by winning and using political power.

The ideal of the liberal regime thus becomes governmental neutrality on those subjects that matter most to people, and precisely because they matter most. Individuals and voluntary groups have beliefs about the purpose of man's existence and the true goals of human life. The regime, as a regime, has no such beliefs, but is officially agnostic. The proper attitude of government is a studious neutrality as among all beliefs, in order to guarantee to every individual and group the freedom to live by its own beliefs insofar as they do not seriously impair the public order which it is the function of government to maintain.

The American polity, of course, has never acted with complete consistency on this principle. Issues are privatized and taken out of politics when they sufficiently disturb the ordinary functioning of the political process, not before. As a result, groups that are too small to cause serious trouble may find their beliefs discriminated against and their freedom to practice them severely limited. In 1878, for example, the U.S. Supreme Court upheld a Federal statute for the then Territory of Utah that made polygamy a crime (*Reynolds* v. *U.S.*, 98 U.S. 145). The Court explained, with a straight face, that while Congress could not legislate religious beliefs, it could ban polygamy because historical experience had shown that polygamy leads not only to domestic but to political despotism.

Mormons protested that the law deprived them of their right to the free exercise of their religion. But there were not many Mormons, and so they could be ignored. No doubt, if 45 per cent of the American people (a minority, but a very strong one) believed in polygamy and insisted on practicing it, the constitutional "right to privacy" would be found to include polygamy. It remains the fact nonetheless that we have not treated all beliefs equally. Such conduct, however, seems inconsistent only because it conflicts with the liberal vision of a neutral and impersonal state that favors no set of beliefs over any other.

The liberal idea, for its fullest realization, would seem therefore to require a minimalist conception of the state. That is, in order to leave as many areas of life as possible to the self-determination of individuals and voluntary groups, the state would be restricted to

doing as few things as possible. But this is not the view taken by liberalism as it has come to be understood in the twentieth century. Contemporary liberalism wants an active and vigorous state that promotes the welfare of the people in a wide range of areas.

Promoting welfare requires some conception of what the people's welfare is, and this is a matter of opinion about which there will seldom be unanimous agreement. The state, therefore, is no longer neutral as among all beliefs but takes certain beliefs about what is good for people and makes them the basis of public policy. And this is not neutrality.

There is an answer to this criticism, however. It is that the state still leaves it to individuals and groups to determine what private visions of happiness, excellence or salvation they will pursue. State power is only exercised, however vigorously, to assure to everyone the necessary means for pursuing his own goals. Equality then becomes, not mere equal immunity from governmental interference, but the equal possession of at least the minimal requirements for the effective exercise of freedom. Hence governmental programs to assure full employment, to guarantee equal opportunity to enter the professions, to give everyone as much education as he wants, etc., imply no communal understanding of the good which is to be imposed on all. These programs aim only at establishing the conditions that enable everyone to pursue his own good as he understands it.[4]

But this is disingenuous and, in charity, we must assume that welfare-state liberals are intelligent enough to know that it is. Affirmative action programs, for example, are an exercise of governmental power that imply a great deal more than an effort to equalize individual rights. The *Bakke* case (57 L.Ed. 2nd 750) was not simply a controversy over the interpretation of an individual constitutional right. It involved two competing theories of equality, two theories therefore of the just society. Which of them was the sounder social philosophy is irrelevant here, since the only point being made is that the *Bakke* case raised (though it did not settle) questions about the basic ordering principles of American society.

Again, programs to equalize career opportunities and income levels for women imply a certain understanding of society and of women's role therein: a woman is now looked upon primarily as a jobholder, [5] not as a homemaker. The new view may be the right one — once more, whether it is or not does not concern us here — but there is no denying that it depends on a new conception of society and

of the relationship of the family to society. A view of society as a collection of autonomous jobholders, male and female, who may, if they wish, marry and raise a family on the side, is a particular conception of the community and its welfare. To make it the basis of public policy is, whatever its other merits, not a demonstration of governmental neutrality.

Similarly, the debate over the civil rights of homosexuals is unintelligible to anyone who fails to see that it involves a social judgment on the nature and purpose of sex. Merely to say that heterosexuality and homosexuality ought to be of equal value in the eyes of the law because two groups of citizens disagree on their relative value is a downgrading of heterosexuality that implies a far-reaching view of life. More is at stake than the right of individuals to follow their own sexual preferences. Any effort to reduce the issue to a question of individual rights is already an attempt to enlist the power of government in support of a particular view of the role of sex in human life, with all the implications that follow from that view.

Furthermore, in a welfare state, legal and constitutional rights tend to become positive claims on the public treasury. The Supreme Court decision that abortion is a constitutional right was followed by a political struggle, not yet ended, over the public funding of abortions. The case for public funding is usually cast in terms of a private right, i.e., a woman's freedom to choose whether or not she will bear a child. The state, it is argued, provides health services to poor women who want to bear the children they have conceived; equality demands that it do the same for poor women who do not want the children and therefore need abortions. The state remains neutral, since it leaves the decision on bearing or aborting the child to the individual woman and only makes it possible for poor women to exercise the same freedom of choice that wealthier women have.

But this "neutrality" in fact commits the state to a very definite answer to a basic question of value. It is implicit in this position that prenatal human life has no value in itself, but only whatever value the mother attributes to it. If she wants the child, its life is a value but only because she wants it. If she does not want the child, its life has no value and may be destroyed. Abortion, in this way of looking at it, is no longer an evil that the state may tolerate to avoid greater evils. It becomes a positive good that the state ought to subsidize whenever the only possible determinant of good or evil in the matter, namely, the subjective will of the mother, decides on it.

This is a consequence that follows from looking upon the public funding of abortion (or of a large number of other things) as solely a matter of private right. That we so often do look on it in this way is only another proof of the fact that we are a liberal society that has a penchant for reducing questions of public policy to questions of private right. The reality, however, is that those who are most eager for public subsidy of abortions have goals in mind that go beyond the mere exercise of a private right. They contemplate such eminently public goals as controlling population growth, reducing the welfare rolls, possibly limiting or even eliminating the "permanent underclass" from American society. Now, all of these may be worthy aims, but a society that commits itself to them by the expenditure of public money cannot claim to be neutral about them. In more general terms, no welfare state is or can be simply neutral about the nature of human good. In such a state, the values of some are necessarily imposed on others, if only through the tax laws.

Yet we should not have fully solved the problem of pluralism if we abandoned the welfare state and went back to the classical liberal, laissez-faire, free-enterprise state (if it ever really existed) or moved forward to a neo-classical liberal state. Even such a state could not achieve neutrality on basic questions of value by leaving all of them to be answered by the individuals directly concerned, because to do this would be to stack the deck in favor of one kind of answer rather than another.

For example, our law has been and to a large extent still is heavily biased in favor of the institution of marriage. It does not grant equal rights to or impose equal obligations upon married couples and couples living in unmarried cohabitation. This is not neutrality, and it is idle to pretend that the bias of the law in favor of marriage does not reflect social moral judgments, judgments which, moreover, are deeply rooted in the religious traditions of our culture. Even a neo-classical liberal society, therefore, would have to ask itself whether the law would achieve genuine neutrality by withdrawing all legal support from the rights and obligations of marriage. Or should it enforce those rights and obligations to the extent that they have been specified in marriage contracts, but leave the content of the contract solely to the individuals involved? Or would the law, by taking this attitude, seriously endanger the pursuit of happiness on the part of many individuals, and of wives and children in particular?

No liberal society, however dedicated to laissez-faire, has in fact

gone so far as to grant marriage no legal status or even to regard it as merely a private contract no different from any other contract. Nevertheless, marriage poses questions that any liberal society, whether it is a welfare state or not, has to face. Is it required by its own principles to give no legal status to the marriage bond or at least to weaken that bond as far as it can without destroying vested contractual rights? Or can it regard the stability of marriage as being in the public interest? If so, on what principles would a liberal society judge what the public interest is? In a pluralist society operating on liberal principles, is there any public interest other than what everyone, or practically everyone, happens to agree upon? What does a liberal society do when significant numbers of people begin to disagree?

One may suspect that, however a liberal society answers these questions, it will fall far short of neutrality because neutrality is ultimately unattainable. For example, when Michelle Marvin wanted to sue Lee Marvin for half the money he had earned during the six years that he and she had lived together in an unmarried relationship, she had first to establish her standing to sue. This she won in a decision of the California Supreme Court. Noting "radically" changed social mores "in regard to cohabitation," the court decided that the law should not "impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many."[6] Ms. Marvin, therefore, could bring her lawsuit.

But the court obviously did more than establish her right to sue. It did more even than to refuse to allow the law to "impose" a standard higher than widespread practice. The court institutionalized the extramarital relationship by making it the basis of legal rights and thereby changed the status of marriage in American law. If other courts follow this precedent, they will inevitably not only reflect but foster a changed social attitude toward marriage and, consequently, toward the family. They will profoundly affect the way in which the rising generation thinks of the relations between the sexes.

Let us grant, for the sake of argument, that those persons may be right who regard such a change in society's mores as a leap into the realm of freedom. The point is that the California Supreme Court and the courts that may follow its lead will have done more than remove the heavy hand of the law from meaningful interpersonal relationships. By refusing to uphold a moral standard previously built into the law, they will have substituted another and different

standard. By making the extramarital relationship the foundation of legal rights, they will have taken away from marriage its uniquely privileged status. In so doing, they will have downgraded the institution of marriage in the eyes both of the law and of the people. They willl thus have made themselves active agents in the transformation of American society.

The California Supreme Court seems to have regarded itself as doing no more than passively registering a change in social mores. Since so many men and women no longer think they are obliged to get married before living together, the court felt that it could no longer insist on the older view that marriage is the only legitimate form of cohabitation. The court's decision, then, is another application of the liberal doctrine of public neutrality on issues that divide a pluralistic society. But the question returns: does this policy in fact achieve neutrality, or does it merely shift the weight of public policy from one side of the scale to the other?

Another example of what this question means is furnished by M. J. Sobran in reference to proposals to legalize euthanasia. He says:

> Now to institutionalize suicide means not only to permit it, but also to *encourage* it. As soon as it is legitimized as an option, it becomes incumbent on the subject to explain why he has not chosen it rather than another course. In other words, to permit people to kill themselves without social obloquy is to put some pressure on them to do it. The pressure will in most cases be slight; in others, especially those of conscientious and charitable people who have become burdensome to their families, it may be intense, even irresistible. The legitimation of suicide is based on a fundamental lack of faith in the dignity of life. The lack of that dignity will be only too keenly felt by those whose life is justified only by the very fact that it *is* life, not by any advantages or satisfactions they confer on others.[7]

Those who advocate euthanasia may reply that they do believe in the dignity of life, but have an understanding of it different from Mr. Sobran's and ask only to be free to act on their belief, not his. It remains nonetheless that institutionalizing suicide, like institutionalizing the extramarital relationship, does not achieve legal neutrality. It abandons the previous public judgment that human life and marriage are worthy in themselves of the recognition and protection of the law, and replaces it with the equally public judgment that they are merely subjective goods whose only value in the eyes of the law is the value attached to them by the individuals immediately concerned.

The question of public neutrality arises and will arise in regard to

many other issues in our rapidly changing and increasingly divided society. Genetic experimentation furnishes a number of them. How far may the scientists and the private foundations go in this area and what things may they be permitted to do with living human material? These are public questions that require public answers. Even the most classically liberal society, which scrupulously refrained from spending public money or establishing public programs in this area would still have to face and answer questions about what its laws would allow to be done by individuals and voluntary groups.

Here, it seems to me, the liberal pluralist society, whether classical or welfare-state, faces a dilemma. Historically, it has resolved the dilemma by taking out of politics and removing from the scope of legal regulation those matters of basic concern on which serious disagreement arose among the people. Can it continue to resolve issues in this way in an era in which the serious disagreements are becoming both deeper and more numerous? Or does not the very effort at neutrality wind up by defeating itself?

Liberal democracy has worked as well as it has and as long as it has because it has been able to trade on something that it did not create and which it tends on the whole to undermine. That is the moral tradition that prevailed among the greater part of the people. It is not necessary to pretend that most Americans in the past kept the Ten Commandments, certainly not that they kept them all the time. It is enough that by and large Americans agreed that there were Ten Commandments and that in principle they ought to be kept. The pluralist solution of withdrawing certain areas of life from legal control worked precisely because American pluralism was not all that pronounced. In consequence, many important areas of life were not withdrawn from the reach of law and public policy and were governed by a quasi-official public ethos.

Thus we could have freedom of religion, because the practices of the major religions of America did not sharply diverge from the generally accepted moral code. One could say what he thought, but it was generally understood that pornography was not an expression of thought. We could have some divorce, to take care of hardship cases, but the law strongly favored the permanence of marriage. We could allow abortion, but only to save the life of the mother. These were compromises with which the generality of the population could live, because they left so much of the moral consensus untouched. And these are only a few examples out of many that could be cited.

In our day the moral consensus is disintegrating in a number of significant respects. They are fundamental ones because we no longer have general agreement even on the value of human life, or on such basic social institutions as marriage and the family, or for that matter on the meaning of being human.[8] At this point, it is doubtful whether the typical response of the liberal pluralist society is any longer adequate, that is, to take the dangerously controversial matters out of politics and relegate them to the consciences of individuals. For this way of eliminating controversy in fact does much more. Intentionally or not, it contributes to a reshaping of basic social institutions and a revision of the moral beliefs of mulititudes of individuals beyond those directly concerned. It turns into a process by which one ethos, with its reflection in law and public policy, is replaced by another. Liberal pluralism then becomes a sort of confidence game in which, in the guise of showing respect for individual rights, we are in reality asked to consent to a new kind of society based on a new set of beliefs and values.

It would be pleasant to end this article on an optimistic note, pointing to a satisfactory way out of our dilemma. Unfortunately, there does not appear to be one. All that we seem to have before us is a steady drift into becoming a crowd of atomic individuals, living on values of a low order and manipulated by an elite of secular utilitarians and social engineers. We no longer have the unity of a common religious tradition, or even the faith in the ability of reason to arrive at moral truth, that we should need in order to restore a rational and humane consensus on the moral foundations of our national life.

One thing, however, we might do, and that is to try to break the grip of the liberal myth. The pluralistic society is a reality and it is not one that will disappear in any foreseeable future. But the reality is one thing, and the way in which we think about it is another. We have conceptualized pluralism and its problems in terms of liberal individualism and its corollary, the subjectivity of all values. But we are not obliged to do that. It may be possible to think about the pluralistic society in another and better framework of thought, and we should certainly try to do so. For, as I said in an earlier article, liberty and equality cannot be the highest values of a political system because they relativize and ultimately destroy all other values.[9] We need to think about the substantive human goods that furnish the criteria by which liberty and equality may be judged and thus come to

be rightly understood. If we do not, relativists will succeed in absolutizing and establishing the value system that is the unacknowledged premise of their public program.

NOTES

1. "Simple-Minded Separationism," *The Human Life Review*, Vol. III, No. 4, Fall 1977, pp. 36-46.

2. *Montesquieu's Philosophy of Liberalism* (Chicago: University of Chicago Press, 1973), p.1.

3. For a full and penetrating exposition of this thesis, see Lenk, Barbara Ann, *Foundations of American Civil Religion* (unpublished Ph.D. dissertation, Yale University, 1978), especially ch. 2. How heavily I am indebted to this dissertation only Dr. Lenk, I trust, will recognize.

4. On this, see Joseph Cropsey, *Political Philosophy and the Issues of Politics* (Chicago: University of Chicago Press, 1977), pp. 29-30.

5. I say jobholder rather than careermaker because it is obvious that most people, whether men or women, do not have careers; they just have jobs.

6. *Time*, January 15, 1979, p. 46.

7. M. J. Sobran, "The Right to Die (I)," *The Human Life Review*, Vol. II, No. 2, Spring 1976, p. 31.

8. If this last statement seems extreme, drop in on any academic circle in the country, make a statement about a common and recognizable nature of man and observe the speed and vehemence with which the academics reject it as a threat to their freedom to decide for themselves what it means to be human. In Academe, the Ayatollah Khomeini is always just over the horizon and must be resisted the moment he shows his head above the most distant hill.

9. "The Burke-Paine Controversy," *The Political Science Reviewer*, VI (1976), p. 419.

Pluralism Revisited

Ellen Wilson

IN COLUMN AFTER COLUMN, article after article, from first one and then another spokesman of the "right" to an abortion, comes the charge that abortion is a Catholic issue. More accurately, that anti-abortion conviction is an article of Catholic faith — and as such, as foreign to the mass of Americans as a monsignor's hat. Planned Parenthood issues cartoons of bishops urging the faithful to torch abortion clinics, and Bill Baird, near-legendary promoter of abortion rights, lays the responsibility on the Catholic Church, uninhibited by a complete lack of evidence for his assertion.

Anyone examining the facts with dispassion will recognize what is being omitted, and what perverted, by charges that Papists are forcing their archaic beliefs upon the nation. Even on a generous estimate Catholics can only muster one quarter of the population of the United States, and New York, one of the states in which they are most heavily concentrated, seems a well-nigh impregnable fortress of pro-abortion fervor. (That opinion on the subject even in liberal New York is not homogeneous is, however, testified to by the surprising raids of the brand-new Pro-Life Party on New York's established parties in last year's gubernatorial election.) As Father Andrew Greeley obligingly informs us, a significant percentage of this 25% of Americans declines to subscribe to all pronouncements of their Church on matters of faith and morals. But even if each and every Catholic exercised his franchise like a docile son or daughter of Holy Mother Church, Catholics alone would lack the numbers to topple abortion laws, or enact a Human Life Amendment.

And so a further charge is made — that Catholics draw auxiliary support in this "religious war" (as columnist Georgie Anne Geyer labels it) from "certain fundamentalist faiths' fervid public opposition to" abortion. Only by a holy — or unholy — alliance can these spiritual descendants of Torquemada and the Salem witch trials threaten the good life for the mass of Americans, or so the argument goes. And then the arguers conjure up pictures of hill-billy book burners re-fighting the Scopes trial, of patrons of tent-revivals, and

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Ku Klux Klanners protecting God and Country from "foreign elements." For good measure, Orthodox Jews and members of Christian Orthodox Churches are counted to swell the list. Unless pro-abortionists locate *some* bases of support for right-to-lifers, how are they to explain the vigor and visibility of the movement?

Now, the identification of these sectarian pockets of support for the unborn is noteworthy on at least two counts. First, it demonstrates an effort to neutralize anti-abortion influence by separating it from the mainstream — by isolating it within certain easily-identifiable camps which can then be quarantined. By doing so, pro-abortionists themselves contribute to the fragmentation of American society, pitting one group against another, identifying a "them" against which to marshall an "us." On their part, pro-abortionists claim the *opposition* is the divisive influence, that rather than leaving their religious differences at home where they will do no harm to the body politic, anti-abortionists drag them into public view, disrupt the democratic processes, dismantle the barriers between Church and State, and threaten the imposition of a theocracy.

But surely it is the pro-abortionist who achieves — or at least hastens — societal fragmentation by insisting upon a *psychological* fragmentation within the minds of religious people. For believers are to hold suspect anything which the "religious" side of them asserts is true or good, and if this should paralyze their ability to make any political contribution — why, such are the necessary sacrifices for the separation of Church and State. Atheists, Agnostics and an assortment of humanists or vaguely "spiritual" folk are to assume the positions of political leadership. (For simplicity's sake, I am bypassing the career of individuals and organizations such as the Religious Coalition for Abortion Rights and Catholics for a Free Choice, "religious" people who are commended for their sensitivity to the *Zeitgeist* and their understanding of the reasonable parameters of religious influence. But such people win favor by accepting — celebrating even — the very psychological fragmentation I have identified. Senator Moynihan, Father Drinan, the Catholics for a Free Choice — these and others like them admit that abortion is an evil, but one which they have no right to oppose publicly, with political weapons. Thus they straightjacket unequivocally anti-abortion religious bodies; they sequester "religious" beliefs from "secular" or "civil" subjects. Under the circumstances it would be

better for us if the Father Drinan's of this world openly dissociated themselves from official Church doctrine and made party with the abortionists, since as things now stand, they are repeatedly brought before the public as "proof" that religious people can be civil and keep their opinions to themselves.)

The other singular circumstance about the insistence that anti-abortion "feeling" is confined to certain religious groups, is the softpedalling of *arguments* for and against abortion. If pro-abortionists are right, and a moral revulsion from abortion is merely a religious quirk or part of the *depositum fidei*, then clearly there is no sense in arguing abortion on the ground of High Reason, and pro-abortionists must simply pray for the quick apostasy of the religionists. If there is no ground for rational discussion between representatives of the two opinions, then force of numbers rather than force of argument must decide the issue (or, religious folk must be induced to abdicate their right to participate in a political "solution" to the problem.)

This is perhaps an explanation for the meagerness of attempts (other than the offering of self-justifying slogans such as "a woman's right to her own body") to *convince* abortion opponents that they are wrong. Where for instance is there a pro-abortion publication on the level of *The Human Life Review* — or even one with equal ambitions? Where are the pro-abortion scholars willing — as John Noonan and Germain Grisez are — to devote time and intellect to books on the subject? Granted, the descent to sloganeering and mudslinging in great and public controversies is natural, the temptation almost overpowering. Still, seldom has one side of a controversy (as opposed to a class or race or religion) so strenuously fought to force the other side outside the bounds of public discourse, by stamping them with the same, uniform label.

Pro-abortionists have chosen two alternative methods of argumentation in response to the abortion opposition. Some feel moved to *convert* abortion opponents (they have their opposite numbers on the other side, of course); some prefer to suppress or isolate them, to excise them from the body politic. Now, to *convert* is not necessarily — and in this case, not at all — to *convince*, to confront with a seamless argument. One difference between the two lies in the means employed to attain the (at times identical) end, though even that end may differ, as faith differs in certain respects from (other kinds of) certitude. We can see that the proselytizing

group of pro-abortionists aim at conversion (rather than persuasion) because they appeal to personal, individual motives, to intent, to what lies *beneath* (and the assumption is that whatever lies beneath is irrational) the political opposition to Supreme Court decrees or Congressional enactments.

Law is meant to distinguish between just and unjust acts (that, at any rate, is the understanding of those people for whom the laws in this country are enacted, by whom, in a human sense, they are legitimized). It is supposed to forbid and to the best of its ability prevent unjust acts, permit and encourage just ones. Neither laws nor courts demand an inner conformity of the mind and will, but only an outer conformity of behavior. (The law does not, for instance, condemn a man for desiring to murder his brother, nor is his confession of such a desire particularly incriminating, unless the brother in question drops dead shortly thereafter under suspicious circumstances. This is in marked contrast to the Gospel warning that whoever harbors anger against his brother will be liable to judgment before God — or to that condemnation of lusting in one's heart which not long ago received national attention.)

But what certain pro-abortionists wish to exact from the public, and particularly from Churches "soft" on abortion, is not only law-abiding behavior — refraining from fire-bombing abortion clinics, or making nuisance calls to their "patients," or blocking admission to the "facilities" — but internal assent. They desire, well, a *religious* faith in abortion. Even in the early post-Decision days, when anti-abortion sentiment was diffuse and disorganized, the abortionists were not at ease in their Court-sanctioned security; they were unsettled by signs of isolated stirrings of conscience, and more than half convinced that the Court had outlawed those, too. Even today in liberal communities and on college campuses which are abashedly pro-abortion (seemingly "safe" territory, where it seems they might have had tolerance to spare for the outnumbered anti-abortionist) pro-abortionists resent the presence of the unconverted, and counterattack with all the unyielding determination of a German prince during the Thirty Years War. The desire for ideological security must always have contributed to the conversion urge, even in the euphoric days of '73, but though that desire has now sharpened to anxiety as pro-abortionists find themselves seriously threatened, pragmatic considerations alone do not explain the phenomenon.

It may help to observe the conversion phenomenon at work

elsewhere, for it is not limited to the abortion question. It is a mark of most political and social movements in America today — those, at any rate, primarily fueled by moral or ideological feeling, rather than economic interest. The civil rights movement, stretching across three decades of vocal activity now, is one of the better examples. For after the initial legislative and judicial breakthroughs, the first political victories of a new wave of black politicians, the elimination of poll taxes and other voter-qualifications and the like, the emphasis shifted to a change of *heart*. A radical change is necessary, of course, if racial prejudice is to be eliminated, and racial prejudice is a corroding evil. But a change of heart cannot be legislated, or decreed from the bench, and quotas, affirmative action programs, laws designed to prevent discrimination against minority tenants, busing, and so on, frustrate the intended beneficiaries to the extent that they strain the powers and function of the law. They promise what they cannot give, and this frustrates both prejudiced and unprejudiced, since they curb liberties with few if any beneficial effects. They dissatisfy many of those who initially supported such legislation because they do not — cannot — satisfy the hopes they foster. The desired change of heart cannot be enforced.

Now, pro-abortionists have not gone to these lengths — have not, for one thing, been able to lay the requisite amount of guilt on American shoulders. They have *tried*; they have accused abortion opponents of racism, of indifference to the plight of the poor, etc. But the populace is by no means convinced of the morality of abortion on demand, as they were, more or less, of the ideal of a society which does not (unfairly) discriminate against minorities. Still, *metanoia*, change of heart, is clearly on the minds of pro-abortionists. They betray themselves by a tell-tale fascination with motives, attitudes, states-of-mind. The relevant question may be why, as agents of political change, they should act this way. Granted the desirability of people holding the right opinions, granted the requirement of broad support in a democracy if a party is ever to attain its political object (though the present-day Supreme Court opens up new opportunities not only for "born" minorities, but for minorities of opinion), granted the right of political activists to moonlight as moral and spiritual leaders, what justifies or explains the fusion of politician and evangelist in this case?

If we set aside the task of justifying, and settle for the less ambitious task of explaining, we may see here an analogue to the behaviorist

thesis that environment is destiny. What certain civil rights activists and pro-abortionists and feminists and members of other political movements are striving for is radical environmental change. Not change to ameliorate, to improve, to render more bearable, but change to catalyze important psychological or "personality" changes. The arguments for busing, for example, rarely exlude — and often are limited solely to — the ideal of transforming prejudiced, segregationist minds into tolerant, accepting minds. Educational excellence, let us confess, obviously occupies a subordinate position on the list of priorities of most busing advocates. Likewise pro-abortionists labor with increasing anxiety to maintain and extend their abortion "rights." But they also (many of them, in their incarnations as NOW members or radical social reformers) labor for a new kind of society, a new set of social and sexual relations — classless, sexless, stripped of nouns which define biologically-engendered roles such as mother, father, aunt, uncle. Enforcing a woman's "right" to have an abortion will not, of itself, usher in the new era of social justice, but it is part of the just social order, and abortion prohibitions are part of the bad old ways. So that, by promoting the one, and attacking the other, social revolutionaries will, at least, be undermining the old social structure, and laying the groundwork for the new.

Treating symptoms to cure root causes. That is not orthodox Freudianism, nor proper Jungianism, not kosher classical psychoanalysis which (on the contrary) would assert that treating a chronic case of claustrophobia without addressing oneself to the dark labyrinthine passages of the subconscious will only induce an eruption of maladjusted behavior in another direction. But to insist, as Alice did, upon beginning at the beginning and plodding resolutely on to the end, to require every patient to go the full subterranean route in approved Freudian fashion (though that may require years of still-abnormal behavior, punctuated by psychiatric bills) — all this belongs to a more leisurely and less egalitarian century. Solutions must be speeded up, time's a-wasting, and it is no longer the Victorian upper and middle classes who seek professional attention. As many politicians attempt to halt escalating rents or gasoline prices by forbidding them to rise any higher, so many psychologists and sociologists have tended to treat poverty and prejudice and aberrant behavior in analogous, immediate ways.

This impressionistic, largely caricatured summary may seem only

tenuously related to the subject at hand. But the tendency to take a behaviorist approach to social and political problems (a tendency with roots stretching back into the last century, and much farther, if we think of the history of Utopianism), to remodel society from the outside in, and so rearrange the component parts that each microcosm of the whole will itself be radically altered, helps explain what's going on in the minds of many pro-abortionists. It explains first why the abortion "right" is charged with such significance for them, so that in some cases "the cause" almost assumes the life-and-death significance it necessarily holds for committed anti-abortionists. It explains, second, why pro-abortionists resent and disown portions of society which prove resistant to their arguments, their prophetic vision, their behavioral mechanisms for inducing conformity. By diluting the opposition's influence, by slowing down (as friction does) the advance of progress, anti-abortionists postpone the advent of the New Man and the New Society. And by proving resistant to that influence where it already exists, we undermine their confidence in the ineluctable nature of the future they prophesy. Anti-abortionists are persistent reminders of the past order, stubborn hangers-on in the present, and hence, not-easily-dismissed competitors for the future. At the very least, we are liable to mislead the populace as to where its real future lies. It is perilously easy for opinions or moral visions — like last year's skirt length — to fall out of fashion; but if even a stubborn minority holds out long enough for that moral vision, it is "in danger" of achieving classic status. (And the classic must be taken into account, answered, by each generation.)

But this is not all. That sector of the pro-abortion coalition intent upon forging a new order and giving birth to a new Adam and Eve find the anti-abortionist not only a painful irritant but a significant threat. They counterattack on a number of fronts, charging us with imposing a private morality, breaching the separation of Church and State, restricting human freedoms, imposing sexist burdens upon women, etc. Yet all of these accusations may be reduced to one single complaint — anti-abortionists unlawfully cross the boundaries of private opinion, thus commiting acts of ideological imperialism, and threatening the pluralistic foundations of our society.

