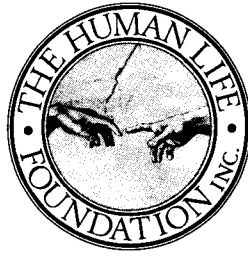


# the HUMAN LIFE REVIEW



SPRING 1981

*Featured in this issue:*

Joseph Sobran on ..... The Abortion Culture

John T. Noonan, Jr. on ..... New Priorities

Ellen Wilson on ..... Ideal and Choice

Lincoln C. Oliphant, Esq. on ..... ERA and the  
Abortion Connection

Erik v. Kuehnelt-Leddihn on ..... The Generations

Radomír Hubálek writes ..... A Letter from  
Czechoslovakia

*Also in this issue:*

John Mariani • Dean Rex E. Lee • Prof. Francis Canavan, S.J.

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. . . FROM THE PUBLISHER

This is the 26th issue of *The Human Life Review*. It seems that we have gotten into the habit of producing "unusual" issues in the Spring. This issue is no different. While still dealing with the abortion issue, our authors' attention ranges far and wide, treating such subjects as the family, ERA, the generation gap, plus the issue of basic human rights (see the open letter from a Czech dissident).

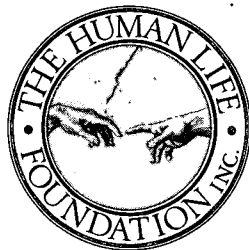
As has become our custom, we have reprinted articles that we feel are important and pertinent. The first (APPENDIX A), "And Baby Makes Three" by John Mariani, first appeared in the *New York Daily News Sunday Magazine*, and is reprinted here with permission. The second (APPENDIX B), "Should ERA Become Part of the Constitution," is a chapter from the book *A Lawyer Looks at the Equal Rights Amendment* by Rex E. Lee (Brigham Young University Press, 218 University Press Building, Provo, Utah 84602).

I again remind our readers that a) we now have available handsome Bound Volumes (fully indexed) of the first six years of *The Human Life Review* (1975-1980 — full information on how to obtain these volumes is found on the inside back cover); and b) *The Human Life Review* is available in microform from University Microfilms International, 300 N. Zeeb Road, Ann Arbor, Michigan 48106 and Bell & Howell, Micro Photo Division, Old Mansfield Road, Wooster, Ohio 44691.

Finally, because of the tremendous publicity and resulting media coverage of the Human Life Bill, introduced in Congress January 19, by Senator Jesse Helms and Congressmen Henry Hyde and Romano Mazzoli, we have had an enormous number of requests for the article "A Human Life Statute" by Stephen Galebach that appeared in our last issue (Winter '81). Since we do not have enough copies of the Review to cover the requests, we have reprinted the article in booklet form; this reprint is now available at \$1.00 per copy from the Human Life Foundation, 150 East 35th Street, New York, New York 10016. Just ask for the Galebach reprint. (Bulk prices on request.)

EDWARD A. CAPANO  
*Publisher*

# THE HUMAN LIFE REVIEW



SPRING 1981

Introduction.....	2
The Abortion Culture .....	<i>Joseph Sobran</i> 7
The Obvious Facts and the Priorities Before Us .....	<i>John T. Noonan, Jr.</i> 20
The Once and Future Choice .....	<i>Ellen Wilson</i> 31
ERA and the Abortion Connection....	<i>Lincoln C. Oliphant</i> 42
The Generation Gap .....	<i>Erik von Kuehnelt-Leddihn</i> 61
"While We Have Enough Men" .....	<i>Radomír Hubálek</i> 72
Appendix A.....	86
Appendix B.....	91
Appendix C.....	102

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## INTRODUCTION

“THE COURT, I REPEAT, is at war with the American tradition, with the whole Western tradition. It would be strange on the face of it if the Court had somehow discovered the real meaning of the Constitution after two hundred years — a real meaning that had escaped that Constitution’s authors and the people who had inherited and lived the constitutional tradition over those two centuries.”

Familiar? Yes, that is our colleague Joseph Sobran, once again writing on abortion. In times past we used to apologize for bringing up that unhappy subject, issue after issue; were we to avoid it *now*, we might well be the only publication around to do so. Without question, abortion has become a dominant national dilemma, a political issue rivaling any other. President Reagan, in a recent address (see the *Washington Post*, March 21), went so far as to say: “Just as surely as we seek to put our financial house in order and rebuild our nation’s defenses, so too we seek to protect the unborn. . .” So we trust our readers will forgive us for beginning this issue with not one but two lead articles that make abortion a central concern.

To be sure, Mr. Sobran, as is his wont (nobody does it better), ranges far afield, demonstrating nexuses both obvious and subtle between abortion and pornography, both of which are anti-family, but then that’s true because of the political *ideology* that has spawned them, which reminds us of what the First Amendment is really all about . . . and so round and round, in a cerebral dance to the music of the times (and the *Times*, as Sobran might visually pun it). Anyone who has read a previous Sobran essay (nobody else has appeared as frequently in these pages) will know what to expect, and how enjoyable it will be.

Professor John T. Noonan, Jr. (another frequent contributor) follows with a most impressive polemic *re* the current state of the Abortion Question. He too minces no words in making his point, e.g., “there has always been abortion as there has always been murder and adultery. But no society that I know of has ever, through its leadership, supported abortion as a good. It does in the America in which we now live.” Thus these two very different articles have one point in common: that whereas abortion “reform” was once advocated for “hard cases” (which proverbially make bad law), it is now supported as a public benefit — not merely a matter of choice, but a morally superior one. Another similarity: both articles are based on speeches delivered to anti-abortion audiences; Professor Noonan’s was directed at a specifically Roman Catholic gathering, which accounts for some specific suggestions he makes toward the end of it

—however, his own concluding “steps” for action were added for this revised version.

Next comes a refreshing change of pace, if not, strictly speaking, of subject. Ellen Wilson draws back to Victorian high ground, the better to view the current plight of the family, plagued now by all the “social issues” of which abortion has become a chief symbol. Who else could convince you that, after a century and more of “progress,” things just might be, well, . . . less good? We all agree, do we not, that an undoubted benefit of women’s “liberation” is “careers” for all? Listen: “The career ideal promises a depth of involvement and degree of accomplishment which it can deliver only to that small group of people who would have discovered the ideal on their own. The family ideal, on the other hand, is naturally adaptable . . . almost any couple can create one, regardless of education, intelligence, or class. This is not to say that families are easy propositions, but only that they require abilities democratically distributed among all of us. For most people, family offers the only opportunity to produce something important and enduring . . .” We’re prejudiced, but this kind of thing may produce the “Us” generation.

Mr. Lincoln Oliphant, a Washington attorney (now working on Capitol Hill), also probes a “family” concern: What do supporters of the Equal Rights Amendment really think such a constitutional amendment would mean? True, it now seems that ERA will not be ratified, but it (or another like it) *could* be, so the question remains important, for many reasons. For instance, supporters long argued that ERA had nothing whatever to do with abortion. Yet, when Massachusetts passed one of the many anti-abortion funding laws, pro-abortionists argued that the *state’s* ERA should *nullify* the legislature’s action! In the event, the court struck down the law without reference to ERA (which so outraged the state’s attorney general that he has asked for a rehearing to settle the ERA question). We repeat: the serious legal and social questions involved are by no means settled, and Mr. Oliphant provides a most interesting analysis of what’s involved.

Speaking of interesting, nobody we know roams so fascinatingly over so much intellectual and factual terrain as our old friend Erik von Kuehnelt-Leddihn, a renowned scholar, linguist, world traveler, etc., etc., and then some. Here he explains, in inimitable detail, the “generation gap” that perplexes the rest of us. Chillingly, he argues that today’s “conditions” are so untypical of past experience that they could be fatal to our civilization: e.g., “Of Hitler it was said that . . . he had no pride in his ancestry and no hope for progeny. The same can be said of modern man.” But it *cannot* be said of Herr Kuehnelt, obviously, so hope remains.

Indeed it does. The late great Whittaker Chambers once quoted Ilya Ehrenburg (a now-forgotten hack “novelist” who prostituted what talent

## INTRODUCTION

he had to serve the Soviets), who somehow found the courage to write — in defense of Boris Pasternak — that “If the whole world were to be covered with asphalt, one day a crack would appear . . . and in that crack grass would grow.” He had in mind the Communist world he knew intimately; where, today, spectacular cracks have appeared in Poland. Czechoslovakia, by contrast, seems thoroughly flattened since the Soviet invasion a dozen years ago. But some months back we received excerpts from a letter allegedly (as the Supreme Court insists we should put it) smuggled out from Prague; bemused, we asked for the whole text. Having read that, we pondered; there is obviously no way we can certify its authenticity, any more than we can disbelieve it; there is little in it that speaks directly to our “usual” concerns — there are dramatic asides about abortion and related things, but they comprise only a very small part of the considerable whole — but what would *you* do, dear reader, if you had read what we read, and had the means to publish it? Why, do exactly that, we hope you will agree, after you have read “While We Have Enough Men” for yourself. (If it’s a fake then — as with the Shroud of Turin — the burden of proof would seem to lie on the other side.) We have run it virtually as we received it (i.e., uncut, and with minimal editing), for the *tone* seems to us an important part of the message.

As is our custom, we include various appendices which we hope will interest you. Appendix A is the full text (plus a few special additions by the author, who was delighted that we wanted to run it) of a feature story we spied in our newspaper one Sunday morning. What struck us was, again, the *tone*: after so many years of Who wants kids? propaganda, a new father lyrically celebrates the birth of his firstborn, and gets his article printed in a mass-circulation supplement. Are the times (or in this case the *News*) really changing? We hope so: in any case, the article is a refreshing change from the plague of “unwanted child” stories, which are not only grotesque, but *unnatural*. Indeed, as this is written, we note in our morning paper that a “surrogate mother” hired to bear a baby for another woman has decided she “now wants to keep the unborn child,” which *is* natural, and thus to be expected. (The story goes on to report that her action “could have far-reaching consequences” for other such “arrangements” — again, who would expect otherwise?)

Appendix B is the final chapter of a new book on the ERA, and thus serves to complement (and add background for) Mr. Oliphant’s article. It is instructive in other ways as well, e.g., it describes what might be called the methodology of the Supreme Court in dealing with such constitutional questions (presumably any anti-abortion amendment would be categorized in similar fashion). The author was once a United States Assistant Attorney General, so his opinions are informed by first-hand experience. Finally (Appendix C), we offer an item sent to us by our friend and

#### THE HUMAN LIFE REVIEW

colleague Professor Francis Canavan, S. J., of Fordham. It is the text of a brief sermon on the family (always a concern of ours) which he recently delivered. In our opinion, *anything* written by Professor Canavan is well worth close attention; more, this short piece nicely supports Ellen Wilson's article, a cheerful symmetry, so to speak. We hope you enjoy it all.

\* \* \* \* \*

Introducing the lead article in our last issue (Winter '81), we noted that it seemed to us a possible "solution to the abortion dilemma." Titled "A Human Life Statute," it was authored by a young Washington lawyer, Mr. Stephen H. Galebach, who argued that the Congress had the power to do what the Supreme Court did *not* do in the *Abortion Cases* (i.e., answer the central question: When does life begin?); if the Congress were to declare the unborn "persons under the law," then their right to life would become a constitutional right. Mr. Galebach's article has received considerable public attention. Indeed, legislation of the kind he advocates (now generally called a "Human Life Bill") has already been introduced, by Representatives Henry Hyde and Romano Mazzoli in the House, and by Senator Jesse Helms in the Senate (Mr. Helms reprinted Mr. Galebach's article in the *Congressional Record* when he proposed his measure January 19).

At his March 6 press conference, President Reagan said that "the whole question" of abortion depended on "determining when and what is a human being." He noted that legislation intended to resolve that question was now before the Congress, and that if the question were to be decided in favor of the unborn, then "the Constitution already protects the right of human life." The resulting press reports clearly assumed that the President was specifically endorsing the "Human Life Bill," which is also known (we are pleased to say) as "The Galebach Proposal."

Naturally we are happy to have played some part in introducing Mr. Galebach's arguments to such distinguished and widespread consideration. Not to mention a spirited public debate: a number of commentators have already written in support of the proposal (e.g., William F. Buckley, Jr., and our colleague Joseph Sobran); numerous editorialists have discussed it, and the New York *Times* printed three attacks on it in one four-day period, which may be a record of sorts (even for the *Times*). The first was an Op-Ed opinion article by two Harvard law professors, the second a lead editorial; the third was a wholly unfortunate (and painfully embarrassing, we'd say) effort by one Russell Baker, who ordinarily attempts humor; but then the abortion issue is not easy to be funny about.

Mr. Hyde was kind enough to send us (just before press time) a draft of a reply to the *Times*, from himself and Senator Helms. We hope it is appropriate to print it below (even though it may not be the final text; nor

## INTRODUCTION

have we seen it in the *Times*), because we think it makes interesting reading. No doubt we will have more on this general subject in future issues.

J. P. MCFADDEN  
*Editor*

Editor  
The New York Times  
Dear Sir,

Despite the scorn expressed by Professors Laurence Tribe and John Ely on these pages last week, the Human Life Bill is proceeding toward Senate Judiciary Committee hearings on April 23 and 24, with the approval of the President and the support of some very respectable constitutional arguments. When the Supreme Court declares the judiciary not competent to "speculate" on "when life begins," legal scholars should not feign surprise that Congress takes up the question.

The *Times* editorial of Saturday the 21st was an interesting effort to avoid the obvious conclusion that if something is a human being then it is also a person under the law. We believe it is legally and morally unacceptable to say that some human beings are not worthy of the constitutional protections of human life. The last time the Supreme Court was willing to find a human being to be a non-person under the law was in 1857. The case was *Dred Scott*.

The full constitutional rationale for the Human Life Bill, which Professors Tribe and Ely do not acknowledge, much less refute, has been set forth in detail by a graduate of their own law school, and a former editor of the Harvard Law Review. We refer them to "A Human Life Statute" by Stephen H. Galebach in the *Human Life Review* for Winter 1981. This article demonstrates that the Human Life Bill is appropriate legislation to enforce the Fourteenth Amendment and is fully consistent with established notions of judicial review. But before the Professors turn to answering Galebach, they should first answer Professor Tribe, who has himself written on Congress's power to enforce the Fourteenth Amendment, as follows:

It is not difficult to reconcile congressional power to define the content of fourteenth amendment rights with *Marbury v. Madison* and judicial review. Judicial review does not require that the Constitution be equated with the Supreme Court's view of it.

L. TRIBE, *American Constitutional Law*, p. 271.

Have at it, gentlemen.

Meanwhile, we here in Congress begin on April 23 to establish the beginnings of human life by scientific inquiry . . . and we invite the *Times* to witness that Congress can answer the question that Tribe, Ely and the *Times* itself feel is beyond our legislative function.

Sincerely,  
*Senator Jesse Helms & Representative Henry J. Hyde*



# The Abortion Culture

*Joseph Sobran*

I HAVE OFTEN WONDERED, in moments of idle speculation, how Dwight Eisenhower would feel if he could come back for a day and see his beloved country. He was the first President I clearly remember, and, having been born in 1946, I still feel toward him the kind of child's awe one feels for a grandfather. Not that I don't know what can be said against him. But in my imagination he stands as the embodiment of the America I grew up in. Though I came from a solidly Democratic home and was all for John Kennedy in 1960, I secretly trembled when my young hero took the reins of state from that tremendous old man. Could there really *be* another President?

I imagine myself guiding the revenant Eisenhower down the streets of my home town, and hoping I don't have to explain to him that the Martha Washington Theater, where I used to watch Westerns on Saturday afternoons during his presidency, has become a porno house. If he noticed and asked me about it, his face stern and troubled, I would have to plead for my town by explaining what would trouble him more, that the disgrace was national. He died in 1969, just before the plague really spread (during the Administration of Richard Nixon, as it happened).

Maybe I could whisk him past such public blights and get him into my house. But even there he might curiously leaf through a newspaper and see the ads for pornographic movies. He might even turn to the classified ads and find notices of a certain kind of bargain: "ABORTION — \$75."

At this point, in my fantasy, I become tongue-tied.

The advent of pornography's liberation was gradual and hard to date. Abortion, however, had its own Pearl Harbor Day. On January 22, 1973, the Supreme Court found abortion virtually on demand to be a constitutional mandate.

But Pearl Harbor Day didn't come out of nowhere. It was pre-

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Joseph Sobran is a syndicated newspaper columnist and commentator on social issues (and a long-time contributing editor to this review). This article is based on a speech delivered earlier this year to an anti-abortion group.

ceded by long preparation. You don't attack without armed forces, a power base, a strategy, and some kind of philosophy.

The Supreme Court has its own philosophy, which it has been putting into effect for many years. The offensive began long before 1973. The Court's several incremental decisions in favor of pornography were phases of that offensive, issuing from that same philosophy. In terms of the schools of philosophy, perhaps the nearest approximation we can suggest is positivism.

This doctrine has put the Court at odds with the Declaration of Independence. Consider:

"We hold these truths to be self-evident, . . ." The Court has been dedicated to moral relativism, an attitude more than a philosophy, but an attitude at odds with the notion of any eternal moral truths.

"That all men are created equal . . ." The Court has treated humanity as beginning not with creation, but with birth.

"And that they are endowed by their Creator . . ." The Court has worked hard, within limits imposed not by the Constitution but by political power, to discourage all reference to that Creator, especially in the public schools, where young minds are formed.

"With certain unalienable rights; that among these [is] life . . ." Here is the crux.

The Court has now adopted, in opposition to the Declaration, the great heresy of the twentieth century: that government has not the duty to recognize and protect ("secure") innate human rights, given by God, but the arbitrary power to create and/or destroy positive rights — including the very right to live — at its whim.

The Court, I repeat, is at war with the American tradition, with the whole Western tradition. It would be strange on the face of it if the Court had somehow discovered the real meaning of the Constitution after two hundred years — a real meaning that had escaped that Constitution's authors and the people who had inherited and lived the constitutional tradition over those two centuries.

It surely begins to look very suspicious when that alleged "real" meaning turns out to coincide with the ideology of today's left-wing intellectuals. Yet the Court asks us to accept its word for it that only the Court speaks for our authentic tradition. It could hardly ask this, or expect our obedience, unless it felt its ideology commanded widespread assent in powerful institutions.

When I reflect that only seven men have foisted such a position on more than 200 million people — not to speak of some 10 million

#### THE HUMAN LIFE REVIEW

unborn people who have died since 1973, and millions more who will soon die — I can hardly believe my ears when I hear it charged that the anti-abortion movement, which seeks essentially to restore the laws of 50 states duly passed by our representatives and struck down abruptly by those seven men, is bent on imposing *its* views on the majority.

No majority ever sanctioned the Court's view. Supporters of legal abortion have consistently refused to put the issue to a democratic test. They prefer to pretend that their ideology is implicit in the Constitution. Those who dispute this are treated not as upholders of a variant opinion but as enemies of constitutional freedoms.

In pornography too, the Court has told us that various anti-obscenity laws violate the First Amendment. It has never denied flatly that obscenity is a valid category for legislation, and in fact has admitted that different categories of speech enjoy differing degrees of constitutional protection; but the cumulative effect of its rulings has been much the same.

The *resonance* of the Court's utterances, one might say, has been wholly favorable to sexual explicitness. Many intellectuals of the Left haven't waited for the Court, but have gone ahead and declared "freedom of expression" an absolute, courtesy of the Constitution. The current Court has said little to discourage this bogus extrapolation.

I hardly need say that the real debate isn't about the text of the Constitution. Any text can be rendered ambiguous by captious interpretation. No, the real debate is about our public philosophy, with the Left insisting that its ideology be treated as the true spirit of the Constitution. One effect of the Equal Rights Amendment would be to incorporate a charismatic symbol of leftist ideology into our fundamental law. Whatever the text of ERA may say (and the words themselves appear unexceptionable enough) there can be little doubt that its supporters actually expect the judiciary to make it mean what they want it to mean, with the result that the courts will be empowered to use the flood of litigation that would certainly ensue upon ratification as the occasions for nullifying hundreds of legislative acts. No previous constitutional amendment has ever had such a purely destructive intent. Earlier ones have been meant to serve as bases for legislation; ERA is meant to curtail the scope of representative government.

The First Amendment was meant to limit only the legislative

power of the Federal Government. This was true, as every school-boy once knew, of the whole Bill of Rights: to reserve power to the states and the people. Later Amendments, like the Fourteenth, conferred broader powers on Congress. But all, in various ways, preserved the principle of legislative supremacy. Even judicial review, as Garry Wills has lately reminded us, was originally defended as an extension of the people's legislative sovereignty, the judiciary upholding fundamental law against particular transgressions by sitting legislatures.

In a tortured sense, ERA might be said to do this. But that is certainly not its spirit. Its concrete aim is to restructure our form of government so as to legitimize the kinds of usurpations the Court has long practiced.

People on both sides of the ideological divide sense that pornography and abortion are deeply related. You can't cheapen (or, if you will, "liberate") sex without cheapening life itself. Sell the one, and you soon buy the other. "Sexual freedom" has come to mean freedom from consequences, from loyalty, from moral responsibility.

By making sex a pastime, the culture of the Left has turned children into party-crashers who deserve expulsion. We even hear hypocritical concern for "unwanted" children, whom it would be cruel not to abort. Nobody is willing to come out for irresponsibility. Instead the Left defines abortion as a responsible act, and interference with it as officious meddling. Pro-abortion rhetoric, demanding that the abortion decision be left to individual conscience, subtly implies that to get an abortion is to obey rather than defy the sense of right and wrong. Abortion advocates present themselves as the friends, their opponents as the enemies, of conscience.

(The Playboy Philosopher Hugh Hefner has backed abortion for many years. He, for one, saw the connection long ago.)

The whole argument of the Left has been deeply dishonest. At first pornography, sexual license, and abortion were defended in the name of privacy. Now our privacy is affronted at every newsstand.

Free expression was supposed to allow us to be more openly concerned and "caring." We were told it would eliminate the movie violence, for instance, that resulted from repressed and pent-up impulses to physical affection. But today our society is more callous than ever — toward the unborn, toward women. Our movies combine obscenity with a level of violence undreamed of a few years ago. Sadistic pornography has become a big business.

If books and entertainments don't affect people for the worse, it is hard to see how they can hope to change them for the better, and we may as well close our schools and universities. As it happens, the Supreme Court has been busy in this area too. In banning even voluntary prayer in the public schools, it has abridged the free exercise of religion in the name of protecting it. It is only a slight exaggeration to say that the only book the intellectuals of the Left want to ban is the Bible.

Under today's slippery rules, one can easily imagine a teacher leading a class in prayer, only to be charged with violating the First Amendment — while another teacher might show his class a pornographic movie, and claim the *protection* of the First Amendment.

Something like this already happens. Under cultural pressures that go beyond formal laws and the judiciary's explicit prescriptions, all college-level teachers know or sense that it is far safer to attack and deride religion than to defend it. The pious feel cowed; the impious, "liberated."

The arguments for abortion have shifted suspiciously too. Once it was a necessary evil whose malign effects would be *minimized* by legalization. Then we weren't supposed to pass judgment: it was a "religious" issue concerning which legislation was, under secular government, inappropriate. Today we are urged to recognize it as a positive good, a "basic right." Not only must we tolerate it, we must pay for it with public funds. It has become a "right of conscience," and never mind the consciences of taxpayers who don't want to pay for it.

previously called an established irreligion. The liberal state, according to its Yale enthusiast Bruce Ackerman, is "value-neutral," but has a duty to subsidize the pursuit of random individual values. You may of course practice your religion in the privacy of your home or church, but that mustn't affect your politics or public life. You must respect the rights of unbelievers, even to the extent of behaving as if *you* were an unbeliever.

The Left has mastered this mode of behavior very thoroughly indeed. When doctors like Kenneth Edelin and William Waddill are accused of murdering viable infants by way of consummating abortions, it rallies to their defense without pausing to ask if there is any justice in the charges, let alone considering the clear suffering the victims have undergone. One wonders if there is any conceivable

point at which they would recoil and cry "No! We didn't mean to permit *that!*"

It is worth wondering, too, just what liberal "neutrality" toward religion really means. So far, this "neutrality" has meant putting religion at severe disadvantages. The same forces that insist on government subsidies of abortion rights get livid when you suggest even a modest tax break for parents who send their children to private religious schools.

This posture is at odds with their customary argument that if you can't afford to exercise a right, you are effectively denied its exercise, and government must lend a hand. Liberals lose their liberality when parents want to control and direct their children's education. Ackerman even suggests that the purpose of public education is to counteract oppressive parental influences. To such ends does neutrality, in the "liberal" sense, lead.

This vindictive eagerness to make parents pay twice for private education shows a deep contempt for parents' rights and for religion itself. When was the last time the Left, liberal or radical, protested the persecution of religion behind the Iron Curtain?

If this is "neutrality," then so was the old "separate-but-equal" racial system. What the Left, led by the Supreme Court, has really instituted is not the separation of church and state, but the invidious segregation of religion. Religious convictions are now second-class opinions. If faith can survive Communist persecution, it can survive the milder, subtler discrimination of the secular liberal culture; but it shouldn't have to.

Let us spell out the analogy of this culture to an established church. When the state has an official religion, it may, as in England, tolerate others. But the established church is paid for out of public monies taken compulsorily, as all taxes are, from all citizens. You have to pay for it whether you belong or not. If you want another church in keeping with your own beliefs, you pay for it out of the money the state has left you.

That is how our educational system now works: you pay for the schools from which religion is banned whether your children attend them or not, whether you agree with them or not, whether you think them good influences or not. I recently watched an NBC News exposé of the deterioration of the public schools, and found that classroom violence had been going on under my nose: my 14-year-old-son, watching with me, commented, "That's what the public

school was like." I had switched him to a Catholic school last fall, not because I suspected what his public school had been like, but because I had decided that he would receive a fuller education in a Catholic school. He, for his part, had assumed until then that the chaos of his daily routine was normal.