The argument is not necessarily disingenuous, even when those framing it recognize that in the process of building a new society resting upon a new-found consensus, the old one must be broken up,

and the secure places of earlier generations uprooted. For even when reformers set themselves apart from the herd, striking out (as they see it) where the people as a whole decline to follow, they still trust in History, or some force adept at riding its waves. They recite the cliche of their forward-looking time — that today's extremism will be tomorrow's accepted custom, a Burkean "prejudice of the future." And so, in their own way, they justify present demands for our allegiance by invoking *future* consensus — a 180 degree revolution from Chesterton's tradition, the "democracy of the dead." (Their "democracy of the unborn" is liable to produce rigged elections since the unborn are pre-selected for survival.) But there is another significant difference between the approaches of pro- and anti-abortionist, and this, too, can be traced back to differing ends, as well as starting points.

Whether or not he admits it (and he quite often admits it candidly), the kind of reforming pro-abortionist I am discussing is committed to the (eventual) overthrow of pluralistic society. He seeks a self-consistent society, which will in turn become the hatchery for future generations of societal conformists. It is clear that this must be true (must, at least, occupy a subliminal position in the social reformer's mind and plans) of anyone seeking to change the structure of society radically, through political or other recognizably public means. (The preacher of religion, on the other hand, unless he is an open or concealed theocrat, commonly works through small groups of individuals drawn to him by some sort of need, if only the need for a new curiosity.)

The other alternative for the reforming pro-abortionist is, of course, to retire into a self-chosen and self-limited society which, precisely because it is small and hand-picked, reflects a uniform philosophy and lifestyle. This is reform in the tradition of Bronson Alcott's Fruitlands, or the settlement at New Harmony, or sixties-style communes, or certain religious communities. Society is transformed by redefining — by taking in the hem of society. Some "excluding" reformists offer the explanation that by example, the rest of society will be converted, won over to the espousal of a future that is seen to work in microcosm. Others don't much care about the salvation of mankind *en masse*, either because of simple indifference or a gratifying belief in their special election.

The difference between these two categories of radical reformer — — the escapist and the imperialist — may be no more, when it comes

right down to it, than a matter of numbers and perspective. For the imperialist, in his desire to homogenize all of society to his vision (and that may require skimming the cream off the top), may choose to exclude peculiar peoples, to designate certain groups of likeminded people as indigestible cliques, regardless of whether these dissenters wish so to isolate themselves, or harbor ideologically-imperialist designs upon the rest of the community. For the goal is not survival or coexistence, but purity, the generation of a new race of men from a new kind of society (with a bloodline beyond reproach, and no doubts as to paternity) which can only improve upon the old to the extent that it purges itself of all the corrupting influences of the old. Faced with the chicken-and-egg riddle, these forward-looking men — frequently with disinterested motives — may choose to disfranchise (philosophically at least) those groups farthest from the light, lowest on the evolutionary scale.

Now it is clear that people wishing to new-mint society in such a way, and willing to invoke legislative restrictions upon others' rights to do so, hold no strong commitment to that makeshift compromise of pluralism along which America has tightrope-walked these two centuries. For neither of the rhetorics employed by most pro-abortionists is congenial to a healthy pluralism. The first, catching echoes from 19th century liberal phraseology, increasingly seeks to shoulder aside the legal and social limits which define the individual's freedom; it verbally decomposes larger social units into their smallest individual units, and sets the individual loose to wander the world in lonely splendor, unencumbered by spouse, parents, children. Denying the legitimate sway of any system or exponent of social morality, whether incarnated in churches, civic societies or (to use Peter Berger's term) other "mediating structures" between the individual and the state. Rhetoricians of this school rebel against even the vaguest, least restrictive elaborations of a social consensus, reserving for their approval virtual unconditional liberty in their private affairs. Whether acknowledged or not, such freedom bears a resemblance to tyranny, but such is the rhetoric of the Liberal State.

The second reforming rhetoric is that of the Welfare State, the rhetoric of accumulating duties, of responsibilities without limits, coercion in pursuit of egalitarian ends. One and the same person may employ both rhetorics on separate occasions — or even in the course of the same conversation. Both are absolutist, are denials of limits, whether upon private liberties or public duties. Both are made

possible by — require — the annihilation of subgroups of the state, of anything which might legitimately shield the individual from excessive demands, or require from him local, particular duties. So now we have a society where it is fast becoming permissible to neglect aged parents or desert demanding infants or divorce troublesome spouses, while the government imposes ever greater sacrifices in order to assist anonymous citizens — other people's parents or children or spouses. And a more important effect than anonymity is achieved thereby: the *motive* for the action is altered, from justice (moral imperatives) to equality, the achievement of identical circumstances (for a discussion of the natural predilection of democratic, pluralistic governments for equality as an achievable goal, see Francis Canavan's article "The Dilemma of Liberal Pluralism" in this issue of the Review). And we once more find ourselves in the reformer's homogenous society.

The radical reformer of society, then, cannot be reconciled to the pluralistic society — will, if he gains sufficient support (this need not mean a majority) undermine both the minimum required assumptions of such a society, and its tolerant foundations. Yet at the same time he is a product of such a society, a heretic who isolates one aspect of the pluralistic ideal and builds a shrine to it alone. He idolizes personal freedom (in the moral, as well as civil domain) which, abstracted from a context, inevitably becomes license. Or, he idolizes equality which, detached from a justice which must sometimes discriminate in order to take into account differences, becomes a burdensome, monotonous conformity.

There are, however, two sides to the abortion controversy, and for symmetry's sake we should examine the relationship of anti-abortionists to the American brand of pluralism. Are the anti-abortionists implicitly or explicitly destructive of the public consensus, impatient of the restraint such a consensus demands, devoted to their own vision of radical reform? It will perhaps sound partisan, but I think not. There are different ways to argue this opinion. I could say — and it would be true — that anti-abortionists are only rarely ideologues, or ideological absolutists. In theory perhaps many should be sorely tempted by the idea of a benevolent despotism, or theocracy, or other "principled" authoritarian state. Some few are so tempted, but in proportion they are fewer than pro-abortionist radical reformers. (I have no settled conclusions on why this should be so. It may have something to do with the Protestant

dissenting tradition of some of the earliest colonies, which, broadening out in the period following the Revolution and the Constitutional Convention into a well-articulated rationale for separation of Church and State, survives as an almost universal prejudice against mixing religious things with politics. But even if there is truth in this, it only outlines a history, and does not explain.)

Another way to express the difference would be to point to that variety of background, political orientation, philosophy, education, etc., which rescues the anti-abortion movement from strict party lines and blueprints of Utopian futures (that same quality encourages the proliferation of anti-abortion organizations and less-than-unanimous agreement on how the abortion party should be fought, but that is another matter). Most of these people do not wish to give up — and see no reason to give up — differing opinions, interests and the like in order to adapt themselves to some ideal of an anti-abortionists' Melting Pot. They tend not to be revolutionaries planning a new society, but generally apolitical people who wish to get this abortion business settled so they can go back to living lives and rearing families.

But neither, on the other hand, do most anti-abortionists see themselves apart from society, as individuals paired off against the state, but otherwise unrelated to any entity beyond themselves. They not only tend to believe theoretically in mediating structures; they use them, participate in them, animate them. They are members of churches, clubs, colleges, civic and volunteer organizations — even families. Though as prone to intolerance and bigotry as pro-abortionists (and succumbing, most of them, on at least some occasions) they have a general feeling that harmless differences should be tolerated. But they will also maintain the authenticity of certain ties — familial first of all — and of the responsibilities which strengthen and define them. The difference is that these are not anonymous duties, administered by the state as proxy, but duties to people with faces. John Noonan, in his book *Persons and Masks of the Law,*[1] describes how easily people may be ignored once they are fitted with legal masks — as Dred Scott, for instance, was masked as a piece of property. It is as least more difficult to make masks for people when they are close to us, when we have seen their faces. It is hard, on the other hand, to love those we don't know, easy to cultivate indifference. This is what distinguishes personal duties towards parents, children, spouse, neighbors, from those which the state

exacts. It is a difference which tends to safeguard anti-abortionists from temptations to radical levelling reform. (Government, Chesterton says somewhere, must treat people alike, because it cannot know them individually; but the family can afford to distinguish, to discriminate, to judge and reward and punish different family members in different ways, because it can best know what each deserves, what each requires, and what extenuating circumstances apply to each.)

All this should not tempt anti-abortionists to complacency — whether about the state of their souls or of their political programs. Rather, it should offer mild encouragement where we are doing something right, while cautioning us about likely trouble spots. From without, there is the danger that anti-abortionists will allow themselves to be maneuvered into the position of a small frantic group outside the (historical) mainstream of American society — to allow the pro-abortionist's view of us to become that of the nation. This can happen without large-scale defections from anti-abortionists or from the uncommitted. The crucial revolution is perceptual, and as James Hitchcock shows in "The Dynamics of Popular Intellectual Change,"[2] the opposition is adept at conveying the notion that they are the upwardly-mobile ideology, that they must increase while the anti-abortion movement decreases. Once a large-enough number of the uncommitted are convinced that this is so, they may accommodate themselves to a reality which does not exist outside the media, and by doing so, bring it to pass in real life. But anti-abortionists can suffer the same optical illusion. And once convinced of their own permanent minority status, they may withdraw one way or another from the fight for political control, redefining themselves as historically and culturally "un-American" elements — in essence, the very spies-of-the-Vatican which pro-abortionists accuse them of being. Because the mass of uncommitted Americans sculpture themselves and their opinions upon a mythical model of *genus Americanum,* this would mark not only theoretical, but actual capitulation to the pro-abortionists.

But this may seem to sidestep the question of what should be done if, in the end, there comes a time when the mass of Americans incline toward abortion in response to the prodding and persuasions of the radical reformers. I sidestep the question both because no universal answer can be provided, and because such a still-distant contingency should not be permitted to dominate the minds — and battle plans —

of anti-abortionists. It is a distraction, siphoning off energy from the effort at hand, and tempting too many with the alluring inducements of rest from the struggle. We are not in that position yet, we may never be, and premature despair of a complete victory is as bad a state as presumption. Besides this, it is likely to lead to the substitution of head-counts for strategy and the formulation of convincing argument. There is nothing wrong with an examination of the philosophical foundations upon which our society rests, or a consideration of the kinds of accord necessary even for an imperfect union of people. But it is a perverse sort of pride which prompts us to nominate ourselves for a new version of the Biblical remnant, especially since we very likely do not know what we are talking about when we do so. Body counts, as the New York *Times* and the Washington *Post* show the morning after every anniversary of *Roe* v. *Wade,* are tricky things, and anti-abortionists may overlook some who are just lying low, or who are camouflaged by some of the attitudes, affiliations, or appearances of the opposition. That is not our job; calculation of a different sort is required of us — and this is likely to remain so, for, unlike so many of our opponents in the abortion controversy, we do not look for the establishment of the Kingdom of God here on earth.

NOTES

1. John T. Noonan Jr., *Persons and Masks of the Law* (Farrar, Straus and Giroux, 1976).

2. James Hitchcock, "The Dynamics of Popular Intellectual Change," *The American Scholar,* Fall 1976 pp. 522-35.

Confessions of a Single-Issue Voter

Grover Rees III

IN MY DREAM a child is playing by a bridge. Then I see the car hurtling toward the child. There is terror in the driver's eyes, because he does not see the bridge. It seems to him that he must either swerve onto the safe ground where the child is playing, or die in the ravine.

But there is a bridge. The driver can save himself if he will only turn his eyes and his car *up* . . . How can I explain it? Not toward the sky, but *up* into another world just outside the corners of the dream. A strange world, but a world with a bridge in it.

I wave my arm in the right direction: it is not gravity the driver must defy, but only his current perspective. But he never sees the bridge. The car wavers once, then veers onto the grass. The child is hit.

The driver gets out and stands over the dead child. He is in shock, but there is something else in his voice when he looks at me and says,"I had no choice. It was him or me."

I wave vaguely toward the bridge, but then my hand drops to my side and I say nothing. Even if I could make him see the world of the road not taken, it would not help. It would perhaps hurt him badly, and I have seen enough hurt today.

The dream has been with me for years. At first I would make more of an effort to show the driver the bridge. Once he even told me he knew where it was. Yet he had still chosen to hit the child, rather than to cross over into that strange other world. Where is the assurance of safe return? The driver might be forced to abandon his car and walk forever in the new world, with the child walking beside him, determined to express its gratitude forever. So you see, said the driver, I really had no choice. It was him or me.

In the end I am always left standing beside the body, the only evidence that a choice was made. I have never given up trying to point out the bridge. I am the evangelist of the fourth dimension, the crazy prophet of the road not taken. Every morning I wake up a little crazier, a little more sad.

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Camus' Stranger was a man who had never cared about anything. He finally found a subject that interested him, after he had been condemned to die.

> How could I have failed to see that nothing is more important than an execution; and that, in the final analysis, it is the only thing of real interest for a man! If ever I got out of prison, I would go to see all the executions.

Every society has its central horror. In post-Revolutionary France it has been the guillotine. One would have wanted to learn all about it, perhaps even to watch the spectacle. It was the most important thing happening in the world.

Capital punishment today amounts only to the occasional killing of an exceptionally depraved murderer who has somehow evaded the obstacles erected by our judges, who generally cannot find it in their hearts to send a man to his death. Their hearts are in the right place. The calculated and organized killing of anybody, no matter how depraved, raises the level of depravity and violence in the atmosphere. The official, respectable nature of an execution, approved by judges and carried out by agents of the state, paid for with a bit of my money and a bit of yours, gives us all a stake in the killing.

When the death march begins, every two or three years, for some killer in Texas or Utah, it becomes for a while the central national horror. Television and newspapers sift through the facts about the condemned man, his loved ones, his victims, the legal hurdles between him and his death. And, not least, the technical details of the death mechanism. We approve or we deplore, but we all watch with interest.

Indochina, too, has given us atrocities enough to focus attention on atrocity itself. Idi Amin has also served this purpose — with his boast of having eaten human flesh and found it tasty — as has most recently the Reverend James Jones of San Francisco and Jonestown. But none of these terrible things — capital punishment, foreign wars, African despots and other twisted men — is close enough to the mainstream of American life to be its central horror. They are unessential. Amin, Jones, Manson, Calley, Pol Pot might never have existed, and life would be the same for all of us except their particular victims.

Yet we are compelled to search for the central horror, the yardstick by which all other horrors are to be judged. The President of the Fund

for Animals said recently that the annual slaughter of baby fur seals in Canada "is the crucial single cruelty in the world." I think he is wrong, but his heart, too, is in the right place. He knows there can be no such thing as violence in the air; he has undertaken the search.

There was what we call the Holocaust. It happened on another continent, before I was born, before most people now alive were born. We call it the Holocaust and invoke its memory that it might never happen again; but we may have retired the trophy too soon. Can there really never be another Holocaust, or even other holocausts?

And if you could find the new Holocaust — if you could isolate the central horror in our society — what could you do about it? If it were *central*, it would be hard to abolish. It would serve some useful purpose. Many good citizens would believe it to be unavoidable, perhaps even desirable. Mostly, they would not want to think about it. You would have to educate them slowly and gently, with an eye toward containing the horror now and ending it later. If they had fostered or tolerated the horror, you would have to convince them that they could reform, not without guilt, but without self-hatred.

Above all, you would try not to be shrill.

Reading the *New York Times* is one of the habits I picked up in college. It works out nicely now that I live in Louisiana, since the things the *Times* worries about are so different from the things most people here worry about. I can choose my worries from a broad selection.

Early in the summer of 1978 the *Times*, its columnists, and its interviewees were concerned about One-Issue Politics. As the election approached, the warnings became more frequent. James Reston predicted that as more people pressured their congressmen to vote certain ways on certain bills — as opposed to the traditional, generalized pressures, such as to vote for lower taxes and against inflation — it would be tougher and tougher to make the tough decisions. Ultimately, it would become impossible to govern.

Bill Brock predicted that as more conservatives responded to "one-issue" fund-raising letters, the Republican Party would find itself unable to raise enough money to present an effective opposition to the Democrats.

I sensed the displeasure of the *Times* when Minnesota Democrats rejected the multi-issue Donald Fraser for Bob Short, who was against abortion and for snowmobiles.

My reactions to these reports were influenced by my experience as a congressional staffer. On Capitol Hill there was always plenty of one-issue politics. Organized lobbying groups knew precisely how they wanted congressmen to vote. Generally, these groups favored higher spending, or took some other position that was unpopular with the electorate at large. Yet it was usually possible for congressmen to satisfy both the uninformed, generalized pressure from voters and the specific pressure from lobbyists: they would vote with the lobbying groups on a key procedural vote, and then cast a showcase vote in the other direction for the folks back home. This is the practice whose abolition Reston feels will make it impossible to govern: one-issue politics in Washington, no-issue politics in Kansas. For myself, I'm glad to see it go.

As for Bill Brock, it's only natural that he should worry more than I do about the credit rating of the Republican National Committee. Besides, he comes with unclean hands: official Republican groups send out as many "one-issue" fund-raising letters as anybody. The only difference is that the money thus raised goes to support the re-election of Republican politicians, even if they were on the "wrong" side of the issue. If it is immoral to raise money to defeat the Panama Canal treaties, are things made right by giving the money to senators who voted for the treaties? Must be the New Morality.

In the coverage of the Minnesota primary, one had a glimpse of what it was all leading up to. The *Times* is not really opposed to one-issue politics. Eugene McCarthy was a hero in 1968 because he fought for principle, against great odds, on one important issue. Even when trivial issues swing elections — as when Floyd Haskell upset Senator Gordon Allott in 1972, riding the coattails of Colorado voters' opposition to a proposed Winter Olympics — the *Times* just gives us the news. But they did not like Bob Short, not a bit, and it had nothing to do with snowmobiles.

"One-Issue Politics" was a code phrase for the one issue that would not go away.

After the election they made it official. The *Times* ran two articles exposing the sins of Roger Jepsen, senator-elect from Iowa. It seems that Jepsen, a conservative Republican, is guilty of being a one-issue voter three or four times over: he attacked incumbent Senator Dick Clark on abortion, gun control, and the Canal, among other issues.

Abortion made the difference. Jepsen had hidden unsportingly behind a "plodding" campaign style and a wide disadvantage in the

public-opinion polls, and had snuck up on Clark at the last minute with the aid of 300,000 anti-abortion leaflets that caused many Democrats to switch over, "especially in urban areas with large numbers of Roman Catholics."

The *Times* quoted an Iowa editorial to the effect that the 1978 campaigns had been permeated by a "shabbiness rarely seen in Iowa politics," but offered no instances of such shabbiness other than Jepsen's efforts to mobilize one-issue constituencies.

Fortunately, the *Times* offered a paradigm of an unshabby campaign: Robert Young, a moderately liberal Democrat from the St. Louis suburbs, had won re-election by "shap[ing] his campaign around service to the district, not party ideology." Mr. Young is the wave of the future: the article found "the heart of the new order of politics and government" in the observation of a Washington lobbyist that "the public does not want its congressional representatives to deal with broad questions. Thus the role of the politician has become largely absorbed in errand-running, and the good runner gets re-elected."

The *Times* chose an ironic example, since the pro-life movement also claimed credit for Young's victory against a pro-abortion Republican. Yet the treatment of the Jepsen and Young campaigns illustrates the curious new mathematics: no-issue politics is better than one-issue politics.

A few days later, *Times* columnist Anthony Lewis noted a CBS news poll revealing that 5 per cent of the American people — an extraordinarily high number by comparison with the figures on all other issues — would allow their feelings on abortion alone to determine their votes in political contests.

Criticizing Iowa right-to-life activists for opposing Clark, Lewis found it tragic that "a senator's conscientious refusal to support a change in the United States Constitution required a vote against him no matter what else he had done and no matter what the character of his opponent." Lewis added that the abortion issue is not going to go away, and that the behavior of the right-to-life movement seems very dangerous, giving "little reason to hope for the forbearance that makes democracy work."

Who are these millions of Americans who are so worrying to the *Times*? And should we all be worried?

This is not an essay on abortion. It is an effort to explain how one-issue voters tick, so that other members of society can decide what to

do about them. But in order to explain how an ordinary American becomes one of that 5 per cent whose feelings against abortion automatically and absolutely determine their votes — and to make an educated guess as to whether their ranks will grow or diminish — one must get inside their minds, examine all their values, find out how their One Issue got to be that way and how it affects their behavior apart from voting. One must try to decide how similar the one-issue voters are to other people, and then to isolate the difference.

You will perhaps not appreciate my suggestion that the one-issue voter is a lot like you. In fact, there is only one difference: he has come to accept, however reluctantly or passively at first, the truth of a single fact (or fiction). If he is wrong, he is wasting his time and causing lots of trouble for everybody; but if he is right, then his political tunnel-vision is not only rational, it is compelling. If somehow you came to share his understanding of this one fact, you would do just as he does.

Suppose, for example, that somebody thrust before your face a color photograph of an eight-week-old fetus. Imagine your resentment of this intrusion, and your association of such pictures with a noisy minority determined to impose its religious beliefs on the rest of us, thereby aggravating overpopulation and oppressing women — imagine that these reactions did not assert themselves for a moment, just long enough for you to examine the photograph in the neutral, non-ideological way you usually look at pictures. And suppose you felt *recognition.* What if you saw that the eight-week-old fetus resembled nothing so much as a newborn baby?

Or (if you are the type who does not need, or does not like, to look at pictures of things when deciding what they are) suppose that you deliberately undertook a search for the characteristics that make something a "human," and rejected criteria such as present intelligence, or physical independence, on the ground that they exclude too many individuals who (something tells you) ought to be included. What if you could find *no* limiting criterion that could be consistently applied without excluding large numbers of "obvious," walking-around human beings?

Or suppose you found it futile to try to decide whether anything is "human," because of the many value judgments and emotional associations implicit in the term, and because of our scant knowledge of the physical nature of consciousness. You would still be left with the problem of where to place the burden of proof. If somebody were

to capture Bigfoot, and he displayed some "human" and some "animal" characteristics, and scientists proposed to slaughter him in order to study evolution, would you want to leave the final decision in the hands of those who proposed the slaughter? If it were conceded that he "might" be human, would you require that those who wanted to save him come up with conclusive proof of his humanity in order to get a stay of execution? Or (leaving to one side your concern for the survival of endangered species) would you require the would-be slaughterers to prove he was *not* human, not like us in any important sense, before proceeding with their plans? To the precise extent that one is unsure about what a "human" is, the burden of proof is decisive.

It might be such a sudden epiphany as looking at a picture, or such a dry and abstract inquiry as deciding where to place a burden of proof, that would force you to the conclusion that an eight-week-old fetus is a human being. You would not be a very different person because of it. Your attitudes on religion and sex, for example, would probably not change; you would continue to like and dislike the same traits in other people and in yourself. Yet — precisely because you would wish to go on about your business, with the same views and friends and habits — this abstract metaphysical conclusion would be most inconvenient for you.

You would have to accept the logical consequences of your belief in the humanity of the fetus. You would have to believe, in other words, that every abortion (technically speaking) kills a human being.

And then somebody would tell you that there are a million abortions a year in the United States. You would have no choice but to accept, on a purely intellectual level, the proposition that a million people were killed last year, in doctors' offices, with the acquiescence of their mothers; and that a million more will be killed this year.

And after you had accepted these intellectual propositions, I think you would begin to brood on them.

You would hate to think about abortion; and you could go whole days without thinking about it. But when the knowledge of it was thrust at you, you would spend days and nights thinking of nothing else. You would decide that abortion is the central horror of our society.

Central, because all the things that create the demand for abortion, and its acceptance by those who do not believe the fetus is human,

only intensify the horror for you, bring it up close where you cannot ignore it.

Cambodia can be abstracted because it is pure hatred; but abortion is more real, precisely because it intertwines death so tightly with love and sex and the mother instinct, with so many tender and familiar moments.

Jonestown may have been endorsed by a few congressmen who knew nothing about it, but the deaths there were not performed in licensed, antiseptic offices with the approval of the United States Supreme Court. (What was the scariest thing about Jonestown? It was the young doctor. We revere doctors. It was the young doctor, trained to save lives, administering the poison; and parents forcing it down the throats of their children, who did not want to die. Those things are hard to abstract.)

Capital punishment is no longer a routine operation; and it has nothing to do with nice people, attractive people, your own friends and loved ones. The central horror is the one you can put on Master Charge.

And there are the numbers: about six million legal abortions by now.

The usual arguments for legalized abortion — often cited as if they mooted the question of the humanity of the fetus — will seem silly to you. You would not want the state to permit the killing of newborn babies because they were unwanted or handicapped, nor of 15-year-olds because they were juvenile delinquents. You would not vote for a law allowing a woman who said she had been raped to kill the alleged rapist without a trial — much less to kill the rapist's infant child. The fact that the present laws against murder do not always deter wife-killing would not cause you to support legalization of wife-killing, notwithstanding the undisputed facts that it would then be far safer for the killer, and that the decision to kill one's wife is an intensely difficult and personal one.

You will become suspicious of politicians who affirm their "personal" (or "religious") belief that the fetus is "a human being from the moment of conception," yet decline to support a constitutional amendment to forbid abortions. They are saying exactly: "I think Charles is a human being, but since you don't necessarily agree with me, I think it should be legal for you to kill Charles." Either they are not very confident of Charles's humanity — less confident than they are of, say, the right way to fight inflation —

or they do not believe in a rule of law. They are not the politicians you would want in power when somebody wants to kill or hurt *you*; and even if (not being a member of any discrete and insular minority) you are absolutely unafraid for your own safety, you will vote against these politicians anyway, because they propose to do nothing about the central horror.

Voting will be the least of your worries, though. You will probably not march in demonstrations, either because you would be embarrassed, or because you never hear of the demonstrations until after they are over, or just because you're always busy with the same things that kept you busy before you knew what the central horror was. But you will feel guilty about not marching, and even guiltier that you do not spend your lunch hour every day passing out leaflets in front of the abortion clinic — leaflets with those pictures of fetuses on them. Maybe you could only prevent one abortion a month. But wouldn't you give up twenty lunch hours to save one child from drowning?

If you are fortunate enough to be paid for thinking, writing, and talking about ideas, you will feel guilty that you spend most of your time on other questions. Never mind that you hate to think about abortion, that you find it difficult to apply your professional skills to the subject as dispassionately as you apply them elsewhere, that your colleagues know your perspective and therefore discount everything you say about abortion. When the ovens of Dachau were in operation, was it moral to exhaust one's persuasive resources on economic policy, simply because one had a better chance of persuading people about economics than about ovens?

Still, as long as the six million abortions can be kept at arm's length — even the ones that take place in the Women's Clinic, the attractive yellow brick building you pass on your way to work every day — they will only bother you as abstractions, no more real than famine in Africa or a few random late-night murders downtown.

Then will come the worst day of your life, the day when somebody close to you will tell you about her abortion. She will be hurt and vulnerable, and will say, "I had no choice. It was it or me." You will do your best to comfort her without lying, and so you will talk nonsense, veering crazily between comforting lies and dangerous truths. Why didn't she tell you *before*, when you could have told her of the alternatives, all painful but all infinitely less horrible? Before,

when you could have called everything by its right name without pointlessly adding to her pain? When you could have shown her the world that the bridge leads to?

You will take long walks. You will go in the middle of the night to stand in front of the attractive yellow brick building and think: Why don't I get a bomb and destroy it?

Reasons not to destroy the building will flood your mind — all practical, having to do with job security and tort liability and prison. Yet if you could postpone dozens of abortions, if you could give those intensely pressured women a few days to think, surely you could prevent a few deaths. Are you not morally bound to destroy property in order to save lives? You don't know. You haven't yet worked out your ideas on civil disobedience. (Is that the best you can do? Now is the time to decide.)

At last you find two unselfish reasons not to become a bomb-thrower: You have a child of your own to support. And it is important to preserve the republican form of government — the only chance for lasting security and freedom — even at the expense of more deaths. You will work through the system, and you will win. You will stop the killing.

You will become a one-issue voter because it is the least you can do. You do not want to be a revolutionary, and you want to sleep nights.

So you will vote for anti-abortion politicians. You will vote against the hacks who say they believe that unborn children are human but that others should be allowed to kill them. And you will vote against the politicians who sincerely believe that the fetus is just a blob of protoplasm, entitled to no legal protection. Not because they are murderers — they lack the essential knowledge and intent — or even bad people, but because they are terrribly mistaken. They stand in the way of stopping the central horror.

Sometimes it will be easy. If you were a conservative or a moderate in Iowa, you might have voted for Senator Clark just because he was the incumbent and was good at running errands — until the pro-life campaign focused your attention on Clark's voting record, which was "wrong" from your standpoint not only on abortion, but also on government spending and foreign policy.

Other times it will be harder; but as the CBS poll confirms, there were certainly liberal pro-life votes for Jepsen; and those few liberal politicians who have risked offending liberal organizations by taking pro-life stands (Senator Mark Hatfield of Oregon and Congressman

Ron Mazzoli of Kentucky come to mind) have received the support of the pro-life movement against more conservative opponents.

Sometimes the issue will not be squarely joined: in Minnesota, pro-life Democrat Short ultimately lost to pro-life Republican David Durenberger, with "one-issue" voters presumably falling back on their traditional preferences. You might even have to choose between two pro-abortion candidates, or to vote against a buffoon who would hurt the cause more by his embarrassing behavior than he would help it by his pro-life votes.

Yet whenever a sincere, presentable person asks for your vote, saying that he or she wants to go to Washington to stop the killing, you will be unable to resist. Whatever their positions on other issues, you will usually find that pro-life candidates command your respect. They are your kind of people, the kind you would want around if anybody were trying to hurt or kill you.

Of course, there are other pressing issues. Suppose your pro-life candidate does not share your concern about the Soviets' military strength, or suppose he favors domestic spending cuts which, in your view, will ruin the lives of these children you are both trying to save? Well, you will try to change his mind, before and after the election. These other issues, left unsolved, could lead to disaster; they should be dealt with right away; but they are not yet getting people killed. So you will take your chances (if you must) that the other issues can wait. You will perhaps even hope that a successful resolution of the abortion problem will bring about a moral renaissance in America, will focus our attention on human life as the most valuable and fragile thing there is, and thereby contribute to the solution of our other problems.

The other side has its hard core, too. But most people who are pro-abortion don't think about it much. If they are right and you are wrong, then a constitutional amendment will inconvenience a lot of women, and in some cases increase their suffering. The same can be said for any number of wrong decisions. But if you are right, then there are those six million deaths. So you care more, try harder: the rabbit outruns the fox because the fox is running for his lunch, the rabbit for his life.

What about the millions of women who have had abortions? They vote, too, and they have a terrible stake in not believing that the fetus is human. Yet they have not emerged as a counterweight to the anti-abortion voters. Perhaps it is because some of them have realized that

what had been destroyed in them was not nothing. Some have now joined the pro-life movement, and speak out about how they were railroaded by the abortionists. Yet as the millions of abortionists mount into tens of millions, and as the pro-life movement gains converts, the polarized society feared by the *Times* may come into being. After the up-or-down vote on ratification of a constitutional amendment, half the country might go away mad. Such divisiveness would be very bad; there are only a few things worse.

You will be a one-issue voter until you win — even though society will give you no medals for "working within the system," even though you know you are a nuisance. You can go for days without thinking about abortion, but on other days the Camusian fascination with the *event* takes hold. You wonder about the details of particular abortions, about your friends and loved ones walking into the yellow brick building, into the waiting room, lying down on the operating table. You see their faces, and you picture the actual process of death, the suction devices and knives and abrasive chemicals; you wonder about resistance and pain and occasional crying. You try to imagine six million deaths. Whenever you can, you tell people about the world of the road not taken, taking care not to be shrill. Someday you will win, and your bad dreams will stop. For now, every morning you wake up a little crazier, a little more sad.

When Judges Wink, Congress Must Not Blink

Basile J. Uddo

The hearing on the case before the panel of three federal district judges was my first contested case. I was petrified. I remember that Sarah Hughes... was one of the judges. At one point during the hearing, when my nervousness was obviously showing, Sarah winked at me as if to say, "It's going to be all right." Sure enough, it was.[1]

WHEN SARAH WEDDINGTON delivered those remarks at a national conference on abortion she gave us an insight into how the whole judicial involvement in abortion got its start: with a wink from the bench! Of course it's not surprising that *Roe* v. *Wade*[2] has its roots in such a non-decorous exchange between judge and counsel since without a strong shove by the judiciary *Roe* v. *Wade* — on its merits — would never have gotten off the ground. But, as clear as it is that personal judicial preferences created a constitutional impetus for the abortion decisions few would have predicted that the progeny of those ill-conceived decisions would have been more illegitimate, and evidence of even greater judicial bias. Today, however, it is clear that the federal judiciary's treatment of abortion litigation is uniquely accommodating to the pro-abortion position.[3] In virtually every instance — from the most minor state abortion regulation, to the more significant congressional attempts to limit federal expenditures for abortions — federal judges have shown an uncanny ability to torture the constitution into a pro-abortion document. The ensuing examples are only the tip of a very large iceberg, so large that the time clearly has come for Congress to limit the jurisdiction of the lower federal courts in abortion cases.[4]

I. The Problem

A. General Regulations

After 1973 nearly every state attempted to respond to *Roe* v. *Wade* by finding those areas where the court might permit some degree of regulation of the abortion issue. Unfortunately, those areas were

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relatively narrow and would only accommodate certain *state* interests in maternal health and "potential" human life. Unlike the personal right created to protect the woman's decision to abort, no right — at any stage of pregnancy — was recognized in the fetus. Ostensibly the state had certain protectable interests in the fetus — more illusory than real — which it could promote, but the fetus itself had no rights.

The first state regulations dealt with procedural matters: the who, when, and where of the abortion. Virtually all of these regulations have been swept away by federal courts, and usually in a manner inconsistent with traditional federal practice. For example, a Utah statute was completely invalidated despite a severability clause that would ordinarily be used to separate valid from invalid provisions.[5] Moreover, the court justified its action by an appeal to what it perceived to be an impermissible "motive" on the part of Utah lawmakers. This kind of legislative mind-reading or motive analysis has always been disfavored in constitutional adjudication.[6]

Other cases relied less upon motive than upon an absurdly literal reading of *Roe* and *Doe*. Ironically one such case occurred in Chicago, a city recently shocked by the Chicago *Sun Times*' reports chronicling the "grisly" acts of what they called the abortion profiteers.[7] One wonders how much of that horror story would have been avoided had not the Seventh Circuit winked at reality when it invalidated certain board of health regulations that would have required abortion clinics to meet some minimal standards.[8] For its part the Seventh Circuit, through Judge Sprecher, felt that the abortion cases had effectively placed first trimester abortions beyond regulation. Hence the regulations, which among other things required an elevator large enough to accommodate a stretcher so that a hemorrhaging woman could be more safely and effectively transported to emergency care, were *unconstitutional.*

Another area treated mischievously (and incorrectly) by the Supreme Court was the question of viability. Here the Court selected a notion devoid of any biological significance[9] and converted it into a crucial point in deciding when a state may "protect" a fetus. Perhaps Justice Blackmun perceived the weakness in his argument and sought some comfort in a flexible definition of viability; one that encouraged states to regulate around this flexibility. Unfortunately the lower federal courts have not perceived the need for this approach.

Minnesota is one of several examples of a state that was rebuffed by the federal courts when its legislatures tried to define viability as that point at which a fetus is "able to live outside the womb even though artificial aid may be required." The state statute also said that "[d]uring the second half of its gestation period a fetus shall be considered potentially 'viable.'" Other parts of the law required a physician to certify that in his judgment an abortion on a potentially viable fetus was necessary to preserve the life or health of the mother, and required certain precautions for the possible survival of a fetus so aborted. A three-judge federal panel rejected this definition of viability and chose instead to give inflexible significance to *Roe's* ambivalent reference to twenty-four weeks as a possible point of viability.[10]

> Using 24 weeks as the earliest point of viability places a decision to terminate pregnancy between 20 and 24 weeks in the second part of the *Roe* test. Thus at any point prior to 24 weeks and subsequent to approximately the end of the first trimester, the state may regulate only insofar as such regulations are related to maternal health.[11]

So the mere *mention* of twenty-four weeks by the Supreme Court converts a number into a talisman capable of overriding the deliberation and fact-finding of the Minnesota legislature, which reached an eminently rational and supportable conclusion. Consider, if you will, this testimony from a similar case:

> Mr. Morris: Doctor, as one who performs abortions I want to read you a sentence and ask you what it means to you. The sentence is, "Viability means capability of a fetus to live outside the woman's womb albeit with artificial aid". . . .
> Dr. Mecklenberg: I would agree with that definition of viability. I think that it has been current. I think it is a definition that takes into account medical progress, *the fact that it is constantly changing*. My perusal of the medical literature would lead me to believe that *potential or continued life exists as early as 20 weeks* — not in the current edition of Eastman's Obstetrics Book, but in the previous edition, the earliest report a survivor was reported as a delivery at 20 weeks gestation. In my own experience I have — the earliest survival that I have had is a patient who was 21 weeks from the time of conception or 23 weeks from the first day of her menstrual period. The child is a year and a half old and normal. [Emphasis added.]

Yet, Judge Benson concludes in the Minnesota case that "[i]n any event, under present technology, it [viability] *does not* arise prior to 24 weeks" (emphasis added).[13] That conclusion, in light of reality, is befitting a Lewis Carroll conundrum.

The special animus that many lower federal judges have shown toward abortion regulations is starkly demonstrated in a Missouri case, *Doe* v. *Poelker*,[14] where an official policy against performing elective abortions in St. Louis city-owned public hospitals was promulgated by Mayor John H. Poelker, and challenged by the plaintiff "Jane Doe." In the process of invalidating the regulation the Eighth Circuit Court panel committed a multitude of methodological and analytical mistakes, not the least of which was to conclude that somehow *Roe* v. *Wade* had converted the constitution into a document that *prohibited* a state from preferring childbirth to abortions by financing the former but not the latter. Had they stopped at that one might excuse the opinion as misguided, but two of the three-man panel — Judges Ross and Talbot Smith — continued on to *punish* Mayor Poelker.

Contrary to the common law and American federal authority, the court awarded attorney's fee to the plaintiffs. The court's justification for ignoring the clear rule against such action was the rarely invoked exception for instances where "the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"[15] Now there is no doubt such an exception does exist, but its use here is unheard of! First, the exception is only to be invoked by the district court, not the appellate court, as it was here, unless the appellate court was *affirming* the lower court.[16] Here the Eighth Circuit was reversing the lower court. So the action was legitimate at the outset. But, even if the appellate court could so act it is clear that the exercise of this power is limited to *exceptional* cases. As one commentator has explained the "bad faith" exception: "But only in exceptional cases and for dominating reasons of justice can the exercise of the power . . . be justified."[17]

Unfortunately, even if by some magic this could have been called such an exceptional case the judges would still be wrong for going on. The question of attorney's fees was never raised at trial; it was first raised on appeal. Therefore, there was *no* fact-finding on the point in the record, *no* notice to the defendant Poelker, nor was there opportunity for proper argument on the point before any court. This sort of thing is simply not done, it violates all notions of fundamental fairness. Winking would be a compliment for what these judges had to engage in to reach their result. The Supreme Court recognized as much in a rare reversal of the Eighth Circuit's pro-abortion result.[18]

B. Spousal or Parental Consent

Another area left explicitly undecided in *Roe* and *Doe*, and therefore subject to state regulation, was the matter of spousal or parental consent as a prerequisite to an abortion. Regrettably, state regulations in this area have also fallen victim to the federal courts.

Spousal consent provisions suffered the more immediate and devastating treatment. In Florida, for example, a moderate requirement for spousal consent would not have applied if the husband was voluntarily living apart from the wife or the woman's life was at stake. Yet, it was declared unconstitutional.[19] More amazing than the result is the Fifth Circuit's opinion affirming the lower court's rejection of this provision. The state had asserted an interest in the marriage relationship as one justification for the consent requirement — an interest traditionally recognized. Yet, Judge Lewis Morgan speaking for the panel rather summarily concluded that this interest was narrow and did not extend to "intrafamilial decision-making processes with regard to child-bearing decisions," and therefore the "state's societal interest in this aspect of the marriage relationship [was] not sufficiently 'compelling' to justify the statute."[20] Can this be so? Is the state's interest limited only to formulation and dissolution of the relationship? Yet, long ago the Supreme Court confirmed that the state's interest extends to the need to protect the "regularity and integrity of the marriage relation."[21] So marriage as an institution — rather than as the accidental cohabitation of two individuals — is a valid concern of the state. Consequently, can the court so easily dismiss Florida's asserted interest? Surely Florida can require that important decisions affecting marriage — adoption, artificial insemination, voluntary sterilization, and, yes, abortion — be forestalled in the absence of unanimity. The *Roe* court did not say otherwise, but the Fifth Circuit plowed fresh turf and said it for them.

On the point of the possible independent rights of the father the opinion writer somewhat frighteningly reasoned that because the fetus is not a person and therefore not a child, then "a fortiori" the father's interest in the fetus is less significant than his interest in live born children, and accordingly less weighty than the woman's right to abort. Now for all the mischief that the *Roe* court did, it held no more than that the Constitution does not use the word "person" in a prenatal sense and that therefore a fetus is not a "person" under the

Fourteenth Amendment. As bad as that is it does not go as far as the Fifth Circuit in deducing that a pre-born child is not a *child* for whom a father may feel and express affection and protection.[22] Clearly a father can quite reasonably be as interested in his child *in utero* as in his postnatal children, and there is nothing in constitutional law or logic that can support the conclusion that this interest is somehow less weighty than the mother's interest in a dead baby. Yet, once again, with mere words, and another wink at reality, the father becomes a menacing and unwelcomed interloper in the exclusive domain of woman and physician.

Some courts have been mildly more sensitive to the roles of parents in the decision to abort made by a minor daughter. The sensitivity is, however, limited, where it exists at all. A prime example is the continuing judicial battle over a Massachusetts statute that requires an unmarried woman under eighteen years of age to obtain the consent of her parents prior to an abortion.[23] The statute precludes a parental veto by also providing that "If one or both of the mother's parents refuse such consent, consent may be obtained by an order of a judge of the superior court for good cause shown, after such hearing as he deems necessary."[24] Surely a reasonable scheme, right? Bill Baird, whom the court called "a pioneer and advocate for the availability of abortions,"[25] among others, thought not.

Their challenge found support in the opinion of Judge Aldrich who in a most perplexing manner admits that the role of the parent in such a matter would be important and helpful, but yet, he strikes down the statute because "an appreciable number [of parents] are not [supportive], for a variety of reasons."[26] By adopting this view he effectively rejected the long tradition of viewing the parent as the one responsible for the nurture and care of the child.[27] As the Supreme Court once said of parents: "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional [e.g., religious, moral, and patriotic] obligations."[28] Judges Aldrich and Freedman winked at that tradition and decided instead that hired abortionists were better suited for this role. A devilish substitution indeed, but doubly so in light of what we know about so-called abortion "counseling."

> The counseling . . . occurs entirely on the day the abortion is to be performed . . . . It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another . . . . Counseling is

> typically limited to a description of abortion procedures, possible complications, and birth control techniques . . . .
>
> The abortion itself takes five to seven minutes . . . . *The physician has no prior contact with the minor,* and on the days that abortions are being performed at the [clinic], the physician . . . may be performing abortions on many other adults and minors . . . . On busy days patients are scheduled in separate groups, consisting usually of five patients . . . . After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room . . . .[29]

The Supreme Court, on appeal, gently reined in the district judges and admonished them to allow the state's highest court to "construe" the statute before deciding its constitutionality — something they should have done on their own. After the Massachusetts Supreme Judicial Court construed the statute as permitting nothing more than parental consultation,[30] the district court reconsidered, but found it nonetheless unconstitutional. In the process the same two judges, over the strong dissent of Judge Julian, did violence to ordinary judicial procedures and analysis. One of these transgressions deserves special mention.

Because the plaintiffs had asked for a preliminary injunction against the enforcement of the consent statute every lawyer worth his salt knows that the plaintiffs would have to *prove* a *substantial* likelihood of prevailing on the merits, *and* that without the injunction they would suffer *irreparable* harm. The district panel, most benevolently, seemed to relieve these plaintiffs of that duty. Judge Julian demonstrated as much when he pointed out the weaknesses in each of the plaintiffs' three major arguments on the merits and thereby destroyed any substantial likelihood of success.[31] But, more poignantly, the Julian dissent focused clearly on the requirement of irreparable harm.

> Where is the harm of members of the plaintiff class of Massachusetts minors? . . . Surely, requiring the minor to comply with minimal legal procedures, though perhaps inconvenient, or even unpleasant, does not constitute irreparable harm or injury to the minor. Only in the instance where the minor's parents and a state judge concur that an abortion would not be in the best interest of the adolescent girl would she be precluded from having an abortion. Certainly enforcement of a state statute which prevents a minor from undergoing a surgical procedure which is found by both her parents and the Court to be contrary to her own best interests, cannot sensibly be said to cause her irreparable harm.[32]

Certainly it cannot, but a majority of this three-judge court did not act sensibly.

Judge Julian also pointed out that the other plaintiffs, abortionists-physicians, would suffer only some loss of income "from the loss of business of some minors who forego having abortions, or who decide under parental guidance to have the operation at a facility other than [the plaintiffs']."[33] Clearly not ruinous or irreparable harm. In bold contrast, Judge Julian described well the true irreparable harm in this case:

> The action of this Court . . . removes for an indefinite period the only legal barrier in this state against the exploitation of pregnant adolescents by operators of unregulated and unsupervised abortion facilities who may be motivated by concerns which are far removed from the minor's own best interest. The stay granted by the majority is legally unjustified and does not serve the best interests of either the minor or the public.[34]

Consequently, two federal judges have managed to delay indefinitely the effect of a statute, enacted in November 1974, which was intended to protect vulnerable pregnant minors at a most crucial time. In the process, these judges have advanced the rather startling assumption that abortion clinics and hired abortionists are better able to protect the minor's interest than are her parents, or a state court. Why the court was so willing to assume the worst about parents and the best about abortion clinics — all contrary to the judgment of the people of Massachusetts — is indeed perplexing. The recalcitrance of this court is only thinly disguised as constitutional law.

C. Federal Funds and the Hyde Amendment

Perhaps the most disturbing example of how overbearing some federal courts have become in the area of abortion is the recent treatment of the Hyde Amendment by one federal judge in Brooklyn — Judge John F. Dooling.

In 1976 Congress attached an amendment to its Department of Labor/Health, Education and Welfare appropriations bill that specifically withheld any appropriation of funds for the payment of elective abortions under state Medicaid programs. The amendment carries the name of its original sponsor Representative Henry Hyde, and reads: "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 was carried to term."[35] One of several attempts to enjoin this amendment was brought before Judge Dooling in the Eastern District of New York.[36]

The plaintiffs, among whom were included the American Civil

Liberties Union and Planned Parenthood of America, asked not only that the Hyde Amendment be declared unconstitutional, but that the judge order the U.S Treasury to reimburse states for elective abortions. The plaintiffs — and ultimately Judge Dooling — seemed undeterred by the fact that the U.S. Constitution specifically prohibits the drawing of money from the Treasury unless properly appropriated by Congress. Specifically article I, section 9, clause 7 provides "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[37] Clearly, even if the judge found some basis for invalidating the Hyde Amendment, he had no constitutional authority to order the government to pay. Undaunted, and with an embarrassing paucity of constitutional authority, Judge Dooling decided that the plaintiffs would probably prevail at trial because the amendment was, for him, unconstitutional. Perhaps his reasoning is best illustrated by the following statement:

> Divisions between sober and God-fearing people so deep and equal deny to civil authority any power to intervene by direction or indirection, either to compel abortion as a measure of population control or to deny medical assistance to the needy who act on their own beliefs. When the power of enactment is used to compel submission to a rule of private conduct not expressive of norms of conduct shared by the society as a whole without substantial division it fails as law and inures as oppression.[38]

So, while it is oppression for substantial numbers of taxpayers to conscientiously object to the funding of abortions with their money, it is not oppression to compel their contributions to such abortions. Or, as John Noonan has said so well: "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!"[39]

Having decided that the plaintiffs' case had merit and should be set for trial Judge Dooling showed little additional concern for the "appropriations" problem — a problem that another federal judge saw as crucial and insurmountable.[40] Consequently, Judge Dooling decided that the funds for abortions had been appropriated and that the Hyde Amendment was simply a restriction on "the circumstances in which the funds can be used to pay providers of lawful abortional services."[41] Consequently, if the Hyde "restriction" is declared unconstitutional, as he thought it would be, the already appropriated

funds would simply be freed. "Payment of funds [would] follow, but not by an act equivalent to appropriation."[42]

Now to reach this conclusion Judge Dooling had to do quite a bit of winking of his own. Most notably he had to wink at the rather clear congressional rules and traditions that provide that amendments to appropriation bills are considered part of the bill and thus a limit on the appropriation itself.[43] When the Hyde Amendment was offered under House Rule XXI,[44] the Holman Rule, it was accepted as "being germane to the subject matter of the bill" and as "retrench[ing] expenditures by . . . the reduction of amounts of money covered by the bill."[45] Hence, the Hyde Amendment must be read as an explicit statement by Congress that *no* funds have been appropriated for the proscribed purpose, *i.e.,* elective abortions. To invalidate the amendment and order payment — as Judge Dooling did — is nothing short of judicial usurpation of a power textually committed to Congress.

In an effort to bolster his misguided analysis of the appropriations question, Judge Dooling relied heavily upon *United States* v. *Lovett.*[46] He felt *Lovett* supported the proposition that "the section [was] a constraint on the use of *appropriated funds*, and, if the constraint [was] one that [could not] be lawfully imposed for constitutional reasons, as it was in *Lovett*, then there [was] no bar to the payment of the money for abortional services"[47] (emphasis added). Unfortunately, Judge Dooling had certainly misread *Lovett*, which did not involve the rejection of one portion of an appropriations act to reach funds otherwise appropriated by the act. Rather, Robert Lovett, an executive assistant to the governor of the Virgin Islands, and two other government employees were considered "subversives" by the Un-American Activities Committee. Because the government refused to fire them, Congress in the Urgent Deficiency Appropriations Act of 1943[48] prohibited payment of their salaries. The three continued to work for the government and sued for their compensation in the Court of Claims. That court decided that the claimants were entitled to the money but did not order Congress to appropriate the funds.[49] The Supreme Court affirmed, and held the salary prohibition an unconstitutional Bill of Attainder, but again, no order was made to appropriate or pay funds. Unlike Judge Dooling's order, the Supreme Court respected the separation of powers and merely acknowledged compensation was due. It did not reach back to the appropriation, stripped of the salary

prohibition, and order payment as though the funds had been appropriated and illegally constrained. In fact, the plaintiffs would never have been compensated had not the House — after a long debate — subsequently voted 99-98[50] to pay the amount due under the Supreme Court decision. Clearly, Judge Dooling misunderstood *Lovett.*

Perhaps Judge Dooling's mistake would deserve less attention had he not taken two additional steps that seem particularly inappropriate. First Judge Dooling found irreparable harm sufficient to enjoin the Amendment despite an earlier order by a three-judge panel (of which Judge Dooling was a member) enjoining the State of New York from refusing to fund elective abortions.[51] That injunction was still in effect and adequately assured that no harm, much less irreparable harm, could come to indigent women seeking free elective abortions in Judge Dooling's state. Second, and more surprising, Judge Dooling's order operated on the Secretary of HEW *throughout* the United States, a result presumably requiring a showing of irreparable harm in each state. Yet the opinion refers to only one affidavit from a New Mexico official stating that state would not pay for unreimbursed abortions.[52] Thus, in one fell swoop a single federal judge in Brooklyn had managed to thwart the expressed will of Congress — formulated after long, tedious months of difficult deliberation — throughout the entire country!

D. Roe *as the Portal to Infanticide*

As bad as all of these examples are the worst is yet to come. The thinking that underlies a South Carolina case, *Floyd* v. *Anders*,[53] makes *Roe* and *Doe* the portal to blatant infanticide. In that case, as the court describes it, "Louise, a young, pregnant woman wished an abortion because her expectancy interfered with her hopes and plans to go to college."[54] (And some still dare to argue that we do not have abortion on demand). Either because she lied or miscalculated, Louise understated her stage of pregnancy by eight weeks when she sought a clinic abortion. Dr. Floyd, "a physician specializing in abortions,"[55] discovered the mistake prior to performing the abortion and informed the patient that being twenty weeks pregnant a hospital procedure was necessary. Five weeks later, Louise was admitted to a hospital and Dr. Floyd, knowing her stage of pregnancy, undertook a prostaglandin abortion, which produced a live male child.[56] The

child, having been transferred to the hospital neonatal intensive care unit, lived for twenty days before he died.

The state prosecutor sought and received grand jury indictments against Dr. Floyd for murder and performing an illegal abortion. Dr. Floyd turned to the federal courts to stop the South Carolina criminal prosecution. There he found three friends in Judges Haynsworth, Russell and Chapman, who were willing to wink at something called the "abstention doctrine."[57] That doctrine in short prohibits federal judges from interfering with state criminal prosecutions for all but the most extraordinary reasons. Judge Haynsworth thought he had such a reason because in his words, "it clearly appears that the state prosecutor was not proceeding in good faith."[58] Many federal judges, you see, are all too prone to ascribe bad faith to anyone who dares question the absolute propriety of abortion on demand.

Well much can be said about this bending of ordinary procedure, but all that need be said is that Judge Haynsworth and company were clearly wrong. As one scholar of federal procedure has said of the exception so blithely used by these judges:

> Although later Supreme Court decisions have not shed a great deal of additional light on the exceptions to Younger, [the case strengthening the abstention doctrine] what the Court has done confirms that the Court is right when it describes them as "these narrow exceptions."
>
> There is no case since Younger was decided in which the Court has found that the exception for bad faith or harassment was applicable.[59]

It is quite clear that bad faith must be clearly, extraordinarily, and affirmatively shown for a federal court to ignore the strength of the abstention doctrine. The few district court cases that have found such bad faith have consistently dealt with extremes, e.g., 100 obscenity prosecutions against the same defendants with multiple acquittals; seizing a film four times without judicial determination of its obscene nature, and similar instances of harassment.[60]

Here the South Carolina prosecutor was bringing a *single* prosecution against a man implicated in the death of a live-born infant: infanticide if you will. Here there is no doubt that a 20 day old died due to "numerous complications which arose from the child's premature birth."[61] While I am not implying Dr. Floyd's criminal guilt, which should be decided at a proper trial, is it plausible to suggest that under the circumstances the prosecution was *clearly* in bad faith for moving toward such a trial? Where is the bad faith? Well

according to the three-judge panel, through Clement Haynsworth, Jr., it inheres in the statement that "the prosecutor had not read the opinion in *Roe* v. *Wade*,"[62] but had relied upon other reports and a digest prepared by a law student. From this the conclusion was reached that the prosecutor must be charged with the knowledge of what that case says, and according to Haynsworth's analysis of *Roe*, such knowledge would argue against any good faith prosecution of Floyd. Of course this is all nonsense, for even if one had never heard of *Roe* v. *Wade*, the facts of this case make it quite clear that a living child was untimely forced from his mother's womb and that action, in the opinion of the pathologist who performed the autopsy, ultimately caused the child's death. No one could seriously argue that *Roe* v. *Wade* clearly allows that sort of thing, or that one would be acting in bad faith to prosecute the doctor responsible. Common sense, if nothing else, revolts at the suggestion. Yet, that is what these judges tell us.

Their mistake is in their bizarre reading of the clearly misguided words of the abortion decisions. Consider if you will some of Judge Haynsworth's statements:

> Seemingly, the child was not viable in the sense that he could live indefinitely outside his mother's womb. . . .[63]

Well it may come as a shock to the good judge but none of us can live "indefinitely" outside our mother's womb. Moreover, such was not the requirement of *Roe*: viability means "potentially able to live outside the mother's womb, *albeit with artificial aid*"[64] (emphasis added). Consider also this statement:

> Indeed, the Supreme Court declared the fetus in the womb is neither alive nor a person within the meaning of the Fourteenth Amendment.[65]

What audacity! Can the judge really believe that the Court, any court, could *declare* someone *not* alive? How could that declaration be explained to that child who struggled to stay alive for those twenty days; what sort of word game will deny the fact of his brief life cut short by Dr. Floyd, who forced him into that struggle before his time? Of course, *Roe* made no such declaration. Perhaps these judges did not read *Roe* either.

Finally, the judge says:

> Had he but read the [*Roe*] opinion . . . , he would have known that the fetus in this case was not a person whose life state law could legally protect.[66]

Again nonsense! This was primarily a murder prosecution and

therefore not dependent upon any trimester/viability argument.[67] The state's interest here is not dependent upon *Roe* or any other case. The child was born alive and died allegedly because of what the doctor did — if that is not legally murder the South Carolina courts are perfectly capable of so deciding without the interference of three federal judges. The Supreme Court said as much when it vacated the Haynsworth judgment.[68]

If none of the prior examples of excessive and mischievous federal court involvement concern the reader, this last case certainly should. For these three judges, without dissent, made a bold and blatant leap from acceptance of abortion to the horrors of infanticide. They ignored ordinary procedures and unhesitatingly thrust themselves into a state murder prosecution and pretended that there was some legitimacy in their attempts to shield an ordinary criminal defendant from the consequences of his acts simply because the matter of abortion is involved.

II. The Response

Having said all of this, is the conclusion that we are stuck with a federal judiciary that has been overly accommodating to the pro-abortion position, and all is lost? The answer is clearly, no. Among the many signs of wisdom that our forefathers incorporated into the Constitution there is Article III. It reads in part that "[t]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[69] That latter phrase has for all time been understood to mean that Congress may grant, retain, remove, or restrict the jurisdiction of the lower federal courts of this country. The Supreme Court has on several occasions concurred in this view[70] and has recently — and almost offhandedly — done so again.

In *U.S.* v. *American Friends Service Comm.*,[71] two Quakers sought to express their conscientious objections to war by having their employer, a religious organization, cease withholding a percentage of wages under IRS regulations. The percentage was based upon the amount of federal revenue ascribed to military purposes. The employer complied, but continued to pay the full amount due to the government. Subsequently, the employer sued for a refund of amounts paid but not withheld. The employees joined in this suit, and requested, on their behalf, an injunction against IRS enforcement of its regulations. Their principal argument admitted

their liability for the taxes, but objected to the "deprivation of their right to free exercise of religion under the First Amendment since [the withholding scheme] did not allow them to bear witness to their beliefs by refusing to voluntarily pay a portion of their taxes."[72] The district court[73] accepted this argument and enjoined the enforcement of the withholding provision against the employer.