But leave aside such specifics of public education's decline. The late sociologist Alvin Gouldner approved, like Ackerman, of public education in principle. In fact he thought it had been very cunning of the "new class" he spoke for to have hoodwinked parents into subsidizing an educational system that quietly subverted their own values. And two radical New York journalists, Alexander Cockburn and James Ridgeway, have lately worried in print about the right-wing attack on the public schools, because, they say, the Left can't survive politically without a public school system to spread leftist attitudes. Such defenses of public education say more than any charges I can level.

At the moment the forces of tradition in America are just beginning to understand how steeply the odds have been fixed against them. Because the religious traditions of this country remain powerful, despite those odds, we haven't had an open and powerful socialist or communist Left here. The closest we have come to the sort of thing France and Italy have was in 1972; but George McGovern's defeat smashed any further chance of that under the two-party system.

Yet there *is* a Left minority in this country, and its main political organ has been the Supreme Court. The mass media and the major universities have helped too to convey the belief that the Court's ideology represents authentic constitutional doctrine. Under this guise the Court has smuggled into law a number of the assumptions and proposals of socialism, with which it clearly has no fundamental quarrel. (The late Justice William O. Douglas, by the way, left a bequest of land to be used by international scholars, with special preference to "scholars" from the Soviet Union, China, Iran, Vietnam, and — of all places — North Korea. Anyone who had predicted this would have been charged with McCarthyism.)

The Courts, the media, and the academies (whose influence, now, reaches down into the schools) form a kind of triangle of cultural power. Each has much to gain by this alliance, reinforcing, as they do, each other's power. (It shouldn't be forgotten that pornography, hard and soft, is the media's great pocketbook issue.)

JOSEPH SOBRAN

Taken all together, they very strongly undermine the influence of parents and churches on the beliefs and morals of the young. From this point of view, the student “rebellion” of the Sixties wasn’t quite what it was called: while the students were rebelling against absent parents, they were actually conforming, with a kind of violent docility, to the secularist and socialist pressures of their immediate college environment. Let it not be forgotten that many of them came from families that had never before had college-educated members but which believed implicitly in “education” as self-improvement, so that the young were peculiarly exposed even by their parents’ trust. We should bear in mind too, as we consider these upwardly mobile youth, that, as the historian John Lukacs has remarked, America is the only country where it has been possible to move “up” socially by moving Left politically: a truth attested to by any number of self-congratulatory autobiographies, during the Sixties and Seventies.

By a fine irony, the more the young conformed to leftist attitudes — by engaging in radical politics and casual sex — the more their liberal elders congratulated them on their “independence.” It may be that the wrong youths were getting all the praise. The ones who showed true independence, I would suggest, were those who remained faithful to home values while away from home, quietly resisting all the immediate and clamorous pressures and solicitations of the campus environment. Not least of those pressures was the contempt they endured when they weren’t simply ignored. Though they got little credit for it, and no publicity, these students showed a courage we ought to honor.

Unfortunately, even those who didn’t flip out in the Sixties all too often did unconsciously absorb the two great rules of etiquette imposed and enforced by the culture of the Left: 1) you may never question the goals of socialism, though you should question all things else; 2) you must keep your religion, if any, to yourself. These rules were no less powerful for being uncoded. Unwritten laws are hard to attack precisely because they are hard to identify.

We saw how powerful this second rule was last fall when liberals grew hysterical over Cardinal Madeiros’ statement on abortion and, even more, over the Reverend Jerry Falwell and the Moral Majority. To the Left, religion is always a threat, seldom a good — except in the watered-down form of those accommodating clerics who join not only leftist causes (including abortion rights) but the Left’s attack on “reactionary” religion. (William Sloane Coffin, between



trips to Iran, appeared on the Phil Donahue Show to tell Falwell he was “ignorant.”) Such clerics, as James Hitchcock points out, also join the Left in its great silence on the Communist persecution of religion — while calling on the churches to “speak out” against right-wing regimes.

A key strategy — perhaps subliminal — of the cultural Left is to induce the young to adopt “liberalized” sexual attitudes and (the real point) habits that will at once initiate them into the new culture and, especially, burn their bridges back to the old, with its code of family loyalties. The great Russian dissident Igor Shafarevich notes that sexual “liberation” is always one of the devices through which socialist movements rob sex of its sanctity and destroy the fiber of the family.

Once the family is weakened, the dignity of the individual is weakened. People all become interchangeable, with no special perduring commitments to others. Marriage is reduced to a “piece of paper,” mere bourgeois convention. In such a moral environment, it is hard to argue against abortion. If people are interchangeable, the powerless among them become disposable. (One begins to hear the case for euthanasia and infanticide: the category of the “unwanted” expands.)

A college setting, like a crazy cult, is the natural place to instill ideologies — “new ideas,” as they are approvingly called — into the young. There they are isolated among others like themselves, away from parental supervision. They have no families or children of their own, no stake in property. They are full of energy and ready to explore novelties. Everything seems possible to them. They can hardly believe themselves capable of fatal mistakes: death and tragedy seem a long way off. They are free. They like to take dares; they feel cowardly if they refuse. And they are secretly afraid, terribly susceptible to moral bullying, especially if it claims the mantle of idealism.

They are especially afraid of going back to their parents. After all, this is the age when they are expected to confirm their independence, their self-sufficiency. Making one’s own sexual choices is a perennial symbol, as much in Shakespeare as in the cinema (despite their profoundly differing codes), of maturity. How easy it is for the young to be rushed into sex; how hard for them to admit to having made a degrading mistake: that would be to admit that their parents

were right about something important. At college it is taboo to admit the truth of *old* ideas.

During the Sixties the campuses proved wonderful recruiting grounds for the Left. Sex played an important role, in both positive and unconfessedly negative ways, in making the young feel they had been inducted — irrevocably — into a new social order in which an undifferentiated (some might say promiscuous) love of “mankind” was to supersede old ties.

Beneath all the rhetoric, one of the real meanings of the furor over sex education is whether the new code of the Left, through the medium of professionals whose ideologies assume a “neutral” guise, is going to replace the authority of parents even at the elementary school level. Traditional codes, given the taboo on religion, are sure to be demoted; and, as usual, the real values of the educators will find bolder expression as more authority is taken over from parents by the state. One way or another, parents’ values will be declared “unconstitutional.” Both sides sense this — one side with deep apprehension, the other with (to use an old but fitting word) gusto. Parental “tyranny” will give way to state “concern.”

At the moment the commonest argument is that parents “fail” to inform their children about sex. No doubt this is often true. Parents also fail to inform their children about religion, but this is still conceded to lie outside the purview of the state.

To the extent that parents do fail, it may be less because they fail to provide biological data than because they fail to give moral, and religious, guidance. And the educators seem reluctant to admit another obvious possibility: that if there is now an increase in sexual mischief (not the term these educators would use) among the young, it is hardly likely to be the result of excessive parental authority. Parents have less authority now than ever before in American history. There were certainly no *more* teenage pregnancies when the family was strong. Why assume that the solution to any current epidemics is to weaken the family still further?

Isn’t it possible, nay, overwhelmingly likely, that the real problem is the new code itself? If the increase in explicitness has only aggravated the perennial weakness of flesh so far, only a fool would dismiss the possibility that the new code, not the family, must be at fault, and that even more of what ails us would hardly cure us.

It seems plain to me, at any rate, that we face here a merely ideological presumption against the family. There is a parallel in

economics. The Left, liberal and radical, has insisted on interfering with the free market — that is, with a system based on voluntary exchange. When the economy falters, the Left's automatic response is not to question its own role, but to demand even more interference. So with the family. The more its status is weakened, the worse the condition of the social fabric; and the more the family is blamed for this. The cure for the ills of statism is always — more statism.

But the deeper question is not whether the family has failed. It is what the family's critics would regard as "success." So far the answer seems to be more access by the young, regardless of their parent's wishes, to contraceptives, penicillin, abortion. In effect, the destruction of the moral influence of parents.

Few would put it this way. But that is only natural. Who favors inflation? There is no organized Inflation Party. But there are plenty of people in strategic positions who have found it expedient to implement policies whose overall result can only be to inflate the currency. And when inflation arrives, those people shake their heads and murmur about the mysterious "causes" of inflation. (It is worth noting here too that many of them refuse to consider inflation as in any sense a moral problem, unless of course they can pin the blame on their adversaries.)

That, in my view, is also how we get socialism. There is no major socialist party here, any more than there is a small band of financiers plotting in whispers to print paper money until the presses overheat. But there are plenty of people who have been taught to despise the three institutions Shafarevich identifies as the perennial targets of socialism: family, property, religion. For every person who consciously subscribes to the socialist creed, there are dozens in whom the cultural atmosphere has bred socialist instincts. Many find it hard even to imagine a kind of progress that doesn't consist in state-directed social homogenization.

After all, socialism is the great phenomenon of the twentieth century. It would be remarkable if a system that has held sway over so much of the earth in our time, and has won so many followers even in democratic countries, should leave America unscathed.

I will not enter into the esoteric debates over whether Soviet socialism or German national socialism or Italian corporate socialism or any of the variants in the dozens of people's democratic socialist republics measures up as "true" socialism. To listen to the avowed socialists, you would gather that socialism has been "be-

trayed” just about every time it has been tried: they are forever insisting that socialism be judged not by its bloody past, but by its radiant future. All one can say is that common sense adjures skepticism toward any dream with such a marked tendency to be betrayed by reality.

Whatever “true” socialism may be, it is pretty clear what *real* socialism is. It is a system that believes that society can be improved by concentrating power in the hands of some elite — racial, intellectual, or ideological — and by destroying institutions that interfere with the state monopoly of power and legitimacy. A socialist is one who thinks he qualifies for membership in such an elite.

This is, to be sure, an unflattering description, but socialism deserves to be defined by its prospective victims, not just by its advocates. True, not all socialists are Lenins; there are degrees of malignity. But the dream itself is malign. For a creed based on alleged insights into the course of history, socialism has been stubbornly resistant to the accumulation of historical evidence. It blames its failures entirely on its enemies, on the things it means to wipe out, on the people it intends to enslave. Like the family and parents.

Reasoning from structure rather than from labels, then, I have no hesitation in calling the general trend of politics, even in America, socialist. How far the election of a conservative regime will arrest or even reverse this trend, it is too early to say.

That depends largely on how much of a fight the American people put up. I don’t expect it to be easy. The resistance will have to be mounted at every level, by people sophisticated in both ideas and power politics.

I do propose one simple measure for every individual who opposes the growth of the supervisory state. Each of us should become familiar with the Constitution, especially the Bill of Rights. It is a surprisingly short and lucid document. Its flavor is not at all what one would assume from hearing the ideologues discuss it, in tones suggesting they hold the copyright.

The First Amendment is especially important. Apart from what it says, it was never intended to be the centerpiece of American government. As far as its text is concerned, it limits Federal power, particularly in the area of religion. Clearly it meant, in forbidding a Federal establishment and guaranteeing free worship, to make religion not less but *more* free. By refusing to give one religion a privi-

#### THE HUMAN LIFE REVIEW

leged status, the Framers were opening the way to multiple religious influences on the state, rather than prohibiting them all. The point was to prevent one church from having an automatic advantage over the others. This should increase, not diminish, the influence of faith on our public life.

The Constitution, in short, is not hostile to religion but friendly to it. Even the Supreme Court has never directly denied this, only evaded it; and Justice Douglas himself once acknowledged ringingly that “we are a religious people whose institutions presuppose a Supreme Being,” a clear allusion to the Declaration which he and his peers, on a later occasion, were so tragically to flout.

We must especially reject any suggestion that since our government must not declare any religion to represent the whole truth, we as citizens have some sort of secular duty to behave as if all religions were false. Restrictions on the government were not intended to be restrictions on the freedom of the people. On the contrary. Such doctrinaire illogic would also say that since we can’t know whether the unborn deserve to live, we must never prevent their being killed. But to say that is to imply that the Bill of Rights is opposed to unalienable rights. And not even the judiciary, the media, and all the academies, yelling in unison at the top of their voices, can make such a position coherent. Let alone true.

## The Obvious Facts and Priorities Before Us

John T. Noonan, Jr.

**W**ALTER JACKSON BATE, in his recent biography of Samuel Johnson, speaks of the characteristic gift of Samuel Johnson as a moralist. Johnson's strength, he says, was his ability to perceive "that rarest and most difficult thing for confused and frightened human nature — the obvious."<sup>1</sup> That is what I should like to concentrate on in the first part of this presentation.

If you look back in history you can see splendid examples where people turn from the obvious to concentrate on something else. For me the most striking example is that of William Blackstone, who in his famous *Commentaries on the Laws of England* made the first attack on slavery that any legal writer had ever made. Having made that great attack in 1765, he so confined it that it applied only to England where there were at most some 10,000 slaves, and it was totally inapplicable to the English colonies where there were actually millions of slaves.<sup>2</sup> Now, that kind of displacement from the monstrous problem to the small problem is, I think, only too characteristic of a moralist. It is not totally hypocrisy; it is somehow fear before the intractable nature of the huge problem. In our present situation where the figures are monstrous, our moralists, and perhaps all of us, have *some* temptation to turn from the huge and shocking and obvious facts to wrestle with some small and more manageable problem. So I should like to address the obvious.

### The Leadership Elite

The first obvious thing is that we are living in the first society in human history where an elite in the society supports abortion. Of course, there has always been abortion as there has always been murder and adultery. But no society that I know of has ever, through its leadership, supported abortion as a good. It does in the America in which we now live. We who are opposed are not so

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much a minority as a group that has been cut out of the leadership group. The majority might very well be with us.

If you look at the leadership, it comes in four principal components. The first, of course, is the media, which has become in effect the fourth branch of the government; which has become in effect a rival teaching church. The media can then be broken down into the leaders: The New York *Times*, The Washington *Post*, *Time*, *Newsweek*, and the three television networks. Those leaders are all solidly in the abortion camp, and, in their wake, virtually every metropolitan newspaper in the country is actively in the abortion camp.

I was reminded recently by the editor of the St. Louis *Globe-Democrat* that it was on our side, and I said that I would mention it. But that is the only newspaper that I know of any size, which is at all anti-abortion. All of us, certainly those of us who are not immersed in these things all of the time, are brainwashed by a sea of pro-abortion news, which also blots out most anti-abortion activity. The media then is the first element of the elite.

The second is the Federal Judiciary, that group of several hundred men and women — mostly men, mostly upper-class, white males — who have created the abortion liberty as a constitutional right and who have zealously, beyond anything that could be found in preceding legal doctrine, promoted the abortion liberty. Justice Brennan, in what was the immediate forerunner of the abortion cases, *Eisenstadt v. Baird*, declared that there could not be any restriction on the distribution of contraceptives to the unmarried, and did so asserting that there was no difference between the married and the unmarried, striking at the very heart of both Jewish and Christian ethical tradition.<sup>3</sup>

Mr. Justice Blackmun in *Planned Parenthood v. Danforth* (decided in the bicentennial year), declared that the only way a parent or a spouse would have a right to say anything about abortion would be by delegation from the state.<sup>4</sup> This is an approach which, of course, is a radical denial of the natural basis of the family, and which has led to the conclusion that neither a parent nor a husband has any interest in an abortion that need be recognized legally.

The spirit of the judiciary is not confined to the Supreme Court. It permeates the Circuit Courts of Appeals and the District Courts. There is only one federal judge whose opinion I have read which was very much against abortion. Most seem to favor it. In Brooklyn a

JOHN T. NOONAN, JR.

judge arrogated to himself a power which the Constitution actually gives to Congress to appropriate money. Contrary to what Article I, Section 9 of the Constitution says — that only Congress can appropriate money — the late Judge John Dooling chose to appropriate a very large sum of money to fund abortion; and he based this remarkable appropriation on the ground that abortion was the exercise of a religious liberty!<sup>5</sup>

The third element of the elite are great philanthropies — principally, great philanthropies centered in New York City. These organizations have given both respectability and large sums of money to advance the abortion cause here and abroad. The fourth element are the doctors, particularly the doctors associated with the university teaching hospitals. The doctors have now as a group, with notable and heroic exceptions, swung over to the abortion side.

Now these four elements of the elite range from the liberal to the conservative. The actual philanthropists are usually very rich, the doctors are usually quite rich. The federal judges and the opinion makers come from the affluent strata of society and yet they cross the ideological lines dividing left and right, they cross party lines, and they make a powerful coalition. Not by, I think, conscious conspiracy, but by convergence, they have come to be the Abortion Power. The country since 1973 has been in the grip of the Abortion Power.

#### **The Nature of Abortion**

The second obvious topic I should like to address is the nature of an abortion. In the early stages of pregnancy it is sometimes lightly referred to as a “D and C,” dilation and curettage. The term curettage refers to the use of a sharp knife on the being in the womb, a sharp knife which will dissect that being. If the pregnancy is somewhat more advanced into its middle stage, the preferred method is described as a saline solution. This injection of salt will have the effect of poisoning the being in the womb and will bring about death by poison. At this stage, or even at a later stage, a third modern method of abortion is by prostaglandin, a powerful chemical compound which could be used to induce and facilitate labor to bring about a true birth. If it is used in powerful-enough dosage it will instead have the effect of impairing the circulatory and respiratory systems, and again bringing about the death of the being by poison, or, alternatively, bringing about delivery at a stage where the being



will be too premature to survive. Finally, there is hysterotomy, an actual delivery in no fundamental way different from a Caesarean delivery of a child, but in this case, delivery with the intention that the child will be too premature to live. There is also the use of a vacuum, which is one way that the knife is supplemented in the early stages: a Berkely aspirator is used to vacuum the womb and dismember the being.

When you look at these methods, you are tempted to say that they are all methods of committing murder; and there is precedence among Protestants for such usage. Karl Barth in his book on *Church Dogmatics*, describing what he says was the great social evil of his day, uses the word "murder" to describe abortion. Dietrich Bonhoeffer, writing in the shadow of execution by the Nazis, also described abortion as "murder."<sup>6</sup> Yet although there is this warrant in theological tradition, it is not common English or American usage. We have reserved the term "murder" for the killing of a being outside the womb. It inflames the dispute to use the term "murder"; but it does seem that one could use, with perfect accuracy and justness, the term "killing." As to all of these methods in use, the knifing and vacuuming and poisoning, if you applied them to any other living thing, to a pig or a bear or a chicken or even a bug, you would say that you were *killing* that thing. Whatever the status of this object, you would have to say that these methods applied to the being in the womb are also methods of *killing*.

#### The Nature of the Abortee

This brings me to the third obvious thing — the nature of the being in the womb. Now as to that, we are in the paradoxical position of having far more information than any previous generation and yet doing more damage to this being than any previous generation. Arguments have gone on among the moral theologians on ensoulment and hominization. I do not believe that any of them are at all relevant to the issues in the public forum or the issues that must be addressed if American society is going to be changed. The public facts, the indisputable and obvious facts, are, first of all, that we know now the number of chromosomes which are the human number of chromosomes. When those chromosomes are present, we have a human being and not a bear or a pig or a chicken. From the very beginning we have the chromosomal count and we also have the sex determinant. So from the beginning we can say it's a boy or it's a girl, and no need to speak of an it. We also know now, and I

speak of discoveries within the last twenty years, that the DNA-information molecule carries all the information which will determine the physical characteristics of that boy or girl. It will determine teeth and toes and nose and eyes and complexion. From the beginning in that DNA molecule the information is coded.<sup>7</sup>

The great French geneticist, Jérôme Lejeune, compared this DNA molecule to a tape recording which contained all the works of Mozart.<sup>8</sup> Taking up that comparison, suppose someone had such a tape recording of all the works of Mozart; and there were no other scores or records of Mozart in existence — this single tape recording was all that was left. Then suppose that the person in possession of that tape recording found it inconvenient to have around his house and destroyed it, and when reproached, he said, “It was only potential. It was only potentially the works of Mozart. As long as I wasn’t playing it, it was just another potential that didn’t reach its actuality.” No one, I suppose, would accept that defense. Yet that is the defense so often heard for the destruction of this DNA-information molecule — that it is only potential. It is no more potential than that tape recording of Mozart would have been. It is as unique and as precious as any tape of the work of Mozart or of any other human being.

We have also seen in the last twenty years a great development of the science of fetology, particularly pioneered by Sir William Liley in New Zealand. We know now that at 28 days there is a pumping heart. We know now that at 45 days there are EEG signs to be read of brain activity. CBS, a year and a half ago, even had on television pictures at about 40 days of the heart of the being in the womb, and at 70 days of a working brain. There can be no *possible* excuse for a generation given this information to believe that this brain and heart are the brain and heart of the mother. They are not the mother’s body. They are a separate, and demonstrably separate, human body.<sup>9</sup>

We also know now that by about the hundredth day at least, there are in place pain receptors and enough development of the central nervous system so that pain can be experienced by the being in the womb.<sup>10</sup> We live in a country where in every state there are laws protecting animals from painful death. If a dog or a cat or even a cow is put to death there are criminal laws protecting that dog or cow or cat, which belongs to someone, from being put to death painfully. Yet, in our country, the being in the womb is without

protection from painful death. Even now, in Illinois, a statute is being contested which will protect from pain; one can well imagine the Federal Judiciary striking that down as inimical to the liberty of the abortion-seeking woman.

I can put before you these facts of psychology and physiology and genetics, and, for some people, particularly people in our modern civilization, they will speak strongly. They indicate the essential humanity of this being who is the object of an abortion. There are others who must be spoken to through literature. I believe here our leading writers have served us even in the course of writing accounts of modern life that in some ways accentuate the excessive liberty of modern hedonists. Writers like John Updike in *Couples*, and Joan Didion in *Play it As it Lays*, have brought out the essential horror of taking the life of a child in the womb.

But perhaps no one has put the matter with greater clarity than someone one would least expect to have done it, a French writer who all of his life struggled with problems of unbelief. André Gide wrote this in his diary at the end of his life as he looked back, having been present at the miscarriage of his sister-in-law:

When morning came, "get rid of that," I said naively to the gardener's wife when she finally came to see how everything was. Could I have supposed that those formless fragments, to which I, turning away in disgust was pointing, could I have supposed that in the eyes of the Church they already represented the sacred human being they were being readied to clothe? O mystery of incarnation! Imagine then my stupor when some hours later I saw "it" again. That thing which for me already had no name in any language, now cleaned, adorned, beribboned, laid in a little cradle, awaiting the ritual entombment. Fortunately no one had been aware of the sacrilege I had been about to commit; I had already committed it in thought when I had said get rid of "that." Yes, very happily that ill-considered order had been heard by no one. And, I remained a long time musing before "it." Before that little face with the crushed forehead on which they had carefully hidden the wound. Before this innocent flesh which I, if I had been alone, yielding to my first impulse, would have consigned to the manure heap along with the afterbirth and which religious attentions had just saved from the void. I told no one then of what I felt. Of what I tell here. Was I to think that for a few moments a soul had inhabited this body? It has its tomb in Couvreville in that cemetery to which I wish not to return. Half a century has passed. I cannot truthfully say that I recall in detail that little face. No. What I remember exactly is my surprise, my sudden emotion, when confronted by its extraordinary beauty.<sup>11</sup>

I suppose if we all had the perceptions and gifts of Gide, we could convey to everyone considering an abortion the extraordinary

JOHN T. NOONAN, JR.

beauty of the being they wish to destroy. It is part of the obvious before us.

Finally, in the list of the obvious I would put the number of abortions every year performed in the United States. Whatever the figures were before the Supreme Court decisions, and, of course, they were hidden in darkness and guessing, there has been an enormous increase. If you took the highest figures estimated, guessed at, by the pro-abortion side, there has been at least a 25% increase. And what we know now is that, supported by an elite, over 1,400,000 human beings are being legally killed each year in our country.

#### What We Must Do

In the face of the obvious, what are we to do? Here I should like to turn to the area of positive action. In part, of course, our task must be education. We must educate as to these obvious things. We must pierce the barriers set up by the media. In particular we must pierce the linguistic disguises which have become fashionable. Even within our own camp, one hears the word "fetus" sometimes used to describe the child in the womb. Well, "fetus" is a term common to human and animal biology and tends to emphasize the common animalness, and it is not the word that was used in either law or common speech before. In law when you gave a gift in a will or a trust to unborn children you did not give a gift in trust to a fetus, you gave it in a trust to a child. That was the language of common experience. Still in our country, I suppose, you do not say to a woman, "How's your fetus?" A woman thinks of having a child or a baby within her, not a fetus. Common sense resists the efforts to bring the baby to the level of an animal.

Yet, the agencies of government use this term, and now the Department of Health and Human Services has carried it one step further, with the creation of the term, "fetus *ex utero*." That would seem to be a contradiction in terms; a fetus is a being within the womb and *ex utero* is, of course, outside the womb. What does HHS mean when in government regulations it speaks of a fetus *ex utero*? It means a child who has been delivered in an abortion who is fated to die and who is an appropriate object for experimentation under the rules set by HHS. With this contradiction in terms, it has designated such an aborted baby.<sup>12</sup>

A third common term, particularly in medical circles, is "termination of pregnancy," as though ending the life of a human being were something like ending a cancer. It is a shameful covering-up of the

truth. Because the hospitals and the doctors and the medical journals would be ashamed to have regulations and articles about the killing of children, they have provided this euphemism.

Finally, in this area of linguistic concealment, I suppose nothing equals the effort of Judge Clement Haynesworth. Three years ago, dealing with a prosecution of a doctor in South Carolina who had brought about the death by prostaglandin of a seventh-months baby, Judge Haynesworth dismissed the case under *Roe v. Wade*.<sup>13</sup> Then he went on to say that the Supreme Court has decided that "the fetus in the womb is not alive." Imagine the state of mind in which that can be put forward seriously. I suppose Judge Haynesworth would hesitate to say that people over 70 are not alive, or people under 10 are not alive, even if the Supreme Court should say so. He sees nothing particularly strange in solemnly making it the grounds for his decision, that by legal *fiat* this being who is moving and kicking and has a beating heart, is not alive for the purposes of the United States Constitution. Education to make the obvious plain, to pierce such linguistic disguises, is one great mission we can all engage in.