The Supreme Court, with only one dissent, reversed this judgment, not on its merits, but because a jurisdictional limitation divested the courts of any power over the matter. The Anti-Injunction Act[74] provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed. . . ." This jurisdictional limitation, imposed by Congress on *all* courts, was upheld even over the strong First Amendment argument:

> '[D]ecisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under the Anti-Injunction Act.'[75]

Eight members of the Court, in this *per curiam* opinion, respected Congress' authority to limit or restrict federal court jurisdiction.

Of course this is just a more recent example of the long-standing attitude of the Court to jurisdictional limitations imposed by Congress. One much more apropos is the Norris-La Guardia Act,[76] wherein Congress severely limited federal court jurisdiction in matters concerning labor relations — an area where federal courts had shown an anti-labor bias for many years. In fact the circumstances and events leading up to the Norris-La Guardia Act bear a discomforting similarity to those now developing in the abortion debate.

As with abortion, the problems leading up to the labor limitation began with several questionable — and subsequently discredited — Supreme Court and lower federal court opinions,[77] which set the stage for continual federal court involvement in labor-management relations. Prominent among these opinions[78] was one which applied the Sherman Act[79] to labor unions, and produced the anomalous result that an act primarily directed toward the social and economic ramifications of the concentration of capital became an act used most often against labor. The result was devastating to labor unions because it gave the courts the opportunity to thwart crucial union activities (e.g., strikes) by use of the dreaded labor injunction.

Subsequent attempts to correct the problem legislatively were often successful until those enactments reached the hostile courts, where they were invalidated or emasculated. This continuing era of harsh judicial intervention came to be known as a time of "government by injunction."[80] The critics of this era, both in and out of labor, were strong, but frustrated. Their voices sound very much as do the voices of critics of the present trend in abortion cases. One such voice was that of Senator Norris:

> This case and the others which I have enumerated illustrate the necessity of passing a law which cannot be nullified even by judges who have no sympathy with those who toil when their interests conflict with great aggregations of wealth. It brings to our minds the almost superhuman importance of an untarnished judiciary. A perfect law can be nullified by an unfair and biased judge.[81]

Hear also Mr. O.K. Fraenkel, a member of the New York Bar:

> Federal courts have, in too many instances, proved to be champions of capital against labor; they should show a greater regard for the realities of the situation.
>
> The courts, swayed by their conceptions of desirable social ends, have limited strike activities by decisions based on the doctrines of unlawful purpose and improper means. Too often they have been blind to the obvious fact that the definition of the scope of these two doctrines involves declarations of policy, ordinarily a task for the legislature rather than themselves.[82]

The problem of almost totally pro-management judicial involvement did not end until the Norris-La Guardia Act severely limited federal court jurisdiction and firmly reasserted the policy role of the Congress and states in matters of labor relations. The Supreme Court upheld the constitutionality of the Act in *Lauf* v. *E. G. Shinner & Co.*,[83] and the long and damaging era of government by injunction began to, and eventually did, subside.

So it is clear that Congress acted wisely and well in retrieving labor relations from the clutches of a hostile judiciary. Today the problem has arisen anew in the area of abortion. Congress has the power, in fact the duty, to speak firmly and clearly in this matter, and to end a similar era of government by injunction and declaration. Congress should not be deterred by cries of "opening the floodgates" or "judicial independence." The Constitution itself wisely gives this power to Congress and it was certainly intended to be used. As Alexander Hamilton said in his Federalist Paper No. 80:

> From this review of the particular powers of the federal judiciary, as marked

> out in the constitution, it appears, that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniencies should apear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove these inconveniencies.[84]

The political processes are capable of assuring that this power not be abused;[85] they have done so for over 200 years. And besides, why recoil from a legitimate use of congressional power because of the theoretical possibility of future abuse, when not to act continues to countenance a *current judicial* abuse. The time has come, Congress must not blink!

NOTES

1. Ms. Weddington's remarks appear in *Abortion In The Seventies* (W. Hern & B. Andrikopoulos eds. 1977), pp. 77-79.

2. 410 U.S. 113 (1973).

3. See John Noonan, "Should Congress Investigate the Treasury's Funding of Abortion?," *The Human Life Review*, Spring 1978, Vol. IV, No. 2, p. 11; and Robert Destro, "Some Fresh Perspectives on the Abortion Controversy," *Id.*, p. 22.

4. The reference to lower federal courts does not mean that no such power exists over the Supreme Court; it does. However, the basis and arguments for such a power are different than those focused on in this article.

5. *Doe* v. *Rampton*, 366 F. Supp. 189 (D. Utah 1973).

6. See, e.g., *United States* v. *O'Brien*, 391 U.S. 367, 382-86 (1968) (Chief Justice Warren's classic condemnation of motive analysis in constitutional decision-making).

7. Chicago *Sun-Times*, Sunday, Nov. 12, 1978, 1 at cols. 1-2.

8. *Friendship Medical Center, Ltd.*, v. *Chicago Bd. of Health*, 505 F. 2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

9. "The notion of 'viability' defined in any such simple fashion is without biological and medical foundation. The word does not even appear in standard medical indexes." Germain Grisez, *Abortion: The Myths, the Realities, and the Arguments* (Corpus Books: 1970), p. 32.

10. *Hodgson* v. *Anderson*, 378 F. Supp. 1008 (D. Minn. 1974), *rev'd in part sub nom. Hodgson* v. *Lawson*, 542 F. 2d 1350 (8th Cir. 1976).

11. *Id.* at 1016.

12. *Planned Parenthood Ass'n.* v. *Fitzpatrick*, 401 F. Supp. 554, 570 n. 9 (E.D. Pa. 1975), *aff'd sub nom. Collauti* v. *Franklin*, 47 U.S.L.W. 4094 (Jan. 9, 1979) (quoting *Record*, Jan. 14, 1975, at 82-83).

13. 378 F. Supp. at 1016.

14. 515 F. 2d 541 (8th Cir. 1975), *rev.'d*, 432 U.S. 519 (1977).

15. *Id.* at 547 (quoting *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975)). The court also cited *F.D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 129 (1974). *Neither* of these Supreme Court cases awarded attorney's fees; they only mentioned the existence of the exception relied upon by the circuit panel.

16. See 6 Moore's *Federal Practice* para. 54.77[2], at 1711-12 (2d ed. 1976).

17. *Id.* at 1709-10.

18. *Poelker* v. *Doe*, 432 U.S. 519 (1977).

19. *Poe* v. *Gerstein*, 517 F. 2d 787 (5th Cir. 1975) (declaratory judgment affirmed) *aff'd sub nom. Gerstein* v. *Coe*, 428 U.S. 901 (1976).

20. *Id.* at 795.

21. *Estin* v. *Estin*, 334 U.S. 541, 546 (1948).

22. Legal tradition is contrary to the Fifth Circuit view: Courts and commentators have consistently concluded that when the average testator refers to children in his will he intends to include those conceived though not born. See generally 5 *American Law of Property* §§ 21.56, 22.42 (Casner ed. 1952).
Tort law has followed a similar rule. In discussing recovery for injury to a fetus Dean Prosser has said:

> Most of the cases allowing recovery have involved a foetus which was then viable . . . . Many of them have said, by way of dictum, that recovery must be limited to such cases, and two or three have said that the child, if not viable, must at least be "quick." *But when actually faced with the issue for decision, almost all of the jurisdictions have allowed recovery even though the injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick.*

W. Prosser, *Handbook of the Law of Torts* 337 (4th ed. 1971) (emphasis added).
23. *Baird* v. *Bellotti*, 393 F. Supp. 847 (D. Mass. 1975), *vacated* and remanded, 428 U.S. 132 (1976), *on remand*, 428 F. Supp. 854 (D. Mass 1977), *permanent injunction granted*, 450 F. Supp 997 (D. Mass. 1978).
24. *Mass. Ann. Laws* ch 112, § 12P (1) (Michie/Law Co-op 1974).
25. 393 F. Supp. at 851.
26. *Id.* at 853.
27. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).
28. *Id.* at 535.
29. *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 91 n. 2 (1976) (Stewart, J., concurring) (citing brief in *Baird* v. *Bellotti*).
30. *Baird* v. *Attorney Gen.*, 360 N.E. 2d 288 (1977).
31. 428 F. Supp. at 858 (Julian, J. dissenting).
32. *Id.* at 859.
33. *Id.*
34. *Id.* at 860.
35. Hyde Amendment, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).
36. *McRae* v. *Mathews*, 421 F. Supp. 533 (E.D. N.Y. 1976), *vacated sub nom. Califano* v. *McRae*, 433 U.S. 916 (1977).
37. U.S. Const. art . I, §9, 7.
38. 421 F. Supp. at 542.
39. Noonan, *op. cit.*, p. 16.
40. The case was *Doe* v. *Mathews*, 420 F. Supp. 865 (D.N.J. 1976) wherein Judge Biunno concluded that even if there was a basis for an injunction (which he did not think there was) "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." *Id.* at 871.
41. 421 F. Supp. at 540.
42. *Id.* at 540-41.
43. See, e.g., 7 C . Cannon, *Cannon's Precedents of the House of Representatives* § 1643 (1936).
44. *Rules of the House of Representatives*, H.R. Doc. No. 663, 94th Cong., 2d Sess. 561 (1977).
45. *Id.* at 563.
46. 328 U.S. 303 (1946).
47. 421 F. Supp. at 541.
48. Pub. L. No. 78-132 § 304, 57 Stat. 450 (1943).
49. *Lovett* v. *United States,* 66 F. Supp. 142 (Ct. Cl. 1945), *aff'd*, 328 U.S. 303 (1946).
50. 93 *Cong. Rec.* 2973-75, 2977, 2987-91 (1947). These debates clearly reflect the proper understanding of the textually committed House power over appropriations.
51. *Klein* v. *Nassau Co. Med. Center*, 409 F. Supp. 731 (E.D. N.Y. 1976) (*per curiam*), *vacated sub nom. Toia* v. *Klein*, 432 U.S. 902 (1977).
52. 421 F. Supp. at 542.
53. 440 F. Supp. 535 (D.S.C. 1977), *vacated sub nom. Anders* v. *Floyd*, 47 U.S.L.W. 3582 (March 6, 1979).
54. *Id.* at 537.
55. *Id.*
56. *Id.* at 538.

57. See generally Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4255 (1978). (Hereinafter cited as *Wright*).

58. 440 F. Supp. at 537. The three-judge panel also relied upon another exception to *Younger* that would allow interference, but only if it was to enjoin the enforcement of a statute "flagrantly and patently violative of express constitutional prohibitions, in every clause, sentance and paragraph, and in whatever manner and against whomever an effort might be made to apply it," *Younger* v. *Harris*, 401 U.S. at 53-54 (1971), quoting *Watson* v. *Buck*, 313 U.S. 387 (1941). The problem is that the Court hopelessly confused this *separate* exception with the bad faith exception to create in essence a third, easier to apply, exception. Consequently, the court was able to satisfy itself that abstention was not necessary without giving attention to the actual constitutionality of the Carolina law. The judges simply ignored the much heavier burden, imposed upon them by *Younger*, which requires clear and compelling reasons for applying either of the exceptions.

59. *Wright, op. cit.*

60. See cases collected at footnote 23 in *Wright, op. cit.*

61. See Apellants' Jurisdictional Statement at 6, *Anders* v. *Floyd* (1977), citing the deposition of the pathologist who performed the autopsy on the child.

62. 440 F. Supp. at 539.

63. *Id.* at 538. Apparently Judge Haynsworth either misread or misunderstood the discussion of viability in *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1976). That case did not redefine or overrule the *Roe* definition, but merely accepted the Missouri definition as one perhaps more liberal than that advanced in *Roe*. That *Roe* definition of potential ability to live outside of the mother, albeit with artificial aid, was clearly reaffirmed, not rewritten in *Danforth*.

64. 410 U.S. at 160.

65. 440 F. Supp. at 539.

66. *Id.*

67. In addition *Roe* made it quite clear that a state *does* have a compelling interest in a fetus' life during the third trimester, and can proscribe elective abortions on viable fetuses during that time. So even beyond the murder prosecution it is entirely possible — probable in fact — that the South Carolina abortion statute could be construed consistent with the abortion decisions and serve as a basis for proscribing abortions of the type performed in this case.

68. *Anders* v. *Floyd*, 47 U.S.L.W. 3582 (March 6, 1979) *vacating Floyd* v. *Anders*, 440 F. Supp. 535 (D.S.C. 1977).

69. U.S. Const. art III, § 1.

70. *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441 (1850); *Lauf* v. *E.G. Shinner* § *Co.*, 303 U.S. 323 (1938).

71. 419 U.S. 7 (1974).

72. *Id.* at 8.

73. 368 F. Supp. 1176 (E.D. Penna. 1973).

74. 26 U.S.C. § 7421 (a) (1954).

75. 419 U.S. at 11 *citing Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 759 (1974).

76. 29 U.S.C. §§ 101-115 (1976).

77. For a complete discusion of these cases and their effect see F. Frankfurter & N. Greene, *The Labor Injunction* (1930).

78. *Loewe* v. *Lawlor*, 208 U.S. 274 (1908); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911).

79. 15 U.S.C. §§ 1-7 (1976).

80. See *The Labor Injunction, op. cit.*, p. 1.

81. 75 *Cong. Rec.* 4510 (1932).

82. Fraenkel, "Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts," 30 *Illinois Law Review* 854, 880-81 (1936).

83. 303 U.S. 323 (1938).

84. *The Federalist* No. 80 (A. Hamilton) at 541 (J. Cook ed. 1961).

85. For an excellent article arguing that the primary and proper role of the judiciary in this country is to keep open the political processes and not to define fundamental values, see Ely, "Forward: On Discovering Fundamental Values," 92 *Harvard Law Review* 5 (1978).

The Liberty of Abortion

John T. Noonan

I. On the Application of the Liberty to the Family

THE OBJECT OF THE LIBERTY was a being located within the body of the childbearing woman. That being was the product of a joint effort of a man and a woman. Did the man have any say as to the disposition of his offspring? Announcing the liberty, Justice Blackmun observed in a footnote that he was not answering that question now.[1]

Read against the background of other decisions of the Supreme Court on the right to marry, to procreate, and to care for one's offspring, the answer to the question was "Yes, a father has a say in the disposition of his child." *Skinner* v. *Oklahoma* had held that Oklahoma could not sterilize a recidivist chicken thief — the right to procreate was so fundamental that it could not be arbitrarily taken by the state.[2] The chicken thief saved from this punishment was a man. It could reasonably be argued that if a man had a fundamental liberty to procreate, that liberty must include the protection of the child procreated throughout pregnancy. If it did not include that protection, all that a man had was a liberty to fertilize the ovum — a liberty that, if not actually meaningless, was a good deal less than a full freedom to procreate.

In *Loving* v. *Virginia* a unanimous Court had invalidated laws forbidding blacks and whites to intermarry — the right to marry was so fundamental that it could not arbitrarily be denied by the state.[3] It could reasonably be argued that, if a man had a fundamental liberty to marry, that liberty must include liberty to have children. If liberty to marry did not include liberty to have children, freedom to marry meant a great deal less than full freedom to marry.

A divorced mother, the Court had held in *Armstrong* v. *Manzo*, could not constitutionally arrange for the adoption of a child in her custody without giving notice to the child's father.[4] It could reasonably be argued that, if a father could not lose his rights to one of his children without a hearing, even if the child was in the mother's control, he could not lose his child within the mother's womb without at least an opportunity to object.

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An unwed father, the Court had held in *Stanley* v. *Illinois*, could not have his children taken for adoption by the state without being given a special status in the adoption proceeding. Even though such a father had not married and had himself failed to adopt the children he had sired, his biological connection was a tie that the state must respect in a hearing.[5] It could reasonably be argued that, if biology conferred rights, a father had as much interest in an unborn child of eight weeks as in an infant of eight months.

These precedents on the right to procreate, to marry, and to be heard on the disposition of one's child were not ancient law. The oldest of them, *Skinner*, had been decided in 1942; the most recent, *Stanley*, in 1972. They were cases which established, if settled interpretation of the Constitution by the Court could establish, that a father had rights in relation to his children that were independent of the state; for in each of these cases state restriction of his rights had been held violative of the Constitution.

Three years after *The Abortion Cases* the question not decided by Justice Blackmun was presented to the Supreme Court by Planned Parenthood, which attacked the constitutionality of a new Missouri law passed after *The Abortion Cases* and framed in light of them. The law required the consent of a husband to any abortion performed upon his wife. It was given to Justice Blackmun to answer the question he had postponed in 1973.

The Abortion Cases had held that the state had no power to intervene in the abortion decision. Justice Blackmun now reasoned that, as the state had no power of its own, it had no power to delegate to the husband. Its grant of the right to consent was void, for it had nothing to grant. "The State cannot delegate authority to any particular person, even the spouse, to prevent abortion during the same period."[6] Authority and structure in the family, it appeared, depended upon the state.

Even Justice Brennan — Blackmun's firmest ideological ally on abortion — did not quite take Blackmun literally. A year later, in an adoption case, Brennan spoke of the family as "having an origin far older than the state," with the implication that a parent's rights did not depend on the state's delegation.[7] But where abortion was at issue, Brennan did not qualify his adherence to Blackmun's subordination of the father to the state and of the state to the childbearer. Five other Justices joined them, holding that the Constitution and, specifically, the Fourteenth Amendment gave only

the carriers of unborn children the power to decide the future of those children in the womb.

The same Missouri law also provided that a girl who was not of legal age could not obtain an abortion without the consent of her parents. The legislation reflected what is the common-law rule about medical practice on children generally: Apart from emergencies in which a parent is unavailable, a physician cannot touch a child without the parent's consent.[8] The common-law rule is paternalist and maternalist, recognizing the parents' judgment as superior to the child's. At common law a child of tender years cannot have a mole removed without the parents' consent. An unauthorized touching of such a child by a surgeon is an unlawful touching, in legal language a battery, which must be redressed by damages paid to the parents.[9]

Once again there were famous Supreme Court cases of the past acknowledging that the parents' liberty to care for their children was independent of, and superior to, the power of the state. *Pierce* v. *Society of Sisters* and *Meyer* v. *Nebraska* had held that the state could not arbitrarily interfere with parents' educational arrangements for their children.[10] *Pierce* explicitly recognized "the liberty of parents and guardians to direct the upbringing and education of children under their control."[11] The upbringing of children seemed to include parental participation in a child's decision to have an abortion.

The liberty of abortion, however, overrode the liberty of the parents. Just as the autonomy of choice was not to be curtailed by the father's interest, so it was not to be curtailed by the interest of either parent in their daughter's welfare. The law requiring their consent to an abortion was declared unconstitutional.

In a companion case from Massachusetts, *Bellotti* v. *Baird*, the Court kept open a crack for parental rights. If a law gave the parents a veto on abortion, subject to a proviso that a judge could override the veto, the law might qualify as constitutional.[12] Tentative, grudging, and half-articulated, this concession took the ultimate decision from the family and conferred it on the minor and on a judge already under instructions from the highest Court that the liberty was almost absolute and belonged to the childbearer, married or not, adult or not. It was a marginal concession.

How marginal was to be demonstrated by the history of *Baird* v. *Bellotti*, a case that also cast light on the forces unsympathetic to the traditional legal treatment of the family. There were four

pseudonymous plaintiffs, all named "Mary Moe," challenging the requirement of paternal consent; three of them were not further identified; the fourth was a sixteen-year-old, who was aborted while her case was being decided. She was, nonetheless, permitted to remain as a plaintiff, presumably on the ground that she might need another abortion before she came of age at eighteen. The interest of the four Mary Moes, however, was clearly overshadowed by the principal plaintiffs, who managed the case: a clinic paradoxically and ungrammatically called Parents Aid; [13] its director, William Baird, a hero of the abortion movement; and Gerald Zupnich, a doctor who performed abortions for the clinic. Time, as is often the case in lawsuits, was an important factor for the litigants. If the state law was allowed to operate in normal course, the clinic and its physician would either have had to be sure that minor girls coming to the clinic had parental consent or abort them at peril of a criminal prosecution. To avoid this danger, they sought an injunction from the federal court in Boston, forbidding the commonwealth's Attorney General to prosecute them. For the court to grant the injunction it had to determine that the law was probably unconstitutional and that irreparable harm would be done the plaintiffs if the injunction were not granted. Bailey Aldrich and Frank Freedman, two members of the three-judge federal court that heard the case, made these findings. The result was that a law enacted in 1973 was still not being enforced in 1978, even though the actual constitutionality of the law had not been finally adjudicated.[14]

What was the "irreparable injury" the court found the plaintiffs would suffer? The fourth Mary Moe had had her abortion, and the status of the others was never determined. The clinic itself was nonprofit. Its gross receipts for the fiscal year ending 1974 were $122,000; they were $224,553 for the year ending in 1975; and they were $350,000 for the year ending 1976.[15] Those were years in which the clinic's work on behalf of minor girls was protected by the federal injunction; but by no means all of its income depended on aborting minors, and the federal judges did not treat the loss of an income source for a nonprofit organization as an irreparable injury.

Dr. Zupnich presented a different case. He was a resident of New York. He commuted to Boston and was present two days a week to perform abortions on a fee basis. It was not shown that he could not have done as well by practicing five days a week in New York. But it was clear that he had what the court called a "substantial income"

from his trips to Boston. What part of that substantial income was owed to the abortion of minors was not stated. To protect this income, Bailey Aldrich and Frank Freedman granted the injunction. At a minimum their actions gave Dr. Zupnich several years in which to practice his profession without interference from the enacted law of Massachusetts.

The Supreme Court of the United States had suggested that the state court in Massachusetts might construe the state law in a way that would make it constitutional.[16] Accepting this invitation, the Supreme Judicial Court of Massachusetts in 1977 added a new feature to the law: A minor in Massachusetts seeking an abortion against her parents' wishes was entitled to a lawyer to be paid for by "the public treasury."[17] Without any action by the legislature, the Supreme Judicial Court turned the abortion decision into family litigation and appropriated whatever money was necessary to pay for the minor's side of the lawsuit. With the aid of this public champion, the minor was entitled, the state court said, to persuade a state judge that an abortion was in her best interest, whatever her parents thought.[18] Finally, the Supreme Judicial Court added a blanket promise that whatever the Supreme Court of the United States said was necessary for the constitutionality of the state law, it would read into the state law.[19] But it professed uncertainty as to how much reading it would have to do. Unless the Constitution prohibited it — and here the state judges were unsure of what the Supreme Court justices would find the Constitution said — the parents must at least be notified of their daughter's court case seeking to override their refusal to approve an abortion.[20]

It would seem that the prostration of state law to the unfathomed will of a majority of the United States Supreme Court could not go much farther, nor could the family structure in the matter of abortion be more eroded. But this was not enough to satisfy Bailey Aldrich and Frank Freedman in the federal court in Boston. The requirement of the state court that the parents be notified when their child sought an abortion was too much of a burden on the liberty. The judges had already seen "strong reason to believe that it would be in the minor's best interests for her parents not to know of her condition."[21] The federal court now felt that any knowledge on the parents' part of a physician's operation on their daughter and grandchild would be barred by the liberty. Although commonly in a judicial proceeding it is necessary to let the adverse party know that you are suing him, when

a daughter sued to get an abortion, her parents might be kept in the dark; they were eliminated as a necessary party.[22] Parents Aid and Dr. Zupnich were not to be disturbed. As this book went to press, the final decision of the case awaited action by the Supreme Court of the United States. The Court had the choice of letting the Massachusetts state court know what further judicial amendments to the legislation would be necessary to satisfy its standards or affirming the lower federal court's decision that total anonymity must protect the child seeking an abortion.

The Abortion Cases and their sequelae took from the American family much of its status in the law. *The Abortion Cases* themselves had created a liberty in which the most fundamental strand in the structure was deprived of support in the law — a mother was relieved of the duty to care for her offspring, if they were unborn, and was given the liberty to destroy them. With this strand removed, much of the remaining legal structure was dismantled by the cases that followed. The teaching of *Meyer, Pierce, Skinner, Loving* and *Armstrong* was turned on its head. Rights that had been thought older and more fundamental than the state became delegations of power from the state. Even the right to procreate became a state-delegated power when it was exercised by the male. As the state had no power to stop abortion, it had no power to protect its delegation of procreation to a man. Parents' interest in their grandchildren was denied. Parents' interest in an operation affecting the body, emotions and conscience of their daughter became a matter of litigation where the state must furnish the daughter with counsel. The abortion decision became a matter of litigation between minor child and the state, which the parents need never know about. The liberty of abortion became larger than any liberty located in the family structure.

Such a view of the childbearing woman was now imputed to the Constitution that she became a solo entity unrelated to husband or boy friend, father or mother, deciding for herself what to do with her child. She was conceived atomistically, cut off from family structure. The *Boston Herald* ran a picture of young girls seeking an abortion in the same months that Justice Blackmun wrote *Planned Parenthood* v. *Danforth*. The girls wore bags over their heads. Without a family identity; these carriers of children were anonymous and parentless. As they prepared to destroy their own children, they put on masks and became faceless.

II. On the Liberty Taken Further

In the summer of 1974, Jesse T. Floyd, a doctor in Columbia, South Carolina, who "did abortions," was visited at his clinic by a young woman, identified in the records of the subsequent criminal case only by her Christian name, Louise. She said her last menstrual period had been in February. Dr. Floyd found her to be five months pregnant. She was twenty years old, unmarried , black, and hoping to enter a technical school in the fall. Her child would have been born sometime in the middle of the fall semester. She did not want the child; the father did not even know of the pregnancy. On September 4, five weeks after her first examination by Dr. Floyd, she entered Richland Memorial Hospital, paid $250, and waited to be aborted.[23]

The preoperative procedure called for a saline abortion, but Dr. Floyd performed the abortion by the injection of prostaglandins, powerful compounds derived from the human seminal vesicles, whose pharmacological and physiological impact on the human body has only recently become the subject of intensive exploration. They could affect both the body of the mother and the body of her unborn child.[24]

Following the dosage of prostaglandins, Louise went into labor and continued in labor for more than twenty-four hours. Early in the morning of September 6, alone in her hospital room, she gave birth to a son. He weighed 1,049 grams, or 2 pounds, 5 ounces. A nurse who saw him shortly after delivery exclaimed that he was "a seven-months baby." In the neonatal-care unit, his age was registered at over twenty-eight weeks.

Thirteen minutes after birth, the boy was examined by a doctor, who noted that the child was suffering from acidosis, or alkaline blood, affecting his respiratory tract; hypothermia, or a subnormal temperature; and the effects of being born in an unsterile environment. The child was placed in the neonatal intensive-care unit of the hospital, which was itself the regional center for the care of premature infants. He was given the usual care provided for "preemies." In the evening of his birthday a pediatrician prescribed that he remain on a ventilator to treat his breathing problem. He was found to be normally responsive to tactile stimulation.

Dr. Floyd was not present at the birth but visited Louise the following day and informed her that the boy had "a slight chance" of living. Louise left the hospital on September 8, leaving the child still

in the intensive-care unit. He was not nursed by his mother, but the hospital provided his nourishment. On September 13 his breathing improved dramatically. Respiratory problems returned with a deterioration of blood gas values. On September 19 the boy's abdomen was extended and there were no bowel sounds. A preliminary laparotomy found the distal ileum, or small intestine, to have a one-inch tear. The surgical procedure known as "a Bishop-Koop stovepipe exteriorization of the ileum" was performed, repairing the tear and a small laceration in the liver. The child's condition improved, but two days later the heart rate had increased and the child was "doing poorly." On September 26, he died.

The pathologist, who performed an autopsy the same day, put under "Final Pathological Diagnosis," the following:

> Premature infant.
> Perforation of ileum secondary to meconium ileus. (Status post-operative Bishop-Koop ileostomy.)
> Peritonitis, right subdiaphragmatic due to above #2.
> Thrombocytopenia with cerebral intraventricular, intramyocardial, interstitial nephritic hemorrhages.
> Hyaline membranes, intra-alveolar hemorrhage, interstitial edema and aspiration of lungs.
> Marked thymic lymphocytic depletion.
> Multiple recent cutdown incisions and lancet wounds.

In the vernacular, the boy had been premature; his small intestine was perforated and it had been operated on; he had peritonitis and hemorrhaging in the lungs and kidneys; his thymus gland was depleted; and he had suffered many cuts. The death certificate completed at the hospital said, under the heading "Death Was Caused By," the following:

> Preterm newborn 26-28 weeks gest. age.
> Electively induced abortion.

The effect of the prostaglandins on the baby was not specifically described. Much depended on the specific prostaglandin employed and the method of ingestion. Prostaglandins are used to induce labor in wanted pregnancies without normally inflicting injury on the child. They are also used in abortions where a birth is not desired, and their application then may be fatal to the child in the womb or cause severe damage to the body of the child. For example, research using ultrasound has shown that, where the prostaglandin PGF_2 was applied intra-amniotically, the fetal heart, in a majority of cases, stopped in from ninety to one hundred twenty minutes. A dosage of

twenty milligrams of $PGF_{2\alpha}$ has been hypothesized to decrease the functional capacity of the placenta, impairing the oxygen supplied to the fetal bloodstream and constricting the fetal blood vessels. Although the prostaglandins in abortion are designed to produce labor, they frequently depend for their efficacy upon their effect on the fetus. For example, when extra-amniotically administered, PGF_2 or $PGF_{2\alpha}$ resulted in incomplete abortions in 40 percent of the cases, so that the extraction of portions of the dead child had to complete the operation.[25]

It remained to be investigated in this case what prostaglandin Dr. Floyd had used and how he had injected it. Dr. Floyd was alleged to have used a dose of forty milligrams. This allegation remained to be proved. The correctness of the autopsy, and in particular its reported diagnosis of meconeum ileus, had to be tested. Had meconeum ileus, a bowel condition usually due to cystic fibrosis, mortally affected the baby's health; or had meconeum ileus been mistakenly diagnosed where necrotizing enterocolitis — a common sequel to prematurity and respiratory distress — had actually been at work? Only when these and similar questions were answered could it be determined beyond a reasonable doubt whether or not Dr. Floyd had inflicted great injury on the child before birth. Since, as it turned out, no trial took place in the courts of the state, nothing in the present discussion of the case should be taken as implying criminal guilt of any character on Dr. Floyd's part.

The hospital reported the boy's death to the county prosecutor, who took no action. Seven months later, on April 1975, a follow-up by the hospital's lawyer, led a new county prosecutor, James C. Anders, to investigate. On August 28 he presented a case against Dr. Floyd to the Richland County Grand Jury, which promptly indicted the doctor for abortion and for murder.

The abortion statute that Dr. Floyd was alleged to have violated had been fashioned by the South Carolina legislature in 1974 in the wake of *The Abortion Cases*. It created a statutory presumption that an unborn child was not viable "sooner than the twenty-fourth week of pregnancy." The following section of the statute, apparently intended to be read with this definition in mind, provided that abortions "during the third trimester of pregnancy" could be performed if two doctors certified that the abortion was necessary to preserve the life or health of the mother. Otherwise, the statute appeared to proscribe third-trimester abortions as felonies.[26] Anders,

the county prosecutor, acted on the basis that the baby in this case had been clearly viable — he was, in the words of *Roe* v. *Wade* "potentially able to live outside the mother's womb"[27] — and Dr. Floyd had apparently made no effort to comply with the statute requiring that the abortion be certified as necessary for the mother's health.

The murder indictment was based on the general South Carolina statute on homicide, interpreted with the aid of Anglo-American common law.[28] As far back as Sir Edward Coke in the seventeenth century, it had been murder at common law to inflict injuries on an unborn child from which the child died after delivery.[29] In Blackstone's classic presentation of the law, "[T]o kill a child in its mother's womb, though a felony, is no murder; but if the child be born alive, and die by reason of the potion or bruises it received in the womb, it may be murder in the wrongdoer."[30] The theory of the law was that the intentional infliction of severe bodily harm on anybody, which brought about that person's death, was murder. That the harm was done in the womb was an irrelevant justification or defense when the child was born alive and died of the injuries he had received. In an analogous way, a number of courts later permitted anybody born alive to sue in tort for the injuries they had received before birth.[31]

The common law had been applied. In 1832 in *Rex* v. *Senior*, a male midwife had been found guilty of manslaughter when with gross negligence he broke the skull of an unborn child he was attempting to deliver, and the child died shortly after birth. The crime was manslaughter, not murder, because the injury inflicted in the womb had not been intentional. The crime was not merely abortion, the killing of a fetus, but manslaughter, the killing of a person born alive. All the judges of King's Bench approved the charge of the trial judge instructing the jury that it should find the defendant guilty of the death of such a person if it found that the blows in the womb caused the subsequent death.[32]

In 1848 the causing of a premature birth by a criminal abortion was itself made the basis for a charge of murder when "the death of the child was occasioned by its premature birth," and it was contended that "the premature delivery was brought on by the felonious act of the prisoner."[33] In that case the jury did not convict.

The chief American cases restating the rule — in New Jersey in 1849, in Iowa in 1856, in Alabama in 1898, in Tennessee in 1923,[34] — involved assaults on the mother that resulted in the premature birth

and subsequent death of the child. The principle of those cases did not depend on whether the born child's death was produced against the mother's consent. The charge of murder in those cases was not for a gross attack upon the mother; it was for intentionally causing grave bodily harm which resulted in the death, after birth, of a child. It was this law which had been kept out of the *Edelin* case by the trial judge — erroneously, in the opinion of half the Massachusetts Court.[35]

It was, of course, possible that the state courts of South Carolina would adopt the old dictum of Holmes in the civil case of *Dietrich* v. *Northampton*, invoked by Justice Benjamin Kaplan in his opinion in *Edelin*; or the South Carolina courts might follow the lead of Justice Kaplan and his two colleagues who believed that *The Abortion Cases* themselves shielded an act done in the cause of an abortion from being regarded as homicidal. Until the evidence in the case was laid out at the trial and until South Carolina courts had ruled, it could not be said with certainty that causing the death of a person by a prenatal act was murder in South Carolina.

Dr. Floyd, aware that he was about to be charged with a serious crime, had been making his own preparations. The day before the grand jury voted the indictment, he filed a complaint in the federal district court in Columbia asking the federal judge, Robert Chapman, to enjoin any state criminal proceeding against him. The next afternoon, the grand jury having voted in the morning, Judge Chapman heard Dr. Floyd's claim that prosecution for his act would violate the constitutional liberty created by *Roe* v. *Wade* and immediately issued a temporary restraining order against the prosecutor.[36] As the constitutionality of two state statutes was drawn into question, a three-judge federal court was then convened by Chief Circuit Judge Clement Haynsworth to try the federal claim of Dr. Floyd.

The three-judge court had to surmount three convergent policies before it could act on Dr. Floyd's request to enjoin his prosecution permanently: the policy of "our federalism" as enunciated by Justice Black in a 1971 decision of the Supreme Court, *Younger* v. *Harris*;[37] the policy against courts deciding controversies "in the air" without much factual information about the matter in controversy; and the policy against a court's easy use of the extraordinary power of an injunction.

Once a state criminal prosecution was under way, Justice Black had held in *Younger*, a federal court should respect the state

proceedings and not use federal power to cut them off. This restraint arose from "a proper respect for state functions, a recognition that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways."[38] Sensitivity to state courts was called for by the federal nature of our system.

For the Court speaking through Justice Black this duty was also founded on the nature of the judicial power itself. That power was meant to be exercised in judging concrete cases. But if a federal court passed on the abstract constitutionality of a state statute without having before it the concrete circumstances of a case, the federal court gave a kind of advisory opinion and engaged in what was "rarely if ever an appropriate task for the judiciary."[39] Dr. Floyd's claim appeared to be precisely this kind of abstract request, because until the prosecution developed its evidence as to his knowledge of the baby's condition, the action of the prostaglandins, and the precise cause of death, and until the Supreme Court of South Carolina had decided whether South Carolina followed the common law on murder in these circumstances, the federal court had only abstract statutes to examine and pass on.

The teaching of *Younger* v. *Harris* was technically applicable only if the state criminal prosecution had "begun."[40] It could be argued by Dr. Floyd that until the grand jury's indictment was read in open court, the state prosecution had not begun. The temporary restraining order of the federal judge had been handed down before the grand jury's indictment had been read out. Consequently, the state proceedings had not "begun" before they were enjoined.

There was, however, an answer to this contention. The prosecutor could observe that the key question was whether "substantial proceedings on the merits" had taken place in the federal court before the state proceedings had begun. Only if such substantial federal proceedings "on the merits" had occurred before the state proceedings had begun was the federal court justified in acting. The hearing on the temporary restraining order was not "on the merits" but a mere determination whether to attempt to preserve the status quo, pending a decision on the merits of Dr. Floyd's claim. Under existing precedents of the Supreme Court, proceedings "on the merits" only came later, before the three-judge court, and by the time

such proceedings occurred there, the grand jury indictment had been read and the state case unquestionably begun.[41]

Still, *Younger* might be avoided by Dr. Floyd if he could show "extraordinary circumstances" or "bad faith" by the prosecutor. As a precedent cited by *Younger* had said, "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."[42] It was clear that the ordinary South Carolina *murder* statute was not such a statute — it was like the murder statute of every other state. It was arguable that the South Carolina *abortion* statute was not such a statute when it was applied to the abortion of a viable fetus. Neither statute appeared to violate "express constitutional prohibitions."

Nor was this a case where there had been constant harassment of Dr. Floyd, unlike a New Hampshire case when the Supreme Court had approved the federal court's intervention to prevent the fifth state criminal prosecution in five weeks.[43] On the contrary, Anders had proceeded slowly, had acted only after prodding by the hospital, and had charged Dr. Floyd with responsibility for a single action committed almost a year before the prosecution started.

Again, this was not the kind of case where an exception to *Younger* could be found in "the breakdown of the state judicial system."[44] Dr. Floyd had been about to be given full opportunity to litigate his constitutional claims in the courts of South Carolina. In the language of Justice Rehnquist, explaining *Younger* in another case, he was to be afforded "a concrete opportunity" to present his constitutional defense.[45] In such circumstances there was no occasion for the federal court to supplant the state tribunal.

Finally, for any court to exercise the equity power of issuing an injunction, there was the traditional equity requirement that "irreparable injury" to the plaintiff be threatened if the court failed to act.[46] Although it might seem otherwise to a layman, it had been authoritatively established by the Supreme Court that the anxiety, inconvenience, and expense of defending a criminal suit did not constitute "irreparable injury."[47] This was the kind of injury that threatened Dr. Floyd if he went to trial; and by established precedents it seemed insufficient to justify equitable intervention by the federal court even if considerations of federalism, of the appropriateness of judging in

the abstract, and of the actual holding in *Younger* did not command abstention.

None of these reasons swayed Judge Haynsworth and his colleagues. For a surprising length of time they left the temporary injunction in effect. Then, after more than two years had passed, on November 4, 1977, they issued an opinion in favor of Dr. Floyd and soon afterward made the injunction permanent. Whatever the outcome of the case would be on appeal — for the state had a direct appeal to the Supreme Court and exercised it — no trial could take place before the autumn of 1978 or, more probably, the spring of 1979. The Supreme Court might summarily affirm Judge Haynsworth and uphold his new encroachment on the laws protecting life, or it might find his intervention unjustified as an interpretation of *The Abortion Cases* or as an interpretation of *Younger*. But if the Court did send the case back, four or five years would have elapsed since the time Dr. Floyd had performed the abortion. Witnesses would be dispersed. Evidence would be stale. Whatever the Court decided, Judge Haynsworth had disrupted the state's case.

Judge Haynsworth held that the "bad faith" exception to *Younger* applied. Anders, he found, should have known that, under *Roe* v. *Wade*, "there was no possibility of his obtaining a conviction that could have been constitutionally sustained."[48] The state abortion statute, he held, was "flagrantly and patently violative of express constitutional prohibitions" — that is, violative of the prohibitions laid down in *The Abortion Cases*. If the abortion statute was so obviously bad, then the indictment for murder, too, was "clearly foreclosed by *Roe* v. *Wade*."

At the heart of Haynsworth's opinion was this extraordinary passage:

> Until the child is viable, the mother's constitutionally protected right to choose to terminate her pregnancy or not to do so must be allowed by the state to prevail over any interest it may have in the preservation of fetal life. Indeed, the Supreme Court declared the fetus in the womb is neither alive nor a person within the meaning of the Fourteenth Amendment....

To confirm that what he said here was not by accident, he added, "The fetus in this case was not a person whose life state law could legally protect."[49]

These statements were remarkable for their unarticulated assumption: that the boy born alive, left by his mother in the hospital, treated as a separate human being for twenty days, had not been a

"viable fetus." Judge Haynsworth had replaced the Supreme Court's test of "potential ability to live" with a new test of "actual ability to live indefinitely." He also had spelled out what was implied in *Roe* v. *Wade* but never actually stated there: For the American legal systems the fetus in the womb was not alive.

As a result of these conclusions, Judge Haynsworth held Dr. Floyd innocent without a trial: He could not be convicted of anything for which he had been indicted. Judge Haynsworth reached this judgment merely by looking at the South Carolina law and at the Constitution as interpreted by the Supreme Court. What Dr. Floyd had done or not done had not been determined. There had been no trial. Before the law and before the public he was and is an innocent man. But his case had become a means for expanding the abortion liberty to its limit.

The Abortion Cases had left open the question whether the liberty of abortion implied that a physician might assure the post-abortion death of a viable child he was aborting. The common law had held such action homicidal. The *Edelin* court had divided on the issue. *Anders* v. *Floyd* eliminated the issue by treating a child who did not survive an abortion for more than twenty days as nonviable, whatever act had made the child's life so short. In effect, Judge Haynsworth declared constitutionally dead the common-law rule. He advanced beyond *The Abortion Cases* to invalidate an ordinary homicide statute as "flagrantly and patently violative" of the liberty of abortion.

NOTES

1. *Roe* v. *Wade*, 410 U.S. 113 at 165 (1973).
2. *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).
3. *Loving* v. *Virginia*, 388 U.S. 1 (1967).
4. *Armstrong* v. *Manzo*, 380 U.S. 545 (1965).
5. *Stanley* v. *Illinois*, 405 U.S. 645 (1972).
6. *Planned Parenthood of Central Missouri* v. *Danforth, 428 U.S. 52 (1976).*
7. *Smith* v. *Organization of Foster Families*, 45 U.S. Law Week 4638 (1977).
8. *Prosser on Torts* (St. Paul; West, 1971 ed.), sec. 18.
9. E.g., *Zoski* v. *Gaines*, 271 Mich. 1, 260 N.W. 99 (1935).
10. *Meyer* v. *Nebraska*, 262 U.S. 390 at 402 (1923).
11. *Pierce* v. *Society of Sisters*, 268 U.S. 510 at 534 (1925).
12. *Bellotti* v. *Baird*, 428 U.S. 132 (1977).
13. The corporate papers of the foundation identify it as Parents Aid without the apostrophe which a grammatically minded federal court added to Parents.
14. *Baird* v. *Bellotti*, 393 F. Supp. 847 (D. Mass. 1975).
15. For the figures, Parents Aid Society, Form 12, for 1973-1974, 1974-1975, 1975-1976, filed with the Division of Public Charities, Department of the Attorney General, Commonwealth of Massachusetts.
16. *Bellotti* v. *Baird*, 428 U.S. 132.

17. *Baird* v. *Attorney-General* (Mass.), 360 N.E. 2d 288, 301 (1977).
18. *Ibid.*, 293, 300-301.
19. *Ibid.*, 292, 303.
20. *Ibid.*, 296-297.
21. *Baird* v. *Bellotti*, 428 F. Supp. 854, 856 (D. Mass. 1977).
22. See the strong criticism of this view in the earlier dissenting opinion of Anthony Julian in the first district court decision in the case, *Baird* v. *Bellotti*, 393 F. Supp. 847, 859 (D. Mass., 1975).
23. The facts are taken from *Appellant's Jurisdictional Statement, Anders* v. *Floyd*, 77-1255, *U.S. Law Week* 46 (U.S., 1978): 3587, supplemented by the records of the hospital. The author was consulted by the appellant and writes from the perspective of one who has taken the appellant's position in the case.
24. Sultan M. M. Karim, ed., *Prostaglandins and Reproduction* (Baltimore: University Park Press, 1975), 1-18.
25. On the nonharmful use of prostaglandins to induce labor, see Michel Thiery and Jean-Jacques Amy, "Induction of Labor and Prostaglandins," in Karim, *Prostaglandins and Reproduction*, 164-167; on intraamniotic injection of PGF_{2a}, Sultan M. M. Karim and Jean-Jacques Amy, "Interruption of Pregnancy with Prostaglandins," in *ibid.*, 107; on the effect of PGF_{2a} on the placenta, *ibid.*, 87; on the 40 percent incomplete abortion rate, *ibid.*, 94; on the effect of the twenty-milogram dosage, A. I. Csapo *et al.*, "Termination of Pregnancy with Double Prostaglandin Input," *American Journal of Obstetrics and Gynecology* 124 (1976): 1.
26. *South Carolina Code Annotated*, 44-41-20 (1976 ed.) = 32-68-1 of the 1962 Code as amended in 1974.
27. *Roe* v. *Wade*, 410 U.S. 113, 160.
28. *South Carolina Code Annotated*, 16-3-10.
29. Edward Coke, *Institutes of the Laws of England* (London, 1809), part 3, ch. 7, 50.
30. William Blackstone, *Commentaries on the Laws of England* (London, 1778), book 4, ch. 14, 198.
31. *Prosser on Torts*, 4th ed. (1971), 335-338.
32. 1 *Moody's Crown Cases Reserved, 346; 168 English Reports*, 1298 (1832).
33. *Queen* v. *West*, 2 Carrington and Kirwin 784 (Nisi prius, 1848).
34. *State* v. *Cooper*, 22 N.J.L. 52 (2 Zabriskie 52) (1849); *Abrams* v. *Foshee*, 3 Iowa 274 (1856); *Clark* v. *State*, 117 Ala. 1, 23, So.671 (1898); *Morgan* v. *State: 148 Tenn. 417, 256 S.W. 433 (1923); Contra, Cordes* v. *State*, 54 Tex. Crim. App. 294, 112 S.W. 943 (1908).
35. American Academy of Pediatrics, *Hospital Care of Newborn Infants*, rev. ed. (Evanston, Ill., 1974), 70-71.
36. *Appellant's Jurisdictional Statement.*
37. *Younger* v. *Harris*, 401 U.S. 37 (1965).
38. *Ibid.* at 44.
39. *Ibid.* at 53.
40. *Hicks* v. *Miranda*, 422 U.S. 332, 349 (1975).
41. *Hicks* v. *Miranda* held that the denial of a temporary restraining order by the federal judge did not constitute "substantial proceedings on the merits."
42. *Watson* v. *Buck*, 313 U.S. 387, 402 (1941), quoted in *Younger* v. *Harris* at 53.
43. *Wooley* v. *Maynard*, 97 S. Ct. 1428 (1977).
44. *Allee* v. *Medrano*, 414 U.S. 802, 835 (1974) (Burger, C.J.,concurring).
45. *Juidice* v. *Vail*, 430 U.S. 327 (1977).
46. *Douglas* v. *City of Jeannette*, 319 U.S. 157, 164 (1943).
47. *Younger* v. *Harris* at 46.
48. *Floyd* v. *Anders*, 440 F. Supp. 535, 539 (D. So. Car. 1977).
49. *Ibid.*, 539.

"The Argument" & "The Question"

Patrick Derr

What follows is a discussion of certain analogies between the slavery argument and the abortion argument.[1] But the term "argument" here refers not to one of those formalized and abstract entities which are the logician's delight, but, rather, to a real disagreement between real people, to a public controversy taking place in living rooms and in the media, to a clash between the deeply-held opinions and beliefs of large segments of an actual human community. In short, what follows is a discussion of just that murky sort of thing which is *not* the logician's delight.

It is often claimed by members of the anti-abortion movement that they are the moral and political descendants of the 19th century Abolitionists. The two controversies do have important common features. Abolition — like abortion today — involved passionate disputes in which compromise was unacceptable to nearly all involved. It generated political disputes so violent as to threaten our system of government. And — once again like abortion — it exhibited a full panoply of deeply-held moral beliefs, powerful economic interests, religious and social institutions, political activism, civil disobedience and even violence.

But the analogy to be discussed here is not between the historical contexts and effects of the arguments, but between the arguments themselves. Each of these arguments advances claims of a legal, constitutional, socio-economic, humanitarian, libertarian and *ad hominem* variety. The dramatic analogies which the two arguments display are most easily exhibited by simply presenting them in parallel: [2]

1. Although he has a heart and a brain, and is human from the biological perspective, a *slave/fetus* just is not a legal person under the Constitution. The Supreme Court made this perfectly clear in the *Dred Scott/ Roe* v. *Wade* decision.

2. A *slave/fetus* becomes a legal person only when he is *set free/ born*; before that time, as the courts have ruled, he has no legal rights and we need not be concerned about him.

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3. A *man/woman* has the right to do whatever *he/she* pleases with *his/her* personal property, the *slave/fetus.*

4. The economic costs, direct and indirect, of prohibiting *slavery/abortion* will be absolutely catastrophic.

5. The social consequences of prohibiting *slavery/abortion* will be disastrous.

6. What is more, both the social and economic burdens which will result from prohibiting *slavery/abortion* will be unfairly concentrated upon a single group: *slave-holders/pregnant women.*

7. Isn't *slavery/abortion* really something merciful? Isn't it really better never to be *set free/born* than to be sent ill-equipped and unprepared into an environment where one is unwanted, unloved and bound to be miserable?

8. Those who believe that *slavery/abortion* is immoral are free to refrain from *owning slaves/having abortions*; they should give the same freedom to those who have different moral beliefs.

9. Accordingly, those who believe that *slavery/abortion* is immoral have no right to try to impose their personal morality upon others by way of legislation or a constitutional amendment.

10. The claim that *slaves/fetuses* are like us is simply ridiculous; all one has to do is look at them to see that they are completely different.

11. The *anti-slavery/anti-abortion* movement is nothing but a *Quaker/Catholic* conspiracy, which violates and undermines the separation of Church and State.

12. The members of the *anti-slavery/anti-abortion* movement are nothing but a bunch of hypocrites. If they really cared about human beings, they would work for *all* humanitarian causes, and they would never resort to violence.

13. The *anti-slavery/anti-abortion* movement is in fact a small band of well-organized religious fanatics who have no respect for democracy or the principles of a pluralistic society.

One could continue the list *ad nauseum,* for the parallel is thorough. But three more examples — and these formulated from the other side of the argument for contrast — will suffice:

14. The question of whether *slavery/abortion* should be tolerated is not a matter of personal or religious belief; it is a question of protecting the civil rights of millions of innocent human beings who are not in a position to protect themselves.

15. The attempt to characterize the *anti-slavery/anti-abortion* movement as nothing but a *Quaker/Catholic* conspiracy is a scurrilous appeal to the very basest sort of religious bigotry.

16. The humanity of *slaves/fetuses* cannot be denied simply because they look different from us; there is no morally defensible way to draw a line somewhere along a continuum of *skin color/development* and claim, "This is where humanity starts, this is where it stops."

In what follows, the position which accepts 1 - 13 and rejects 14 - 16 is called "The Argument"; the position which rejects 1-13 and accepts 14-16 is called "The Counter-Argument." Whether this terminology is justified (it is) remains to be seen.

What is particularly striking about these arguments for slavery ("FS" hereafter) and abortion ("FA" hereafter) is just that there seems to be *no* popular argument for the one that has not (or could not) be used for the other. At least at the rhetorical level, the analogy between FS and FA is complete, and we may with justice speak simply of The Argument: only the particular terms used to *apply* The Argument need be changed — "slave," "fetus," "Quaker," "Catholic" and so forth.

With respect to their logical structure, the analogy of FS and FA is clearly also complete. Whether any part or parts of The Argument are valid is completely independent of its reading as FS or FA. Any part of the argument which is valid on the former reading will be valid on the latter reading, and any part which is invalid on the former reading will also be invalid on the latter reading. This holds, *mutatis mutandis,* for The Counter-Argument as well. Thus at the logical level (as at the rhetorical level), we may legitimately refer to FS and FA simply as The Argument.

Are FS and FA psychologically analogous as well? This question is almost certainly ill-formed. But since the arguments in question are arguments between real persons, in real contexts and with real feelings, perhaps there is *some* sort of issue here. The public controversies which attend FS and FA do indeed have something in common which may appropriately be described as psychological: namely, a very particular sort of misunderstanding.

The controversies surrounding FS and FA are permeated by a type of misunderstanding which goes far deeper than mere words. The words, the sentences — these make sense to all involved. The abolitionist understands FS when he hears it: but that a rational adult who is informed of the facts can *advance* FS — *this* is incomprehensible to him. And so, in desperation, he is driven to impute to the advocate of FS a complete contempt for human life. Similarly, the proponent of FA understands the *words* of the anti-abortionist; he understands that they are a denial of FA. But that a rational adult who is informed of the facts can *deny* FA — *this* he cannot understand. And so, in desperation, he is driven to attribute the denial to the irrational: to the perverse influence of a "popish

plot" or a childhood spent under the "warping influence" of "jesuitical casuistry."

In sum, the proponent of The Argument can hear and understand the *words* that constitute The Counter-Argument, but not the *man* (or woman) who utters them. How is it that this is the case? Do The Argument and The Counter-Argument themselves inspire such feelings? The answer is that they do not. Rather, such feelings are generated (almost, but not quite inevitably) by the clash of certain prior commitments without which the advocates of The Argument and The Counter-Argument simply would not be parties to the dispute.

Those who advance The Argument are antecedently committed to the claim that the slave or the fetus is not a human being — or at least not a human being in the same way that we are. Those who advance The Counter-Argument are antecedently committed to the claim that the slave or the fetus is a human being. Now, the logician is correct in claiming that neither of these commitments is *logically* necessary. But the ethician is surely also correct in claiming that they are psychologically necessary: that is (with exceptions that are rare and not unique to either side of the dispute [3]), the human *persons* who are *party* to the public disputes in question do not *in fact* advocate The Argument or The Counter-Argument without these (respective) commitments. To advance The Argument, thus, is to have adopted an antecedent commitment which makes the advocacy of The Counter-Argument rationally inexplicable: how can anyone make such absurd claims on behalf of something which is plainly not a human being? The situation obtains for the advocate of The Counter-Argument as well: how can anyone make such depraved claims against something which is plainly a human being?

To the professional philosopher, trained and drilled in the adoption of contrived dispassion, and inoculated with a terror of undiscovered prior assumptions (and a maniacal drive to find them out), such antecedent commitments may seem not only implausible, but vaguely immoral. In fact, they are neither. And it is for just this reason that it is correct to observe that FS and FA are in addition psychologically analogous: the mutual incomprehension which attends their deployment is of the same order, arises from the same circumstances, and generates the same imputations of irrationality and immorality to one's opponents. Hence, at the psychological level

(as at the rhetorical and logical levels), FS and FA may again be justly referred to as The Argument.

With respect to possible moral analogies between FS and FA, one is tempted to speculate that the acceptance of either is typically grounded in some sort of teleological system, and the rejection of either in some sort of deontological system. But this is certainly false. There are more types and kinds of ethical beliefs at work in the public controversy than are captured by any such abstract taxonomy. And there seems to be no justification for assuming either that the advocates of FS and FA do not take seriously their talk of slave owners' and womens' *rights*, or that opponents of FS and FA do not take seriously their own talk of social consequences.

No doubt, which *parts* of The Argument or The Counter-Argument one regards as relatively weightier or weaker is in large part a function of one's relative sympathy for teleological or deontological considerations. Thus an advocate of The Argument who is inclined to place special emphasis upon moral rights might stress 1, 2, 3, 8, and 9 to a greater extent than 4-7 or 10-13. On the other hand, an advocate of The Argument who is inclined to put greater emphasis upon consequential considerations would likely regard 4-7 as the most compelling of his claims.

This is an important insight, but it is more important here to notice that this "preference function" ranges equally over *both* camps in the controversy. It is characteristic not of FS or FA, but simply of The Argument. Similarly, the relative conviction with which the proponent of The Counter-Argument advances each of his own claims will also — and in just the same way — be determined by his inclination to emphasize rights or consequences.

The moral analogy between the slavery and abortion disputes is just this: in neither case is a particular person's acceptance or rejection of The Argument systematically predictable (with any real success) on the basis of a general characterization of that person's moral beliefs.

At all four levels, then — rhetorical, logical, psychological and moral — the analogies displayed by FS and FA are so complete that one must conclude that we have here not two merely analogous arguments, but one argument, The Argument, with multiple applications. Indeed, a fuller analysis might consider some of the other applications to which (in different times and places) The

Argument has been put: against Jews, against deformed children, against the mentally ill, and so forth.

Of course, these *applications* of The Argument are systematically *dis*analogous in one vital and defining respect: the class of putative human beings whose fate and "genuine" humanity is at issue is in each case different — slaves for FS, fetuses for FA, and so forth. Nonetheless, however it is *applied*, The Argument remains The Argument.

From this exploration of analogies two conclusions follow. The first is that the disagreement which underlies the public use of The Argument and The Counter-Argument is *not* at base a religious disagreement, nor a logical difference, nor a matter of rhetoric or style, nor even a matter of abstract moral principle. It is, rather, first and last a metaphysical dispute, which we may call The Question: namely, What is Man, and what does it mean to be human?

To answer The Question is to settle The Argument. To answer any other question is to beg The Argument, for it is precisely our answer to The Question which must ultimately determine our commitment to the humanity (or lack of humanity) of the class of putative human beings against whom The Argument is wielded. And to decide this is to decide the fate of The Argument. For the second conclusion which follows from the above analysis must be that The Argument is bankrupt — both logically and morally — if used against a class of human beings.

If it is granted that The Argument fails when applied to slaves, because slaves are human beings; if it is granted that The Argument fails when applied to Jews, because Jews are human beings; if it is granted that The Argument fails when applied to the mentally ill, because the mentally ill are human beings; then it must be granted that the argument fails when applied to fetuses, if *they* are human beings. The first three failures surely *are* granted by all parties to the abortion argument. Anti-abortionists ask why the last failure is not granted as well.

NOTES

1. Various aspects of these analogies have been mentioned, or discussed, by several authors. The two sources which have had the greatest influence upon the present discussion are Roger Wertheimer's "Understanding the Abortion Argument," *Philosophy and Public Affairs*, Vol. I, No. 1 (Fall, 1971), pp. 67-95, and Dr. and Mrs. J. C. Wilke's *Handbook on Abortion* (Cincinnati: Hiltz Publishing Co., 1972), p. 115.