Secondly, there is a political mission. As to that, one can see in this country different levels of political response. I said I did not think we are a minority. In fact, the best opinion polls have always indicated that the great majority of Americans reject abortion on demand, reject abortion for nine months, reject the liberty as the Supreme Court has actually given it.<sup>14</sup> They are often in favor of it as described in the press, but in fact are against what the reality is. In fact, the greatest center of opposition is among women. I do not believe we need to win over the majority of American women; it is already ours. Certainly there is an elite group that needs to be won over. But the great strength of the pro-life cause lies in the women of America.

With such strength in the grass roots, one sees it reflected in the political process. The state legislatures which are closest to the grass roots are mostly pro-life; then the House of Representatives has become solidly pro-life in its voting on abortion funding. The Senate, which is more immunized from popular pressures, is closely divided. The Executive Branch agencies are more immunized, and the Judiciary is the most immunized of all. I do not believe that the legal battle or the political battle can ever change everything. It is only one element of the culture. Yet we live in a country that is a

JOHN T. NOONAN, JR.

legalistic country; law is an important element of the culture. We cannot abandon the legal and political fields.

#### **Believers and Abortion**

Realizing that this is an answer that each believer alone can give, may I say for myself that the Gospel gives criteria, and provides ways in which parties will be judged and, above all, ways in which priorities will be drawn up. If the Gospel is preached, light is provided by which persons will make their judgments on the taking of life in the womb. In particular, it seems to me that if the Gospel is preached, believers will ask themselves, "Why are we against abortion in the first place?" The answer to that would seem to be, "because it is not within man's power to take innocent life."

Now if that is the reason for being against abortion it would seem that a question that an officeholder must ask is: "Why am I unwilling to do anything to protect innocent life? If it would be wrong for me to take this life myself (as I suppose must be the premise of every one of those politicians who says he is personally opposed to abortion but will do nothing), how can I in conscience then provide the means by which abortions are carried out, either providing the facilities or the personnel or the money? How can I refrain from working to bring about some protection for these lives in the womb?"

I believe that one must respect the consciences of the politicians and the legislators and candidates who affirm that they are against abortion but will do nothing. Yet, at the same time, it seems a task for believers to say these consciences are wrong. They have misjudged. They have failed to make the *proper* moral evaluation and they are in fact directly cooperating in injustice in failing to protect innocent human life, and they are even directly cooperating in killing when they provide the means of taking innocent life.

A second question that will certainly be decided in the light of the Gospel teaching is the question of priorities. Now I know there is a great danger for the Church to seem to be putting its values in only one place or, as the code expression goes, "in becoming a single issue Church." But you know that that term "single issue Church" or "single issue voting" is a slogan coined by the friends of abortion to embarrass the efforts made to rectify the situation. It has never been thought on any other political issue that you were wrong if you had priorities and made your first priority the basis of your voting.

I put to you three analogies, trying to bring out the difficulty that everyone faces of preserving all of one's values and the necessity of

#### THE HUMAN LIFE REVIEW

choosing priorities. First, suppose a father wants to be present at the sports activities of his son and the music recitals of his daughter and yet has to earn a living. If he sometimes cannot go to those sport contests or attend the music recitals but says, "The first thing I need to do is to earn a living," is he to be said to be indifferent or callous about the cultural and sporting activities of his children, or is he to be said to have put first things first?

Or a second analogy. Suppose a parent has a child seriously ill in a hospital and a kind relative comes and says, "I would like to give your child a \$3,000 scholarship to my college." If the parent says, "I'd rather you gave me the money to help with the hospital bills so that the child may live," is that parent to be called indifferent to education because he puts the health of the child first?

Or finally, a third analogy. Suppose a family's house is on fire, and one child is in danger within the house. And the firemen come and offer to save the precious books and memorabilia and photographs of the family. If the father says, "No, save the child," is that father indifferent to all the other values in the house? It seems to me that in each of those cases, for all of us, the priorities would be inescapable. As to which situation we are in, I would say for myself that we are in the situation of a burning house.

The last analogy also suggests a lesson as to the political decisions to be made as we confront difficult choices in the form of a constitutional amendment, and the choice is between a perfect amendment which may not be passed and an imperfect amendment which might be passed. We might not think too well of firemen who proposed to put out a conflagration except for the blaze in two rooms. But if those imperfect firemen left us the hope and possibility of extinguishing the final flames ourselves, we would certainly prefer them to firemen who sat on the street waiting for wonderful new equipment which might come next year and which might never come, while the blaze continued to destroy what we held dear. We must have priorities, and priorities that are practicable.

◦ Step One: Stop the killing by passage of the Human Life Bill. Only a majority is needed. Immunized against immediate attack by a provision restricting the jurisdiction of the federal courts, the act is authorization for effective legislation against abortion. If the Supreme Court sticks to its announced principles, the act will survive constitutional challenge. If the Supreme Court bows to the abor-

tionist ideology, the act will have provided at least temporary surcease.

- Step Two: Stop the killing and prevent attack in the Supreme Court by passage of a Power to Protect Life Amendment, reversing the Abortion Cases and restoring to Congress and the states the ability to outlaw abortion. A two-thirds majority can now be found in the Congress to pass this amendment.

- Step Three: Tax abortion-related income at a special rate. Power already exists under the 16th Amendment for Congress to single out specific activities for taxation. Congress has already specifically taxed such socially disreputable income as that involved with overseas bribery and with the Arab boycott. Congress can constitutionally show its preference for childbirth over child death by imposing an abortion-related income tax. Only a majority is needed.

- Step Four: Pass the Human Life Amendment. This amendment will enshrine in the American Constitution the great principle that life is sacred. Its passage will complete the education begun by Step One. A two-thirds majority can be found in the next four years.

These four steps can command the loyalty and support of every opponent of abortion. Let us follow the example of our anti-slavery ancestors. They took five years to pass three Amendments eradicating slavery and its worst after-effects. We can take more than one year to pass more than one amendment eliminating abortion and preventing its return.

Momentum is with us if we take Step One and move to Steps Two and Three this year, with Step Four as our goal.

Let us put out most of the fire now. Then let us insure that it is out everywhere and will not start again.

#### NOTES

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2. William Blackstone, *Commentaries on the Laws of England* (London, 1765), 1, 14, pp. 424-425.
3. 405 U.S. 438, 452 (1972).
4. 438 U.S. 52 (1976).
5. See *Harris v. McRae* 48 U.S. Law Week 4941 (1980).
6. Karl Barth, *Church Dogmatics* (Edinburgh: T. & T. Clark, 1961), vol. 3, 415-422; Dietrich Bonhoeffer, *Ethics* (New York: Macmillan, 1965), 175-76.
7. John T. Noonan, Jr., *A Private Choice* (New York: The Free Press, 1979), 155.
8. Jérôme Lejeune, Testimony, May 7, 1974 *Hearings Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary*, 94th Cong., 1st Session.
9. Noonan, *op. cit.*, p. 157.
10. *Ibid.*, 158-160, 167.
11. André Gide, *Last Journals*, trans. Richard Stookey, *Translation* (Winter, 1978-1979), 95.
12. Noonan, *op. cit.*, 149.
13. *Floyd v. Anders* 440 F. Supp. 535 (D. So. Car. 1977).
14. Noonan, *op. cit.*, 73.



# The Once and Future Choice

Ellen Wilson

*"While the joy of God be unlimited creation, the special joy of man is limited creation, the combination of creation with limits."*

*"For a plain, hard-working man the home is not the one tame place in the world of adventure. It is the one wild place in the world of set rules and set tasks."*

G. K. CHESTERTON, *What's Wrong with the World*

IN RECENT YEARS DEFENDERS of the family have taken issue with contemporary society's condescending and at times even hostile treatment of "family values," but they have seldom directed their attention to what we might call the "replacement myth" which removed the family from its central position. It did not take long for cultural commentators to label the '70's the "Me Decade," and many people have suggested that the narcissistic self-involvement and wary avoidance of commitment characteristic of our age were the chief culprits. But the great myths or ideals which unite societies in a shared vision of how life, at its best, should be lived, do not usually disappear without a replacement. Instead, they yield to other ideals which more potently embody that society's hopes and ambitions. What were the reasons for this challenger's triumph, and how have we fared under the new order?

The ideal of the family enjoyed its heyday in the last century, the cherished child of the Victorian middle class. In order to understand its appeal, we must approach those smitten by it with greater sympathy than we have usually demonstrated, for the Victorian middle class has not weathered the 20th century well. It has come under special attack from feminist groups aghast at the docile, domestic, home-bound Victorian "little woman," who presents such a contrast to the independent, self-sufficient subscriber to *Ms.* magazine. Because of our century's preoccupation with the Woman Question, as it used to be called, we tend to see the Victorian family simplistically, and thus wonder at its appeal. For we tend to see it only from the (modern) woman's point of view, and to magnify those aspects of it which seem to us stifling and claustrophobic.

The reality of Victorian family life — even among the middle class

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Ellen Wilson, our contributing editor, will shortly publish "An Even Dozen," a collection of her essays.

which, then and now, seems to have been the source and guardian of society's unifying ideals — may have been almost as dark and narrow and despotic as it is currently pictured. But we should at least try to understand the magic worked by the myth on both sexes, and we should avoid condescending explanations involving flights from reality and feminine neuroses unless the evidence, dispassionately considered, leaves us no option.

First, the myth describes a *family*, and both sexes responded to its appeal. "A man's home is his castle" may now be interpreted solely as a charter for male despotism, but it seems the Victorians were usually thinking of something else when they used it. They were thinking of the world beyond the moat, of what the castle walls were keeping *out*. A castle is not a prison, nor is it solely a refuge. Its defining characteristics are security and the relative freedom of action within which security permits. Outside the Victorian male's castle loomed Queen Victoria and the British Empire, bobbies and social superiors. Within those walls lay freedom, symbolized by smoking jacket and slippers. Within was warmth and the nursery and the use of Christian names.

Before we summarily dismiss this as a clever plot to reconcile the bird to the gilded cage, we should consider that at its best the ideal offered women too the possibility of a full and satisfying life. For Victorian women too, the home represented a refuge from public demands and the strictures of society; it also offered more — a sphere of action, a center of activity. So rapidly has the world changed, so quickly have the old forms broken down, that we forget how recently many women regarded marriage and family as a means of *escape* from dependency, and a chance to assume important responsibilities.

In the Victorian ideal women assumed the crucial role of organizing and maintaining the household as a system that would fend off the chaos constantly threatening from within and without. A well-oiled domestic machinery (which included domestic help) presented meals, laundered shirts, and produced more or less well-behaved, well-turned out children. The result, when achieved, was as technically impressive as a busy office, a factory, or a well-stocked supermarket. A woman's satisfaction with the governance of this small society was commensurate with the responsibility she had exercised and the difficulties she had encountered. Domestic order, as the Victorians understood, achieves a kind of beauty, for order and

regularity are elements of the classically beautiful. To the extent that the boundaries of chaos and disruption are pushed back, the homemaker participates in a subsidiary act of creation, mirroring God's disposition of the elements of chaos into an ordered universe. Virginia Wolfe recognized this in a passage from *To the Lighthouse*, where she describes two cleaning women rescuing a long-abandoned home from the chaotic condition into which it had descended:

Slowly and painfully, with broom and pail, Mrs. McNab, Mrs. Bast, stayed the corruption and the rot; rescued from the pool of Time that was fast closing over them now a basin, now a cupboard . . . Flopped on chairs, they contemplated now the magnificent conquest over taps and bath; now the more arduous, more partial triumph over long rows of books, black as ravens once, now white-stained, breeding pale mushrooms and secreting furtive spiders.

As Virginia Woolf realized, domestic activities — from the management of the family finances to the production of a succulent *Boeuf en Daube* to the bringing up of children — brought satisfaction not wholly dissimilar to those of the artist or entrepreneur. As a middle-class Victorian ideal, family life offered many women a good opportunity.

Now let us turn back for a moment to the masculine side of this arrangement, for the Victorian home was not just a feminine preserve; it offered males more than a pipe by the fire. G. K. Chesterton, in one of the opening chapters of his autobiography, describes his father as typically Victorian in the depth and range of his non-professional, "extra-curricular" activities. Professional labels — clerk, banker, barrister — were often woefully inadequate definitions of these men. One's profession provided for one's economic needs and established respectability. But life's deepest satisfactions often arose from that post-five o'clock world of amateur interests — in chemistry or natural history, drawing or photography, inventing, gardening, or collecting. In fact, one of the striking differences between professional men then and now is the ability of the former group to throw off business preoccupations once the working day had ended, and to plunge into interests (which often demanded high levels of training and application) rather than entertainments.

As an ideal, then, the Victorian family offered both sexes a magic circle within which they could pursue activities which would express their personalities, and create an order which reflected them. It offered a degree of autonomy and control which public life denied

them, and it is this sense of freedom within limits which renders true creation possible. The public world enforced inhibitions and the dilution of individuality (remember that manners, clothing styles and the like were more standardized then than they are today). "Self-expression" was reserved for the home.

Of course, the reality usually fell well short of the ideal — many original female talents were stifled by lack of opportunities and/or outright opposition; many marriages were unhappy, with males selfish and domineering, women neurotic and repressed. And the ideal as it was pictured in a hundred novels, plays and stories included a relatively large household and a secure economic basis, thus keeping most of the poor and working class off limits. But to understand its mystique, we should realize that even revolutionaries like the British Fabians could represent the revolution as a means of extending the social benefits of middle-class family life to the lower classes. Malcolm Muggeridge recalls his Socialist father and his friends "planning the downfall of the capitalist system," after which all classes "would become educated, and when they were educated, instead of — on Sundays — racing their dogs or betting on the horses or anything like that, they would sing madrigals or read *Paradise Lost* aloud." In other words, the lower classes would learn to enjoy the same sort of creative outlets and private satisfactions as their middle-class counterparts.

It explains both too much and too little to say that Victorian ideal of the family perished because the Victorian world perished. The economic advances of the working classes, the dislocation caused by world wars, the technological revolution, inflation and the expectation of rising living standards — all of these collaborated to encourage new social arrangements, including the two-income family, which must, under any circumstances, have greatly modified the old ideal. One 20th century development surely rendered that ideal less attractive, and that is the increasing attention lavished on the young. As a result, many social arrangements are now judged primarily on their ability to please the young and accommodate their preferences. For the old ideal was probably least attractive to young people, who often felt smothered by the family life their parents had created, and chafed under its restrictions. A youth culture is thus less likely to champion the rights and independence of families than a culture which affirms the values of maturity.

But whatever the reasons, the family ideal was replaced midway

through this century by the Ideal of the Career. As Victorians once worshipped the hearth as the radiant center of life and warmth, we idolize the office. The career is the place where we expect fulfillment, the opportunity for self-expression and achievement. Even our conception of education has kept pace with this changing ideal: a century ago, higher education was undertaken as a means of cultivating the mind, accustoming it to abstract thought and fitting it for scholarly pursuits. The university was sharply distinguished from any institution advertising utilitarian intentions.

Today, however, education is associated in the popular mind with employability, job qualifications, and career training. Many employers fund their employees "continuing education" in order to improve their job performance, and pre-professional courses of study — largely because of their "practicality" — are considered less frivolous than purely academic courses of study. The liberal arts retain their reputation as the preserve of the dilettante, but amateurism is no longer a virtue. In short, though education is still highly respected, it is now respected for different reasons. Once seen as something which improved the individual as a person — a thinking, creating being — it is now something that improves him as a producer. It is the training-ground of careerists.

Overtime is another part of the career ideal, and at the same time a by-product of the decline of the family ideal. Those without families may more easily spend long hours in the office than those so encumbered, and even the latter may more easily excuse long absences from the family if its members no longer consider the home the center of their lives. The Victorian banker or company official familiar to us from books left work punctually every day, and arrived home well before dinner, *sans* briefcase. Today, overtime on a regular basis is a sort of badge of honor in certain professional circles. It demonstrates not only one's commitment but also the high demand for one's services. Private activities, though they may be pleasanter or more interesting, pale in *significance*, and significance is what the careerist is seeking in his job. Meaning — that sense that we are allying ourselves with the great work of the world, fulfilling our purpose — is sought in the career as it was once sought in family life.

Neither ideal is wholly unrealistic, for a cultural ideal with no source of credibility, no point of contact with the world as we see it, would soon collapse. Both are, at least in part, attempts to compen-

sate for inadequacies in other areas of life. Many Victorians found their jobs dull, much of Victorian society was regimented and conformist, and thus creative and individualistic impulses were likely to be released in private life. Similarly the modern impulse towards independence from families is partly a reaction to the constrictions they can impose on their members, and naturally encourages a greater reliance on "public" sources of fulfillment. And for the unmarried and those with less than satisfactory family situations, the career becomes an outlet — an occupation in a double sense.

But we should realize that the contemporary idealization of the career overlooks realities too. First, the number of people with "careers" rather than "jobs" is quite small, and this is not likely to change substantially. By contrast, the Victorians were realistic about breadwinning; their exalted conception of the family was grounded on their very practical understanding of a job's purpose: by and large, people go to work in order to support themselves, though they may be encouraged to work harder and longer in order to live better or to provide for loved ones. But even the interesting or high-status job has dull patches. The lawyer may have a sincere interest in tax litigation; the mechanic may be captive to the romance of the automobile. But not all legal cases break new judicial ground, most mechanical difficulties are routinely solved, and on a sunny spring day or a rainy Monday morning, economic realities alone may keep the wheels of commerce moving. These things we all know in our heart of hearts, as the Victorians knew that homemaking had monotonous stretches. But the ideal still mesmerizes, and there are perhaps few of us who do not half-believe in some chimerical perfect career which would challenge and excite us, and never dissipate into dull routine.

The unromantic reality is particularly hard on those who were promised most and, by and large, handed least. I am speaking of the distaff side of many modern two-income families. In the past few decades many such women were prodded towards the marketplace in order to swell small family incomes or, in cases of divorce and the like, assume the role of chief breadwinner. Some who would otherwise have been more reluctant were reconciled to their double burden by a feminist rhetoric which promised fuller lives and the opportunity to exercise suppressed talents. It is difficult to see what the woman at the checkout counter or the bank teller or the department store clerk makes of such extravagant claims. Has the work

site really replaced the home for her as the center of her intellectual and productive life, the source of her sense of self-worth, the unleasher of harnessed energies? Probably not, but the public myth survives, largely because it focuses not on these women, but on their younger, more advantaged, upwardly-mobile sisters, many of whom *can* achieve more satisfying work lives, and who, in any case, see no socially-acceptable alternative. For what purpose was the modern woman's consciousness raised, for what was she educated, what can reward her efforts with a sense that her life has meaning, if not the career? Economically, politically, sociologically, the Victorian family is no longer a viable option.

Still, it seems to me that its replacement is inherently — unavoidably — less capable of directing people to the kinds of productive satisfaction they seek from life. Only artists or inventors or captains of industry (or perhaps people in service professions, such as nursing and counseling) have the opportunity to transcend in their work lives the static sense that each day's actions only repeat those of the day before. Only these people, in other words, are not locked into the finite and the immediate in their day-to-day work. They can connect present labors with future developments and see their workaday activities as dynamic, progressive.

Those under the spell of the career ideal may reply, Yes, that is true *now*, but we want to create a world where everyone can experience those satisfactions in his job. Former President Carter was proclaiming his membership in this group when he promised the National Urban League last year not just *jobs* for the nation's unemployed, but interesting, challenging, exciting jobs.

It is difficult to see how this promise could have been kept. First, most jobs — even high-paying, white collar ones — do not test the limits of one's creativity or (what is much the same thing) guarantee the freedom of action necessary for the sort of satisfaction I have described. Even "interesting" jobs may lack that pipeline to the future, that sense of being an efficient cause, which we all seek in some aspect of our lives.

Second, most people are just not equipped to be artists or empire builders. Perhaps our naive faith in education has persuaded us that, given equal opportunities, we can achieve roughly equivalent results. But this is simply not true, and even if it were, some people would still have to carry out the orders of other people. There are not enough openings for corporate presidents.

Finally, most people are not prepared to surrender that great chunk of their lives necessary for the achievement of the career ideal. This is my second point considered from another angle: if all of us were artists or empire builders, perhaps all of us would willingly consecrate our lives to art or commerce. But such toying with the subjunctive will get us nowhere. The career ideal is an elitist one, which is only another way of saying that it will disappoint or elude most people.

The family, on the other hand, by its nature introduces that missing vertical axis, that escape from a repeating present. Of course family life also has constants — dishes, beds, laundry, dinner — but these coexist with that developmental pattern which is the family's biological function: the bearing and nurturing of the next generation. Here is an escape from the prison of the present which anyone — whether bricklayer, truck driver, waitress, or whatever — can attempt. As George Gilder pointed out in *Sexual Suicide* and, more recently, *Wealth and Poverty*, the family can inspire the breadwinner to invest his job with a heightened significance, borrowed from the home. But the reverse is not true. Savings accounts are literally investments in the future, and children bring to reality the inevitable pilgrimage from the present to that future.

Finally, as the Victorian ideal also acknowledged, there is the element of control and autonomy, without such satisfaction in an act of creation is largely spoiled. To put it simply, most people are not bosses. The scope of their activities is limited; to a greater or lesser extent, they are told what to do and how to do it. Further, in a complex, highly-automated society, the individual worker loses sight of the process in which he is involved. The prototypical example is the assembly line, where a worker contributes one small part of a whole he may never see and rarely think about — and even that small part is built according to someone else's design. Satisfaction with the activity of production is usually inversely proportional to one's distance from the completed product.

But as our survey of the Victorian ideal showed, family life was attractive in part because it provided an escape from external social structures and controls; it offered an opportunity to create one's own system, one's own establishment. The wife created a smoothly-functioning domestic order; the husband developed elaborate, home-centered activities; together they created a social circle and helped form the characters of their children. In all of these activities



they were synthesizers, selecting and arranging the elements of their private lives, ordering their household, educating their offspring. They were not empire-builders, but builders of a tiny semi-independent kingdom within the commonwealth, a sort of Danzig or Monaco. The scale of operations was small, but it was almost wholly within parental control. They directed a complete process, rather than one station on an assembly line.

If something of this ideal were to be imported once more to our own time — if it were refitted to suit differing economic situations, the modern realities of two-income families and the like — we would at least be in a position to see more clearly those aspects of modern life that threaten the essential autonomy of the family and imperil the great creative enterprise on which it is embarked. We would see more clearly, for example, the extent to which government threatens to break through the charmed circle and become, in effect, just one more employer of husband and wife (“This is how we want you to handle the job of raising Sarah and Michael”). Government assumed direct control of the education of the young (in public schools) generations ago, but today parents and local school boards face increasingly detailed regulations specifying everything from the numbers of bathrooms to the ethnicity of the teachers to the composition of school sports programs. Many of these seemingly trivial decisions are as significant as sex education or values-clarification programs; *in toto*, they persuade the parent that he is fit for no more than a minor role in the education of his child.

There are other intrusions which are not wholly the fault of the government. Partly as a result of the higher divorce rates, the courts have been drawn into the adjudication of rival theories of childrearing and the definition of a proper role model. Recently, a local court ruled that the parent retaining custody of the children must receive permission before moving a great distance from the divorced spouse. Though the beneficial intent of this ruling is clear, the boldness of the intrusion into family affairs is startling. (“Kramer v. Kramer” shows us how an explosion of marital “hard cases” can transform judges from legal professionals to amateur child psychologists and marriage counsellors.) At the lower end of the economic spectrum, largely because of elaborate Welfare arrangements and child assistance programs, governments have found more and more excuses for interfering with the lives of welfare families. Since governments are ill-equipped to reconcile the kinds of complex and

intimate problems which face families, they tend to treat the individual and overlook the social institution of which he is a part. This partly intentional, partly unintentional blindness to social institutions such as marriage and family has led courts to decide many "family issues," involving spouses and minors, as though they were simply cases of civil (that is, public) rights. Hence abortion and contraception rights for minors, denial of spousal consent for abortions and the like. The scope of parental action narrows, the outer world intrudes upon the carefully constructed internal order, the originality of idea and individuality of approach which should flourish in the home, if anywhere, are subjected to government standardization procedures, the king in his castle sees his family becoming wards of the state.

Disillusionment with the career ideal has probably already begun to set in, or at least the recognition that it can leave important needs unsatisfied. Recently, for example, feminists have taken to discussing the problem of loneliness among older career women and the possibility of single-parent parenting. Another is the public preoccupation with pleasure — entertainment — rather than with interests. The career ideal promises a depth of involvement and degree of accomplishment which it can deliver only to that small group of people who would have discovered the ideal on their own. The family ideal, on the other hand, is naturally adaptable to a larger population, because families share outlets for individuality which do not require great talents. And though families are not governed democratically, almost any couple can create one, regardless of education, intelligence, or class. This is not to say that families are easy propositions, but only that they require abilities democratically distributed among all of us. For most people, family offers the only opportunity to produce something important and enduring, something non-ephemeral. It allows the inartistic and the commercially-inept to extend their influence into the future, fashioning an achievement which will survive them. It is also, by the way, an important training-ground for the exercise of responsible freedom, for in the home one discovers by trial and error what dreams may be realized, and how. By comparison, the career ideal is at best mistaken idealism, and at worst, a cruel hoax.

Of course, most people won't be taken in by it, or not wholly. Most people will be forming our contemporary compromise families — juggling jobs, planning children, parcelling out household

#### THE HUMAN LIFE REVIEW

responsibilities. And most of these people will derive satisfaction even from these compromise families, so great is their potential, so strong our need of refuge from the consuming world. But almost all of us today find the fight to make our own private order out of chaos more difficult because of government regulations as to how to proceed, social pressures to direct our energies elsewhere, and externally-induced insecurity about the value of what we are doing in the home. Thus life — a difficult proposition under the best of circumstances — is made more difficult still, and all in the name of independence and the good life. What we need is not a nation of empire-builders but a nation of nations; a nation of city-states and petty principalities, of Monacos and Danzigs, for whom outside intervention is the exception rather than the rule. Only moats and castle walls can give us the security to sally forth each morning to build other men's commercial empires.

# ERA and the Abortion Connection

Lincoln C. Oliphant

**P**EOPLE WHO ONCE SAID there is no connection between the Equal Rights Amendment and abortion are now faced with the embarrassing fact of . . . the Commonwealth of Massachusetts.<sup>1</sup>

When Massachusetts was considering adding an "equal rights amendment" to its state constitution it sought the opinion of one of the country's most influential professors of Constitutional law, Laurence H. Tribe of Harvard Law School. Professor Tribe was unequivocal:

In response to your request that I study the implications of the proposed Equal Rights Amendment to the Massachusetts Constitution with respect to issues of abortion, I have examined the text of the Amendment and decisions in related areas and have concluded that adoption of the amendment would have no effect whatever on the power of the state to regulate abortion or to protect fetuses consistent with the federal Constitution generally.<sup>2</sup>

In a state such as Massachusetts, where anti-abortion political power (and emotion) is strong, assurances such as Tribe's can make the difference between success and failure. David Farrell, a political columnist for the Boston *Globe*, has recently written that supporters of the Massachusetts amendment were "Aware that ERA could be doomed in Massachusetts if the lawmakers believed . . . that ERA does, in fact, limit the Commonwealth's power to give fetal life what little protection is still available under [the *Abortion Cases*]."<sup>3</sup> But with assurances that there was an impassible wall between ERA and abortion, with fears about an ERA-abortion connection effectively shut out by the weight of expert opinion, the state adopted its "ERA" in November, 1976.<sup>4</sup> (The state has also ratified the proposed federal Equal Rights Amendment, and similar assurances about *its* meaning for abortion also played an important role in the ratification debate.)

The wall supposedly separating abortion from the equal rights principle (whether found in a state or federal amendment) has been demolished. Demolition was supervised by the state affiliate of the

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American Civil Liberties Union, the Civil Liberties Union of Massachusetts (CLUM).

On July 9, 1980, CLUM filed a complaint in the Supreme Judicial Court of Massachusetts alleging that the Massachusetts abortion laws were unconstitutional (under the state constitution) because they violated the state's Equal Rights Amendment. The statutes prohibit the use of state funds for abortions "not necessary to prevent the death of the mother."

CLUM argued as follows: the Massachusetts Medicaid program covers a wide variety of medical services, elective as well as therapeutic, for both men and women. Abortion, however, is singled out for different treatment and "Abortion is a procedure unique to women. It is one of the two medical alternatives available to pregnant women; the other alternative is birth." Therefore, pleaded CLUM, "By singling out for special treatment and effectively excluding from coverage an operation which is unique to women, while including without comparable limitation a wide range of other operations, including those which are unique to men, *the statutes constitute discrimination on the basis of sex, in violation of the Massachusetts Equal Rights Amendment.*"<sup>5</sup>

On September 8, 1980, the full Supreme Judicial Court began hearing arguments. On February 18, 1981, the Court ordered the State to pay for "lawful, medically necessary abortions on Medicaid-eligible pregnant women." The Massachusetts court did not address the Equal Rights Amendment argument. The challenged statutes were struck down because they were found to violate the state's constitutional guarantee of due process of law.<sup>6</sup>

We do not have, then, the views of the Massachusetts court on the relationship between the equal rights principle and abortion. But this article is not about what judges think, but about what prominent abortion advocates think. We cannot have the opinions of federal judges on the meaning of the federal Equal Rights Amendment because it has not been ratified, and we do not have the views of the Massachusetts court because it did not deign to give them to us. But responsible republicans do not wait for courts to rule before making judgments. Results are anticipated, and legislative and personal judgments made accordingly. There is no better way to anticipate a court's result than by looking at what it is the proponents of a legal change say (or demonstrate) they intend to accomplish.

In the Massachusetts case, an affiliate of the country's most

LINCOLN C. OLIPHANT

influential private litigation group (the American Civil Liberties Union appears before the U.S. Supreme Court more than any other litigant except the United States government) and an affiliate of one of the most prominent groups to support ratification of the Equal Rights Amendment argued to the state's highest court that the equal rights principle compelled the legislature — and therefore the people of the Commonwealth — to pay for abortions even though the legislature had specifically voted to deny such payments. When we have such pleadings, we do not need an opinion of a court. The plaintiff's pleadings are the bellwether of social change, and a sure guide to what ERA means for its most powerful advocates.

We are not restricted to reading the pleadings, though. CLUM's executive director has explained the lawsuit this way:

... The United States Supreme Court, in *Harris v. McRae*, restricted the availability of Medicaid abortion services by holding that [neither the Medicaid statute nor the Constitution] obligate[s] states to fund all medically necessary [abortions] . . .

Undaunted by defeat at the federal level, CLUM filed a new suit . . . [arguing] that to single out abortion for limitation constitutes sex discrimination in violation of . . . the State constitution and its Equal Rights Amendment.

The state Equal Rights Amendment provides a legal argument that was unavailable to us or anyone at the federal level. The national Equal Rights Amendment is in deep trouble . . . Because a strong coalition is being forged between the anti-ERA coalition and the anti-abortion people, *it was our hope to be able to save Medicaid payments for medically necessary abortions through the federal court route without having to use the state Equal Rights Amendment and possibly fuel the national anti-ERA movement. But the loss in McRae was the last straw. We now have no recourse but to turn to the State Constitution for the legal tools to save Medicaid funding for abortions.*<sup>7</sup>

Equal rights amendments have various purposes — but not all of them are made known. There are, for example, purposes to which a state ERA may be applied but which are being delayed for fear that such an attempt will “fuel the national anti-ERA movement.” This is the position of CLUM's executive director, who *knew* of the ERA-abortion connection, but “hoped” to save taxpayer funded abortions without giving the game away and possibly helping the “national anti-ERA movement.” Now that the “federal court route” has been closed, CLUM has “no recourse” but to unveil the tool it has kept hidden, the state ERA. If the federal ERA is ratified, there will be more surprises from the pro-abortion lobby.

#### THE HUMAN LIFE REVIEW

One problem with those who deny an ERA-abortion connection is that they are denying the wrong arguments. Such people are engaged in stuffing straw into caricatures of the real arguments and then, after mocking the caricatures, knocking them down.

Consider for example a statement by the intellectual godfather of the amendment, Thomas I. Emerson of Yale Law School:

The ERA has *nothing* to do with the power of the states to stop or regulate abortions, or the right of women to demand abortions. The state's power over abortions depends upon *wholly different* constitutional considerations, primarily the right of privacy, and *would not be affected one way or the other* by passage of the ERA. This allegation [that there is an ERA-abortion connection] is pure red herring.<sup>8</sup>

We will soon see which better describes the situation: Professor Emerson's red herring or this writer's straw man. But first consider the statement another authoritative source, the U. S. Commission on Civil Rights:

While opponents of the ERA often link it with reproductive freedom for women, it is *clear* that the ERA is *not necessary to establish* the right of women to such freedom. The right to choose between abortion and childbirth already has been delineated by the Supreme Court as protected under the Constitution's right to privacy.<sup>9</sup>

Does the Commission think that news of the *Abortion Cases* hasn't filtered down to the anti-abortion army? Does the Commission believe that anyone, anywhere, is arguing that ERA is *necessary* to establish an abortion right? The Commission's footnote might have been comprehensible if it had been written in 1970, but in 1978 to write that "it is clear that the ERA is *not necessary to establish* the right of women" to abortion is just silly. *Nobody* is saying ERA is *necessary to establish* the right to abortion. Do we need more evidence than over 1 million abortions annually? The Commission on Civil Rights has erected a straw man and blown him over with a puff.

Professor Emerson says ERA "has nothing to do with the power of the states to . . . regulate abortions" because ERA would affect equal protection analysis and the Supreme Court has decided the *Abortion Cases* under "wholly different constitutional considerations, primarily the right to privacy."<sup>10</sup> It is true that the *Abortion Cases* were grounded in a Constitutional right to privacy which the Court found primarily in the Due Process Clause of the Fourteenth Amendment. It is also true that the Equal Rights Amendment

would affect the way the courts analyze sex discrimination claims which usually arise under the Equal Protection Clause of the Fourteenth Amendment. All right, but so what?

Professor Emerson knows that Constitutional freedoms, extended, bump into each other. What we need to know is how the addition of a new amendment will change the Constitutional vectors. Where will the next collision between Constitutional rights occur, and at what angles and velocities? In the case of ERA and abortion, it is difficult to repress the fear that James Madison's carriage is on a collision course with Bella Abzug's bus.

Often-repeated arguments such as those made by Emerson and the Commission on Civil Rights are disingenuous and misleading. They do not speak to genuine concerns, and they do not answer these legal questions:

1) Will the Equal Rights Amendment *reinforce* or *supplement* the theory of abortion rights established by the Court in the *Abortion Cases*? This is the "second rationale" inquiry. It asks whether ERA will provide another peg on which the Court can hang its abortion theories.

2) Will ERA *expand* abortion rights already delineated by the *Abortion Cases* and subsequent decisions? This question is not concerned with the creation of new rights, but with the enlargement of recognized rights which, though vast, may not be absolute. A minor's right to an abortion without parental involvement is an example of a "question 2" issue.

3) Will ERA *create new* abortion rights? The High Court has not sanctioned every demand of the abortion lobby and may not grant every future demand. The issue of tax-paid abortions is the best example of a "question 3" problem.

Questions 2 and 3 are related. Any distinction between *expansion* of rights and *creation* of rights is definitional.

Will ratification of the Equal Rights Amendment 1) reinforce or supplement, 2) expand, or 3) create abortion rights? Those are the questions, and facile statements about "wholly different constitutional considerations" and ERA not being "necessary to establish" an abortion right do not address — let alone answer — the questions.

Whether adoption of the Equal Rights Amendment will reinforce or supplement the theory of the *Abortion Cases* is a matter of dispute, of course, and I have given the views of Emerson and the Civil Rights Commission. Holding opposing views are distinguished professors of law such as Charles E. Rice of Notre Dame and



#### THE HUMAN LIFE REVIEW

Joseph P. Witherspoon of the University of Texas. Rice wrote in 1975:

Nobody can tell with certainty what the effect of the ERA will be upon state abortion laws. The uncertainty as to its application in several areas is one of the main drawbacks of the ERA. But it could be fairly argued, and I happen to believe, that if the ERA were adopted it would make it abundantly clear that the states are disabled from prohibiting or even restricting abortion in any significant way . . . The combination of the Supreme Court abortion decisions and the Equal Rights Amendment would operate to prevent any restrictions on abortion which are more stringent than the restrictions imposed on sexually neutral operations such as appendectomies.<sup>11</sup>

Professor Witherspoon wrote:

ERA *may* be viewed as guaranteeing to a woman that her right of privacy, including the right to medical treatment, may not be cut off by anti-abortion legislation which prevents only a woman from obtaining medical treatment but not a man and thus as confirming and ratifying through a formula against discrimination based upon sex the basic result reached in *Roe v. Wade* on the basis of the extension of the right to privacy. There is some evidence that scholars like Emerson may have had in mind using the ERA as a basis for attacking anti-abortion laws in the event the court tests failed.<sup>12</sup>

The second legal question asks whether ERA will expand abortion rights already established. The area for possible expansion is small indeed, but not nonexistent. It need hardly be said that any expansion will come at the expense of unborn children and their families, and remove the remnants of a once-powerful pro-life system of laws. The remnants are not unimportant: the Supreme Court has heard oral argument in a case that will decide whether a state can require a physician to simply *notify* a minor's parents or guardian of her abortion.<sup>13</sup>

The third legal question asks about new abortion rights. Most conspicuous is the question of funding.

On June 30, 1980, the Supreme Court held that the Constitution does not require Congress to pay for the medically necessary abortions of indigent women. (*Harris v. McRae*, \_\_\_\_ U.S. \_\_\_\_, 1980.) On the same day, the Court held that the states were not required to pay for such abortions, either. (*Williams v. Zbaraz*, \_\_\_\_ U.S. \_\_\_\_, 1980.) Both cases were decided by 5-to-4 votes. Three years earlier, by votes of 6-to-3, the Court held there was no requirement to pay for elective abortions. (*Maher v. Roe*, 432 U.S. 464, 1977, and *Beal v. Doe*, 432 U.S. 438, 1977.)

A shift of one vote in 1980 or two votes in 1977 would have changed the results. Let me suggest how the Equal Rights Amendment could have made the difference.

In *McRae*, the Court held that, the *Abortion Cases* notwithstanding, the funding restriction did not impinge on either the "liberty" protected by the Due Process Clause of the Fifth Amendment or the "equality" protected by the equal protection component of the amendment. In determining whether the funding restriction (the Hyde Amendment) violated the equal protection component, the Court followed its traditional two-tiered analysis. First, it held that the legislative restriction did not violate any constitutionally-protected substantive rights, i.e. there is no constitutional right to a tax-paid abortion. Then the Court turned to the second issue: whether the legislative restriction discriminated against a *suspect class*. The *McRae* majority quoted *Maier*:

An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases.<sup>14</sup>

If the Equal Rights Amendment had been in the Constitution when *McRae* was decided, the result surely would have been opposite. ERA is designed to make the class of women (and the class of men) a suspect class. Legal distinctions between men and women will be eliminated entirely or (for those distinctions purportedly based on unique physical characteristics) subject to strict judicial scrutiny.<sup>15</sup> If women were a suspect class, and if the Hyde Amendment had had to undergo strict judicial scrutiny (both because of ratification of the Equal Rights Amendment), this Supreme Court would have held that the Constitution mandated public funding of abortions. Perhaps ERA would have changed the results in the 1977 non-therapeutic abortion decisions as well. For the Constitution to have been read to require public funding of abortion, only one *McRae* justice needed to switch his vote; only two shifts would have been required in 1977.

If the Equal Rights Amendment is ratified, we can expect attempts to overturn the abortion funding cases. The arguments in federal courts will follow the arguments now being made in the Massachusetts court: prohibitions against abortion funding will be said to be sex discrimination in violation of the ERA. Attempts by some proponents of the Amendment to gloss over ERA's potential for serious mischief in the abortion area are disingenuous, misleading, and unworthy of the importance of the issue.

#### THE HUMAN LIFE REVIEW

Advocates of the Equal Rights Amendment use legislative history in extraordinary ways. Any legislative history is a malleable thing, but the abuses heaped upon the history of this amendment are without equal. Advocates of the amendment take positions inconsistent, hypocritical, and contradictory — while nearly always prefacing their opinions with attacks on Phyllis Schlafly or some unnamed, benighted souls who are “uninformed” and “confused.”

Susan Taylor Hansen, writing for a predominantly “Mormon” audience says in her article “Women Under the Law” that

... “Mormon” opposition to ERA to date . . . too often reflects astonishing ignorance of the basic legal questions involved. Too often one hears objections . . . that are manifestly silly, obviously uninformed or even calculatedly misdirected. The uniformity and fervor with which this ignorance is displayed can, in the long run, only hurt the image of the church.<sup>16</sup>

Miss Hansen follows this dispassionate survey of the minds of her opposition by reassuring us that “. . . only after addressing the facts, can we move to a meaningful discussion” of ERA’s impact. She offers her own “comments” as a “first step toward fuller understanding of this complex subject.”

Hansen’s legislative history lesson is of some help, but she makes a serious and common error. She says, after cautioning about uncertain interpretations, that “Few amendments, however, have had the same wealth of pre-passage legislative discussion of intent as has the ERA in the House of Representatives and the Senate.”<sup>17</sup> This statement is designed to allay fears. It is designed to make one believe that the Amendment’s purposes are well-known and we can rely on the Court to carry out those purposes, *and only those purposes*. Unfortunately, we can have no such guarantees, and Hansen provides us with the evidence:

The Supreme Court, however, has thus far failed to rule that sex is a “suspect classification.” To do so would be tantamount to declaring that the denial of legal rights on the basis of sex was unconstitutional under the equal protection clause of the Fourteenth Amendment. It would be the judicial equivalent to ratifying the ERA. . . . The fact that the Court has had ample opportunity to make such a ruling without doing so suggests that it is unlikely to do so in the foreseeable future.<sup>18</sup>

She does not say specifically whether or not she thinks the Court ought to perform the “judicial equivalent to ratifying the ERA” but she clearly *implies* that it should by quoting Congresswoman Martha Griffiths, who championed ERA in Congress in the early 1970’s: “There never was a time when decisions of the Supreme Court could

not have done everything we ask today.”<sup>19</sup> Hansen also says (and she should be honored for her candor) that “The Fourteenth Amendment, for example, has far exceeded the originally perceived purpose — elevating the status of blacks — and has come to serve as a tool of justice for many oppressed persons and groups.”<sup>20</sup>

Now what does Hansen ask us to believe? First, she says to trust the courts with the Equal Rights Amendment because it has a “wealth of pre-passage legislative discussion.” Yet, she resents the fact that the Court has not gone beyond what she knows to be the “originally perceived purpose” of the Fourteenth Amendment and saved the states the trouble of ratifying the ERA. With Congresswoman Griffiths, she believes the Supreme Court should save ERA proponents the trouble of convincing state legislatures to amend the Constitution by reading into the Fourteenth Amendment a meaning its authors did not put there and no court for over 100 years has been able to find there. Miss Hansen wants us to trust ERA to the courts because courts and legislative history can be trusted — but to the extent that the courts have been faithful to the history of the Fourteenth Amendment she opposes *that* (presumably because you can’t trust courts).

ERA proponents cannot have it both ways: they cannot comfort us by telling us that legislative history will bind the courts (e.g. in the ERA cases) and then cheerily report that courts really do their best work when they break those bands (e.g. in the Fourteenth Amendment cases).

The argument for judicial fidelity which Miss Hansen attempts can never be made persuasively, I believe, by a 20th Century legal liberal. In asserting the integrity of the present amendment’s legislative history and the fidelity which judges will pay to that history, the legal liberal undermines his own allegiance to the Court’s infidelities against other legislative histories. (The *Abortion Cases* are perhaps the best examples of Fourteenth Amendment infidelities.)

This inconsistency may trouble some of the amendment’s proponents but the more sophisticated of them do not need to sort out the inconsistency because of their own view of the Constitution. They use the argument for legislative fidelity hypocritically because they have no intention of holding future courts to the meaning of the amendment *as it was understood when adopted*. To these people, the amendment means one thing today, another tomorrow. (I am inclined to say that today it means whatever it needs to mean in

#### THE HUMAN LIFE REVIEW

order to be approved; tomorrow it will mean whatever it needs to mean to advance some cause.) To these people, the abortion right can as easily be “put” into “Equality of rights” as it was into “Due Process of Law.” To them

“Government” appears as a vast reservoir of power which inspires them to dream of what use might be made of it. They have favorite projects, of various dimensions, which they sincerely believe are for the benefit of mankind, and to capture this source of power, if necessary to increase it, and to use it for imposing their favorite projects upon their fellows is what they understand as the adventure of governing men.<sup>21</sup>

And for these people, Constitutional meaning must change to accommodate their favorite projects.

This permutable view of the Constitution was held by the members of the House Judiciary Committee who supported the Equal Rights Amendment. In the Committee report (signed by, among others, Abner J. Mikva, recently appointed to the United States Court of Appeals for the District of Columbia, the second most powerful court in the nation), the members gave their view of the “legislative history” of the Amendment:

Because [“Equality”] is a symbolic word, and not a technical term, its enshrinement in the Equal Rights Amendment is consistent with our Nation’s view of the Constitution as a *living, dynamic document*.<sup>22</sup>

Living, dynamic documents do not mean tomorrow what they meant in their committee reports. In fact, legislative histories are frequently irrelevant to “living, dynamic documents.” (And what can Miss Hansen do when she tries to rely on the argument for fidelity and finds that part of the legislative history is intentionally changeful? To say the court will follow the history when the history says the language is “living” and “dynamic” is to say that we are engaged in an enormous Constitutional game of chance.)

There are a thousand maxims for legislative interpretation, but none so widely applicable as Lord MacMillan’s, which ought to be meditated upon day and night by supporters of any Constitutional amendment. Said MacMillan: “In construing an Act of Parliament, the legislators who passed it cannot be asked to state on oath what they meant by particular words in it — for which they must often be devoutly thankful.” The promise of putting “symbolic words” into the Constitution is that they have no meaning; lawyers and judges give them meaning later. This practice may multiply the gratitude of legislators, but it should give no comfort to the people.

LINCOLN C. OLIPHANT

Even to the extent that ERA's legislative history seems to provide details rather than symbols, the details are contradictory. In a recent edition of *America* magazine, Elizabeth Alexander, a lawyer and legal advisor to "Catholics Act for ERA," and Maureen Fiedler, a nun and national coordinator of that organization, wrote an article explaining how abortion and ERA are "separate and distinct." After some obeisance to the fidelity argument, the writers began a series of paragraphs surely designed to overwhelm their readers. They first quoted Congresswoman Griffiths and Senator Bayh, then a paragraph from the Senate Report:

The original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness." As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex.<sup>23</sup>

Setting aside the legislative history, Alexander and Fiedler give us their conclusion of what ERA will mean for abortion:

*In these statements, Congress clearly expressed its intention that the Equal Rights Amendment should not be applied to abortion laws since pregnancy and the corollary ability to have an abortion obviously flow from physical characteristics unique to the female sex. Such a clear statement of intent would be difficult for the Supreme Court or any court to overcome.*<sup>24</sup>

*Furthermore, Congress provided the judicial branch with a sound legal basis for excluding abortion from the broad equality mandate of the E.R.A., by providing an exclusion for unique physical characteristics.*

Abortion is a situation that arises from the unique physical characteristic of pregnancy. In this situation, there is no characteristic that can be shared with the other sex because, of course, men are incapable of becoming pregnant and of having abortions. *Where the characteristic is not shared with the other sex, there can be no issue of discrimination based on sex.* Since it is impossible to treat men and women equally in this area, there can be no showing of a purpose or intent to discriminate.

Thus, a legal argument in this case that alleged discrimination because of impact on one sex would certainly fail. Similarly, the idea of discrimination arising because women are forced to bear unwanted children makes no sense because men have no "right" or capability of bearing any child, wanted or unwanted. Put in simplest terms, the Equal Rights Amendment guarantees equal rights for men and women. Men can't get pregnant, can't have babies, and can't have abortions. There is no way any E.R.A. can give, or deny, men an "equal right" to abortion with women!<sup>25</sup>

The Alexander-Fiedler conclusion has just one flaw: the country's foremost ERA experts say it is dead wrong. This conflict is immensely educational, for it shows how "wrong" one can be even though one has "the legislative history" on one's side.

#### THE HUMAN LIFE REVIEW

The country's foremost ERA interpreters filed a brief *amici curiae* in *G.E. v. Gilbert* (429 U.S. 125, 1976), because, in the judgment of these experts, General Electric Co. was misusing the legislative history of the Equal Rights Amendment in trying to defend its disability insurance program, which did not cover pregnancy. And what was G.E. arguing? It was arguing what Alexander and Fiedler argue: Pregnancy is a "unique physical characteristic" that cannot "be shared with the other sex," so "there can be no issue of discrimination based on sex." In trying to disconnect the ERA-abortion connection, Alexander and Fiedler have had to use the arguments of G.E., that sexist institution, against which, in the Supreme Court, were arrayed the entire spectrum of women's and labor groups, the staunchest defenders and most important interpreters of the proposed amendment.

The *Gilbert amici* brief was signed by Thomas I. Emerson of Yale Law School, Barbara A. Brown and Ann E. Freedman of the Women's Law Project, and Gail Falk. Brown, Emerson, Falk and Freedman wrote what is probably the most important work on the proposed 27th amendment, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women" (80 *Yale L.J.* 871, 1971). Joining the authors of the Yale article were Ruth Bader Ginsburg, then of Columbia Law School and probably the leading legal writer and scholar on "women's issues," and Melvin L. Wulf and Kathleen Willert Peratis of the American Civil Liberties Union. Mr. Wulf is a prominent Supreme Court practitioner; Prof. Ginsburg now sits with Abner Mikva on the D.C. Court of Appeals. These leading ERA interpreters explicitly and comprehensively rejected the Alexander-Fiedler interpretation of ERA. And when that interpretation is destroyed, the conclusion that there is no ERA-abortion connection is destroyed also.

In the *amici* brief, Emerson, Ginsburg, and colleagues said:

General Electric Company . . . argue[s] that the legislative history of the equal rights amendment supports the proposition that Title VII permits G.E. to penalize women employees disabled by pregnancy and childbirth by denying them disability insurance benefits available to employees for virtually all other disabilities. To put forward this argument, G.E. . . . make[s] use of selected portions of legislative history, quote[s] those portions out of context and thus distort[s] the meaning of that history . . .

Legislative history reflects the congressional intention that there be a two-tiered standard of judicial review under the ERA: (1) explicit general classifica-

LINCOLN C. OLIPHANT

tions are *per se* outlawed; (2) classifications purporting to deal with a "unique physical characteristic" of one sex are subject to strict scrutiny . . . .<sup>26</sup>

*The legislative history of the ERA includes several examples of pregnancy classification permissible under the amendment.* Among these are "a law providing for payment of the medical costs of childbearing," and "laws establishing medical leave for childbearing." *These pregnancy classifications are valid not because (as suggested by G.E.) [and, this writer adds, as stated by Alexander and Fiedler] pregnancy classification is outside the scope of the ERA, but because the test applicable under the ERA is satisfied . . . .*<sup>27</sup>

If G.E. were a state employer subject to the ERA, *its treatment of disabilities related to pregnancy and childbirth would not survive the scrutiny appropriate under the amendment . . . .*<sup>28</sup>

A contextual approach to the legislative history of the ERA reveals the superficiality of the quotation search made by G.E. . . . [Our analysis] discloses that pregnancy classifications of the kind here at issue would not survive the ERA. . . .<sup>29</sup>

Thus the logic underlying Alexander and Fiedler's conclusion that ERA and abortion have no connection have been shattered by the ERA brain trust. Some of the principals of Catholics Act for ERA may continue to believe that ERA and abortion have no connection, but when the cases reach the courts, advocates like Emerson, Brown, Falk, Freedman and Wulf will be arguing before judges like Ginsburg and Mikva. Paraphrasing Congressman Henry Hyde, I don't think this is a combination the unborn can live with.