2. The argument for slavery consists of statements 1-13 as read using the first of each pair of italicized terms which are separated by a slash "/" mark; the argument for abortion consists of the same statements

as read using the second of each such pair. Since acceptance of some proper subset of 1 - 13 need not imply acceptance of the entire argument, the legitimacy of collecting all of 1-13 — and both readings — under a single name might be questioned. This issue is the subject of much of what follows.

3. For example, see Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs*, Vol. I, No. 1 (Fall 1971), pp. 47-66.

A Theist Looks at Marriage

Erik von Kuehnelt-Leddihn

IN ORDER TO UNDERSTAND this essay more fully one should perhaps read (or reread) my article "The Christian Faith and Woman" in this review (Fall 1977), because there we dealt with some of the basic differences between the sexes. They are both physical and psychological, and their interconnectedness is now more and more realized; in the last twenty-five years considerable advances have been made in this field of research.[1] Most important for our theme, in the earlier essay, are the distinctions between the four forms of love: Eros (infatuation between the sexes), the "affections" (as C. S. Lewis calls the sentimental ties between the members of the family[2]), friendship (*philia*) and charity (*agape*). "Sex" is not love, but merely a possible means to express love as well as, unfortunately, hatred or contempt (if it is not merely used for personal gratification).

Now, as to marriage! Although Martin Luther told us that marriage is a "worldly affair,"[3] neither he nor the Old Testament Jews looked at it from a purely secular viewpoint and insisted on surrounding this "binding contract" with religious ceremonies. Indeed, nearly all over the world weddings used to have a religious (or quasi-religious, tribal) character. Only in modern times, with the rise of the omnipotent state since the French Revolution, do we see the state psychologically assuming the position of the religious bodies, offering either secular alternatives to the religious rites or even insisting that no religious ceremony take place before the almighty state has given its recognition to marriage. This may amaze some Americans (and British) who do not realize to what extent the modern state has become a Leviathan in Continental Europe — even in its liberal-democratic guise.[4]

Taking a bird's eye view of marriage, we become aware of two important factors: the Natural Law, on which it is largely based, and Original Sin. To a non-believer the results of Original Sin (which we have stressed so strongly in our earlier essay) might appear simply as the basic non-perfection of human nature whose wholeness we can,

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nevertheless, *imagine*. Man is wounded in his nature: he is forgetful, exposed to disease, prone to sin and crime, fickle in his attachments, imperfect in his reasoning, dominated by evil appetites, condemned to physical decay and death. In other words: the great Theistic religions explain all this through the Fall,[5] but the explanation is not needed for anybody to see its tangible results. And as for the Natural Law — a concept that is not accepted by all theistic religions[6] — one must beware of overrating its immediate recognizability. A world traveller like myself will find it hardly evident except in the light of Faith. There is practically no crime, no sin, no horror condemned in our *quondam* Christian civilization which is not mentioned elsewhere. The contours of the Natural Law are exceedingly sketchy and indistinct.

Marriage is a truly universal institution, but the hard fact remains that polygamy had a headstart and is, in principle, still its prevailing form. Even polyandry exists — though it is clearly not in keeping with the Natural Law. (Why? Because, unlike polygyny, it eliminates the essentials of fatherhood. "Man is the animal who knows his grandfather." But in a polyandric society he does not even know his father.[7]) Here it must be remarked that polygyny does *not necessarily* debase women. Thanks to the concubines China was practically polygynous, but the mother-in-law and the *Tai-Tai* (the "first wife") ran the home where the men frequently were only some sort of guests. Many Empresses actually ruled, and if we think of the influence the Sung Sisters had in our time, we would look in vain for anything similar in Japan. The (high caste) Indian "polygamy" was different from the general Moslem one and *purdah*, the seclusion of women in the *zenana*[8] was not originally Indian, but imposed by the Moslem conquerors. (India has *basically* a matriarchal culture.[9]) The existence of women in certain (though not all) Islamic harems, characterized by ignorance, vice and boredom, was truly miserable. And, significantly enough, polygyny fosters not only female but also male homosexuality, above all if the moral and intellectual level of women is artificially kept very low. The male thirst for a genuine partner then becomes directed towards other men.[10]

In addition, polygny has also a purely socio-economic aspect, especially in Africa where women are the working animals and their physical strength is even greater than that of the males. Missionaries are sometimes accused by the natives of being "inhuman" to women because in a Christian marriage the poor single wife has to do the

work of three or four. I will never forget a Kigongo woman boarding the "Congolia" in Brazzaville to cross the Zaire-River: she was carrying a huge basin with a pyramid of pineapples on her head, and a whole group of men had to help her to put it down. I tried to lift that burden and found that I could raise it barely 3 inches from the ground for about 5 seconds. When I asked the men how they could carry such a load they laughed loudly. "We? We are men, we could never ever carry this!" Thus muscles and the ability to bear many children are all-important with African women.[11] In very large areas (West, Center, East) they are therefore deprived of their capacity for sexual fulfillment by undergoing an operation for which circumcision is highly euphemistic.[12] This kind of barbarism was fanatically defended even by such a "progressive" statesman as the late Jomo Kenyatta. In our civilization the male appears as the provider, but this is not universally the case. In a large part of Guinea only the women are traders. Actually, in "a state of nature" (we use quotes since, in relation to man, this state does not really exist) the women are not only the more active and ambitious, but also the harder workers. Agriculture was originally the domain of women,[13] whereas the men were hunters (a more exciting and less backbreaking occupation!). Men are the lazy sex, the impractical dreamers, the thinkers. Also they are the less natural, the more artificial ones. Their aggressiveness is undeniable, but it is intermittent.[14]

Yet, apart from the division of labor, what is really the basis of marriage? In most societies marriages are arranged, if not decreed by the father, by both parents, sometimes even by a patriarchal grandfather. We have become accustomed in relatively recent times to seeing marriages contracted on a basis of infatuation, of Love with a capital "L," which, in turn, might be of either a predominantly erotic or sexual nature. Let us say it once more: Eros seeks union, sex *gratification.* Needless to say, especially in the male (the artificial, badly integrated creature) Eros and sex can be utterly apart. The question remains whether Eros, sex, or both together can form a sound foundation for marriage — although in true erotic love there is a longing for permanent closeness, for marriage.[15] Sexual attraction, however (unlike erotic yearning) does not take the entire person and personality into account, but only one aspect of it. And even Eros cannot be trusted.[16] Marriages arranged by "elders" often had the advantage of being based on sound, objective judgment — a factor notoriously lacking in people who are in love. Therefore one should

not wax indignant at the *Catechismus Romanus*, the key product of the Council of Trent, which stated that the consent of the parents is indispensable for a marriage (Part II, viii, 32). Admittedly, this has to be understood in the spirit of the times. Still, there is no reason to believe that in the past (or even in other regions) marriages were and are unhappier than they are in the West today. First of all, the Church then saw in the marriage contract the concurrence of the wishes of the contracting partners and their families because without the "yes" of the bridegroom and the bride no marriage (sacramental or otherwise) was thinkable; to have been patently *forced* into a marriage can be the cause for an annulment in the Catholic Church. Secondly, even in our allegedly individualistic age, marriage is not only a union of persons, but also of families.[17] English is apparently an unromantic language since it speaks of fathers-in-law, mothers-in-law, and so forth. (In French *beau-pere, belle-mere* etc., sound much nicer.) On the European Continent the parents-in-law are usually addressed as father and mother. Marriages between members of hostile or incompatible families have always created grave problems — not only in the age of Romeo and Juliet.[18]

All this does not lesson the importance of choosing the right partner "for life," marriage being a relationship "unto death," which means that one partner will bury the other.[19] In the light of this thesis, marriage leads into the next life.[20] Of this the Jews were conscious when they asked Jesus how a woman is going to fare when, having been widowed several times, she will meet several husbands in Heaven.[21] We know what Jesus replied and yet, remarriage even after death of one partner remained a problem among Christians. Tertullian denied its licitness,[22] and in the Eastern Church it is celebrated with less ceremony than the first marriage. Actually the Christian system is one of "successive polygamy."

The real difficulty in choosing the right partner lies in the fact that he (or she) is a radically different person (due to the profound differences between the sexes) with qualities and gifts missing in the other partner, but at the same time having the same wavelength and last, but not least, having the same or the nearly same religion, because religion alone gives an answer to the wherefrom, the why, the whereto, the how. The partner ought to be of the same social layer, the same nation, should have similar interests and tastes, customs and habits. In a deep love men and women seek a complimentary partner and — paradoxically enough — up to a point also *themselves*, that is

to say: otherness as well as sameness. To make matters even more complicated, we must remember that these partners are not static, but change in time, which compels them constantly to adapt and readapt their relationship.[23]

I firmly believe on the basis of countless talks and interviews that erotic love is primarily (though not exclusively) eidetic, which means visual in a wider sense. It is prompted directly or indirectly by a preconceived image of the ideal partner which psychologists, above all Carl Gustav Jung, have called the *anima* (in the male) and *animus* (in the female mind).[24] The question whether the exact nature of *animus* and *anima* is inherited or acquired at a very early age, so far, has not been solved. I tend to believe on good evidence that it has its roots in impressions going back to earliest childhood. Every man and woman has his or her "type," an ideal provoking erotic love. Men especially can have another, separate one, conditioning sexual attraction only. (Keyserling, however, rightly thought that to marry merely for reasons of sexual attraction was the basest thing one could do.[25] It, indeed, amounts to building on a swamp, whereas to make Eros the sole criterion means building on sand. As a matter of fact, the choice of the right partner sometimes is also determined by analogies one draws between himself and his own father or mother, which can result in a most fallacious decision.[26] No doubt, sentiments directing this crucial stage in life can be just as fatal as clever calculations, so we should not be surprised that Thomas Aquinas in this situation stressed divine enlightenment as a result of fervent prayers.[27])

In the domain of "attraction" we encounter nevertheless an important difference between the men and women. The male *anima* is far more flexible than the female *animus*: this means, in concrete terms, that a man can fall in love with a larger variety of women than *vice versa*.[28] As a rule one very rarely comes across the person conforming totally to one's *animus* or *anima*, but if one does, it is "love at first sight," the *coup de foudre*. Usually falling in love is a process lasting days, weeks or even months during which the *animus-anima* is "readjusted." A woman's *animus* being, as a rule, far more rigid, her adjustment is rarely total. This is one of the many reasons (as we know from European polls) why a much greater percentage of men than women is happy in their marriages.[29] The sad result is, that too many women try to "reeducate" their husbands, i.e. to bring them in line with their *animus*-picture. Since a woman's approach is

usually indirect, she will try — vainly — to reach her goal by minor remarks, certain facial expressions, imprecations, sighs or even tears. Now, pedantry is a female rather than a male vice for the simple reason that women view people, situations, and events not in an "overall" way but, rather, in detail. (Not in vain is the ideal secretary a woman — which has nothing to do with a supposed female "inferiority," but is due to her specific gifts.) Hers is a world of concrete facts, not of dreams and abstractions. And one can imagine how the untidiness of the male (especially of the man of genius, the artist, the "bohemian") grates on her nerves.[30] One has to see these drives in connection with a wife's disappointment in her *animus*-expectations. Thus, as a result, the majority of men marry their "governesses": a true male, however, does not mind (it might even amuse him), but a pedantic man does. And this then endangers the marriage.[31]

The only too well known lack of complete marital harmony can be observed in many domains. A grave obstacle in the marital dialogue is the female inability to express feelings and other non-concrete notions clearly. In a sense, women can, as we said in our earlier essay, be masters of the word and the word is woman's greatest artistic strength. In the literary domain women have, indeed, competed successfully with men, and yet they frequently fail in expressing their thoughts succinctly. This irritates "rational" man and leads to the desperate female complaint: "You simply don't want to understand me!"[32] Significantly enough, even outstanding women writers have great difficulties in describing not so much the way men act, as how their minds work.[33] Perhaps it is the additional male chromosomatic "Y" which women lack.

If one knows all the bio-psychological difficulties in marriage, one truly wonders how marriages can, nevertheless, succeed. Unfortunately the male-female differences are not confined to the simple domestic domain of material orderliness. There is also the subtler problem of mutual intuitive understanding. Living together is a delicate matter because frequently (female) intuition is pitted against (male) reasoning. Both are subject to errors, the ones committed on the basis of intuition being usually the graver ones. Still, startlingly correct insights, too, are sometimes arrived at through intuition.[34] Reason does not require definition, whereas intuition — which in all likelihood belongs to the "animal order"[35] — cannot be so easily analyzed and reduced to a scientific formula. A

Chinese proverb says that the first advice of a woman is the best, her final one the most fatal.[36] The reason for this is probably the fact that immediate reactions are intuitive, and intuition is certainly better developed in women. It cannot be trained the way reasoning can, although practice and a certain neglect of the intellect undoubtedly lead to a heightened capacity in this field.[37] These differences do not make women good companions for men in the sense of comrades, of "pals." From childhood on many men try to make playmates of girls, an effort which rarely meets with success. We do, as we said before, seek a certain measure of sameness in our partners and, in a way, we want them to be mirrors of ourselves. For a man the ideal marriage partner is therefore not a hundred-percent female but, rather, one endowed with a few "statistically" male qualities[38] — and *vice versa*. And since the partner should have qualities and abilities in harmony with one's own ambiance (family, class, race, speech, educational level, manners, etc.) a certain "incestual" element comes into play in the ideal choice. A dashing, headhunting Orang Kubu from Borneo is not an ideal match for a Vassar graduate (however emancipated).

We have to face the fact that men and women live in different "worlds" — psychologically as well as physically. It must be borne in mind that women bring into marriage their bodies — which might sound like a commonplace and a banality, but the fact remains that to her it is the most precious "possession" because she identifies herself with her body much more than a man does: she is more emphatically soul *and* body, last but not least because she is nearer to nature to which her body is tied in so many ways.[39]

It has been said that woman is essentially corporeal while the male leads his body on a leash like a little dog.[40] Therefore sexual life, in a way, means more to her than to man and yet she is normally the more frustrated one in this domain — one of the many contradictions and confusions caused by the Fall. In all likelihood her orgasmic capacity considerably exceeds that of man and yet her chances to fulfill it in a normal, fertile sexual act are far smaller than his — all of which has created in our days a new set of neurotic tensions. There is little doubt that in the history of human evolution the female orgasm appears at a very late date; it is non-existent in the animal kingdom.[41]

We have to face the hard fact that, sexually, men and women are ill adapted to each other; their sex rhythms are just as different and as badly synchronized as their whole life rhythms — all of which, naturally, create marriage difficulties in a fallen world. Still, woman's

commitment in the sex act, her "surrender," is far greater than man's, and greater also is its significance, last but not least because it can lead to motherhood which has a far greater "immediacy" than fatherhood has (which, in turn, has a greater "transcendental" importance).

Men are frequently not conscious of all these facts; especially in our age they tend to treat women as "identical partners," as "she-men" — the name given to Eve *before the Fall.*[42] Only through the Fall did woman become the "weaker sex," but precisely because of this she ought, according to Scripture, to be respected, treated with sympathy and affection.[43] Today it is fashionable to speak about woman's biological superiority (and this in spite of the fact that women are more frequently ill than men), but it is merely medical progress which has sharply reduced the hazards of childbirth. In the Neolithic period women were at the time of their deaths on the average 22, men 29 years old![44] Even up to the early 19th century the (frequently widowed) rulers often had several wives in succession. Francis II, Holy Roman and Austrian Emperor, Napoleon's opponent, who ruled from 1792 to 1835, was married four times. Still, women have not only frailties, but also specific strengths (as men have) which indicates that they have to play frequently (though not always) different roles; to ignore this would produce dire results.[45] These would be most obvious in certain extreme cases, if, for instance, women were given combat duty in a war. If this became a reality, the wars would become sado-masochistic sex orgies.[46] Chivalry, which is partly a piece of our Christian medieval heritage, also has its place in marriage. And if, as Scriptures insist, the man is the head of the family, then the wife is its heart — which again brings us to the interplay of reason and intuition. But there ought to be between husband and wife a mutuality which Otto Piper has expressd with the man's declaration to his wife to the effect: "I am for you what I am and what I do," whereas she confesses: "Through you I become what I am." [47]

Still, one should not forget that marriage means the coordination of personalities and thus, in spite of the greatest intimacy imaginable — the sexual act — diplomacy, tact and consideration for the partner's different personality, for all his foibles, predilections and weaknesses, are of paramount importance. The bare realization of rights and duties is not enough. The partners have, in addition, also to realize the otherness of each other's sex with all its sometimes comic, irrational and irritating aspects.[48] Men must be aware that vanity is

essentially a *male* vice; women are not vain: they are eager to please, which is a very different thing. (The height of typical male vanity would be to dispense entirely with the praise or admiration of others while cultivating a — perhaps secret — boundless enthusiasm for oneself.) But the eagerness to please shows woman's tragic dependence on the reactions of others. We have heard the complaint: "The man has women to lean on, but women are alone." The wife needs the husband's encouragement, his attention, his *time*, probably much more than he needs hers.[49] Just because she is "other-oriented" she is afraid of solitude and, if neglected — "neglected" is the right word! — she will crave for other sources of affection. Very often a son will replace the husband in her heart, which, of course, impairs the marriage.[50] But the real cancer in so many marriages are lies which inevitably destroy mutual confidence and consequently the marriage, which ought to be a fortress, becomes a house divided against itself.[51]

A perfect marriage *can* create an ideal blend of sex, Eros, affection, friendship and charity, with the result that the boundaries between these drives and loves become completely blurred and a synthesis occurs.[52] However, when we try to evaluate these elements as to their importance, we must probably put the emphasis on friendship because it is far more related to loyalty and permanence than to either Eros or sex.[53] Sexual desires have their natural ups and downs, and Eros, too, lacks steadiness. It has been said that human beings are by nature, not monogamous but polyerotic.[54] Eros is a fickle god, "he is notoriously the most mortal of our loves," as C. S. Lewis put it.[55] And, indeed, if we hear of two people deeply in love erotically and, after some time, are told that they have become indifferent to each other, we merely react with a shrug. Friendship, on the other hand, we regard differently, more seriously and if we notice that two real friends have ceased to be friends, we are rightly shocked; we probably will inquire how this happened, and which of the two is guilty of the break. Hence also the firm but not always obvious connection between marriage and friendship. What lovers who intend to marry should, above all, ask themselves is this: *Can this man, can this woman, be my friend for a lifetime*?[56] It is precisely in the light of marital friendship that a divorce assumes its depressing, "un-Christian" aspects.[57]

Idem velle atque idem nolle, ea demum firma amicitia est, is the definition of friendship given to us by Sallust.[58] In other words: in a friendship there must be an identity or a great similarity of tastes,

convictions and purpose. Such also must have been the uniting bond in the loves of the great saints.[59] All this means, however, that an integral part of the education for marriage (which men need just as much as women) is to learn to like, to love, even to admire the opposite sex and to cultivate friendships with it.[60] An old Viennese joke tells us of a naive young lieutenant serving under Francis Joseph who used to say: "I am enormously lucky with women — they all enchant me." Lucky Lieutenant! And lucky the girl who finds nearly all men wonderful!

Another exceedingly important aspect of marriage must be discussed here: procreation — the *creation* of children. They are the results and objects of our love and as such give marriage its plenitude. They can make a dull marriage happy, and the sorrows and anxieties they inevitably cause might draw their parents nearer to each other. As Unamuno said: "Bodies are united by pleasure, but souls are united by pain."[61] Yet such are the pitfalls of Original Sin that the offspring sometimes become an occasion for quarrels and dissent in a marriage. Still, a childless marriage remains a torso and the inability to have children can be a real cross, though sometimes happily alleviated by adoption.[62]

All in all, marriage is a genuine adventure and should be viewed and appreciated as such. But an adventure requires courage and determination including steadfastness. Paradoxically, marriage receives its deepest existential significance in advanced age when the specter of a (temporary) separation through death is casting its shadows, when the children need no longer be cared for and the sexual drives diminish.[63] This is the time when husband and wife need each other more than ever and the hope for an eventual reunion beyond the grave becomes strongest. Yet, precisely because marriage is an adventure in which love as the "giving of oneself" plays a crucial role,[64] it is such a total and dramatic experience. The life-fulfillment of two persons is at stake. And since our whole existence is marked by the two elements of "incertitude and risk"[65] there is nothing extraneous in this adventure, nothing that does not organically belong to our existence. Its success or failure, however, is of the utmost importance in our lives. And this all the more so as it is being offered to us as a "road to sanctity," as a means to save our souls.[66] Let us, then, terminate this essay by quoting two men, one a Jewish psychologist, the other a man of literary genius not bound by ecclesiastic dogma.

Oswald Schwarz wrote in his famous book *The Psychology of Sex* on marriage:

> One thing must be stated at once and with great emphasis: contrary to the commonly held belief it is not love. What else? It is the feeling of belonging to another person more closely and more completely than in any other human relationship, it is the sense of being welded together with this other person into the unit of the "couple" or the "We"; the two mythical "halves" have found each other for ever. These two people are transformed down to the core of their personalities, irretrievably. That applies to the man as well as to the woman. Once a husband he can never become his previous self, even if the marriage has been legally dissolved or broken up by the death of his wife. This is the psychological fact underlying the Catholic concept of the sacramental nature of marriage and the "indelible character" of a married person. On the psychological as well as on the spiritual level marriage is indissoluble.[67]

And it is D. H. Lawrence, who has written in an essay entitled "A Propos of Lady Chatterley" the lines, probably surprising to some of our readers:

> It is marriage, perhaps, which has given man the best of his freedom, given him his little kingdom of his own within the big kingdom of the State, given him his foothold of independence, on which to stand and resist the unjust State. Man and wife, a king and a queen with one or two subjects, and a few square yards of territory of their own; this, really, is marriage. It is a true freedom because it is the true fulfillment for man, woman and children.
>
> Do we want to break marriage? If we break it, it means we all fall to a far greater extent under the direct sway of the State. Do we want to fall under the direct sway of the State? For my part, I don't.
>
> And the Church created marriage by making it a servant, a sacrament of man and woman united in the sex communion, and never to be separated, except by death. And even when separated by death, still not freed from the marriage. Marriage, so far as the individual went, eternal. Marriage, making one complete body out of two incomplete ones, and providing for the complex development of man's soul and woman's soul in unison, throughout a life-time. Marriage sacred and inviolable, the great way of earthly fulfillment for man and woman, in unison, under the spiritual guidance of the Church.[68]

NOTES

1. Thus the "Y" in the male cells was long suspected, but actually found only in 1958. The differences in the blood supply of the male and female brains were established only in the early 1970's. Cf. *Frankfurter Allgemeine Zeitung*, Dec. 19, 1973, p. 35. A good systematic account of male-female physical differences can be found in Lucius F. Cervantes, S.J., *And God Made Man and Woman* (Chicago: Regnery, 1959). In this connection it should also be borne in mind that the female form is the matrix. The male sex is an "additional" development. Cf. Leon A. Palik, "Sexuality and Endocrine Glands," in *Pirquet Bulletin of Clinical Medicine*, Vol. XXIII, Jan.-Feb. 1975, pp. 3-7. This means (symbolically) that the male can "remember" the female.

2. We would also call "affection" the love of the subjects for the *pater patriae*, the monarch and his queen. It is not easy for anybody who grew up in a republican framework (where purely constitutional questions are paramount) to understand the world of monarchical sentiments. It is based on the concept of the nation as a large family. A republic can always be established "overnight": a monarchy needs a

long period of a growing mutual familistic acceptance.

3. The main reason for Luther's skepticism towards the religious significance of marriage lies in melancholic anti-sexualism and his anti-eroticism. Thus we get from him such pessimistic outcries as: "We might easily love a sack, but not as easily a wife. Only a very pious man or woman could without effort love the spouse and the children from all their heart." Cf. *Kritische Gesamtausgabe* (Weimar: Bohlau, 1914), Vol. III, p. 30. There are many such remarks (and worse ones), but very much contradicted by the letters to his wife whom he loved dearly.

4. Wherever we find the influence of the French Revolution, the civil marriage *preceding* a Church marriage has been made obligatory. Bismarck introduced it in Germany, the National Socialists brought it to Austria. Priests in these countries who would perform a marriage ceremony without a previous state marriage could be jailed.

5. It should be noted here that although religious Jews clearly recognize the Fall they have not developed a "theology" concerning Original Sin as Christianity has.

6. Calvinism hardly accepts it, but Luther did. Cf. Franz Xaver Arnold, *Zur Frage des Naturrechts bei Martin Luther* (Munich: Max Hueber, 1947).

7. There is polyandry in the Tibet. It also should be noted that tribes exist where biological fatherhood is not known at all: in the eyes of the Trobrianders — as Bronislaw Malinowski told us in *The Sex Life of Savages* — there is no connection between copulation and procreation.

8. Hinduistic India, however, was fundamentally monogamous. Yet kings, maharajas and other persons of rank frequently had a plurality of wives. Cf. Abbe J. A. Dubois, *Hindu Manners, Customs and Ceremonies* (Oxford: Clarendon Press, 1959), pp. 207, 210.

9. India as *mataram* is the "Motherland," not a "Fatherland." There is, in other words, nothing revolutionary about leading female politicians in India.

10. Yet the Japanese male in search of a genuine partner frequented the *geishas* ("artists"), who were highly educated, polished and accomplished women. (They were and are not *joros*, prostitutes.) The increasing education of Japanese women makes the geishas slowly superfluous.

11. This is even more important to themselves. Hence the difficulty in getting African girls to pass the final high school examinations. They cannot wait to get married in order to have children. And to practice contraception to them is the end of love as well as of marriage. Cf. Michael Croce-Spinelli, *Les enfants de Poto-Poto* (Paris: Grasset, 1967), p. 278.

12. *Ibid.*, p. 274. See also Fawn M. Brodie, *A Life of Sir Richard Burton* (London: Eyre and Spottiswoode, 1967), pp. 110-111; Hans Leuenberger, *Die Stunde des Schwarzen Mannes* (Munich: Biedersrein, 1960), pp. 196-200.

13. This is a tenet not only of the *Kulturkreislehre* of Wilhelm Schmidt S.V.D., but also a number of other ethnological schools.

14. This is also characteristic of the male sexual life. The male lacks permanence, as he is a "torn person." Cf. Nicholas Berdyayev, *Von der Bestimmung des Menschen,* tr. J. Schor (Bern: Gotthelf, 1935), p. 320. Women, Berdyayev, insists, have a "wholeness" lacking in men.

15. Cf. C. S. Lewis, *The Four Loves* (London: Geoffrey Bles, 1960), p. 130.

16. Very good on this subject is Otto A. Piper's *Die Geschlechter: Ihr Sinn und ihr Geheimnis in biblischer Sicht* (Hamburg: Furche-Verlag, 1954), p. 187. This is a Lutheran theologian; the same view is expressed by the Catholic philosopher and theologian Josef Pieper in his brilliant *Uber die Liebe* (Munich: Kosel, 1972), pp. 150-154.

17. This to me was most evident when talking to an Italian Communist without religious beliefs who was opposed to divorce; the good man told me that he could well imagine getting a divorce from his wife, "but what should I do with my in-laws? I just can't meet them in the streets, lift my hat and say '*buon giorno, signore, signora*!' They are to me father and mother!"

18. Herbert von Bismarck, the son of the "Iron Chancellor" was not permitted to marry the girl he loved; her family was bitterly opposed to Bismarck (as most Prussian Conservatives were).

19. Herein lies a tragic aspect of marriage: Gabriel Marcel insisted that to love means to say: "Thou shalt never die."

20. Pope Paul VI was of the conviction that marriage and family are transcendent, are founded on earth but due to their "vertical character" will "penetrated by divine love get their final consummation in a form we cannot imagine" in Heaven. Cf. Jean Guitton, *Dialogues avec Paul VI* (Paris: Fayard, 1967), p. 327.

21. Cf. Matth. 22:23 ff.

22. Tertullian, however, was a heretic, the intellectual leader of the Montanists. Interestingly enough in Spanish villages, especially in Castile, the remarriage of widows, but also of widowers is often violently protested. Cf. Nina Epton, *Love and the Spanish* (London: Cassell, 1961), pp. 172-173.

23. Jean Guitton, who also insists that love can be the fruit of marriage, emphasizes the mobility of married love. Cf. his *Essai sur l'amour humain* (Paris: Aubier, 1948), p. 101.

24. Cf. C.G. Jung, *Wirklichkeit der Seele* (Zurich: Rascher), 1947, *passim*. The *animus-anima*-concept has been adopted by a large number of psychologists and psychiatrists.

25. Cf. Hermann Graf Keyserling, *Amerika, der Aufgang einer Neuen Welt* (Stuttgart-Berlin: Deutsche Verlagsanstalt, 1930), p. 324.

26. Cf. Friedrich Freiherr von Gagern, *Eheliche Partnerschaft* (Munich: Manz, 1965), pp. 138-139.

27. Cf. St. Thomas Aquinas, "De Eruditione Principum," *Opuscula Theologica*, Book V, chapter 28. In Bernardin de St. Pierre's second classic *La Chaumiere Indienne* the last sentance in the book is: "*On n'est heureux qu'avec une bonne femme*" — "one is happy only with a good wife."

28. This is one of several reasons why polyandry is rarer than polygny and why men, in all likelihood, fall more frequently in love than women.