Abortion and childbirth are simply two alternative, and equally dignified, ways of dealing with pregnancy — or so the "pro-choice" people insist. Therefore, unless "pro-choice" advocates lose their present advantage in the courts, as the drive for equal rights comes to include protections for women having babies, it must also come to include protections for women who end their pregnancies by abortion. This trend has been with us for some time, and will continue. The proscription of sex discrimination in the 1964 Civil Rights Act came to mean abortion rights. Title IX of the Education Amendments of 1972, which prohibits sex discrimination in educational institutions receiving federal funds, came to mean abortion rights. The "Alternatives to Abortion Act" (Title VI of the Health Services and Centers Amendments of 1978) was meant to be a "pro-life" bill but turned out to provide funds only to centers which are willing to counsel on "all options" available to pregnant teenagers. Anti-abortion counseling centers have refused to counsel abortions, and so are excluded. Until anti-abortion forces can break the weld holding abortion and birth together as just "two alternative



ways of dealing with pregnancy," each advance for women's rights will be an advance for abortion rights.

Pro-family, pro-life people will often find themselves in a dilemma: they will be torn between their desire to support legislation designed to eliminate discrimination against women generally (or against pregnancy-leading-to-childbirth specifically) and the knowledge that such laws will be used to expand abortion rights. When the Equal Rights Amendment is ratified, its sweeping language will create undifferentiated "women's rights" which mean pregnancy rights which mean abortion rights. The links probably cannot be broken. The now-classical statement of the abortion-equals-birth mentality was made by Federal District Judge Jon O. Newman, who said:

The view that abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy may be gleaned from the various opinions in [the *Abortion Cases*].<sup>30</sup>

Newman's formulation has been held up to parody. Professor John T. Noonan, Jr., of the University of California (Berkeley) Law School has observed that embezzlement and cashing a check, when stripped of their sensitive moral arguments, are simply two alternative ways of withdrawing money from a bank, and prostitution and marital intercourse, when stripped of the sensitive moral arguments surrounding them, are simply two alternative ways of satisfying the sexual instinct. But Judge Newman, we should remember, says that he "gleaned" his stark, amoral formulation from the *Abortion Cases*. Several members of the Supreme Court must think Newman was right.

In a dissent in one of the 1977 abortion funding cases, Justice Brennan, joined by Justices Marshall and Blackmun, said:

Pregnancy is unquestionably a condition requiring medical services. [Citation omitted.] Treatment for the condition may involve medical procedures for its termination, or medical procedures to bring the pregnancy to term, resulting in a live birth. "Abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy." [Citing Newman.]<sup>31</sup>

Note that the Justices have thrown out Newman's reference to what may be "gleaned" from the earlier cases. They can say with authority (at least the authority of a dissenting opinion) that "abortion and

childbirth . . . are simply two alternative medical methods of dealing with pregnancy.”

In the 1980 Hyde Amendment case, *Harris v. McRae*, Brennan, Marshall, and Blackmun used their statement from *Beal*. The idea that abortion-equals-childbirth is so valuable to these Justices that they take every opportunity to expound it. After quoting themselves, they add the following:

In every pregnancy, one of these two courses of treatment is medically necessary. . . . But under the Hyde Amendment, the Government will fund only those procedures incidental to childbirth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, the Hyde Amendment deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in *Roe v. Wade*.<sup>32</sup>

It is easy to see how these Justices would think that the Hyde Amendment is unconstitutional: if abortion and childbirth are simply two indistinguishable medical procedures, how can Congress rationally fund one procedure and not the other? And, if the distinction is irrational, it is not constitutional. The three justices, being unable to distinguish abortion from childbirth, are also unable to distinguish coercion from inducement. They charge Congress with using *coercive incentives*. Life means death, birth means abortion; incentives mean coercion; “war is peace; freedom is slavery; ignorance is strength.”

In *McRae*, Brennan, Marshall, and Blackmun were joined by Justice Stevens who wrote his own dissenting opinion. We have come within one vote, then, of being told that the Constitution of the United States requires the Congress of the United States to pay for abortions when it pays for childbirth, and this because “Abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy.”

We are not too far, in the courtrooms of this country, from a final decree that abortion and childbirth are in all things equal. A shift of one vote in *McRae* would have done it insofar as funding is concerned. Many judges are now agreeable, and we can be sure that abortion advocates will continue to push the morally warped theology — I use the word advisedly — that abortion equals birth.

Two leading pro-abortion groups (the American Civil Liberties

#### THE HUMAN LIFE REVIEW

Union and Planned Parenthood Federation) have made the following argument to the U.S. Supreme Court:

Since pregnancy is a condition requiring medical attention, [we must] determine whether abortion is a safe response to it at certain medically recognized stages. Neither the choice of live birth nor that of abortion can be considered "unnecessary" under this analysis, despite the fact that those treatments present different outcomes as a result of the treatment.

An analogous situation is presented by a diagnosis of kidney disease, where the choice of treatment is transplant or dialysis. Each choice produces significantly different outcomes with different effects on the patient's mental and physical health, but this by no means indicates that one choice is less "necessary" than the other . . . . While the choice of treatment would be predicated upon consideration of a number of individual factors known only to physician and patient, they would at least not be forced to give overriding consideration to an arbitrary State determination that one form of treatment was more moral (*i.e.* more "necessary" under a State definition of that term) than the alternative choice.<sup>33</sup>

The ACLU and Planned Parenthood argue that deciding whether to give birth or abort is like deciding whether to have your failing kidney replaced by transplant or renewed by dialysis. It is hard to imagine a *less* analogous situation, but the pro-abortion mentality no longer comprehends distinctions between rejected, surgically dismembered children and failing, surgically replaced kidneys. When the state tries to say "damn it, this is wrong, there *is* a difference between kidneys and children and we will pay only for kidneys," the American Civil Liberties Union and Planned Parenthood call this an "arbitrary determination." The Equal Rights Amendment will be used to further the cause of abortion because pro-abortionists no longer recognize a difference between abortion and childbearing. To pro-abortionists, they are simply two alternative methods of dealing with pregnancy.<sup>34</sup>

I have tried to show here some connections between the way influential supporters of the Equal Rights Amendment and abortion habitually think on these subjects. If the Amendment is ratified, many of these habits of thought will be transformed into Constitutional law — the kind of law which, for example, takes one's property and uses it for purposes one opposes, such as paying for elective abortion; the kind of law which cannot be amended or repealed by the people's elected representatives.

I have come, ineluctably and possibly irreversibly, to the conclusion that there is an ERA-abortion connection. As more and more

LINCOLN C. OLIPHANT

people reach the same conclusion, the Amendment's prospects will diminish. This is as it should be, for if ERA means abortion it does not mean progress, it does not mean liberty, it does not mean "rights." Abortion means death: it only remains for us to know what the Equal Rights Amendment means. In one very important regard, I believe I know.

NOTES

1. The first section of this article appeared in a slightly different form in *XL Human Events* 13 (Dec. 6, 1980).
2. Quoted in David Farrell, "SJC Ruling Could Affect ERA Votes," *Boston Globe*, Sept. 7, 1980, p. A6.
3. *Id.*
4. The relevant part of the Massachusetts Constitution reads, "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." *Mass. Const.*, Pt. 1, Art. 1, amended by the One Hundred and sixth article of Amendment, approved Nov. 2, 1976.
5. See, Complaint, *Moe v. King*, S. Judicial Ct. of Mass., Civil No. 80-286 (filed July 9, 1980). I am aware of one other attempt to use a state equal rights amendment to gain abortion rights. In the Spring of 1978, several physicians attempted to intervene in a case involving taxpayer-funded abortions. The physicians' argument was similar to that being made in Massachusetts.

Applicants' first claim to reimbursement as a matter of right rests on the Hawaii Constitution's guarantees of due process and equal protection and Article I, Sec. 21 which provides that "equality of rights under the law shall not be denied or abridged by the state on account of sex." Abortion is a medical procedure performed only for women; withdrawing funding for abortions while continuing to reimburse other medical procedures sought by both sexes or only by men would be tantamount to a denial of equal rights on account of sex.

Memorandum in support of the Motion to Intervene, *Hawaii Right-to-Life v. Andrew I. T. Chang, et al.*, Circuit Court of the First Circuit, State of Hawaii, Civil No. 53567 (filed May 11, 1978).

The motion to intervene was denied. The judge did not address the equal rights argument.

6. *Moe v. Sec. of Admin. & Finance*, S. Judicial Ct. of Mass., (mimeo. decision released Feb. 18, 1981. The complaint listed Governor Edward King as the first defendant, but the action against the Governor was dismissed.)

7. "From the Executive Director's Desk" column, Civil Liberties Union of Massachusetts *Docket*, Aug., 1980, p. 8 (emphasis added).

8. "Statement of Thomas I. Emerson on Proposed Resolution to Rescind Connecticut's Ratification of the Equal Rights Amendment," reprinted in *Hearings on S. J. Res. 134 Before the Subcomm. on the Constitution of the Sen. Judiciary Comm.*, 95th Cong., 2nd Sess., 136, 138 (1978) (emphasis added).

9. United States Commission on Civil Rights, *Statement on the Equal Rights Amendment* (Clearinghouse Publication 56), 22 n. 23 (Dec., 1978) (emphasis added).

10. In a 1974 letter, Professor Emerson seems to have taken other positions on the abortion-ERA controversy from those he takes in his testimony to the Connecticut legislature quoted here and the *amici* brief he signed in *General Electric Co. v. Gilbert*, discussed in Section C, *infra*. In the letter, Emerson said:

You are right that the article on the Equal Rights Amendment in the *Yale Law Journal* was published prior to the abortion decision of the Supreme Court. The main reason we did not discuss the abortion problem in the article was that abortion is a unique problem for women and hence does not really raise any question of equal protection. Rather the question is one that is concerned with privacy.

I think that the ratification of the Equal Rights Amendment, while it would not affect the abortion situation directly, would indirectly have an important effect in strengthening abortion rights for women. The passage of the Amendment would reflect a concern on the part of the American people with women as human beings and thus would certainly carry over into the abortion picture.

Letter from Thomas I. Emerson to Ms. Cres Apprill, Jan. 15, 1974, copy in author's files.

The first paragraph of the 1974 letter sets out a different view than Emerson argued in his *amici* brief.

## THE HUMAN LIFE REVIEW

The second paragraph of the letter speaks of an important indirect effect of ERA on abortion rights.

11. Letter from Charles E. Rice to Mrs. Paul White, Feb. 3, 1975, copy in author's files.
12. Memorandum from Joseph P. Witherspoon to the Board of Directors, National Right-to-Life Committee, Sept. 15, 1975, copy in author's files (emphasis in original).
13. For a discussion of the case, see Garn & Oliphant, "Abortion and the American Family: A Note on a Court Long Overdue," *The Human Life Review* Vol. VI, no. 2, Spring 1980, p. 16.
14. *Harris v. McRae*, — U.S. —, slip opinion at 23 (1980).
15. The "meaning" of the Equal Rights Amendment given here is taken from the *amici* brief of Emerson, *et al.* discussed in Section C, *infra*. The Emerson analysis may or may not be correct. Cf., e.g., R. Lee, *A Lawyer Looks at the Equal Rights Amendment* (1980), especially Chapter 6, "What Would the ERA Do? The Uncertainty of the Standard."
16. XII *Dialogue: A Journal of Mormon Thought* 82, 83 (Summer, 1979).
17. *Id.* at 88. Since committee reports are the best source of legislative history, and since the Senate and House Judiciary Committees supported different versions of an amendment (notably, the House Committee supported the Wiggins Amendment) and wrote their reports about different language, it is very difficult to see how the legislative history of ERA can be described in terms of praise.
18. *Id.* at 86-87.
19. *Id.* at 87.
20. *Id.* at 88.
21. M. Oakeshott, "On Being Conservative," quoted in Wm. F. Buckley, Jr. (ed), *American Conservative Thought in the 20th Century* (N.Y.: Bobbs-Merrill, 1970), p. 94.
22. H. Rpt. No. 92-359, 92nd Cong., 1st Sess. 8 (Separate Views) (1971) (emphasis added).
23. Alexander & Fiedler, "The Equal Rights Amendment and Abortion: Separate and Distinct," *America* 314, 315-16 (April 12, 1980).
24. People who are supposed to be as concerned about abortion as I presume Catholics Act for ERA claims to be, ought, after the *Abortion Cases*, to be utterly incapable of uttering a sentence such as "Such a clear statement of intent would be difficult for the Supreme Court or any court to overcome." The Supreme Court had no problem at all in overcoming an entirely adequate history of the Fourteenth Amendment and abortion. John Hart Ely, Professor of Law at Harvard Law School, wrote the following about the Court's allegiance to legislative history:

What is frightening about *Roe* is that this super-protected right [of abortion] is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. . . . And that, I believe . . . is a charge that can responsibly be leveled at no other decision of the past 20 years. At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.

Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale L. J.* 920, 935 (1973) (all footnotes omitted). Reprinted in *The Human Life Review*, Vol. I, no. 1, Fall 1975.

25. Alexander & Fiedler, *op. cit.* at 316 (emphasis added).
26. Brief for Women's Law Project and American Civil Liberties Union as *amici curiae* at 4-5, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).
27. *Id.* at 13-14 (emphasis added).
28. *Id.* at 19 (emphasis added).
29. *Id.* at 21.
30. *Roe v. Norton*, 408 F. Supp. 660, 663, n.3 (D.C. Conn. 1975).
31. *Beal v. Doe* 423 U.S. 438, 449 (1977) (Brennan, J. dissenting).
32. *Harris v. McRae*, — U.S. —, slip opinion at 5 (1980) (Brennan, J. dissenting).
33. Brief for American Civil Liberties Union and Planned Parenthood Federation of America, Inc. as *amici curiae* at 11-12, *Beal v. Doe*, 423 U.S. 438 (1977).
34. To the pro-abortion people who think it is unfair to treat abortion with the unique disdain it deserves, must be added those who *are able* to make distinctions between abortion and birth but who get their distinctions muddled. These people include a majority of the Supreme Court. Dr. André E. Hellegers, Professor of Obstetrics and Gynecology and Director of the Joseph and Rose Kennedy Institute for the Study of Human Reproduction and Bioethics, Georgetown University, has made this point about as well as it can be made. Said Dr. Hellegers in an appearance before the Senate Committee on Human Resources,

LINCOLN C. OLIPHANT

The logic of the Supreme Court escapes me as a physician. This is the Court which holds [in the *Abortion Cases*] that it does not know when human life begins in the womb. For the purposes of allowing abortion the Court, therefore, treats the fetus as if it were just a tumor. But for the purposes of disability benefits [in *General Electric Co. v. Gilbert*] the fetus may *not* be treated as a tumor, for, if it were a tumor, the woman would qualify for disability benefits.

Hearings on S. 995 Before the Subcomm. on Labor of the Sen. Comm. on Human Resources, 95th Cong., 1st. Sess. at 77 (1977).

# The Generation Gap

*Erik von Kuehnelt-Leddihn*

**T**HE GENERATION GAP, today far more significant than ever before in recorded history, has several implications, above all in the domain of family and society, but also in those of culture and politics.

The roots of this disquieting gap with its many negative aspects are to be found in various fields. It has to do with the social and political experiences of the preceding generation not shared by the young; with the shrinkage of authority; with the “sexual revolution,” and the increase of purely sensual drives as opposed to those connected with genuine affections. There is also the pagan worship of youth itself; the disappointment of the young in regard to their parents; the weakening of religion as well as of fideism, coupled with a growing skepticism toward the existing order; the educational crisis; the non-historic, anti-dynastic bent of our times; the indifference if not hostility toward procreation and, last but not least, the curious, negative evolution of human intelligence, a phenomenon baffling all biologists. This adds up to no less than eleven important factors, all forming an interdependent maze of roots out of which our specific generation gap has grown. We shall consider each one in order to understand the nature of this malady — because a malady it certainly is.

Our first item refers to the radically different experiences of the generation which, in Europe, went through depression, the rise of totalitarianism, the war and its sometimes equally terrible aftermath, as compared with those of the generations grown up in an age of prosperity. In America the situation was not quite the same: the Depression, the New Deal and the war did not cut quite as deeply as in Europe though, oddly enough, one spoke in the 1950’s — in Europe a period of expectation, if not of limited hopefulness — of the *beatniks*, “the lost generation.” Their European contemporaries were, on the whole, serious students whose horizon had been broadened by the war, by their experiences in foreign countries as soldiers,

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or quite frequently also as prisoners. For many this had been a purgatory in the true sense of the word. In addition, large numbers had now become displaced persons. But they all shared with their elders experiences which have no American parallel: the hardship of life behind the lines, foreign occupation and persecution, starvation and, above all, the horrors of aerial warfare, holocausts which were often worse than any battles at the front. For today's youth all this is merely history.

Another factor was and still is to be considered in Europe: political loyalties. The writer of these lines was born a subject of Emperor Franz Joseph, became a citizen of the first democratic Austrian republic in 1918, a citizen of the Corporate Austrian State in 1934, a subject of the Third Reich in 1938, and a citizen of the second Austrian democratic republic in 1945. This meant each time a different coat of arms, a different anthem, a different flag, a different currency — and the same happened to Italians, Spaniards, Croats, Hungarians or Bohemians. For a young Austrian of today this frequently means that one grandfather betrayed a monarch, the other a republic, while his father successively betrayed a Christian dictator and a racist tyrant. Betrayals and breaches of loyalty followed one upon the other. Under such circumstances, what kind of respect can a young man or woman have for his or her forebears? Authority rests, after all, on either love, respect, or reason. I obey out of love or affection, or because I respect wisdom and experience, or simply because it seems reasonable to do so — three basic situations represented by parents, teachers and traffic policemen. However, the latter alone has, in addition to authority, coercive power.

The sexual revolution, prepared equally by the thinkers of the preceding generation, by philosophers, biologists, psychologists and psychiatrists, affected not merely the sexual realm, but also the character because, here too, the concept of loyalty as well as the precept of discipline were deeply challenged. Unlimited sexuality harms the affections, harms love. Love is a genuine tie, sex in itself is not. Neither prostitutes and call girls, nor Casanovas and Don Juans are *lovers* in the narrow or even the wide sense of the term; they are merely abominable abdominalists. The sexualist finally sees in his parents mere sex partners, not partners in love, and this destroys another link between the generations.

Closely connected with modern sexualism is youth-worship, which goes hand in hand with a depreciation of older persons



*because* they are feeble and nearer to death. Youth is considered a particularly active age sexually (which is of course correct) and also a happier one (which is a fallacy). This youth worship, however, is a perverse attitude, because in all great cultures and civilizations (and even in most low ones, except perhaps among the Eskimos) age, and especially old age, has always been venerated. (To tell a Chinese lady that she looks like a hundred is a great compliment). In ancient China a man came truly of age only at the age of 50, at which point he ceased to shave.<sup>1</sup> By making young people believe that without any effort, without any additional virtue — just by their mere existence — they are wonderful and enviable, reverses a natural situation, and thus establishes an artificial strain between the generations. The old envy the young who, in turn, despise the old. The “senior citizens” (frequently exiled to one of the “cemeteries for the living”) are desperate because they can never again be young — and the young vainly and sometimes desperately try to pretend that they are not afraid of inevitable old age. To protect themselves against their seniors, they try to establish a whole subculture with different clothes, different behavior and, above all, with a language (a secret language?) all their own.<sup>2</sup>

In addition, the young are disappointed with their parents whose generation had theoretically broken with their own immediate past but continued to *live* according to even older patterns. However, the young generation has not produced a single radically new idea. What moves them — morally, politically and culturally — are fashions, slogans, a certain kind of music. But ideas? None. In the 1960's a German publishers' association, inspired by the student unrest, sent out talent scouts to discover what they hoped would be brilliant manuscripts by young authors. They found absolutely nothing. And no wonder, since the intellectual signposts in that student movement were either long-defunct luminaries like “Young Marx” or Bakunin, or men in their ripe old age like Theodor W. Adorno or Herbert Marcuse. The intellectual idols of the two previous generations had been thinkers, critics and analysts like Renan, Darwin, Freud, John Dewey, Léon Blum, Oliver Wendell Holmes Jr., André Gide and Nietzsche — highly “respectable” people, if you like, but frequently (if you take a closer look at some of them) gravediggers of our western civilization.<sup>3</sup> And the parents and grandparents of the mutinous students had revered these men but lacked the temerity, the courage, the true conviction to live up to their

message. Religion to these generations was largely only the whiff from an empty bottle which the next generation simply discarded.<sup>4</sup>

The weakness of today's religious convictions is a further factor. Traditional Christianity is a patriarchal religion with God the Father in Heaven, the Holy Father in Rome, the Fathers of the Church as its source of inspiration, the monarch as *pater patriae*, and the father as head of the family. Abel Bonnard said rightly of ancient France that the King was the father of his people because every father was king in his family.<sup>5</sup> Now, this concept of fatherhood was also present in the Reformed Faiths (historically the King was the head of his country's Church) and it existed in Judaism where God is *aba*, Father. Of course, whoever says "father" implies a mother and in the strong psychological (but certainly not dogmatic) synthesis of Christianity and monarchy, the Queen (as either consort or ruler) was very much present in the minds of the people.<sup>6</sup> The traditional Christian concept of a nation is that of an extended family. One can well imagine how in older times two things developed in many countries with a monarchical system: a) a feeling of continuity thanks to a single royal family with rulers often in office during several decades, and b) a dynastic feeling within families in analogy to the ruling dynasty. Man has been defined as the animal that might know his grandfather and Tacitus told us that it is shameful to ignore one's ancestors.<sup>7</sup> And it is precisely the interest in grandparents and even further-removed ancestors as well as — in the other direction — the interest in their grandchildren, which gave a sense of continuity and linked the generations. Modern politics favors the politician as against the statesman. But the politician is primarily interested in winning the next election, whereas the real statesman is interested in the fate of his and the nation's grandchildren. The politician makes politics, a short-ranged affair encompassing only a few years, whereas the statesman tries to make history which spans the generations.

Modern man — and this is especially true of the young generation — is "ahistorical." The anti-dynastic attitudes current in the modern family are intrinsically connected with an ignorance about history which Henry Ford called "bunk." Modern man is "a creature of the moment." He lives for the present, is not interested in the past and does not care about the future. J. M. Keynes, asked how he viewed the effect of his economics in the long run, replied: "In the long run we're all dead" — the kind of reply to be expected from a homosex-

ual.<sup>8</sup> Of Hitler it was said that, like a mule, he had no pride in his ancestry and no hope for progeny. The same can be said of modern man.

There is, needless to say, a real connection between pride in one's ancestry, reverence for the memory of one's forebears, and the desire for procreation. It is natural to desire the continuity of a line one views with affection and admiration. The generation gap militates against continuity and this, incidentally, can be achieved only through a relatively numerous progeny. Families with only one or two children are apt to become extinct in due course.

It is one of the characteristics of our time that the purely sensual relations and enjoyments prevail and this is true of the ascendancy of sex not only over love (infatuation), but also over the "affections."<sup>9</sup> Among the young and youngest generations sound and motion have priority as documented by the enthusiasm for orgiastic dancing accompanied by noisy music — individual ecstasy within a crowd, a physical explosion which has, at best, a *collectivistic-horizontal* character so typical of our generation.

Our *traditional* culture, however, was not collectivistic-horizontal but personalistic and vertical. Only the egalitarianism of the French Revolution tried — unfortunately quite successfully — to bring about a change. With egalitarianism came ethnic nationalism and (partly due to Darwin<sup>10</sup>) racism. Equality and with it the drive for sameness has highlighted the entire political scene of the western world ever since 1789. This, as one can easily understand, created a reluctance to acknowledge superiorities and inferiorities. Sheer duration, however, usually provided the older generations with a greater reservoir of *experience* whereas equality has no scientific (nor spiritual) foundations. Adults obviously know more than children, old people are, as a rule, wiser than young ones. In the four great revolutions, the French, the Russian, the German<sup>11</sup> and the Chinese,<sup>12</sup> the driving force has always been the young generation which almost automatically chooses the most radical forms of the ideology that is being fought for.<sup>13</sup> All this inevitably widens the gap. And it is obvious that in such revolutions the enthusiastic young will claim that they have insights (almost amounting to private revelations) not given to the older generation which therefore has made a mess of their own country and society.<sup>14</sup>

Tension, if not hatred between the generations, is often the result of all this. The old will claim (and frequently rightly so) that the

young have no ideas of their own but are fanatically applying those which their elders developed some time before, although they did not follow them through, nor carry them out to their last logical conclusions, because they instinctively sensed their inherent absurdities. And it is precisely their experience which gave them a healthy amount of skepticism and inner distance. But the young with their all-too-receptive hearts and brains have adopted these notions without reservations, hence their fanaticism, coupled with naivety. One should reread Dostoyevski's *The Possessed*, where Stephen Trophimovitch, the old liberal, says about a recently published book:

I agree that the author's fundamental idea is a true one, but that only makes it more awful. It's just our idea, exactly ours; we first sowed the seed, nurtured it, prepared the way, and, indeed, what could they say new, after us? But heavens! How it's all expressed, distorted, mutilated! Were these the conclusions we were striving for? Who can understand the original idea in this?<sup>15</sup>

The original idea? Yes, basically it is the same but the generation gap, as we said before, exists precisely because the young (who have nothing essentially to offer and are frequently *unius libri viri*)<sup>16</sup> rightly feel that their parents and grandparents did not live up to their convictions because they either lacked courage or the acuity of mind to envisage their final consequences. Thus the young National Socialists of Germany thought that their parents, who believed in Darwin, Spencer and Haeckel, ought to have heroically accepted Hitler's creed of the survival of the fittest, while our young libertines, largely misinterpreting Freud<sup>17</sup> and the *Declaration of Independence*, are sure that their parents should have engaged in permanent adultery and, according to their democratic creed, ought to have striven for the democratization of schools, armies, churches, banks and factories. In other words: their parents are traitors or ninnies, whereas they themselves are courageous, truth-loving and honest, above all immensely honest. It is their honesty, so they believe, that drives them to rebellion, to riots or attempted revolutions as in the case of the very grave Paris riots in 1968. Yet, they are not aware of the simple fact that criticism is usually easy, as is the destruction of obsolete conditions, but that it is difficult to replace them with something positive. And their parents should not be judged too harshly for accepting certain destructive notions with their minds, but not with their hearts. After all, Freud was rather puritanical in his private life, Marx despised the working class and

revered the aristocracy, Lenin was married in Church (to another atheist), Calles, the great persecutor of the Church in Mexico, had his daughters educated in a convent school, and I know of a loose-living, godless French Freemason who was profoundly shocked when he met a married Anglican bishop and his wife.

No wonder that the present young generation is not fideistic, which means that it puts very little stock in *faith*. It wants proofs and rational arguments. It is skeptical and distrustful because it feels cheated by its elders. But the trouble is that this attitude of suspiciousness and incredulity is only partial, works only in certain directions. The young do not want to listen to the other side. They do not read the books of those who contradict them because these authors are "prejudiced." Their parents and grandparents were still "mixed readers" whereas they, though highly skeptical in one way, will believe almost anything if the information or argument jells with their ideology. During the Vietnam War they were sure that the Viet Cong consisted of admirable heroes while their own countrymen were fiends who perpetrated one My-Lai massacre after another. Now they prefer not to take notice of the agony of the "boat people," or the Cambodians.

There is a similar ambiguity about young people's "individualism." Their parents and grandparents, so they insist, were "bourgeois," typically middle-class conformists, and one must rebel against them in the name of non-conformism and individuality. Yet, the result of this revolt is nothing but another uniformity: instead of striped trousers, blue jeans; instead of clean shaven faces, the hirsute appearance; instead of polished speech, the new standardized jargon.

For the educational crisis the older generation is actually largely responsible. Their notion was, that their children should have it better than they had it and that "self-realization," achieved through a diminishment, if not abolition of discipline, would make things easier for them in school, and later in life. (Self-realization is not a Judaeo-Christian ideal; fallen man must shed the Old Adam and become a new man.) The "kids" were banished from home and sent to schools where they got more entertainment than learning and education. The result is not only the linguistic gap between generations, but also one in knowledge. When father or grandfather makes a reference to a great writer, an outstanding artist of the past, a famous philosopher or a brilliant statesman, the children look

blank. But they are not in the least ashamed of their ignorance because they know things which their parents ignore: the songs of a famous Rocker, the code-name of an efficient drug . . . parents and children live in different worlds. In terms of hours and subjects there is today more education, but there is less knowledge. The result is a generation gap in family conversations. This has happened before in history, but only very occasionally and in specific areas. Today it is a phenomenon characteristic for the entire western civilization.

Needless to say, this gap between parents and grandparents is a dangerous incentive, setting a deplorable example for the relationships between parents and children. The grandparents are old, they are near to death, they reek of death; they are no longer bread-earners, they are a nuisance. The modern family is a nucleus-family comprising only one or two generations. The values, the knowledge, the experiences accumulated are not transferred to the grandchildren.<sup>19</sup> The result is that each generation, in a way, starts from scratch since nothing is handed on — except in books, but modern man reads very little. The boob-tube devours his free time. The statistics about the time wasted in front of the electronic screen are heartrending. Thus historic and cultural continuity is rapidly getting lost. Horizontal man is a lonely jerk isolated within a crowd.

There is, finally, the ever-widening intelligence gap between the generations — at last something the older ones are not responsible for. And this is the crux of the matter: we know that in the last 200 years puberty has been setting in earlier and earlier (in the cities more so than in the countryside). In the 18th Century the puberty of boys normally set in between the ages of 15 and 17, occasionally even later. We have no statistics for girls, but we have the records of choir boys. Joseph Haydn, for instance, was a choir boy in Vienna until his voice broke at the age of 18. Today the famous boys' choirs (like the Vienna *Sänger-knaben*) have enormous difficulties because boys under 8 are not sufficiently matured to be trained and when they are 11 or 12 their voices begin to break.

Now, when puberty sets in, most body organs undergo an accelerated development, and one would think that the brain would keep step. But apparently it does not. Today mental maturity is enormously *delayed* and the student unrest in the 1960's is *partly* due to the fact that our college and university students are physically "real men" — but not mentally.

On the European continent in the 18th and early 19th centuries

boys went to university (graduate school!) at the age of 15-17. A knowledge of Latin and Greek was required, and often also of Hebrew. Take the career of William Pitt the Younger: he went to Cambridge at the age of 14, was a member of Parliament at 19, Chancellor of the Exchequer at 23, and at 24 (!) *for the next 17 years* Prime Minister of Great Britain (and thus the leading figure of the British Empire). Today a man of that age could not even hold a minor cabinet post in Liechtenstein. The Imperial Ambassador at the Court of St. James was at that time Count Stadion, aged 26; he had already been minister plenipotentiary in Stockholm at 23. Monarchs were declared to be of age and fit to govern at the age of 18. Alexander the Great was 22 when he started his victorious campaign against Persia.

Some people might argue that the life-span was then infinitely shorter (which is factually true), but this is no cogent argument because the records of longevity have not changed since. (In 1930 Bulgaria, for instance, had an average lifespan of only 48 years, but over 1300 centenarians.) Goethe finished the second part of *Faust* and of *Dichtung und Wahrheit* at the ripe old age of 82. People normally died in the prime of their lives from diseases which today pose no problems. I have seen and experienced the decline not only of knowledge but also of intelligence in my own country through all these years.<sup>20</sup> But what is the explanation? The biologists are at a loss. The fact that the lower classes have higher birthrates but are intellectually depleted because their brightest members move upward and leave behind a vast majority with modest I.Q.'s offers only a partial solution.<sup>21</sup> It is, incidentally, obvious that the lack of respect of the older generation for the minds of their progeny also serves to widen the gap between them. In Europe the standard of secondary schools is declining constantly.

What one would like to see — for a number of reasons — is harmony, understanding and affection between the generations: respect and reverence of the young for the old, hopeful expectation of the old for the young. Aristotle said that the love of parents for their children is naturally greater than that of children for their parents.<sup>22</sup> But today there is not only a lack of understanding between the generations: they do not even *know* each other. They do not quarrel a great deal because live contacts between them are frequently limited to the narrow framework of the immediate family which, as a rule, dissolves when the children consider themselves

"grown up" and decide to leave their "oppressive" parents. In American society especially, the generations hardly meet, being divided into teens and "singles,"<sup>23</sup> young marrieds and older couples, old and very old senior citizens. Yet, the young need the older generation which, in turn, needs the company of young people. Theoretically at least, they could have most interesting and fruitful conversations.

When I was 18 (living in Austria and Hungary) I got my bachelor's degree and went to graduate school — the norm within the highly selective educational system of the Continent. And I also entered the world of adults, which means that I dressed like my father and grandfather, spoke their language, thoroughly shared their interests and was treated by them as an equal. There were no institutions, organizations, clubs, etc. for the young only. (Even in the universities one always found a number of middle-aged students.) Also men and women were better integrated. (They still are: hen parties and "smokers" or stag parties are considered ridiculous in most parts of the Continent, and clubs — a term for which there is no non-English equivalent — hardly exist.) The harsh division between generations in our western society is an unmitigated evil and a real weakness. To overcome it is by no means easy since — as indicated — the roots of this malady are so manifold. They have to be cut individually. But if it could be done, we would have a better and more humane civilization.

## NOTES

1. In antiquity the ages of real maturity were considered to be 50 or 60. Ernst Jünger, on the other hand, once wrote: "Forty years is a terrible age. Then you become what you are!" Another German author noted that at thirty one gets the facial expression one deserves.
2. Konrad Lorenz in his *Die acht Todsünden der Menschheit* (München: Piper, 1973), pp. 65, 71, wrote about a near-ethnic or near-racial hatred of the young for the older generation. (There is an English version of this important book.)
3. Léon Blum, the French statesman, defended incest (*vide* his book *Du mariage*, Paris: Albin Michel, 1937), Oliver Wendell Holmes, Jr. declared that the condemnation of murder was a purely "municipal" idea, André Gide extolled homosexuality, etc.
4. *Vide* my narration "The Whiff from an Empty Bottle," *The Catholic World*, October 1945 (still written under my pseudonym F. S. Campbell).
5. Cf. Abel Bonnard, *Le drame du présent*, Vol. 1, "Les modérés" (Paris: Grasset, 1936), p. 35.
6. She was (in German) *Landesmutter*, mother of the country. Yet unlike the case in republics, a woman as head of the state was by no means rare. Maria Theresa had 16 children, was a devoted wife, and ran an empire.
7. "*Turpe est de proaevo nescire.*"
8. About Keynes' sex-life cf. David Gadd, *The Loving Friends* (London: Hogarth Press, 1974), esp. p. 189.
9. C. S. Lewis calls the loving relationship between near relatives (parents, children, siblings, grandparents, etc.) "affections"; they are neither sexual nor erotic, neither friendships nor ties of charity.



## THE HUMAN LIFE REVIEW

10. There is no doubt that without Darwinism or the continuation of his Doctrine by Haeckel the message of the National Socialists would have been unthinkable. Cf. Stanley J. Jaki, *The Road of Science and the Way to God* (University of Chicago Press, 1978), p. 301.
11. The German Revolution has been called by Carl Schmitt very rightly "The Legal Revolution," a complete "turnover" (*revolutio*), but democratically-legally arrived at.
12. Especially in China's Cultural Revolution the young generation played a key role. Its history, filled with the most nauseating atrocities, has yet to be written.
13. The words of Anatole France: "*Il n'y a de supportable que les choses extrêmes*" ("Only the extremes are bearable") find a strong echo among the young. The "middle road" has no fascination for them.
14. One of the characters of the German-Bohemian novelist Karl Hans Strobl has uttered the view that those who are thirty ought to be killed off. This slogan was repeated by the American student movement in the 1960's.
15. Cf. F. M. Dostoyevski, *The Possessed*, Part II, Ch. 4, No. 2.
16. The most typical case of being enslaved by a single volume was the worship of Mao's Little Red Book by the Revolutionary students.
17. Freud was by no means a leftist. He insisted that all great civilizations will inevitably rest on repression. He feared the ignorance and violence of the masses.
18. The *Declaration of Independence* gave — as its name says — the reasons for the break between America and Britain. The apparent "egalitarianism" in the Preamble is obviously not a piece of left ideology hypocritically signed by slaveholders, but an insistence that Americans are not inferior to Britishers and ought to have the same rights.
19. The German word for grandchild is *Enkel* which, curiously enough, means originally "little ancestor." This is based on the belief that the grandparents are embodied in their grandchildren (and not the parents in their child).
20. Our university professors are profoundly shocked by the intelligence and knowledge of those entering the universities. The universities (graduate schools) in Austria have to accept all those with a B.A. or B.Sc. degree. (This no longer applies to Germany.)
21. The British *Dictionary of National Biography*, in spite of continuously improving chances for a better education for the many, shows a decreasing number of outstanding men and women of lower class origin. cf. E. McSait *Political Institutions* (Appleton-Century: New York, 1938), p. 440.
22. Cf. Aristotle, *Nicom. Ethics*, VIII, 12, 2-3.
23. An American father whose daughter had an unpleasant experience with a young man on a date put great emphasis on the fact that this undesirable boy was five years older. This remark would be incomprehensible to most Europeans.

*A Letter from Czechoslovakia:*

**“While We Have Enough Men”**

*Radomír Hubálek*

*Mr. President:*

My name is Radomír Hubálek, my address is Zubří No. 816, I am 38 years old, I am a worker and I work at the National Rubber Manufacturing Company in Zubří. Please excuse me for bothering you already the second time, but I can not do otherwise because the matter does not concern myself.

I am appealing to you again anxiously, I am pleading that you use your influence and authority to obtain a release of at least one person from the group called Committee for the Defense of the Unjustly Prosecuted so that I might take his place and finish his prison term. I would be overjoyed if this selected person could be Mrs. Otká Bednár, the only woman in the group who was sentenced and denied probation. My reason for selecting her is not the shorter duration of her prison term (I will accept also a longer one), but because she is a woman. It is not good to see, among those sentenced for questions of conscience, a woman while we have enough men.

I admit that my plea is rather unusual, but this does not change the fact that my purpose is to help a suffering human being, a suffering woman, an ill woman. Therefore I am not submitting an application, but a plea which is intended to appeal to the heart of the person from whom help is expected.

I do not possess detailed information, and therefore am unable to judge all the circumstances which resulted in the sentencing of the Committee for the Defense of the Unjustly Prosecuted (CDUP) group. Personally, I have never met anyone from the people around them. Nevertheless, I feel that I must raise my voice to express my

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Radomír Hubálek may, or may not, be living in Prague; this letter, which we are assured did originate in Czechoslovakia, was published last year in *Studie* (which is described as a Czechoslovak Catholic emigré review published in Rome). It was translated by a friend, Mr. V. Chalupa, who lives in Chicago (we have not altered his translation).

conviction that it would be good if, in our country, in our beloved country, the Constitution and all the laws voted by the National Assembly were observed and respected, not excepted even Law 120/76 of the Official Bulletin, without any restrictive and unpublished exceptions; if someone would monitor this observance day and night and if everyone responsible for their observance took seriously those to whom he is responsible.

Already in summer, I sent you a letter of a similar content. On August 6, I posted it, by registered mail, at the post office of the Prague Castle, your residence, so that a possibility of its non-delivery is excluded. My intention was to wait for a reply. Tuesday, August 7, I approached one of the Castle officials who was addressed by the others as "Major." He did not give me his name, and therefore I am unable to identify him, and even the secretary working there replied to my inquiry that she was not acquainted with him well enough to know him by name, although she had a long discussion with him. And so I learned from these two people that I should definitely not wait for a reply to my letter, that the processing of my petition could take longer, but that I could expect, with certainty, a reply within three or four weeks. There was nothing else for me to do but assume that I was given true information — and to wait. And because I am still waiting for the promised answer and because the probability of an answer is now minimal, I am using the form of an open letter. Not to exert pressure, but in order to strengthen somewhat my pleading voice as my first appeal was not heard. By doing so I am using again my right of petition and I have elected the open form now also in order to express that the matter of my plea is not something underhanded, but something which should not be kept secret, even though originally I preferred to submit a private plea.

In this connection, I would like to mention the reply of one of the young security guards at the Castle to a question I posed him while I was waiting for a decision. I asked him how many people he knew whom he could identify as speaking the truth under all circumstances. The answer was: No one. Please believe me, this reply was not encouraging.

And therefore, to make my plea more understandable, please let me explain in some detail the reasons and considerations which led to it, or if you wish, make a sort of personal profession of faith.

First I must mention the role of truth in human life, as I perceive

it on my, assuredly imperfect, level of knowledge. I consider a lie, every lie, every deceitful communication, to be a contribution to an effort of a total destruction of values. A human being who lies, does so in the conviction that it is, for some reason, advantageous for him to deceive intentionally the recipient of his communication. He fails to realize that he himself, the author of the lie, becomes the first and foremost victim of his own deception. In order to be effective, his lie needs one basic precondition — the addressee of the lie must be convinced that the liar is telling the truth. Thus, a liar bases his lie, tacitly and dishonestly, on the authority enjoyed by the truth. A lie is therefore vitally dependent on truth, but at the same time undermines truth, subverts it, and thus destroys the very value on which it has the effrontery to depend. Therefore, each and every deceitful communication contains automatically its own fundamental contradiction, and therefore can never result in anything good. When a “clever” lie is found out to have used a counterfeited passport of truth, it loses its support and dies because it is nothing but a parasite living off the truth. Truth does not need a lie, but a lie can not live without the very truth it seeks to deny. Truth is life; lie is nothing but an effort to kill it.

Likewise a man “dealing” in lies has the inclination to see a liar in everyone else without first verifying it.

All this sounds perhaps naïve enough, but only until we realize that every moment of our lives is a moment of truth because it is given to us only once, and it is up to us to decide to what we will freely consecrate this moment; whether to the truth of our conscience — or if we waste it irrevocably by deceit and lie.

I know many people who believe that it is possible to lie their way to the truth, and that this way is the more reliable the more people of this kind there are. Many believe a lie is not truly a lie if everybody lies and at the same time knows it about all the others — that this actually serves the truth! Perhaps this is so because each liar concedes subconsciously the authority of the truth and therefore tries to dress up his lie so that it, at least, makes the impression of truth. And so, all around us people lie as well as they can, and they give no thought to the fact that they give witness to the lack of responsibility for their own actions and that, due to their conviction that a lie is always the easier way out, they purposefully transform themselves into permanent cowards. To lie one’s way to the truth is therefore impossible because a lie is not a direct opposite of the

truth but its more or less foul-smelling substitute. The bad smell will not diminish even if I meet it with a smile and pretend not to notice it. The relationship between truth and lie could be best compared to the relationship between light and darkness. Light penetrates darkness; never has darkness penetrated light. Equally, the darkness of a lie can never overcome the light of the truth.

A liar can be best compared to a man who tries intentionally to pay with counterfeit money which, too, only appears to be genuine. And the results are the same — deterioration of the currency and also of mutual trust — even though the truthful word remains true and the genuine coin remains genuine. In this connection it is interesting to note that there exist also states whose rulers put into circulation false words as well as false currency. Then of course, they must do it to so great an extent that nobody dares to refuse acceptance to such words or money.

But there is still another danger. Who will believe a man who has been found out to be a liar? No one who values truth. Perhaps only the other liars will try to convince him that they believe him. Will they succeed? What will come out of it if liars deceive other liars? Truth? Never. Only a still bigger lie. If a cheater in cards cheats another cheater, this still does not make the game honest.

What to think about a man who frequently relies on lies when we hear him talking about his own sincerity, about understanding among peoples, or even about peace? He wants to be taken seriously, he proclaims his devotion to high values, and at the same time he does not believe even himself.

Even a truthful person is in the danger that he could take pride in his possession of the truth and claim for himself a monopoly of truth. This, however, is a form of a more sophisticated deceit. Because nobody "owns" the truth; truth is not subject to man. Truth stands above man. And man can either serve the truth, submit to it, acknowledge its validity — or fight it, oppose it — in vain, with all the tragic results of such an attitude. Truth prevails, truth exists since eternity, and man does not decide that it be valid now and invalid at some other time. Not even matter can oppose the laws to which it is subject.

What are therefore the chances of success for a lie? Minimal, if it is alone. But many possibilities and perspectives are open to it, if it joins with other negative forces, such as hate. We will revert to this point later.

Why do I dwell to such great length on the matter of truth? Because I consider it the key question of each man's life, since without truth, the life of an individual or of any society or of humanity lacks *sense*. History shows us that, for the sake of truth, many people sacrificed their lives and that they considered such a price as adequate. Not to go to far, let us look at the memory of Magister Hus<sup>1</sup> which is well preserved in our grammar school readers, but applied in actual life with such extreme shyness. He certainly would not have wanted that. Who refuses to accept Hus' bequest of truth and is willing to serve a lie, is figuratively speaking putting another burning bundle of straw even under this bequest. Hus' sacrifice whose praise is being mouthed by many, is granted living sense and fulfilment only when there appears someone who understands his bequest and who is willing to pay a full price for the sake of truth.

I would give everything for being able to trust all your words, to trust all who lead our country, all those who claim to fight for peace, if I could be confident that everyone who wants to talk about peace realizes that he only subverts peace and serves war as long as he has hate of any kind in his heart.

The terrors of war, killings and every evil in this world need certain conditions. It is necessary to produce these, and to lead people into them systematically and consistently. Ideologies of a high level of perfection were constructed and tested for this purpose. Their common characteristic, their common mark is, next to lying, hate, hate of other people; on lies and hate they stand, and once lie and hate are taken away, they perish. One differs from the other only in the manner in which they rationalize hate which they consider to be the moving force of history. Here, of course, they are vindicated by history because hate has always been a force in the world — the only question is: where did it lead? There is available a whole selection of usable hates: national, class, racial, social, political, religious, personal or group hates, etc. All of them, however, have the same tendency and the same effects. They pitch man against man, they depict the other person or the other group as enemy — and then struggle for their suppression, defeat, destruction, liquidation, elimination, extermination. There are many degrees of such hostility, war being only its highest expression. If we wish to fight war *effectively* and if we want our struggle for peace

among people, nations, states be taken seriously, we must work to remove war's pre-conditions — hate in any form.

If I am a ruler, nobody will believe my desire for peace, no matter how loudly proclaimed, if I abuse simultaneously my rule for oppressing the people whom I am supposed to lead, if I will deny their rights as obviously as the nose in one's face, if I establish organizations which pretend to work for peace, but by their silence approve the opposite or pretend not to notice the education towards hate which starts with little children, or even claim that such an education to hate is "scientifically" grounded. Where will I wind up with such a subterfuge even if I call it with the noble name of "tactics?" Such a ruler must not fear a multitude of people with sincere hearts as much as the depth of their convictions. For such a ruler, those are dangerous who broke the notorious wall with their head — afterwards it is discovered that it was a wall of fear constructed of cottage cheese only.

Once we were told: A good tree bears good fruit and a bad tree bears bad fruit. Because war is impossible without hate and peace is impossible without love of men, it could be said that love brings peace and hate brings war. Love can not bring war and hate can not bring peace.

I am dwelling on this point in detail because it is necessary to tear away calmly the mask behind which lie tries to hide, and to keep tearing it away whenever lie tries arrogantly to put it on again, so that it can not benumb people by claiming it leads to peace through hate and deceit and to trumpet that such is the best and safest way and that anyone who does not follow it, is an enemy of peace. Only unmasked lie stops being dangerous — like an unmasked traitor becomes worthless for his paymaster.

Even the mother's womb which from time immemorial used to be a symbol of security, has become — thanks to the high level of hygiene achieved by medical science, and an institutionalized hate of life — the place of mass killings of barely conceived human lives, the place of a purposeful and publicly approved genocide of unborn, but already live beings. The language itself expresses the knowledge that human life begins in a mother's womb, and not at the moment of birth. Begetting = beginning of life. The spirit of lie inspires even here those who find it convenient, to claim that — perhaps! for three months this is not *human* life! This is nothing but a specific expression of hate of life as such, and it is only a question of time when we

RADOMÍR HUBÁLEK

start to describe other types of killing elegantly as — artificial interruption of life! These abortion advocates and proponents of intentional abortions do not consider this newly begotten life to be *life*, but only a “cause of pregnancy!” Today, then, a human being is publicly denied his unalienable right to live during three months of his intra-uterine existence. It is a horror when a simple deliberation of a woman decides about life or death — will I let the life growing in me live or will I have it deliberately killed? Mothers — would you only be able to hear and follow my voice! — mothers who do not appreciate the gift of your motherhood, make the gift of your unwanted children to someone who values a child’s life, or even sell them, only, I beg you a thousand times, do not kill them!

To those who chose terrorism and violence I would like to say, if I had a chance (because I am willing to offer myself in exchange for any innocently held hostage anywhere in the world) to realize that the pursuit of their rights does not give them at all a pretext for violating the rights of others, no matter how strongly they exclaim that this is their way of pursuing their own rights. By choosing their way, they only create additional injustice and bury even those rights which they intend to defend. What do they defend by taking hostages while not willing to be taken hostage; by placing explosives and observing from a safe place unsuspecting people be torn to pieces while not willing to be torn to pieces themselves; by throwing bombs on children while not willing their own children or brothers and sisters to be targets of bombs? And finally we witness how these people practice their theory of “justice through hate” after they achieve power, or total power, through their killings. Then, they are ready to sacrifice the lives of many other people, but they are unable to offer their own lives. By that, they are known. By that, they demonstrate to the entire world their supercilious cowardice. Until they are ready to sacrifice their own life *in advance*, nobody can trust them, nobody can be convinced of their good will.

Why am I dwelling on all this in such detail? Because it affects me personally.

My arrival in this world is certainly marked indelibly by the era of the fury of war during which I was born, during which the hate of man towards man celebrated its great orgy. I came to this world in an era when, only a few dozen miles from the place of my birth, departed from this world in the Auschwitz concentration camp pri-



soner No. 16670 without fearing death, on the contrary, giving strength to others.<sup>2</sup>

I hope you will not mind if I admit that I came to believe deeply in God through attentive study of atheistic literature. And I discovered that the intent of these authors to disprove Him fails because they first construe artificially some concept of a god which they can then easily demolish by their rationalistic arguments. And so they only fortify unintentionally by their efforts the substance of the true, not constructed, God, without knowing it. But let them have credit for it. Later, by systematic confusion of concepts, they helped me to clarify better the meaning of words. The curious thing is that the efforts of these hardworking, although constantly repetitious authors to darken the idea of God, do not prevent them from placing on the highest rung of the ladder of intelligence a somehow blindly purposeful chance. I am glad to have found that even these authors were deeply believing people. They believe that through science, through "scientific" arguments they can penetrate spheres where no science is competent, where knowledge reaches its limits and where an area begins which is beyond the capacity of human reason, and therefore can not be disproved. These efforts to disprove God who in his supremacy is beyond disproof, is like explaining to someone in love that there is no such thing as love, that science failed to find anything like love in live matter, and that therefore love is a fictitious concept invented by men, without any real and tangible substance. Such a man could be right perhaps for himself, but he can not disprove love for others who feel love firmly in their hearts, or at least desire it with all their hearts.

I became a believer in the moment when I cast away the pride of my knowledge about the world and stood before the miracles of creation which surround us, only in silent wonder — and I did not feel at that time any fear of the unknown, but a deep vibrating joy that no one can be trusted (i.e., believed) more than the source of everything that is good around us, in us, and therefore he to whom we owe our existence.

The endeavor of the atheists to deny everything transcending man is well illustrated by the apt fable about the section and the line. The section said: I am, I see myself, but a line? A line is an invented nonsense, I do not believe in it. Let someone show it to me in its entirety, all its points! Then I will accept it as proof and I will believe in it because I, the section, decide whether a line exists!<sup>3</sup>

Man is endowed with laws governing his physical functions which he may violate only little if he wishes to preserve his physical integrity, but he can not free himself from these laws; in the same way he is subject to laws governing his mental functions which he can not violate if he wants to remain man, even if he should consider himself no matter how modern and progressive. The human destiny to be human can not be changed, it can only be fulfilled better or worse.