29. Investigations in Germany and Austria, however, have also shown that the most important form of happiness for men does not lie in their careers: it is *Familiengluck*, family happiness (79%!). In the light of these realizations it is worth mentioning that Jean Guitton considers that in France only by 1900 the love matches started to prevail. Cf. his *Ecrire comme on se souvient* (Paris: Fayard, 1974), pp. 58-59. "Love will follow marriage" was the general notion. This idea is not at all rejected by the Lutheran theologian Helmuth Thielicke in his *Theologische Ethik* (Tubingen: J. C. B. Mohr-Siebeck, 1964), Vol. III, Part 3, p. 587. The Catholic Dr. Rene Biot in his *Education de l'amour* (Paris: Plon, 1951), pp. 230-231 pleads for a "marriage d'amour raisonnable."

30 C. S. Lewis, *op. cit.*, p. 87.

31. Keyserling thought that men are by nature untidy. Cf. his *Sudamerikanische Meditationen* (Stuttgart: Deutsche Verlangsanstalt, 1932), p. 228. This characteristic is one of the many sources of female unhappiness. On women's diminished satisfaction in marriage cf. also Kenneth Walker, *A Physiology of Sex* (Penguin 1949), p. 83. Hence there is no history of "divinization" of man by women, as there is one of woman by men. Men might be loved by women, but they hardly are to them "adorable creatures." It also has been said that no man is a god in the eyes of his valet. This is even more true in the case of the husband judged by his wife: marriage, indeed, is a man's school of humility.

32. Cf. Francois Mauriac, *Le mystere Frontenac* (Paris: Grasset, 1933), p. 162, on the frequent inability of women to "communicate."

33. A reflection of this you find in the excellent novel of Rosamund Lehmann, *The Source and the Ballad* (London and Paris: Albatross, 1947), p. 256.

34. My father was a pioneer in X-ray and radium research. I remember my mother who had not the slightest scientific background, preaching to him about the dangers he exposed himself to. My father was always greatly irritated, contradicted her, but my mother proved terribly right.

35. Bees, not only sheep and dogs, are very well known to desert Alpine villages before a mountain-slide could destroy them.

36. Cf. Aurel Witteck, *Parallelen des Geistes* (Prague: privately printed, 1937), p. 116.

37. Before the last war I knew some *old, illiterate women* in Hungary who had practiced intuition all through their lives to a degree that they had a "second sight": they could tell total strangers all the details about their private lives. As to forecasts, however, they were mostly guessing.

38. All sex qualities are merely statistical: there are loquacious men, taciturn women, etc., etc.

39. On female body-connectedness see also Erich Neumann, *Die Psychologie des Weiblichen* (Munich: Kindler, 1975), pp. 14-22.

40. Hence clothes to women are also more important than to men. They are, in a way, an exteriorization of their bodies. (This, however, is less apparent in civilizations where women are systematically repressed.)

41. On this subject cf. Irenaus Eibl-Eibesfeldt, *Liebe und Hass* (Munich: Piper, 1976), p. 179. Even such a feminist like Simone de Beauvoir is skeptical about the importance of female orgasm. Cf. her *Le deuxieme sexe* (Paris: Gallimard, 1949), Vol. II, pp. 160-161.

42. In Hebrew: *ish* is man, *ishsha* — woman. The vulgate speaks about *virago*, the German translation of *ishsha* is *Mannin*. Only after the Fall is the woman's name Eve (*Havah*) which means "life-giver." On the effects of the Fall cf. also Blaise Pascal, *Pensees*, 434 (131) and the outstanding analysis by Romano Guardini in his *Die Existenz des Christen* (Munich: Schoningh, 1976), pp. 99 ff.

43. Cf. I Peter 3:7.

44. Cf. D. Kahlke, *Die Bestattungssitten des donaulandischen Kulturkreises der jungeren Steinzeit* (Berlin: Rutten und Loening, 1954), Vol. I, p. 149.

45. An excellent analysis of the results of total female "emancipation" can be found in George F. Gilder, *Sexual Suicide* (New York: New York Times Book Co.: 1973). Another good book refuting "feminist"

claims is Phyllis Schlafly's *The Power of the Positive Woman* (New Rochelle: Arlington House, 1977).

46. Various European television stations showed in 1978 an American film in which the training of women for combat duty was featured. Some of the ladies were interviewed — with bloodchilling effects. The immediate reactions of the viewers was that this film must have been produced in the Soviet Union as a piece of clever propaganda and "planted" in the West.

47. Otto A. Piper, *op. cit.*, p. 75.

48. The "comic" is nearly always the result of a juxtaposition of the commonplace and the sublime. The number of jokes derived from the various relations between the sexes is therefore unlimited. Rudolf Allers in his *Sexualpadagogik* (Salzburg: Pustet, 1934), p. 264 tells us bluntly that "the greatest difficulties in marriages stem generally from the fact that the partners know nothing about the characteristic qualities of the opposite sex."

49. Especially in the United States an endless number of films has been produced in which the total dedication of a man to his work (and the little time left for wife and children) has provided the dramatic background.

50. Cf. Jean Guitton, *Essai sur l'amour humain*, p. 119. He says of the excessive affection of the mothers for the son that it "demands no special efforts of reciprocal adaptation" (as does the wife-husband relationship).

51. Cf. Joachim Bodamer, *Schule der Ehe* (Freiburg i. Br.: Herder-Bucherei, 1960), p.35.

52. This "unity of the marriage relationship" creating nearly a single person of the partners has found a more precise expression in literature than in scientific works. Thus for instance in Marcel Jouhandeau's *Monsieur Godeau marie*. In this connection it would not be legitimate to forget the carnal aspect of marriage entirely. The Catholic Church never did. Thus in the *Rituale Romanum*, Tit. VIII. Ch. 8 we find a *Benedictio thalami*, a "Blessing of the Marital Bed."

53. Nietzsche, too, was convinced that a man who has the talent for a good friendship will also get a good wife, "because the good marriage rests on the talent for friendship." Cf. his *Menschliches-Allzumenschliches*, No. 378. (His condemnation of "love matches" can be seen in No. 389.) Montaigne was of a similar opinion, saying that a good marriage rejects "love" and "tries to assume the character of a friendship." Cf. his *Essais*, Livre. 3 Chapter 1. Thomas Gilby O.P. tells us that "distributively marriage is a sacramental relationship of personal friendship. Procreation is the primary purpose of the institution which directly concerns the race, mutual sanctification is the principal purpose of the companionship which directly concerns persons." Cf. his *Community and Society* (London: Longmans, Green, 1953), p. 153.

54. Kenneth Walker, *op. cit.* p. 94. Charlotte Kohn-Behrens believes that a) men are more influenced by Eros than by sex, and b) that they tend rather towards physical than psychological infidelity. Cf. her *Der bedrohte Eros* (Munich: Biederstein 1960), p. 39, 42. Kampmann citing Aurel Kolnai, similarly, insists that the male infidelity is motivated by "experience," its female counterpart — by a person. Cf. Theoderich Kampmann, *Anthropologische Grundlagen ganzheitlicher Frauenbildung* (Paderborn: Schoningh, 1947), Vol. II, p. 284.

55. C. S. Lewis, *op. cit.* p. 130.

56. He who wants to read a brilliant dialogue in the best Gallic manner between a young man (though not madly in love) and the father of the girl he wants to marry should peruse Robert Poulet's brilliant *Contre l'amour* (Paris: Denoel, 1961), p. 63.

57. The reader should bear in mind that Christian *orthodoxy* which includes the orthodoxy of the Reformation faiths always opposed divorce. This is not only true of the Anglican community, but also of Lutheranism. Cf. for instance, Otto A. Piper, *op. cit.*, p. 224. Luther had "extremist" views on that subject. Cf. his "Commentary on Matthew XIX" in the *Erlangen Edition* (Erlangen, 1850), pp. 140-142. Compare also with the essay of Heinrich Baltensweiler, "Die Ehebruchsklauseln bei Matthaus, V. xxxii und XIX, ix" in *Basler Theologische Zeitschrift*, XV, No.5 (Sept.- Oct. 1959), pp. 340-356. The (Reformed) author denies quite convincingly that the term *porneia* should be translated with "adultery."

58. Cf. Sallustius, *Bellum Catinilinae*, XX. 4. "To want the same things and to reject the same things, that, indeed, is genuine friendship."

59. That saints truly loved each other, there can be no doubt. The most celebrated cases are those of Saint Francis and Saint Clare, Saint Francis de Sales and Saint Jeanne de Chantal, Blessed Jordan of Saxony and Diana D'Andalo, perhaps even Saint Bernard of Clairvaux and Ermengard of Brittany. Saint John of the Cross carried a picture of Saint Teresa over his heart, but destroyed it in a spirit of sacrifice.

60. In the 17th century many debates on the interrelationship between love and friendship took place in France. Cf. Nina Epton, *Love and the French* (London: Cassell, 1959), p. 162. On the friendship between marriage partners cf. also Hans von Hattingberg, *Uber die Liebe: eine arztliche Wegweisung* (Munich-Berlin: Lehmann, 1940), p. 275 and Ida Friederike Gorres, *Zwischen den Zeiten* (Olten: Walter, 1961), *pp. 53-54.*

61. Cf. Miguel de Unamuno, *El sentimiento tragico de la vida* (Buenos Aires: Coleccion Austral, 1945), p. 118.

62. To the old Jews the four great afflictions were: leprosy, poverty, blindness and childlessness. The German sociologist Hans Giese also considered the lack of children as a "grave, torturing problem." Cf. his *Psychopathologie der Sexualitat* (Stuttgart: Enke, 1962), p. 267, and so does the Catholic theologian Bernhard Haring C.S.S.R. in his *Das Gesetz Christi* (Freiburg i. Br.: Wewel, 1955), p. 1079 where he calls it: "One of the worst crosses in marriage." Adoption, indeed, is the only way out, yet the butchery of the unborn goes on and on!

63. Cf. Jean Guitton, *Essai sur l'amour humain*, p. 129.

64. The notion that love is a "gift of oneself" we find in the writings of Gabriel Marcel, of Dietrich von Hildebrand (*Das Wesen der Liebe*, Regensburg: Habbel, 1971, pp. 80-81) and of Karol Wojtyla (Pope John Paul II) in his *Amour et responsabilite* (Paris: Societe d'Editions Internationales, 1965), p. 87.

65. This the title of a German book by the outstanding Catholic philosopher Peter Wust, one of the pioneers of Christian existentialism: *Ungewissheit und Wagnis* (Salzburg: Pustet, 1937). Wust is very little known in the English-speaking world. This volume is based on the view that man is an insecure animal, whereas the beasts are (in their instinctive existence) *animalia secura*.

66. Here we also refer to the title of an excellent book, Robert Maistriaux' *Mariage, route de saintete* (Brussels: Pro Familia and Tournai, Casterman, 1959). Maistriaux was professor at the Institut Louis le Grand in Brussels, a layman and specialist in racial intelligence. An equally profound book is Ernst Michel's *Ehe: eine Anthropologie der Geschlechtsgemeinschaft* (Stuttgart: Klett, 1948). His is an interesting thesis: Marriage should be based squarely on sex and charity, not on Eros!

67. The reader can find this passage in Oswald Schwarz, *The Psychology of Sex* (Penguin 1949, several times reprinted), p. 224. Professor Schwarz came to his conclusions not by Revelation but by his work as a scientist, methodical thinker and practicing physician. I have known personally this extraordinary man.

68. Cf. D. H. Lawrence, *Sex, Literature and Censorship*, essays edited by H. T. Moore (New York: Twaine Publishers, 1953), p. 107. The notion that marriage is not merely this - worldly we can also find in C. S. Lewis, *Miracles* (London: Geoffrey Bles, 1947), pp. 190-191. It would, however, be a mistake to think that ecclesiastics always held a high opinion on marriage. When Ozanam, the great Catholic social thinker died, a monsignor said to Cardinal Pecci (later Leo XIII) that it was a pity that Ozanam had "fallen into the trap of marriage." "Ah," said the Cardinal, " I did not realize that Our Lord established Six Sacraments and One Trap." Cf. Robert Maistriaux, *op. cit.*, pp. 48-49. The best short definition of marriage I know has been made by Ida Friederike Gorres (*op. cit.*, p. 64) who wrote: "Marriage is the hallowed ground, the sanctified place for those lovers who should, who are able, who are permitted and who are determined to take the risk of procreation."

Special Feature:

Modern Attitudes toward Life and Death

BUCKLEY: Malcolm Muggeridge has appeared on "Firing Line" more frequently than any other figure. For this I feel sure you join me in gratitude. His background and his *persona* are very well known. Perhaps only Alistair Cooke has appeared more frequently on the civilized side of television. No one has written more scintillating literary or social criticism than Muggeridge. No one more ebulliently transformed the oldest English humor magazine [*Punch*] than he. No one saw before he did more piercingly the dreadful dimensions of Soviet Socialism. No one has written memoirs at once more useful and pleasurable. And very few have traveled, with greater profusion of benefits for others, the road to Damascus. Malcolm Muggeridge's opposition to abortion is well known, less so, his conviction that the same attitude of mind that permits abortion cannot know when to curb its milleniarist passion for the perfect society. What must come, what surely will come, Mr. Muggeridge predicts, is euthanasia. In predicting this he predicts that the rationale will be contrived for eliminating those who do not live, in the haunting phrase of Justice Blackmun in the abortion decisions, "a meaningful life." In espousing this position Mr. Muggeridge appears to take also a position different from that of many who understand themselves as being intellectually in harmony with the Judeo-Christian teaching. He takes, or seems to take, a position not only that a state cannot for its own convenience condemn to death anyone even by passive action, but also the position that an individual must not decide, even anticipatorily, to choose death over certain kinds of life. Concerning that question I propose to examine Mr. Muggeridge, who toward the end of the hour will be assaulted by that able torment-person Mrs. Harriet Pilpel, about whom more in due course. I should like to begin by asking Mr. Muggeridge how he reconciles his belief that only by hating one's life in this world will we keep life for all of eternity, with his fierce devotion to prolonging one's life in this world?

MUGGERIDGE: Well I'm not exactly in favor of prolonging life in this world, but I am very strongly in favor of not arbitrarily deciding to end it. Either by the individual himself, which I think is a simple thing to do, or by society in general making the assumption that it's not worth living. I'm against that. Hating one's life in this world, of course, is to a materialist almost blasphemous. But to a person who finds the greatness of life, the joy of life, the wonder of life, in its relationship to eternity, it makes more sense.

BUCKLEY: Well, does that answer the concrete question whether the state

Wm. F. Buckley Jr. and Malcolm Muggeridge are well-known (as editors, authors, TV personalities, and much more) on both sides of the Atlantic. This interview was transcribed from Mr. Buckley's "Firing Line" TV program, which was taped in New York City on May 21, 1979, and telecast in the U.S. by the Public Broadcasting System. It is printed here with permission. "Firing Line" is produced by the Southern Educational Communications Association, Columbia, South Carolina.

should be permitted to collaborate in a decision reached by an individual to end life rather than to prolong it on terms unsatisfactory to him? I ask you that question in context of your grander position that there is something wrong with clinging to life in this earth since there is so much about it that is to be despised.

MUGGERIDGE: Well, the first part of your question, as far as the matter of the state collaborating with an individual who wishes to end his life, actually such cases of people wishing to end their life are very, very, very much rarer than advocates of euthanasia would care to admit. I was the other day with an old matron who'd worked for thirty years in what's called a terminal ward. And she told me that she could recall only *one* case in which the individual concerned, with clear faculties, a clear awareness of what he was saying, wanted his life to be ended. The usual thing is that the decision to end a life is taken on the basis of medical opinions, which of course, in themselves, often are mistaken. They are far from being always right, and they are the basis of what people looking on to someone else's life might suppose to be justification.

BUCKLEY: Well, I think what you say is true, but let's attempt to reason therefrom concretely. There is a man, you may or may not have heard about, whose name is George Zygmaniak, a young man, 21. He broke his neck, was paralyzed from the neck down, begged his brother to shoot him. Brother obliges. Shot him. He's tried for murder and is acquitted by the jury. Now, taking each one of those step by step, no one doubts that the request was made, therefore he would fall in the category — would he not? — of those who in fact intelligently sought the end of their life.

MUGGERIDGE: Only if you assume that his mind at that moment was clear, capable of making a decision like that. Say, for instance, that he had altered his will in that state of mind. It's very possible, supposing the will had been contested, that a court might have accepted the fact . . . that his faculties were not working clearly and adequately, so that . . . .

BUCKLEY: The trouble with that reasoning is it's circular. Isn't it? It's really saying if somebody chooses to do something there is reason to suppose that he is not sane in choosing to do that thing.

MUGGERIDGE: Not at all. It's saying that people under great stress, particularly connected with what might appear to be terminal illnesses, are liable to be in a neurotic state of mind, and to ask for things which, were their minds clear — and sometimes afterwards their minds have become clear. I myself know people who have shouted to die and who've lived, and who say that the one great mercy of their lives was that their shouts went unheeded.

BUCKLEY: Well, the obvious example of that would be people under torture. One knows that people under torture sometimes long for death, and when torture ceases . . .

MUGGERIDGE: Exactly.
BUCKLEY: But, let us postulate that Mr. Zygmaniak in fact desired death.
MUGGERIDGE: Well, if you postulate that, you've postulated the whole thing. If you say that, you're really postulating the whole thing. You see, I consider that someone's desire to be killed — and I've felt such desires . . .
BUCKLEY: Are natural.
MUGGERIDGE: Not necessarily, but it is not to be taken at its face value, and that the state must base its attitude toward this situation on that. If only because once you accept Mr. ah, I forget his name . . .
BUCKLEY: Zygmaniak.
MUGGERIDGE: Zygmaniak's position, you will open the way to an infinite number of abuses if only for that reason.
BUCKLEY: Well, the notion that if you prohibit pornography you will end up by prohibiting James Joyce is the so-called "slippery slope" argument, and you have used that precise metaphor in going from abortion to euthanasia. I think in fact distinctions can be made that distinguish between Zygmaniak say, and a state looking at Zygmaniak and saying, "You are not leading a meaningful life and under the circumstances we're going to order your execution."
MUGGERIDGE: Well, let me give what I think is perhaps the best illustration of what I'm trying to say. The sort of law which would enable Mr. Zygmaniak to be killed was in fact passed by the Weimar Republic. That was the first government in modern times that passed euthanasia legislation, and the arguments from which it was based were precisely . . . those of the Zygmaniak case. That decree, those regulations, without any modification, provided the basis for this Holocaust that all your viewers of the West have been watching. There was no change. The doctors operated the decree under the Weimar Republic and the medical profession continued to cooperate with the Nazi authorities in putting it into effect subsequently. I'm only using that . . .
BUCKLEY: Well, this presumes that Hitler was anxious for a juridical anointment of Auschwitz and I see no evidence of that.
MUGGERIDGE: The curious thing is that in the documents concerned — and they have been examined with great care — there is no evidence whatsoever that Hitler made any attempt to modify or extend or do anything about the existing legislation. That it provided the basis for, first of all, getting rid of what were called useless lives, in other words people who were sick, people who were senile, people who were mentally afflicted. Later, getting rid of children that had been born, like mongol children and so on. And finally, getting rid of people who were not considered to be appropriate citizens of a state that aimed at being a *Herrenvolk*. And finally, of course, still with the same procedure, getting rid of people who were racially unacceptable. I'm only using it for one reason, Bill. Because it was just that one case — the

useless life, the man who wants to end it, the state steps in and ends it for him — that opened the way to this Holocaust. And I will predict to you, without any reservation, that we are embarking upon a holocaust, a humane holocaust, which will put that other one quite in the shade... Fifty million babies were killed off last year. That's not a bad start. And when you get on to this other — already it's happening you know, old people don't want to go to homes because they think they're going to be killed, Mongol babies are disappearing from wards... When it's all worked out, that will be the result, and the justification for it will be just this case that you've mentioned. And that's why I'm against basing any sort of legislative procedure on such cases.

BUCKLEY: Well, in the first place he was tried. So the reason he was tried is that, in fact, the brother committed murder. But you have an interesting intervention — a jury refused to convict him. So there you have an adversary position between the law, which says a murder is a murder, you can't shoot somebody even if he asks you to. And on the other hand, the jury of one's peers saying that under the particular circumstances, they are not disposed to send the quotes killer to jail. Now let's not let these distinctions elude us. In the first place I think it extremely unlikely that had the Weimar Republic failed to pass its euthanasia laws, it would have stayed the hand of Adolph Eichmann. That is to say, we were faced with a government that made its own *macht politik*, and abominated, as I understand it, such sentimentalism as common law rights, which went widely unobserved at every level. But is it a fact that civilization requires you, the individual, to collaborate with doctors who seek to use modern technological ingenuity simply to keep you alive?

MUGGERIDGE: Not at all. Not at all. Nothing requires you to do that. But equally, it is clear to me at any rate, that nothing can possibly justify putting in train a process, an attitude of mind, which can only result in this ultimate determination to be relieved of the burden of looking after the ostensibly unfit, inadequate, defective citizen. As far as your point about Hitler and the Nazis are concerned, of course, it's perfectly true, they might well have proceeded to kill the sort of people who were killed in the camps, but they would not necessarily have had, which they did have, the full cooperation of the German medical profession, which they did. The doctors made no protest.

BUCKLEY: Ah, gosh. Isn't that um, a little genocidal? To say that about all doctors?

MUGGERIDGE: It's a little genocidal, but it's a simple fact. And if you read the summing up at the Nuremburg trial — because as you know, what they did in the matter of what we call mercy killing, was one of the war crimes charged against them — they were convicted of it. And if you look at the summing-up of it by a man called Alexander, who was the American representative there, you will see that this is what he states. That because this

began in humane terms, mercy killing, just such cases as you mentioned . . .
BUCKLEY: He traced the authority therefore . . .
MUGGERIDGE: Yes. And he said that there was never
evidence that the medical profession, still less psychiatrists, in whose hands the decision in these matters very often lay, made any protest whatever.
BUCKLEY: Of course . . . that argument is frequently used for tactical advantage. There are people in America who say we must not have capital punishment for people who murder their father and their mother because the next thing you know, the state having once been licensed to kill, it will send to the electric chair people who steal apples. I think that is an anti-historical argument, but I'm wondering why you think it isn't.
MUGGERIDGE: Well, I think first of all we must be absolutely clear, if we're going to make any sense of this discussion, that capital punishment, whether it be good or bad, the situation is completely different. Capital punishment is the state deciding that a particular crime is such that the person who commits it, will . . . is better killed, and that the person who commits it. . .

BUCKLEY: What if his crime is Jewishness?
MUGGERIDGE: Yes, but not, because Jewishness has not been in any civilized country a capital offense, nor indeed was it in the Third Reich.
BUCKLEY: You're saying we're progressing against civilization.
MUGGERIDGE: Yes we are. We're progressing against civilization. But anyway, if and when capital punishment is commended as a method of getting rid of Jews, the attitude that will be required will be different. But as of now what is advocated in the case of capital punishment — I'm not at this minute concerned to say whether it's justified or not — is that a state is entitled to kill a man who commits a certain kind of crime because the deterrence thereby created will prevent a worse evil . . .
BUCKLEY: Well, that's *an* argument.
MUGGERIDGE: Yes. And what I would think to most people is the decisive argument. But never for one minute is it suggested that in killing the murderer you are doing a great kindness to *him*. You're dealing with something that society demands. Now, in euthanasia, what makes it such a sick and horrible thing, is that it is purportedly done in the interests of the person who's killed. And of course in the case of abortion it's done against a child not yet come into the world, who can't be said to have done anything good or anything bad. . .
BUCKLEY: Well I'm anxious to stay on this side of abortion because . . . your views are well known on that and happen to coincide with my own . . .
MUGGERIDGE: I only wanted to get rid of capital punishment because otherwise it's going to be a red herring, you see.
BUCKLEY: Well, I raise the subject of capital punishment only to stand, or to

attempt to stand athwart your argument that if you give the state a certain power, it's going to abuse it.

MUGGERIDGE: Well, I don't think there's any parallel between the two at all. I mean, we know that it's liable to abuse it, we know in fact already it's abusing it. That cases, special cases that were considered to be obvious, people in particularly advanced stages of illness were being killed. . .

BUCKLEY: Killed? Or were not being tended?

MUGGERIDGE: Or not being tended, allowed to die. They're pretty much the same thing.

BUCKLEY: In philosophy it's all the difference in the world.

MUGGERIDGE: Yes, but for the individual concerned, if you say I'll kill you or allow you to die, I'll say, dear Bill, do whatever takes your fancy because for me it comes to the same thing.

BUCKLEY: Yes, but if you are scheduled to die, the question of how you die becomes a moral consideration, right? And the fact that you're going to die anyway is something that you come to terms with. Suppose I ask you to analyze the case of Kerri Ann McNulty. Forty-five days old, suffering from cataracts in both eyes, nerve deafness, and from severe mental retardation to the extent establishable. Parents request that an operation to clear an obstruction in her aorta not take place. Judge says no. It must take place, because the quality of life is not a proper consideration. You are unequivocally on the side of the judge?

MUGGERIDGE: Unequivocally on the side of the judge, and so would be all the best pediatricians I know, such as for instance Dr. Everett Koop, who has written a great deal on this, and who says that in handling cases of this kind which don't necessarily — the best treatment by a doctor of that calibre, is not necessarily calculated to increase indefinitely the span of life. But that insofar as he has, and he has had many experiences of the kind, worked upon and sought to maintain the life of people, of children who've been written off medically, it has been on the one hand an enormous spiritual experience for him. It has enormously enhanced the spiritual life of their parents, and more often than not, in a surprising number of cases has proved to invalidate the original medical conclusion. So that . . .

BUCKLEY: Sudden remissions and that kind of thing.

MUGGERIDGE: All sorts of things have happened . . .

BUCKLEY: Sure.

MUGGERIDGE: . . . that you can't be sure. So I think the judge was right. On the other hand, of course, a doctor who is a Christian, and who, being a Christian, has a due sense of the sacredness of human life, and of how what is the soul in people is what matters infinitely more than their bodies. Such a doctor, in deciding what is the best possible course of treatment for a grown-up person or a child, will be actuated by the well-being, the true well-being of that child, spiritual and physical. In those circumstances . . .

BUCKLEY: What authority does he have?

MUGGERIDGE: He has the authority of being a doctor. He has the authority of being a Christian. He has the authority of having taken an oath as a doctor which he proposes not to scorn and deride, but to keep. Namely, that being a doctor means looking after those who are put in your charge, totally, wholeheartedly, in conjunction with your own faith and your sense of what God wishes is their good.

BUCKLEY: But what then is the authority of the parent?

MUGGERIDGE: The authority of the parent is to, in having chosen that doctor, and they chose him, and they could have had some other doctor, they could have had one of these killing doctors, Heaven knows there are plenty of them, who'll kill them at the drop of a hat. If you say, we want this child killed, they'll do it. No difficulty finding one of them.

BUCKLEY: Well, here there was a difficulty because the matter was referred to a judge.

MUGGERIDGE: Yes, but only because by some accident it was brought up. I mean things like that are being decided by killer doctors every day of the week. And it was brought up, no doubt, before a judge, possibly even — and here I'm guessing — possibly even to have on the books a really good case that my dear Bill Buckley can quote on his program. Because that also happens. It happened with abortion. Specific cases were promoted in order that a good, a seemingly good argument might be available. So I don't know how it got into court. I think the judge is there to administer the law. And if you have judges who take a sentimental view, and say to a murderer, "Well sir, I'm terribly sorry, but I sympathize with you very deeply and therefore I'm not going to punish you," you'll make an even greater nonsense of our law than is the case now. Just before I left England a journalist came on the television and said that he had, at his wife's request, given her some poison. And she died. Well, he said of course if there's a case about this I shall plead guilty. And the judgment of the media inevitably was that he was a fine fellow. And there was no case. The director of public prosecution decided he was not going to bring a case, which means that to all intents and purposes euthanasia is now legalized. That's the position.

BUCKLEY: Well, euthanasia usually means action by the state, doesn't it?

MUGGERIDGE: Well no, it means an action by a doctor in the confidence that the state won't worry him about it. That's what it means. It means that doctors going around the wards now, and they're doing it, they see some... I tell you that these . . . take Mongol children. They're a burden on their parents. They're a burden on society. They seldom grow more than a certain age. I happen to have had something to do with them. They're enchanting kids actually. And they give a great beauty to the homes where they are. And even to hospitals, where the nurses love them. But they're disappearing. They're disappearing because this other notion, which is quite in a different

dimension. That if you've seen someone, they can't get their A-levels, or otherwise equip themselves in ways that we consider appropriate to life in this world, or can't be sexually potent or something like that — they get rid of them. And they're getting rid of them. And they'll go on getting rid of them. And one day people will wake up and find that they've created as I say a humane holocaust which won't be put on the media. It won't be put on the television screen. People won't shiver and shake over it as they did over that other. It will be particularly horrible.

BUCKLEY: I recognize the cogency of your nightmare. I am trying to question whether you are eliding certain distinctions. And I invite you to consider, for instance, the distinction stressed by Francisco de Vitoria, the 16th century Spanish Dominican and theologian, who was an early proponent of the distinction between ordinary and extraordinary means of preserving life, and insisted that ordinary means were proper and indeed required, extraordinary means not so, Karen Anne Quinlan being the most famous extant case.

MUGGERIDGE: Who is still alive, of course.

BUCKLEY: Who is still alive, the extraordinary means having been removed.

MUGGERIDGE: They all said, if you remove them she'll die, didn't they? One and all.

BUCKLEY: That's correct.

MUGGERIDGE: And they were wrong.

BUCKLEY: They were wrong.

MUGGERIDGE: You see, every time we know they're wrong it's very important to register that, because all this structure of thought is based on the assumption that they will be right.

BUCKLEY: Well, it's based on the assumption that they're right. . . I don't think it has ever been proved outside a mathematical laboratory that a prediction is always right.