What does life's evolution on earth mean? The explanation by means of chance claims that it is a chain of events without a direction and that a direction is construed only *ex post*; it is a sequence of extremely improbable possibilities and of life systems in the most improbable situations. Its direction nor its reasons are known. Does the darkness of chance thus create the light of order?

Lie tries to imitate truth, lie is dependent on truth. Atheism, in its substance a denial, is already by its name dependent on theism which it tries hopelessly to deny; even disregarding the fact that should it "manage to win," it would lose, at the same moment, even its name. Its only purpose is to oppose the laws of creation even if, actually, it recognizes some of them under the form of the natural order or the laws of history, but above these laws it does not place the law of laws, but a pseudo-god, the goddess Chance, and claims that she caused the forming of principles directing all live creatures. A blind chance which sees nothing but darkness, is said to have caused all this! Chance is therefore the goddess of Darkness. (But light was created first!)

It is claimed that chance is scientific, or rather that it is scientific to believe in it. Myself, I have never heard any scientist claiming to have a scientific opinion about these questions, but many non-scientists claim so very rigidly and insistently. The entire world and everything in it is governed by specific laws, by an accurate order — and here we are told to believe scientifically that all this is an outcome of non-order, of chance, of chaos. Even researchers in the field of the information theory who perhaps are closest to chance, are at a loss how to deal with it. Due to its substantive nature it is undefinable, and therefore eludes even calculations. To want to base on it the work of creation is therefore an endeavor more than audacious and risky. It has been impossible to create even with the help of computers a random selection of numbers which would not contain an ascertainable order. To state that something happened by chance

#### THE HUMAN LIFE REVIEW

seems to me to be an arrogant statement designed only to hide a failure in discerning the relevant causes.

Darkness is perhaps the phenomenon best masked as chance with the appearance of some mysterious order, but in fact it has no laws and causes helplessness. Such is then the picture of chance raised to the supreme principle of creation. Formerly people did not know how to explain nature, so they used some supernatural explanation; today, they simply blame chance.

Then there is still another great danger in materialism, no matter how noble and scientific an adjective it uses. If man is *only* a composition of tissues and bones, or if you prefer, a perfectly functioning system of live matter, then there is indeed no reason why such a man should need any kind of human rights.

I have been fortunate to have had the opportunity to examine and investigate gradually many religious systems. Where did I end? Or rather: with whom did I end? It is someone called Jesus.

What does Jesus mean for me? How do I understand Him?

Very simply: He has shown to all men who care for it, how they should live to be men. *Men!*

He showed it by words in perfect harmony with deeds.

He did not hide from his followers the difficulties of the road, on the contrary, he stressed their profound meaning. He was telling them: They persecuted me and they will persecute you too, they will hate you even for the sake of my name. I give you my peace, my tranquillity. To make it clear to everyone that you belong with me, repay rudeness with kindness, threats with a good word, vengeance with forgiveness, and all hate with love. In this way he became in spite of all the age-long hate the incarnation of peace, and if someone is interested, he could deliberate over the question why his way is the only way to peace, and also why his way leads to the cross.

Jesus's *highest* priority was not material plenty for everyone. He did consider it important that people do not suffer want, but he cautioned very emphatically against putting this request at the head of all striving. He was aware of the danger which lies in making material plenty (today we would say: consumption) the center of all human striving, a venerated idol to whose interest, or rather to what would be proclaimed as its interest, everything else should be unconditionally subordinated. Because in that moment matter and its possession (by man) begins to be more important than man himself. The partisans of this misleading theory are always ready to propose

as proof of its justification the assertion that all this is *after all* for the benefit of man, and therefore its importance is overriding.

A good tree bears good fruit, a bad tree bad fruit; a good tree can not bear bad fruit and a bad tree good fruit. This view of Jesus — by their fruit you will know them — was made somewhat problematic by a classic of dialectical materialism when he stated that the only criterion of theory is practice. At the same time, he puts this principle upside down when he claims that it is necessary to stop explaining the world and to start changing it. His followers put their own interpretation on this question and from these two contradictory principles they created a principle nowhere expressed, but unshakably observed: The only criterion of practice is the theory.

To believe in Jesus means for me to keep his words — to love all people without a difference, and to love most the one who gives us life.

To hate Jesus means to break his comandments, to cultivate hate, and thus to open the road for evil.

Whoever considers the fight against Jesus, and herewith also against his entire inheritance, as more important than peace and tranquillity, let him not try to mask his efforts poorly by false claims that he wants also to fight for peace.

Most of what I am writing is not new, original. Rather the formulations are new, less commonplace. Nevertheless, I want to bear the responsibility for every word. I was not endowed with much wisdom, therefore I will be grateful to anyone who shows me my possible errors or calls my attention to all I could be doing wrong.

However, the purpose of this letter is not to finish someplace in a file bearing my name, but to achieve what it set out to achieve.

It will perhaps help a little to show the relationship of light and darkness. Because these terms are applied even to the rule of men over men, to politics. An enlightened regime — a regime which is permeated by light, which creates and spreads light and which does not fear light. The rule of darkness — not only does it not spread light, but considers light as its mortal enemy, and therefore strives to liquidate its sources or at least to strangle, shadow, mute, and falsify light; and at the same time is afraid to come out into the light with what it is doing.

In no way would I wish that our present be called such a dark age in the future.

There are certainly many people who pray sincerely for you and

#### THE HUMAN LIFE REVIEW

your co-workers that you may find the way of light and be faithful to it! Perhaps you do not wish it, perhaps you resent it, but still, it is a fact. And there is no defense against it because the essence of prayer is truth and faith, and this is one of the few activities which it is impossible to prohibit, and even if it should be tried, such a prohibition will prove to be powerless.

I would like to assure you also that even I do not believe in a god of the sort in which you do not believe. I want to believe in a living, creating and permanent God and not in some construction of a human mind. God only within the limits of our projections could not possibly be God.

I value very highly the steadfastness and bravery of all who purposefully and under great sacrifices struggle for the observance of our laws. I have not the slightest intention of criticizing them, nevertheless I believe that they overestimate by far the responsiveness of those to whom they address their initiatives. Experience proves that those to whom the appeals are directed, are not being reached sufficiently to react with a sensible answer. They feel ambushed, and therefore they consider the attitude of those who only wish to be helpful, as an inimical attitude. The leaders of our society, let us call them representatives, are with all due respect to their abilities and their offices, also only men, essentially similar to us others, they are even composed of the same particles as are the bodies of other people. But their task is exacting beyond imagination and I can imagine quite well that even many of those who are now in prison, would not want to exchange places with them. They might not be badly off materially — an aspect to which they conceivably ascribe an undue importance — they suffer no shortages and, compared with the current situation, they live in almost fabulous circumstances; yet they feel themselves that all this is not enough to fill the mental void, yes, their anxiety is visible in their appearance. Therefore it must be taken into account that they live in constant fear that they could somehow lose the material security and the power entrusted to them, they try to secure both in any possible way, but they have nothing fundamental on which to lean. Therefore it is no wonder that they interpret any voice other than their own as an expression of personal enmity. Consequently, it is necessary to formulate petitions kindly and let them get used to the fact that those who comment on the ways of their leadership, act consistently and under all circumstances in accordance with truth and trust and have

RADOMÍR HUBÁLEK

no intention to endanger the representatives' vital security. The length of time which the representatives will need to accept the positive criticism and will stop pretending to be deaf or like dead and thus ventilating their own fears and anxieties, will demonstrate the measure of their understanding and their willingness to face facts, and not to turn their back on them.

I am selecting this kind of communication in full respect to your person, Mr. President, and in full awareness of the heavy burden of responsibility which you carry, not with the intention to make your burden heavier, but to lighten it and to have my weak and timid voice penetrate to you, and I wish you to hold your office in full health as long as possible, I wish you to be always granted the strength to keep the truth, to see the reasons for a deep mistrust to you and your co-workers which I see everywhere around me cease. I beseech you, keep trust with the truth under all circumstances, I implore you out of all my infinitesimal strength.

Truth is the necessary condition for life, love between men, peace, justice, common good.

Lie is the prerequisite and necessary condition for destruction, death, hate, darkness, chaos, war, general injustice.

It is up to every man to choose one of these two possibilities. For himself, but also for those others who have been entrusted to him.

In the end, I would like to repeat my plea to be allowed to assume the punishment to which was sentenced Mrs. Bednář so that she is released from prison. While I am not an expert in legal questions and while perhaps our laws have no provisions for such a case, I assume that my request could be granted in such a way that she would be pardoned and I would then be sentenced in a new judicial proceeding. I will gladly plead guilty to any true accusation. Perhaps I will be sentenced to prison even without her release. I will be satisfied even with such an outcome because, even though one part of my petition remains unfulfilled, at least it will be myself who will be allowed to complete the number of persons sentenced for questions of conscience, and not someone else. I will then be able to point to one small act when my little daughter asks me one day: "Daddy, what did you do to ensure that laws and human rights are observed in our country?"

I expect that someone may try to subsume to my action dishonest, treacherous or slimy motives. I am ready to be hated by people

#### THE HUMAN LIFE REVIEW

towards whom not a shadow of hate is in my heart, whom I respect for their humanity.

I do not arrogate to myself the position of a judge over actions of other people, including yours and those of your co-workers, although I can not pretend falsely that I agree with theories and practices which are in obvious contradiction to each other and to the plan of creation.

The greatest danger can come and also comes from people who are also ready to use lies for "tactical" reasons while they believe themselves to be owners of the truth for which they are then willing to fight by any means whatsoever.

Please remember that you, too, were once in a situation where your life was to be sacrificed like a living offering on the altar of hate for its glory. You have been given the possibility, even if under terrible conditions, to choose between life and death. But — was every woman of that time in that same situation given a similar choice?

And so I have done what conscience commands me to do. When I leave this world, I will be answerable for all I have ever done, and very often there were evil and shameful deeds. Nevertheless, I do not harbor hate towards anyone, I wish that people love each other, and I am not ashamed of it. And with God's help I would like to make a little contribution towards this goal; if I am allowed. I do not want to permit the just to be oppressed.<sup>4</sup>

I pray fervently for you and your co-workers that you, too, may grant truth to everyone.<sup>5</sup>

Mr. President, please do what your conscience commands.

Respectfully yours,

Radomír Hubálek

Zubří, December 30, 1979.

P.S. I am mailing the original to you, a copy to the Editor of Rudé Právo.<sup>5</sup> I will also give the text to anyone who will be interested in it.

#### NOTES

1. Magister Jan (John) Hus, former Rector of the Prague University and religious reformer of the fourteenth and fifteenth century, ultimately burnt at the stake as a heretic, stressed the primacy of "God's truth" in his teachings.

2. Meaning the recently canonized Father Maximilian Kolbe.

3. Surprisingly enough, the corresponding terminology is lacking in English. The Czech "úsečka" (section) means a straight line between two limiting points; "přímka" (line) means a straight line with no limiting points, i.e., infinite.

4. These two sentences paraphrase well known sentences from Mag. Hus' letters from prison.

5. Rudé Právo (Právo means "Truth") is the official daily of the Communist Party of Czechoslovakia.

## APPENDIX A

[*The following article first appeared in the New York Daily News Sunday magazine on February 15, 1981. Mr. Mariani is a New York freelance writer whose articles have appeared in many national magazines; his article is reprinted here with permission (©1981 by the New York News, Inc.).*]

### **And Baby Makes Three** ***A Love Song to a New Mother and Her Child***

*John Mariani*

**Tuesday, March 18**

It was one of those clear New York twilights when the colors of the city have a hard edge and the intensity of an Edward Hopper painting. My wife Galina and I were caught in traffic on the East River Drive when suddenly she told me to pull the car off the road.

"What's the matter?" I asked, noting that she was smiling at me as if she were about to spring some good news. She reached into a brown bag and pulled out a papier-mâché egg and a greeting card full of small animals bursting out of shells. I opened the egg. Inside were a dozen little candy babies and a small toy carriage.

The back of my brain counted slowly to three, then sent a shock wave through my entire body. I blurted: "We're going to have a baby!"

"Got it on the first try," said Galina, whose eyes by now were brimming with tears.

I sat there, on the edge of the East River Drive, with yellow cabs and commuters whizzing by, and I swore I saw the 59th Street Bridge turning a somersault over Roosevelt Island.

All the stock phrases ran through my mind:

*We are going to have a baby. I am going to be a father. He will be our son. She will be our daughter.* Then I buckled my seat belt, drove up the parkway at a slow speed, keeping to the right-hand lane and avoiding all lunatics. Meanwhile, I was sure other drivers could see streams of Daffy Duck cartoon hearts pouring from my car; and the colors of school buildings and street signs and clouds and tug boats took on a storybook jollity, as if I'd just crossed into the land of Oz.

That night in bed, as Galina slept, I watched her breath rise and fall, and I thought about a future that seemed to be moving in with the momentum of a nine-month glacier. What will the child be? Will I do the right thing? Will I act like a jerk? Will I be singing "My Boy Bill" or "My Little Girl" on delivery day? Would the child ever break my heart or love me as much as I love its mother?



THE HUMAN LIFE REVIEW

Thursday, April 10

Galina and I are in Italy to write some stories and to visit the little fishing village on the Adriatic called Vasto, from whence my grandfather and grandmother came to America in 1905. (Galina's forebears are French and Russian.) I wanted to trace the lineage back to my grandfather's house, which as it turned out was a stone dwelling near the mariners' monument on the hillside overlooking the sea. I'd brought along some soil from my father's grave in America. He had never gotten to Vasto, so, with the wind surging up the hillside, I tossed the soil into the wind and sea, while down below fishermen were dragging their boats onto the sand as my grandfather did a hundred years ago.

Wednesday, May 21

Today I met my wife's obstetrician, Dr. Joan Adams, a remarkable woman with very beautiful hands. She holds down a practice in Bronxville and works in two clinics where pregnancy is not always greeted as a joyous event. "A 16-year-old girl came in the other day," she tells us sadly, "to have her fourth abortion in two years. She refuses to take the pill because she thinks it's dangerous. I wanted to wring her neck. I told her, 'Don't you ever think of the consequences?' Here I am spending all my time trying to bring healthy infants into this imperfect world, and these kids are having one abortion after another, as if they were coming in to have a tooth pulled. Well, I won't do it. I sent her to someone else."

Monday, Aug. 11

We go together to have an ultrasound scan done on the fetus, a technique that measures the heartbeat and the size of the child and could perhaps foretell the sex, though we do not want to know it. The technician runs a scanner across Galina's stomach and, like the sound of some far-off voyager in space, the little heartbeat comes through sounding like vivid static. The photograph looks something like a weather map taken from the moon, and I think of the movie *2001: A Space Odyssey* — the final scene of the embryo approaching earth.

Wednesday, Aug. 27

Today I turn 35, yet it seems for me and Galina that life is really just about to begin. The joy of participation in this blessed event makes me wonder how generations of males could have been so foolish as to divorce themselves from each enthralling moment of their wives' pregnancies. There is a thrill in each cautious change of anatomy. Suddenly a man begins to realize that the female form is not just ornamented for his delectation but that every part, every buffering curve, every muscle and fiber, is perfectly designed for the creation of small miracles on a regular basis. Galina is now round in the belly, wider in the hips, with a rich fullness that goes aptly under the term "glowing."

## APPENDIX A

As we have dinner at a small country inn, I feel my prolonged adolescence slowly dropping away, like a protective skin. Men hold on to their adolescence as long as they can, but paternity replaces all the tempers of youth with the satisfactions of procreativity, as if the birth of a child secures a fine measure of continuance, and the feelings of masculine pride sparkle with the harmony of past and future hopes and dreams.

I make up a list of things I'm resolved to do, or not do . . . or that I will never get around to doing. They include:

- To abandon the right to sleep late in the morning — a luxury every father has told me is dashed forever.
- To give up the dream of a little foreign sports car that sits only two people.
- To deny her — if she *is* a her — freedom to go out with guys named Guy, Woody, Darryl or Biff.
- To hope that he — if he's a he — won't date girls who wear designer jeans.
- To belt him/her in the chops the first time I hear from him/her the words: "I didn't ask to be born."
- To refrain from ever exaggerating the family's financial problems by swearing that "We're going to the poorhouse!"
- To resolve to do anything, *anything*, to keep my child from being hurt.

Wednesday, Sept. 24

Tonight, at Lawrence Hospital in Bronxville where our baby will be born, we attend our first Lamaze lecture, given by a nurse named Miriam Shwatt, who is never less than fully attentive to every curious and silly question new fathers and mothers might ask. Around me sit the couples: a room full of very pregnant women, their hands folded across their stomachs; the husbands, next to them, not a little puzzled by this whole series of lectures, yet each of them throughout the night takes his wife's arm, or massages his wife's neck, or nervously helps his wife onto the floor for the exercises.

Lamaze's greatest importance, however, is merely in preparing the couple for each moment of the birth cycle, the way the child forms itself in the womb and forces the womb itself to change shape. The embryo is transformed from a tadpole-like creature into a floating infant, and I am struck by the extraordinary sophistication of the mechanisms involved, the secretion of the proper hormones, the exactness of the journey through the birth canal. I learn at the age of 35 that the reason a child shows no signs of wrinkling after being in the water for nine months is because of an emollient called vernix caseosa, a coating no chemist in any lab in the world can even approximate for effectiveness in protecting the skin. I'm fascinated with the umbilical cord and how it transmits all nutrition, blood

#### THE HUMAN LIFE REVIEW

and oxygen until the moment of birth when a different system — the finally formed lungs — takes over immediately.

From worm to whale, from gnat to gnu, from bug to baby, the systems work according to the great design of nature.

Thursday, Oct. 9

Galina and I go to watch a movie showing the birth of a child to a couple quite obviously living in a California of 10 years ago. The production values are awful, the print sorely scratched and the babblings of the real-life characters rather dated. But at the point when the baby was actually born, this film becomes in our eyes the most beautiful movie we, and probably the rest of the parents in the audience, had ever seen. There isn't a dry eye in the house.

Wednesday, Nov. 5

Galina is three days overdue. She awakes with a terrible pain in her side, which we believe to be contractions, although they do not correspond to the duration and kind described to us in the Lamaze course. We go to the hospital, and I'm feeling lightheaded. After nine months, after all the waiting, after all the emotional flux and hormonal changes, the time is here. Galina feels alternately claustrophobic and excited.

Dr. Adams examines Galina and tells her the pain is probably only a pinched nerve caused by the baby's foot. Galina's father and brother come to the hospital (her mother lives in Paris), and both speak to her in the unique way fathers and brothers do when their loved one is in pain. Her brother counts off the breathing during contractions, and her father strokes Galina's forehead and whispers, "*tout ira bien, chérie*," just as he must have when Galina was a little girl with a fever. I can see in his eyes that he hardly believes his daughter has grown into woman, wife and now mother in so brief a period of time. The pain subsides that evening, and Galina sleeps through, while a fetal monitor registers slight contractions Galina can barely feel.

At six in the morning, I stumble into Galina's room to find Dr. Adams smiling at me. "Ready to have a baby?" she asks. "Galina hasn't dilated very much, so we're giving her Pitocin, a hormone that helps things along." Within 15 minutes Galina begins to have contractions, and I sit there holding her hand, counting off the endless seconds of respiration and mounting pain. It is so difficult to watch the person you love suffer. I cannot imagine many men mustering a woman's courage, hour after hour in labor.

But surprisingly, after only an hour and 45 minutes Galina feels the need to push down. The head nurse whips back the sheet and sees that the baby's head is clearly visible, or "crowning." Dr. Adams and the nurses lift Galina off the bed onto a stretcher as I struggle to get antiseptic slippers

## APPENDIX A

over my boots, an activity that seems to take more time than any of us now has.

In the delivery room Dr. Adams and the staff work with the smoothness and precision that makes my excitement more thrilling than terrifying. I'm trying to focus a camera on the proceedings while Dr. Adams does a quick episiotomy to ease the baby's head out. I can see the hair on the child's head — dark, like mine. Then the head — bloody and beautiful — emerges, followed immediately by small shoulders, a round belly, and legs that start kicking in the air. A great gasp of air rushes into the baby's lungs and the child lets out a fine, robust scream, shuddering and trembling into life. It's a boy, a grand struggling son, a wriggling little screamer who is immediately calmed by being placed on his mother's chest. The pain, the pulling, the muscle spasms drop away from Galina's face and she murmurs, "My little sweetheart, my darling baby."

Unlike at the movie, I am not crying at all, for my emotions and nerves are sparkling, and I'm feeling what Wordsworth called "Thoughts that do often lie too deep for tears."

Looking at my son, calm on his mother's breast, I cannot imagine that he could grow up to be anything but a saint, a man of gentleness, nothing less than beloved. For he seems formed of little cells of affection, the sweetest atoms of the universe, the purest enzymes of life, with rivers of the dreams of ancestors flowing through his sweet little body. As I look down at him, with all my hopes and fears cuddled around him like swaddling, I feel the perennial joy of paternity rising in my own breast. For I never knew the human heart could swell so mightily, like a woman full with child.

## APPENDIX B

*[The following is the final chapter of the book A Lawyer Looks at the Equal Rights Amendment, by Rex E. Lee, a former Assistant Attorney General and currently Dean of the Brigham Young University law school in Provo, Utah. While we feel that it is a fair summary of the book itself, we remind the reader that Mr. Lee makes the case outlined here in much greater detail in the full text. We thank both the author and Brigham Young University Press for permission to reprint the chapter here (© 1980 by Charles E. Jones, Trustee; all rights reserved).]*

### **Should ERA Become Part of the Constitution?**

The decade of the 1970's witnessed intense national debate over whether the Equal Rights Amendment is in our interest. The central feature of the debate has been confident but conflicting assertions by both sides concerning the effects of the ERA if it becomes part of the Constitution. All the congressional testimony and reports favoring the Equal Rights Amendment assert that it would not invalidate laws prohibiting homosexual relations, intersexual occupancy of sleeping facilities in public institutions, or forcible rape. Opponents of the amendment are equally convinced that these results would occur. Concerning the mandatory use of women in combat, even the proponents are in disagreement.

Both sides in this debate have missed the point. Neither during the present preratification period, nor, if ratified, for decades after can anyone on this planet know what the ERA will mean. The most important question is the standard of judicial review: judicial scrutiny, strict judicial scrutiny, qualified absolutism, or something else. No one knows what that standard will be. My own best judgment is that it will be either a strict judicial scrutiny or qualified absolutist approach. . .

Moreover, even after the standard is identified, uncertainties will still exist. The qualified absolutists contend that laws prohibiting forcible rape, homosexual conduct, and coeducational dormitories for single people will be saved by their two qualifications. I am equally convinced that laws prohibiting homosexual conduct and coeducational dorms are inconsistent with that standard. The only hope for those laws would be to persuade the courts either to adopt something other than an absolutist approach or to ignore the doctrinal underpinnings of absolutism. In the face of that kind of uncertainty, how is the conscientious citizen to make a choice?

For a few people, the answer will be easy because there are no horrors in the parade. Constitutional legalization of homosexual conduct and coed dorms is exactly what they would like. For most people, however, these would be unwanted results and would therefore cause serious con-

## APPENDIX B

cern. For these people the starting point for determining whether the ERA is in our national interest is a frank recognition that no one knows what it will mean, and no one can know what it will mean until after it becomes part of the Constitution.

The only rational approach to the Equal Rights Amendment issue, therefore, is to recognize the risks that flow from the fact that the amendment might be interpreted in certain ways, and then to ask whether the benefits from the amendment outweigh those risks.

The risk side of the analysis has been the subject of preceding chapters: the different interpretations that might be placed on the amendment, and the comparative likelihood that one interpretation or another might be adopted.

The analysis turns now to the benefit side: how badly is the amendment needed and, to whatever extent the need exists, are there better ways to satisfy it?

### **The Lessons of History**

The perspective of history offers a helpful starting point. In 1923, when the Equal Rights Amendment was first introduced, the Supreme Court of the United States had never even dealt with the argument that laws discriminating against women violate constitutional guarantees of equality. Highly offensive sex discriminatory practices had been consistently upheld.<sup>1</sup> Furthermore, women had enjoyed the most fundamental of all political rights — the right to vote — for only three years.

Three decades later, in the 1950's, a modified version of the ERA passed the Senate twice, but proponents characterized the modifications as an effective nullification.<sup>2</sup> As of that time, an equal protection argument had at least been presented to the U.S. Supreme Court in a sex discrimination case, but the Court easily rejected it and upheld the discrimination.<sup>3</sup>

Passage of the amendment by Congress in 1972 was preceded by almost two years of congressional consideration. Throughout most of those two years — more than a century after the general guarantee of "equal protection of the law" had been written into the Fourteenth Amendment — the equal protection clause had never been used to invalidate a sex discriminatory law. And most of the ERA proponents despaired of ever obtaining equality for women through the Fourteenth Amendment. Nevertheless, many of them conceded that, if the Supreme Court were to apply the Fourteenth Amendment's equal protection clause to women, the Equal Rights Amendment would be unnecessary.<sup>4</sup> Others disagreed.<sup>5</sup>

*Reed v. Reed*, the first Supreme Court case to hold a gender-based classification unconstitutional under the Fourteenth Amendment, was handed down in November 1971, after the House of Representatives had passed the Equal Rights Amendment but before Senate passage.<sup>6</sup> As is

usually the case with developing constitutional doctrines, it was impossible to forecast in late 1971 how much protection *Reed v. Reed* would actually afford against sex discrimination. Specifically, the unanswered question was whether the rational basis standard would apply, so that invalidation of gender-based discriminations would be rare, or whether sex discrimination would be treated the same as racial discrimination, subject to strict judicial scrutiny.

Over the intervening decade since *Reed v. Reed*, the Supreme Court has developed a rather comprehensive body of case law dealing with sex discrimination. The standard is neither rational basis nor strict judicial scrutiny. It lies somewhere between the two. The result has been that the number of cases upheld and the number invalidated have been about equal. Whether the Supreme Court has gone too far, not far enough, or just about as far as it should is a matter for individual decision.<sup>7</sup>

But it is beyond dispute that the big leap has already been made. One of the proper roles for a constitutional amendment in achieving reform is to make large changes, to reach new ground previously unexplored. With respect to sex discrimination, a change of that magnitude was needed in 1971. It had been needed for decades and even centuries prior to 1971, but nothing had happened. Today, the situation is very different. There is no longer any question whether equality is constitutionally guaranteed to women. It is.