MUGGERIDGE: No, or even generally right, even that is quite questionable. And the opinions of doctors have to be taken — and doctors, good doctors, Christian doctors, are very, very, very strong on this — taken with the utmost reservation. Because *they* know that they don't know, and you and I know, everybody's known of cases of people . . . who've been written off. Do you remember the Baron at the *Spectator*?

BUCKLEY: Yes.

MUGGERIDGE: Well, do you know that he's absolutely all right now?

BUCKLEY: Certainly no one was suggesting that he be . . .

MUGGERIDGE: Well, it's marvelous because he was written off, you know.

BUCKLEY: Yes, yes.

MUGGERIDGE: And he's perfectly all right.

BUCKLEY: Yep, yep. A total remission.

MUGGERIDGE: A total remission, he's absolutely okay. Doctors can't find

any traces of the illness anymore. . . It's wonderful. And I think God sends those things to us just so that we shouldn't accept these terrible arguments. But again let me say that your theologian was quite right. No doctor that I know, even the most wonderful Christian doctor, would say that in *all* circumstances, that you apply *all* possible recourses. And they say we must treat this case as it is. We must do what we know is best for them spiritually and physically. And that is not a thing on which you can base the practice of euthanasia.

BUCKLEY: Well, I agree. Now Cardinal De Lugo, the Jesuit theologian, stressed the following distinction. That you are not obliged to delay death. He gave two examples. A man who is condemned to starvation — and this, in the 16th century, was not all that unusual — is he obliged to accept a morsel of bread if it's sneaked in to him? Answer: yes, if he has reason to believe that it will be followed by somebody sneaking in another morsel of bread. No, if it's simply a one-shot relief. By the same token, you're condemned to death by burning. You have a bucket full of water. If that bucket full of water is enough to douse the flame definitively, you must use it. If it only slows down the rate at which you are incinerated, you are not obliged to use it. The usefulness of those distinctions may seem remote, yet I think that they do in fact apply to people, say, who are struck down by cancer, will live four, five, six months if they submit to certain medicine, will live four, five, six days if they don't. Do they have in your judgment the moral right to opt for the latter over against the former?

MUGGERIDGE: Yes, well I think that that's an artificial statement of the case. I prefer, if I may, to put another . . . something that's going on in our world. I'd say now, turn our minds over to the Soviet labor camps, where Solzhenitsyn was, and where various people have written and there are various testimonies, some published and some in *samizdat*. I've just been reading them and one thing they all say is this, that when you're in that situation, which is like the situation of the starving man, you have the alternative of saving your body or your soul. And if you decide to save your body . . .

BUCKLEY: You lose both.

MUGGERIDGE: You lose both. If you decide to save your soul, you'll be given strength to save also your body. Now, I see in that, much a better parable.

BUCKLEY: The strength of defiance.

MUGGERIDGE: That's right. The strength not only of defiance but of a soul. Of a soul, of being aware of that part of one, which is not just part of the animal kingdom. Not just part of time. Not just part of a socio-economic system in which we live. And it's in that people are aware of that, or doctors are aware of that . . . This idea of saying, "He's a goner, knock him off," won't arrive.

BUCKLEY: Well, you're using the active instead of the passive voice, that's

important, not that, you shouldn't do that. I have for instance myself signed a legal document prepared by a doctor/lawyer who was on this program, actually, years ago, the relevant sentences of which are: "If I become incompetent, in consideration of my legal rights to refuse medical or surgical treatment regardless of the consequences to my health and life, I hereby direct and order my physician, or any physician in charge of my care, to cease and refrain from any medical or surgical treatment which would prolong my life if I am in a condition of 1) unconsciousness from which I cannot [interesting point] recover; 2) unconsciousness over a period of six months; 3) mental incompetency which is irreversible. However, although mentally incompetent, I must be informed of the situation, and if I wish to be treated, I am to be treated in spite of my original request made while competent." Does that strike you as pagan?

MUGGERIDGE: No, I think it is . . . may I read you mine?

BUCKLEY: Yeah.

MUGGERIDGE: Well, I've written a very short one, and I've written this. The first is that I would hope that I would be put in the charge of a Christian doctor, who would take account of my spiritual circumstances and my soul, as well as of my body. And secondly, that if any apparatus should be required to prolong my life, that would be needed, or could be used for people younger, that it wouldn't be used on me.

BUCKLEY: Now why does that relieve you of the burden of your philosophical argument as iterated up until now?

MUGGERIDGE: Only because of my total confidence in the Christian faith as giving true guidance. Only because of that. And I have that confidence, and I can't really see how anything we could discuss could have any decisive conclusion, except on that assumption.

BUCKLEY: In other words it's sort of a spiritual devolution of authority.

MUGGERIDGE: Yes it is, and I believe in that. I believe in that.

BUCKLEY: Well, your document, if I understand it correctly, would be insufficient to guide a Christian doctor under the laws of most states, in the absence of a positive authority.

MUGGERIDGE: I don't think so, I don't think so, and I'm thinking here again of this Dr. Everett Koop and also Harley Smyth, two doctors, Christian doctors that I have a very high regard for, and are very advanced in their profession. I have perfect confidence that they would decide the treatment, and that their decision about that treatment would be governed by considerations of my soul as well as my body, like the men in the labor camps, they didn't err on one side or the other, they would take account of both.

BUCKLEY: But aren't you giving them the authority that it horrifies you that the state should under any circumstances exercise?

MUGGERIDGE: Yes but the state's not Christian. They're quite different.

BUCKLEY: What if you had a Christian state?
MUGGERIDGE: Well you can't. There's never been a Christian state, there can't ever be one, because power and faith in Christ are incompatible. That would not be possible.
BUCKLEY: The doctor would have power.
MUGGERIDGE: Yes, he would. But I trust him because he is a Christian. I mean, it's an act of faith, I agree with you. But it's not an act of faith that could possibly apply to any sort of temporal, or even ecclesiastical . . .
BUCKLEY: Or collective authority.
MUGGERIDGE: Collective authority. Only to the sort of a Christian who would himself feel that he was answerable to God for what he did, and for whom I would have love and respect to know that he would be thinking of my soul and my body, and I'd be perfectly content with what he would decide in the light of that.
BUCKLEY: But implicit in your mandate is that if there is a surplus of technical equipment, some of it should be used to actually keep your pulse beating.

MUGGERIDGE: It might be, depending entirely on the treatment that he advocates. But even if that treatment that he advocates included a machine, and the machine was wanted elsewhere, I want him to relinquish, even give up the treatment, if it was wanted for someone younger. You see, that's the only point about the machine, isn't it? I would hate. . .
BUCKLEY: To preempt the machine.
MUGGERIDGE: Yes, if someone younger needs it. And of course, they do very often need it.
BUCKLEY: Let's say a shortage of blood would be an obvious example.
MUGGERIDGE: Absolutely. Or a kidney machine, or a heart machine, or a lung machine. And I think this is another terrible part of the situation we're in, that these machines are there, and they are limited. And sometimes nurses have to decide these things at night — there's nobody there, and they've got to decide, does it go to A or B? And I feel the deepest sympathy with them. But that's all part of this problem. That's arisen in part because of the enormous success of doctors in their, in the development of their profession. I think also — you probably won't agree with this, in fact very few people would — but I think partly that success has been achieved because they have regarded the men they're treating as bodies, have forgotten this other dimension of the soul, and that it is part of God's way of sorting it out, that because they're only bodies, we'll arrive at this point where you say, "Well I've got five kidney machines and seven men who need it, what'll we do?" They seem to have arrived at a *reductio ad absurdum* of compassion. And all this question of euthanasia. What do you say? Well, this life, I can't see that it's useful. And again, you see, you're thinking only

of that life, not thinking of the effect on the people who care for that life. You're not thinking of what it does to them.

BUCKLEY: Well, you may indeed be thinking of that primarily.

MUGGERIDGE: Yes, and that's true too. But what it does to them is so fantastic.

BUCKLEY: You may have released them from a terrible burden.

MUGGERIDGE: But also you may deprive them of a marvelous spiritual insight almost amounting to ecstasy, which I've seen myself. People have found, in looking after a Mongol child, some sort of spiritual enlightenment and joy, which they didn't find even in looking after their beloved healthy children. You're taking that away from them because you say, "We're society, we don't want people like that. They're useless." But I don't think anybody's useless. And I think that you're insulting all creation if you say,"Well, that's a cabbage, get rid of it," or "that's a wretched little fetus developing in some person who doesn't want it, suck it out, like a, with a vacuum cleaner, chuck it away." I think when you get to that, you're getting into the Himmler world. You're getting into the Holocaust, a holocaust situation. I'm against it all, Bill.

BUCKLEY: Well, I know you are. I know you are, and I question only your insistence that as a, your teleological certitude that condition A has got to lead us to condition B.

MUGGERIDGE: Yes, of course, you must disagree with that.

BUCKLEY: It's interesting that the cases I have recited have been cases in which that entity that interposed against mercy killing was the state. But I take it you think this is a state that is quickly going to adopt different standards.

MUGGERIDGE: Well, these things are done you see in order to create. . .

BUCKLEY: In order to provoke us.

MUGGERIDGE: . . . in order to provoke us and create the precedent on which you can construct a holocaust. I mean that's got to be. I remember very well being on some, one of these wretched television panels where the first of these things cropped up in England, you know. And a judge failed to sentence someone who'd murdered a sick relative, and I was the only person on the panel who said that. And they all turned on me and said, "you've got a heart of stone, I thought you were a humane man and look at you." I said wait, wait, wait, see what comes of this.

BUCKLEY: The position of Albert Camus on suicide is by any standard intolerable, right?

MUGGERIDGE: Um hum.

BUCKLEY: Now, is it intolerable in the light of that Christian teaching which, as I began by quoting you, as having recently quoted, that life in this world is life in a veil of tears?

MUGGERIDGE: Well, I don't think so really because I think the veil of tears

image is first of all not a good image. I prefer St. Teresa of Avila who said life in this world is like a night in a second class hotel. I think that's very good. But you know you can get a bit sick of a second class hotel and look elsewhere. But I think that the denigration of this world implicit in a Christian faith is not what it seems to be in materialist terms, in fact, I would say without any hesitation that it's in realizing that life in this world could be suitably compared to a night in a second class hotel, that I suddenly realized how incredibly beautiful and wonderful it is, in that, in itself beautiful and wonderful, because it contains all these extraordinary hints and intimations of what it's related to. In other words, the earthly city of St. Augustine is a grubby place, but once you see the city of God, the grubbiness somehow seems much less, much more bearable, because you know that every single thing in it, even the grubbiness, is related to this other city of God.

BUCKLEY: Mrs. Harriet Pilpel is an attorney with Greenbaum, Wolf, and Ernst, a well-known author and commentator and activist. Mrs. Pilpel.
PILPEL: I am lost somewhere on the slippery slope. As I understand the conversation so far, the slippery slope of abortion would lead us to the slippery slope of euthanasia, but the slippery slope of war and of capital punishment would not. I would like to point out as a way of preface to my question that traditionally, in the Anglo-American system as well as elsewhere throughout the world, abortion was by and large not condemned, in fact, at one time it was not even condemned by the Catholic Church. I would also like to point out that on the anniversary of the abortion decision this year, January 22, 1979, there was a service in a church at which the representatives of many Protestant and Jewish denominations talked about the obligation, the spiritual obligation of having only children who can be properly taken care of. Bill, you talked about "meaningful life," in quotes, and you quoted Justice Blackmun in my opinion out of context, and not in relation to what he meant. When he used that expression, which you can certainly interpret by itself to mean what you mean, namely a judgmental opinion as to whether a life is meaningful. He, I do not think, meant that at all. What he meant is that traditionally we have regarded this as the beginning of a human being, and he used the short form to express that at that particular point because he'd said it so many times before.
BUCKLEY: He was making a biological point, well. . . rather a . . .
PILPEL: He was saying that biologically, sociologically, legally, traditionally, even to a great extent religiously, and in two thirds of the world today judged by area and population, this is the point at which a human being comes into existence. Therefore, without getting at all into the merits of euthanasia. . .
BUCKLEY: Excuse me, but he said nobody seems to agree on the subject. This is one of the reasons, this is one of the points that led up to his decision. . .

PILPEL: He said nobody agrees, but the law, he said, had always regarded this as the beginning of the human being. . .

BUCKLEY: Of course he was wrong.

PILPEL: No, I don't think he was wrong. . .

BUCKLEY: Because forty-seven states had anti-abortion laws. . .

PILPEL: . . . But that didn't mean they thought they were human beings. They were not homicide laws, they were not classified as murder or manslaughter or homicide, they were a special offense which was enacted into law in the middle 19th century for reasons of health, and had nothing to do with the theological basis for which some groups in the United States, and of course throughout the world, maintain abortion is improper.

MUGGERIDGE: Could I ask a question there?

BUCKLEY: Yeah.

MUGGERIDGE: It's only just this: that if it's always been accepted that life begins at birth, how extraordinary it is that you could claim in law, if you ran over a pregnant woman in the street in a car, she could claim additional damages for the loss of the child in her womb. If it wasn't a child, why the damages?

PILPEL: Well, you see the damages were to the woman.

MUGGERIDGE: No, no, to the child. . .

PILPEL: No, they were not. They were damages to the woman, that is the woman was permitted to recover damages, because, especially in centuries prior to this one, children were considered very valuable economic assets. And so she could recover for the damage to her, and she could also recover herself, as could her husband, for the loss of the child. But until. . .

BUCKLEY: You mean an incipient child.

PILPEL: For the loss of the child that would have been born if the child had been born. (Laughter from the audience.) But leaving aside . . . I think that we can agree to disagree on that question . . . but I just wanted to make clear that I'd like to know from both of you why there isn't a slipperier slope from war, such as the Vietnam War, or from capital punishment, which in this country has been invoked primarily against the poor and the underprivileged, why *that* isn't a slippery slope much more than abortion or anything else to the kind of holocaust you're talking about.

MUGGERIDGE: Well, shall I answer?

BUCKLEY: Please.

MUGGERIDGE: Yes. In the case of war, of course, war as for instance we fought in 1939, war is an evil thing, but it is sometimes justified in that it prevents something which is more evil.

PILPEL: I would like to ask you about some war other than the 1939 war.

MUGGERIDGE: I prefer to, because that was the one I fought in, if it wouldn't upset you too much. I didn't actually fight in the Vietnam War, but had I been an American I might be there in the front line with my television

camera losing it. But the point is, the point is I actually fought in the '39 war. Now I had to make this decision, and would prefer to base it on that. I reached the conclusion, war is an evil thing — and I'd always assumed in anything I'd written or thought that war was evil — but that there are circumstances in which war should be fought to prevent something which is more evil, and on that basis I personally fought in that war, and so I think did most of the people. That's the matter of war.

PILPEL: Just a moment. That's a war with which you were in agreement.

MUGGERIDGE: Yes.

PILPEL: I am asking about a war which you feel is unjustified.

MUGGERIDGE: But then I wouldn't fight in it. I would be a conscientious objector and our law provides the facilities for being a conscientious objector . . .

BUCKLEY: Actually I'm not so sure. Are you talking about American law or British law?

MUGGERIDGE: British law.

BUCKLEY: Because selective objection, at least up until quite recently, was not permitted.

MUGGERIDGE: No, well in British law it is . . . You say, "I cannot fight in this war because of the following reasons" and you produce credentials. . .

BUCKLEY: I have nothing against Jenkins?

MUGGERIDGE: Right. And you produce credentials to prove it, and you're put to dig Lady Ottoline Morrell's garden or something like that, instead of going into the trenches, which of course is the case. I personally think there's something slightly abstruse about that because wars occur, unlike acts of euthanasia or abortion, as a result of historical, collectivist circumstances over which individual human beings have very little control and therefore I don't accept the parallel. With regard to capital punishment also, I think that again, you're dealing in that case not with an innocent baby that's in the process of developing in his mother's womb, and by the way over that question of the time of birth, even the United Nations Declaration of Human Rights, the first declaration of human rights, specifically mentions children before they're born in that, so they were as up a tree as we are.

PILPEL: But they also, in that Declaration, talked about the right of every woman and every family to decide to have only such children as they want. . .

MUGGERIDGE: Well they were thinking, I think, of birth control, something I also don't like but unfortunately we're not talking about that.

PILPEL: Well, we could talk about that.

MUGGERIDGE: Yes.

BUCKLEY: Let's not! (Laughter.)

MUGGERIDGE: I'm delighted to talk about it, but abortion is something different. I mean the case of them saying the child, the children before they're born, specifically presupposes that those good men at the United

Nations believed that that was a child before it was born. I just mention that. Capital punishment seems to me to be, the situation seems to me to be as follows, that you decide as a state, as a collectivity, that the deterrent of executing a man prevents a wrong greater — I mean a criminal — prevents a wrong greater than the wrong of executing him. That is a decision that's taken, it's a majority vote, maybe when . . . the majority that voted was wrong.

PILPEL: The majority vote for capital punishment in general, but how do you feel as a Christian about the murder of innocents, the capital punishment of innocent men? There are many who feel that. . .

BUCKLEY: He's against it. (Laughter)

PILPEL: Yes, but there are many who feel, I am now paraphrasing, that it would be better to not put to death 99 criminals, if by so doing, you avoided putting to death an innocent man.

MUGGERIDGE: There are many who feel that but . . .

BUCKLEY: We're getting away from the slippery slope. We must relate please, Harriet, to the question of euthanasia.

PILPEL: Well, I have asked a question which hasn't been answered. I will develop the question further then. It seems to me that war and capital punishment breed a disrespect for human life far in excess of what abortion breeds. The question is what leads to euthanasia? When I come to euthanasia I think I would pick up a distinction, Bill, that I believe you made but which has not been made sufficiently in this program, which is active euthanasia or passive euthanasia. The document you described as having been promulgated by you in the case of your own incompetency or demise, is basically, I think, a document of passive euthanasia. What you're saying is, if I can never again think, feel . . .

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BUCKLEY: Don't keep me alive.

PILPEL: Don't keep me alive by machines. Now that is called by some active, uh, passive euthanasia and it may be, although it's not clear, and as you pointed out in the Karen Anne Quinlan case, the failure to use the machine did not result in death. Active euthanasia, on the other hand, is when

someone says: I don't want to live anymore. Now, Mr. Muggeridge said that people were in a "neurotic state" when they were pronounced terminally ill. I would like to know what would be normal state for someone who's been pronounced terminally ill. I don't necessarily approve of euthanasia, but I think you have to have different standards of what people want depending on the condition in which they find themselves.

MUGGERIDGE: You know we have these hospices in England, I don't know whether you have them in America, but anyway we do.

BUCKLEY: We're beginning to have them.

MUGGERIDGE: You're beginning to have them. And I am familiar with the people there and have discussed these matters with them. And what they say is that, the first point I made which was this matron who'd worked in this field for 30 years, she's only met one case of a person who had actively asked to be killed, when he came to the point. Secondly, with regard to being in a normal or neurotic state of mind, I think any doctor would agree that when a man, for instance, has just heard that he's got terminal cancer, that his state of mind at that moment is not one on which you would wish to base a decision of this kind.

PILPEL: But suppose after six months or something, he has uniformly stated that . . .

MUGGERIDGE: Well, all the evidence I have is that it's extremely rare that he says yes. And also, as far as that's concerned, it's a little far-fetched to base a kind of general idea of mercy killing upon it because it is rather easy for people, you know, to kill themselves if they really want to. I did have one shot at myself and it wasn't successful but I think when people really want to kill themselves it's not very difficult. And so I wouldn't . . .

PILPEL: If you're paralyzed from the waist down, it's very difficult.

MUGGERIDGE: Well, it's very difficult if you're paralyzed from the waist down, but again you're talking . . .

BUCKLEY: You mean from the neck down.

MUGGERIDGE: Neck down.

PILPEL: From the neck down.

MUGGERIDGE: Neck down. These things are rather rare, and I wouldn't myself think it right to base any kind of general approval of mercy killing upon them, you see, anymore than I would have agreed to base abortion on the cases that are invariably brought up, of the husband who's had 17 children, and then come home boozed and begets an 18th. You know . . .

PILPEL: What would you say about that case? You would say that's too bad, she should have the 18th child?

MUGGERIDGE: I would . . . You see, first of all, I lived before contraception came in, people forget how recent it is, you know, and in my childhood it was unknown virtually . . . and we were very poor people, I was not actually surrounded by people who had 17 children, precisely how they managed to

avoid it, is a matter that I wouldn't personally think it right to inquire into, but I'm only saying that . . .

BUCKLEY: It's unseemly, you mean?

MUGGERIDGE: Yes. This scene that's presented is typical, you see. It's one of the few advantages of being old, that you know what utter nonsense people talk about the past. And it is a tremendous relief, and rather funny as a matter of fact.

BUCKLEY: When a couple — the most illustrious case in America recently being Henry P. Van Dusen, former Dean of the Union Theological School, and his wife decided, we don't know when — or do we? — at some point in their future to commit suicide together, in more or less, in the tradition of Philemon and Baucus. And at age 77 he, 80 she, they both took an overdose . . . One must assume, must one not, that that was a highly deliberate act, and by a man who had spent the whole of his life attempting to elaborate moral and theological distinctions?

MUGGERIDGE: And I think he had an awkward little time at the pearly gates. Well, that's his headache, not mine.

PILPEL: Well, I suggest that one of the things that should have been part of this conversation, but we probably don't have time for, is the living will. Namely, that people should be thinking in terms of their own demise, in terms of making their eyes available, or their organs available for transplant, and so forth, and somehow that is an important subject which can be considered at least in the same general bracket as what we're talking about now. Because at least whether you die while you're conscious or after you've ceased being conscious for a long time, there is some advantage, and perhaps, I forget whether that's in your document or not Bill . . .

BUCKLEY: I'm not so sure we should make *everybody's* brain available, are you? (Laughter.)

PILPEL: I didn't say the brain. I said eyes, kidneys, heart, which I think is an important thing that we can do today.

MUGGERIDGE: Well if people really want to give them, I can't see why they shouldn't give them, but . . . It takes away a lot of rather pleasant sentimental songs, for instance: "Maid of Athens, ere we part/ Give oh give me back my heart./ But since that has left my breast,/ Take oh take oh take the rest." (Loud laughter.)

BUCKLEY: Thank you very much Mr. Muggeridge, thank you Mrs. Pilpel, ladies and gentlemen.

APPENDIX A

[*Our Contributing Editor, M. J. Sobran, is now a nationally-syndicated newspaper columnist, as "Joseph Sobran." Among his first efforts was this column (which appeared in the Washington* Post *July 10), which comments on the U.S. Supreme Court's July 2 decision in* Belotti *v.* Baird. *Reprinted with permission (© 1979, Los Angeles Times Syndicate).*]

Whose Child Is This, Anyway?

by Joseph Sobran

Why is it that every time somebody asserts a new right, all of us wind up less free than we were before?

The Supreme Court has now ruled unconstitutional a Massachusetts law requiring minors to get parental approval before obtaining an abortion. Though divided, the majority seems to think a girl should be able to get the necessary permission from a judge who deems her "mature." And if the judge deems her immature, he himself should be the one to decide whether the abortion is in her best interest.

Leave aside the ethics of abortion. Leave aside the question how these minutiae are quarried from the Constitution. Let us simply consider what the court's ruling implies about the rights of parents, the relations of parents and children, and the scope of state power.

In the first place, the court holds that the girl who wants an abortion owes no obedience to her own father and mother. In the second place, it holds that she does owe obedience to the court, which has the discretionary power of deciding whether she may or may not make the abortion decision for herself.

To put it another way: the court assumes the right to act in loco parentis — while denying parents themselves that right.

The girl herself has no new freedom. She has, it is true, a right to defy her parents, but not to defy the court. She has merely exchanged submission to her father and mother for submission to some judge who barely knows her.

Justice Byron White, the lone dissenter, asked how on earth the Constitution can be construed to deprive parents of the right to decide whether their minor child shall have surgery. It is a question that should give pause even to those who regard abortion as a valid freedom.

So-called children's rights mean, in practice, increased state power over parents. In Sweden it is now illegal to spank your own children. Whether this makes children freer in any real sense is very doubtful. What is certain is that the state has a new jurisdiction over the home and the family. In effect, Swedish parents are being whittled down into minor-grade civil servants.

That is the shape of things to come in the totally bureaucratized society our social reformers aspire to.

Every right requires some agency to enforce it. The perennial political problem is how to establish a power to protect our real rights, while insuring that such power won't itself be used to violate our rights.

A peculiarly modern problem is this: that many of the so-called "rights" we enjoy — or are about to have inflicted on us — are not protections against power, but claims against the freedom of our fellow citizens. Civil rights, women's rights, gay rights: these and others really require that the state punish some of its citizens for the discretionary use of their own property.

They do more. They create a power in the state to set explicit standards for what was formerly private behavior. Every citizen becomes answerable to some public authority, usually a federal bureaucrat, for an ever-broader range of personal decisions.

The last stronghold of private freedom is the family. A few weeks ago the court recognized this when it held that parents have the right to commit their children to mental hospitals. In so ruling it acknowledged that this is a decision better made by parents than by public officals. It would be unfair, therefore, to characterize the court simply as an enemy of the family as an institution.

Nevertheless, the court is afflicted by the general confusion about the public and private spheres. In limiting the range of private discretion — even in the name of "rights" — it limits our freedom. This is nowhere more obvious than in its increasing tendency to treat the family as nothing but the lowest administrative level of the state.

By conferring on children so-called "rights," the state actually alters the structure of the family. Some people think this is a fine thing: reform should know no bounds. But we have come a long way from the days when it was assumed that there were some things no man could put asunder. And what has been the result of all our tampering with the traditional family? Soaring rates of divorce and abortion; a tripling of the number of children who grow up with a single parent. If there is any evidence of a corresponding increase in human happiness, I have yet to hear of it.

APPENDIX B

[We received a considerable amount of mail commenting on the debate in our last (Spring '79) issue between Profs. William Hasker & Thomas Sullivan. One letter in particular caught our eye — not surprisingly; the author, Mr. Joseph A. Breig, of Cleveland, Ohio, is the author of eight books, and writes a column syndicated in a number of Catholic diocesan newspapers. We herewith print his comments in full.]

Prof. William Hasker, in his "Abortion and the Definition of a Person" utters what is a widespread error concerning the beginning of human life.

He puts the physical first, and the spiritual second. He asks "at what time does the fetus begin to have a soul?" He speaks of "the time of ensoulment." He alleges that "the question about the fetus is simply, does it possess a human soul or does it not?"

This sort of thinking — which as I say is widespread — puts everything backward and upside down. The fetus does not possess a soul; the soul possesses the fetus. The fetus does not "have a soul;" the soul "has a fetus."

The fetus — the body — is there because the soul is there. It is the soul which forms the body. We must get altogether away from the old erroneous notion that the fetus begins to develop, and then at some point of development, God breathes into it an immortal soul.

"Soul" is the principle of life. If the soul, the principle of life, is conceived in a dog, we have a dog soul forming a dog fetus; and never will it form anything else. Plant a tomato seed, and if it germinates, what you inevitably get is a tomato plant, because the principle of life is a tomato soul.

So with all living things. It is the soul — the principle of life — which forms the plant or the animal. It is the soul which gives life and provides growth. Where there is growth, there is life; without life there can be no growth.

In the plant or the mere animal, the principle of life, the soul, is (like the body) material, and therefore subject to death and dissolution. In the human being, the principle of life is not material but spiritual. It is therefore deathless, indestructible; it is immortal; it will live as long as God lives, forever, without end.

Conception takes place because the soul, the principle of life, becomes present and instantaneously begins to form a body according to the nature of the soul: a plant body, or an animal body, or a human body. From the instant of conception in a human womb, what we face is a human being, a human soul, a human principle of life, in the process of forming a human body through which the soul will operate until it departs from the body in death, later to return and re-form the body in the resurrection.

Those are the truths about conception and growth. Prof. Hasker was

right in his original conclusion that the soul is united with the body — or better, the body with the soul — from "the very first moment of conception . . . the union of sperm and ovum." But he is in error in imagining now that this is not the fact, merely because many persons do not accept the full consequences of the truth.

To argue that something is not true merely because some or even almost all persons shun the consequences of the truth is to fall into a grievous error in logical thought. Yet that is the burden of Prof. Hasker's article.

He asks "what, then, is the eternal destiny of the very large proportion of human beings who perish within the first few weeks of pregnancy?" The answer is obvious: their eternal destiny is life everlasting. Unless God supplies Baptism, this would be an everlasting life in a state of all the happiness possible to the natural human being (as distinguished from the supernatural being formed by the sacrament of Baptism).

Prof. Hasker remarks that IUD's, rather than being contraceptive, in fact kill human beings early in conception (assuming — what is a fact — that the human being is present from conception). And he says that in such case, "the United States government has (by distributing such devices) committed mass murder on a scale to make the Nazi atrocities pale by comparison." He considers this consequence unacceptable. But in fact it is the truth.

From the instant of conception, we are in the presence of a new, unique human being. That human being, under God, is entitled to our devoted love, concern and protection. We should do all in our power to see to its development, birth and education — to help it to become all that God intends it to be. That, quite simply, is the truth about every new human conception — and we should face fully the consequences.

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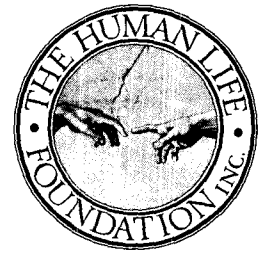
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