Some may argue that the principle reason for this change has been the pendency of the Equal Rights Amendment. That may or may not be true. In any event, it is largely irrelevant. Whatever the reason for our movement from nothing to judicial scrutiny along the sexual equality continuum, the fact is that we are there.

#### Massive Change or Flexibility?

Regardless of what the issue might have been in the 1920's when the amendment was first introduced, in the 1950's when it passed the Senate, or in the early 1970's when it was formally proposed by Congress, the central issues concerning the need for an Equal Rights Amendment in the 1980's are:

1. Whether the greater need is another radical, massive change in the constitutional rules dealing with distinctions between men and women, or
2. Whether the greater need is for flexibility in determining what kinds of distinctions between men and women are really in our national interest, and what kinds are not.

This correctly characterizes the issues today for this reason: the only room left for a change so great as to warrant a constitutional amendment is a change to an absolutist standard, qualified or otherwise. If the Equal Rights Amendment does nothing more than move us along the continuum from judicial scrutiny to strict judicial scrutiny, then the change is not

## APPENDIX B

worthy of a constitutional amendment. It is certainly not worth the risk of more radical change.

The real issue for each citizen, therefore, is whether he or she feels that all — or nearly all — governmental distinctions between men and women should be constitutionally eliminated. It is clear that some people would answer this question yes. But the great majority probably would answer it no. Almost none of those who testified at the congressional hearings, or those who drafted the reports recommending congressional passage, intended such an extreme result. They did not want to do away with virtually all governmental distinctions between men and women. They wanted a constitutional guarantee of equality for women. At the time there was none. Today there is.

For those Americans who share the view that we should leave some flexibility to make some governmental distinctions between men and women, another constitutional amendment is not the answer.

The second major purpose asserted by the proponents in urging congressional passage of the ERA was that such an amendment was needed as a symbol.<sup>8</sup> It is true that constitutional amendments can serve as symbols. The question is, a symbol of what? More specifically, how firmly should we freeze the capacity of our governmental structure to react? If we now have all or substantially all the answers concerning the distinctions that government should be able to make between men and women — particularly if we are convinced that there should be none or very few — then a constitutional amendment is an appropriate symbol. For a constitutional amendment is the surest way to prevent government from drawing distinctions. If, on the other hand, we are still at the stage where we need to feel our way, committed to equality in the large matters like employment and promotion opportunity, educational opportunity, political activity, and equal pay for equal work, but still uncertain about such things as the draft, combat, and promiscuity in state college dormitories, then a constitutional amendment is the worst possible choice of a symbol.<sup>9</sup>

### **Experience Indicates the Need for Flexibility**

Many people have the perception that, within the last few years, appointments to federal and state judgeships and to important executive positions in government have favored women. That is, if the appointee had not been a woman, someone else more qualified would have been appointed. Some believe that such preferences are not only fair and appropriate but necessary. They compensate for past discriminations against women and provide highly visible role models for future generations. Others take the view that whatever mistakes may have been made in the past, the burden of the corrective should not rest upon persons in today's society who have done no wrong.



## THE HUMAN LIFE REVIEW

The important issue is not whether the perception is correct, nor which side in the debate is right. The real issue is the debate itself. It should continue. In some instances treating women better than men with respect to government appointments is probably a good idea, and in other instances it is not. Moreover, whatever the balance of relevant considerations today, whether in general or in specific cases, the balance probably will be different a generation from now. Neither for this generation nor for those that will follow is it in our national interest to cut off debate on that issue by making unconstitutional government's power to prefer women.

Regardless of where we were ten years ago, or thirty years ago, or a hundred years ago, today we are at the fine-tuning stage. The need is for careful case-by-case examination of whether and to what extent men and women should be treated differently. A constitutional amendment, very simply, is not a fine-tuning instrument. It has more the qualities of a sledgehammer.

An incident that occurred during the period of my service in the United States Department of Justice illustrates the degrees of flexibility of different sources of law. A federal statute prohibiting sex discrimination by schools receiving federal financial assistance provides, among other things, that its provisions shall not be interpreted to prohibit father-son or mother-daughter activities as long as there is reasonably comparable opportunity for each.<sup>10</sup> In 1976 some administrators at the Department of Health, Education, and Welfare decided that a certain school district was not in compliance and determined to prevent further father-son banquets in that district until corrective steps were taken. The plan was never implemented — indeed, knowledge of its existence was limited — because some senior officials at the White House heard about it and brought it to an end with a telephone call.

The White House officials who reversed it considered the short-lived ban on father-son school banquets a silly decision. The reality is that in a government administered by human beings, we have to accept the fact that from time to time there will be silly decisions. The judiciary is also inhabited by human beings and they are not immune from the same kinds of mistakes that other human beings make. In the case of the father-son banquet decision, the mistake was easily correctible, requiring nothing more than a simple telephone call. If the same result had been unambiguously written into the statute, the corrective would have been more difficult, requiring congressional action. But by far the most inflexible source of law is a judicial decision interpreting a constitutional provision. Mistakes at that level can be corrected only by the death, retirement, or change of mind of Supreme Court justices, or by a constitutional amendment. The likelihood of any of these is extraordinarily rare. Over the history of our republic, literally thousands of constitutional amendments

## APPENDIX B

have been proposed. Excluding the Bill of Rights, whose adoption was part of the commitment for ratification of the Constitution,<sup>11</sup> only sixteen have been adopted.

Perhaps the best evidence that we are closer to the fine-tuning stage than to the major overhaul stage is provided by the 1980 experience with the draft. One of the few ERA results on which everyone agrees is that, if the amendment passes, women must be subject to the draft whenever men are. When the reinstitution of compulsory military service became an issue in 1980, the companion question was whether women should be subject to it. Most of the resistance was to drafting anyone, but a separate issue was easily identifiable and almost as strong: if there is a draft, should women be included? Leaders of several groups supporting the Equal Rights Amendment spoke in favor of equal treatment.<sup>12</sup> But our national legislatures — who usually are a fair bellwether of national public opinion — separated the issues fairly early in the debate and determined that even if compulsory military service were to be reestablished, it would not apply to women.<sup>13</sup> Under the ERA Congress would not have had that choice.

Even as to one of the few ERA consequences on which everyone agrees, therefore, the 1980 draft experience shows that our nation is not at a point of consensus. We are not ready to harden the decision process into constitutional concrete. We need the leeway to make decisions on a case-by-case basis as particular issues — the draft among them — arise at different times and under different circumstances. Obviously this will not be done in a constitutional vacuum. Always in the background is the Fourteenth Amendment's guarantee that gender-based discrimination will be subject to judicial scrutiny.

Of course there are still examples of unfair sexual discrimination. Of course changes need to be made. But they should be made with a scalpel, not an axe. The tools for that kind of change are available. Indeed, changes by scalpel are already at work through the whole spectrum of law, including constitutional guarantees, statutes, administrative regulations, and ample authority to enact more statutes or administrative regulations as they are needed.

Adequate legislative authority exists without an additional constitutional amendment. Other things being equal — particularly if the subject matter does not require national uniformity — the best unit of government to enact laws is the smallest unit that has authority to do so. State and local governments have far-reaching powers, generally called police powers, to act in the interest of the general welfare of the people.<sup>14</sup> Accordingly they would have power to enact any conceivably necessary law. This is demonstrated by the liberalization that has occurred in state laws during the decade of the 1970's dealing with such subjects as family law (particularly the "tender years" doctrine and the circumstances under which a wife

#### THE HUMAN LIFE REVIEW

may establish a separate domicile), and the adoption of the equal management concept in community property states.<sup>15</sup>

In some instances, national uniformity might be preferred. While Congress's powers do not reach as many subjects as the states' police powers,<sup>16</sup> congressional enactments of Title VII of the Civil Rights Act and the Equal Pay Act<sup>17</sup> demonstrate that, under existing constitutional authorization, Congress too can be a significant force in making changes where changes are needed.

#### Shifts in Governmental Power

There is another cost of the Equal Rights Amendment. It is a cost that is necessarily involved in any constitutional amendment limiting what government can do, and particularly what state government can do. The cost involves shifts in governmental power. In the case of the Equal Rights Amendment, the shifts would occur along two planes.

By definition, a constitutional amendment which limits what government can do places its limitations on the legislature, within whose policy-making domain the power would otherwise fall. And since the interpretation of constitutional amendments is a judicial function, the decrease in legislative power is accompanied by an increase in judicial power. For example, if the Equal Rights Amendment were determined to prohibit separation of the sexes in college dormitories, the courts would make that determination by interpreting the amendment. The effect would be that the authority to decide this policy issue would shift from the legislative to the courts.

Most of the laws that would be held unconstitutional under the ERA are state laws. Accordingly, governmental power would shift not only from the legislature to the judiciary, but also from the smaller governmental unit (the state) to the larger (the federal government).<sup>18</sup>

Even in the absence of constitutional adjudication, there would probably be a legislative power shift from the states to the federal government, increasing the policymaking power of Congress and decreasing that of the state legislatures. It is a shift that would be accomplished as a result of Section 2 of the amendment. Before 1971 the proposed Equal Rights Amendment vested legislative enforcement authority jointly in Congress and the states. In 1971 state legislative enforcement authority was eliminated in favor of the present language of Section 2, which states: "Congress shall have power to enforce, by appropriate legislation, the provision of this Article."

There is little doubt that Section 2 would shift legislative power from the states to the Congress. This would occur even if Section 2 were interpreted, as some of the proponents contend, not to have affirmatively constricted state powers in this area.<sup>19</sup> The constriction would necessarily

## APPENDIX B

result from expanded federal authority. The federal government, unlike the states, is a government of specific, enumerated powers, which means that anything the federal government does must be authorized by some constitutional provision. Within the sphere of its constitutionally authorized powers, however, the supremacy clause of the Constitution, contained in Article VI, provides that federal authority is supreme; that is, federal authority takes precedence where federal and state authority conflict. Accordingly, expanding the constitutional bases for congressional action in any area necessarily causes a corresponding reduction of the powers of state governments once Congress exercises its newly created constitutional power.<sup>20</sup>

In the case of some constitutional amendments, shifts of governmental power represent costs that are worth paying in order to secure the constitutional guarantee. And some people feel that governmental power shifts from the legislature to the judiciary,<sup>21</sup> or from state and local governments to the national government, are desirable. The only point is this: for those who believe that, other things being equal, it is better to vest governmental power in smaller units rather than larger, and in elected legislators who must periodically answer to the people than in nonelected judges, the shifts in governmental power that would accompany the Equal Rights Amendment represent another significant cost.

### **The Fourteenth Amendment Analogy**

The potential dangers of the Equal Rights Amendment are posed by its breadth, its vagueness, and its uncertainty. No one knows how many specific prohibitions are included or are not included within its broad, unqualified declaration that there shall be no governmental distinctions on account of sex. But vagueness is also a characteristic of the Fourteenth Amendment, on whose existence a substantial part of the argument against the Equal Rights Amendment is based. Is it not unfair and inconsistent, therefore, to build an argument against the ERA on the combination of criticizing the vagueness of the proposed amendment while at the same time proclaiming the adequacy of the equal protection clause of the Fourteenth Amendment?

For anyone willing to learn the lessons of history, experience with the Fourteenth Amendment provides one of the most persuasive lessons why the Equal Rights Amendment should not be adopted. It is true that the Fourteenth Amendment, like the proposed Twenty-seventh, is vague. Look what the courts have done with that vagueness. At one period of our nation's history they used it to invalidate a broad spectrum of state laws regulating businesses,<sup>22</sup> including laws designed to protect the health of men and women in high health-risk employments. In more recent times the same amendment has been used, and is still being used, to prevent

states from prohibiting or regulating abortions.<sup>23</sup> Many people thought that the Court's substantive due process nullification of governmental economic regulations was a good idea. Many people also agree with the Court's abortion decisions. The present point is not whether these decisions are good or bad. The point is that anyone who thinks that a constitutional amendment with the vagueness of the Fourteenth or the proposed Twenty-seventh is not an open invitation, and indeed directive, to perpetual judicial policymaking, is not aware of what the Supreme Court has been doing since about the 1890s.<sup>24</sup>

Does this mean that the Fourteenth Amendment should never have been adopted? Not at all. The Fourteenth Amendment brought about comprehensive changes that were needed. They were changes that only a constitutional amendment could achieve. Before the Fourteenth Amendment the guarantees of the Bill of Rights were not binding on the states. Aside from the guarantee of jury trial and the prohibition against ex post facto laws, state governments were not obligated to follow any standards of fairness in state criminal proceedings. Due process of law was binding on the federal government, but not the states. Most important for present purposes, there was no constitutional guarantee of equality anywhere in the Constitution.

The existence and history of the Fourteenth Amendment are relevant to the Equal Rights Amendment for three reasons. First, given the fact that the Constitution contained no guarantee of equality prior to the Fourteenth Amendment, the vagueness risk was worth taking. Now that there is a general guarantee of equality which extends to all groups, including women, the analysis is different. The vagueness risks are the same; the need is not. With the Fourteenth Amendment's guarantee of equality extending to all people, it is difficult to make a case for a separate guarantee of equality applicable to any group already covered by the equal protection clause. And if one particular group were to be singled out for such special treatment, it is hard to make the case that it should be a group that is not, in fact, a minority.

Second, the Fourteenth Amendment teaches that the risks of constitutional vagueness are never-ending. Vague amendments constitute a continuing, open-ended invitation to any new generation of federal judges to fill their ample vessels with new doctrine. The Fourteenth Amendment is particularly instructive in the regard. The first radical venture into judicial policymaking (when judges substitute their judgment for that of the legislature in government regulation of business) did not begin until almost thirty years after the amendment had become part of the Constitution.<sup>25</sup> It was a venture that lasted four decades and which, within its particular substantive sphere (economic regulation), today lies largely dormant.<sup>26</sup> Thirty years later the process started again, and it is continuing, this time

## APPENDIX B

affecting such substantive matters as contraceptives and abortions. The subject matter is different, but the process is not. Neither is the constitutional amendment under whose banner the process occurs.

The third lesson of the Fourteenth Amendment experience concerns the difficulty of undoing mistakes once they occur. During the economic-regulation round of the Supreme Court's fascination with substantive due process, the correction took forty years. For the abortion round, the correction has not yet occurred. Maybe it never will.<sup>27</sup>

In the case of the Fourteenth Amendment, the risks were worth running because the need for massive change was great. The changes were achieved, and the risks have proven to be real. But the risks entailed in the proposed Twenty-seventh Amendment are not worth running because the need for massive change is not great. Indeed, massive change is the biggest risk.

## NOTES

1. See chapters 2 and 3 of my book, *A Lawyer Looks at the Equal Rights Amendment* (Provo, Utah: Brigham Young University Press, 1980). [Hereinafter *A Lawyer Looks*.]

2. W. Chafe, *The American Woman* 188 (1972). "The Hayden rider in effect voided the operative intent of the feminist bill, and rendered it meaningless. 'My amendment is a revolving door,' Hayden boasted. 'We come in one side and go out the other.' One Washington reporter observed that Hayden 'could put a rider on the Ten Commandments and nullify them completely.' Although the Equal Rights Amendment was passed by the Senate one more time in 1953, with the Hayden rider, the Senate's action effectively buried hopes for its adoption until the late 1960's."

3. *Goesaert v. Cleary*, 335 U.S. 464 (1948).

4. *Equal Rights for Men and Women 1971: Hearings on H.J. Res. 35, 208, and Related Bills, and H.R. 916 and Related Bills before Subcomm. No. 4 of the Committee on the Judiciary, 92d Cong., 1st Sess.* 303-4 (1971), at 50, 357. [Hereinafter *House Hearings*.]

5. *Id.* at 90, 123.

6. 404 U.S. 71 (1971). *Reed v. Reed* was decided November 22, 1971. The House passed the ERA on October 12, 1971, and the Senate on March 22, 1972.

7. See generally Chapter 4 and Appendix A of *A Lawyer Looks*.

8. 118 Cong. Rec. 8902, 92nd Cong. 2d Sess., 1972; *House Hearings*, *supra* note 4, at 90, 167, 361.

9. Professor Paul Freund states:

The value of a symbol, however, lies precisely in the fact that it is not to be taken literally, that it is not meant to be analysed closely for its exact implications. A concurrent resolution of Congress, expressing the general sentiment of that body, would be an appropriate vehicle for promulgating a symbol. When, however, we are presented with a proposed amendment to our fundamental law, binding on federal and state governments, on judges, legislature, and executives, we are entitled to enquire more circumspectly into the operating meaning and effects of the symbol.

Freund, *The Equal Rights Amendment is Not the Way*. Reprinted in *House Hearings*, *supra* note 4, at 607, 610.

10. 20 U.S.C. §1681(a)(8) (1976).

11. See Chapter 2 of R. E. Lee, *With Liberty for All: A Study of the United States Constitution* (Provo, Utah: Brigham Young University Press, forthcoming). [Hereinafter cited as Lee.]

12. See "Reopening an Old Debate," 115 *Time* 32 (Feb. 11, 1980) and "Registration Plan Cheered, Boomed," *U.S. News and World Report* 7 (Feb. 18, 1980).

13. *Wash. Post*, Feb. 20, 1980, at A1, col. 1; *Wash. Post*, March 7, 1980, at A7, col. 1.

14. See *Nebbia v. New York*, 291 U.S. 502, 524 (1934), citing the *License Cases*, 45 U.S. (5 How.) 504, 583 (1847).

15. See generally Chapter 9 of *A Lawyer Looks*.

## THE HUMAN LIFE REVIEW

16. See Lee, *supra* note 11, at chapter 6.
17. The Equal Pay Act prohibits discrimination on the basis of sex so far as equal pay for equal work is concerned. See 29 U.S.C.A. §206 (1963).
18. The best discussion of this subject in the legislative history is in the minority views of Congressman Edward Hutchinson. See H.R. Rep. No. 359, 92nd Cong., 1st Sess. 6 (1971), at 13-16.
19. See generally Brown, Emerson, Falk, and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 894, at 908.
20. See Lee, *supra* note 11, at chapter 6 for a general discussion of federal and state powers. For some congressional views concerning the effect of Section 2 on state-federal relationships, see the remarks of Congressman Mikva, a proponent, *House Hearings*, *supra* note 4, at 91-92, and Senator Ervin, an opponent, 118 Cong. Rec. 9081 (1972). See also L. Tribe, *American Constitutional Law* 1075 (1978).
21. Section 2 of the Equal Rights Amendment also creates the possibility of a power shift from the federal judiciary to the federal Congress. Though the exact reach of the cases is uncertain, the Supreme Court has interpreted the enforcement provision of the Fourteenth Amendment (Section 5) as giving Congress at least some role in declaring principles of constitutional law. See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); and *Oregon v. Mitchell*, 400 U.S. 112 (1970). Whatever the result of Section 2 in this respect, it is quite clear that the net effect of the ERA as an allocator of power between the courts and legislatures will favor the courts. That is, the shift of policy making authority from the legislatures to the courts under Section 1 would be greater than the shift of authority under Section 2 from the courts to Congress to say what the ERA means.
22. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Lochner v. New York*, 198 U.S. 45 (1905); *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).
23. See discussion of abortion cases in Appendix A of *A Lawyer Looks*. See also Lee, *supra* note 11, at chapters 17-18.
24. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).
25. *Id.*
26. See Lee, *supra* note 11, at Chapter 17.
27. Any chances for correction would surely be destroyed by passage of the Equal Rights Amendment, which would also seal the fate of the few remaining peripheral abortion questions, such as spousal and parental notification of the abortion decision and postviability abortion regulation.

## APPENDIX C

*[The following article has been adapted from a sermon given by Francis Canavan, S. J., on Dec. 28, 1980 in the Fordham University Church. Father Canavan is Professor of Political Science at Fordham University, and is currently writing a book of freedom on expression and the First Amendment.]*

What is there to say about the family that is not a bromide and a platitude that has been uttered ten thousand times already? Being against the family is being against motherhood; and motherhood, as they say, is as American as apple pie. Motherhood and apple pie go together, in fact, since one of Mother's chief occupations is making apple pies.

To find something to say about the family, then, let us turn our attention away from America for a moment and look at Sweden. Why Sweden? Because Sweden is the future. Nowhere else have modern, advanced and progressive ideas been put more fully into practice than in Sweden. Here, for example, is a passage from a document written by a Swedish sociologist and distributed by the Swedish Consulate General in New York:

During the 1960's there was mounting discussion of the nuclear family in Sweden which carried over into debate about marriage. Some felt that marriage as a religious institution was detrimental to the individual as well as to society. Others asserted that it was marriage as a legal institution that fomented problems.

It became increasingly clear that growing numbers of couples in Sweden (and in Denmark) were living together without being married, especially during the latter part of the 60's. In the early 70's, this practice was also seen on the rise in such countries as the United States, the Netherlands, Belgium and France. It seems as if initially many of these couples demonstrated against the religious and/or legal marriage. At the same time, almost all over the Western world, communes of different types started. Most of these have not endured. However, cohabitation without marriage has.<sup>1</sup>

It seems, then, that marriage and the permanent family have come under considerable suspicion and criticism in Sweden. A very large percentage of young Swedes will have no part of them. But is not the same thing true in our own country, even though to a lesser extent? Motherhood is no longer held in all that high regard in the United States and we all know that nowadays apple pies are mass-produced in factories.

As the press is fond of telling us, the institution of marriage is in trouble in America today. For example, some time ago (March 1, 1979) the New York *Times* published an editorial in which it made this statement: "Today, half of all marriages break up and half of all married women work." The *Times* mentioned this interesting social statistic simply as a reason for amending the Social Security law. But what it said was astonishing and disturbing. For if it is true that half of all marriages break up,



#### THE HUMAN LIFE REVIEW

then the social implications of this fact are enormous. It does not only mean that a lot of women have been and will be deprived of their husbands' support. It also means that we are producing a horde of traumatized young people, many of whom will be tomorrow's more or less serious problems.

One might think that in the face of this situation, we would be urged to do everything possible to restore and bolster up marriage and the family. But the same organs that tell us that the family is in difficulty also assure us that the family as we know it is *passé* and becoming obsolete. One of the problems facing the American family today, therefore, is a crisis of confidence, a loss of faith even on the part of parents themselves in the value of what they are doing. Women in particular are subject to an incessant barrage of propaganda telling them that they are sacrificing their very personalities by bearing and raising children. It is not only that, however; the idea of the family itself is under attack.

This attack on the family arises out of the growing individualism that permeates our society. A team of sociologists — Americans in this instance — have remarked that

modern identity is peculiarly individuated . . . . Individual freedom, individual autonomy and individual rights have come to be taken for granted as moral imperatives of fundamental importance, and foremost among these individual rights is the right to plan and fashion one's life as freely as possible.<sup>2</sup>

Individual autonomy no doubt deserves our highest admiration. But making it compatible with a permanent commitment to marriage and parenthood is not easy.

Not only sociologists have pointed to our individualism. The literary critic, Lionel Trilling, has commented that "the particular concern of the literature of the past two centuries has been with the self in its standing quarrel with culture."<sup>3</sup> That is an intriguing thought: the individual self has a standing quarrel with culture. Maintaining a society and a culture necessarily puts restraints on the self and its desires, but literature tends to support the self against culture.

Because of this constant assertion of the self and its demands against the needs of society and culture, those who are making the sacrifices required to raise children need some assurance from the rest of us. They need to be assured that they are not fools who are throwing their lives away. They need to be assured that what they are doing is of enormous value, not only to their children but to their country, and constitutes an essential part of the service of God.

I will put it more strongly: no society has anything more important to do than raising its own next generation. Nothing is more important. Nothing. Not exploring the cosmos with Carl Sagan — not finding a cure for cancer — not governing the United States — not solving the problems

## APPENDIX C

of New York City — not singing arias on the stage of the Metropolitan Opera House — not advertising a new, new, NEW detergent.

All of these activities have their place in the overall scheme of things. All of them make their contribution to our society and its culture. But all of them have whatever value they do have from the service that they ultimately render to human beings. In all of the universe that we are acquainted with, only Man is made in the image and likeness of God. As St. Irenaeus said, "The glory of God is a living human being." The service of God is accomplished largely through service to the highest of His creatures, namely, to our fellow men: "Inasmuch as you did it to the least of my brethren you did it unto me." But no service is more truly essential than the initial and basic one of raising children to take their place in the human community. Of what use are a high technology and a high culture if we cannot live in a society populated by sane, decent and civilized people?

For the family is the basic social unit for producing human beings, not merely in the obvious physical sense, but in the more important psychological, educational and spiritual sense. All of us who are engaged in various social, educational and spiritual ministries are only supplementing and building upon the work of the family.

I do not mean to suggest, of course, that we should all stand up and cheer for every pair of sweet kids who rush into marriage without really knowing what they are doing. Unfortunately, it takes neither intelligence nor maturity to get married, although it takes a lot of both these qualities to stay married and raise children properly. The failure of many married people to develop intelligence and maturity no doubt has something to do with our soaring divorce rate.

But it is worth saying today, and saying over and over again, that every married couple who are seriously trying to raise children and raise them well, should have a great confidence in the value of their task. They should never allow themselves to be put down or talked down to by success-oriented individualists. The individualists may succeed in winning the glittering prizes because they have subordinated all else to success. But they are as the flowers of the field that spring up in a day, then wither and die. It is the strong and healthy families of today who offer this country the only sound future it can hope for. Mothers, fathers, take heart — the future belongs to you.

## NOTES

1. Jan Trost, "Unmarried Cohabitation in Sweden," *Social Change in Sweden*, no. 18 (May 1980).
2. Peter and Brigitte Berger, and Hanfried Kellner, *The Homeless Mind* (1974), p. 79.
3. Quoted in *The Political Science Reviewer* (1974), 23-24.

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