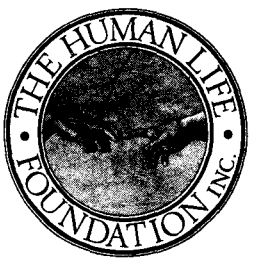
the HUMAN LIFE REVIEW



SUMMER 1983

Featured in this issue:

John T. Noonan, Jr. on ..... The Akron Case

Mary Meehan on ..... Facing the Hard Cases

Prof. Francis Canavan on.... The Pluralist Game

Joseph Sobran on ..... Moderate Radicals

Terry Eastland on ..... Who Put the Wrong in 'Wrongful Births'?

Rep. Henry J. Hyde on..... ERA and Abortion

Also in this issue:

Colman McCarthy • Prof. Hadley Arkes

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. . . FROM THE PUBLISHER

As our regular readers know, we took a giant step forward in our last issue with the publication of President Reagan's article "Abortion and the Conscience of the Nation." It received nation-wide media coverage, and put the *Human Life Review* on the proverbial map as a prestigious national publication. It also put the sitting President of the United States "officially" on record as being opposed to the immorality of abortion-on-demand as Abraham Lincoln was to the immorality of slavery. It is, as they say, a tough act to follow. But we think we have done our best with Prof. Noonan's devastating rebuttal of the Supreme Court's latest horror in the Akron decision.

Mr. Terry Eastland's article first appeared in the Summer 1983 edition of *This World*, published by the Institute for Educational Affairs and the American Enterprise Institute for Public Policy Research (Subscription Office: 125 West 24th Street, 4th floor, New York, New York 10011. Subscriptions are $16 per year for 4 issues). It is reprinted with permission.

A sad note. Mr. James W. O'Bryan, Art Director of *National Review*, and our good friend of a quarter century passed away June 25th. Jim gave us invaluable help and advice in planning and designing all we have published (he was responsible for the design and production of our first two books, *An Even Dozen* and *Single Issues*). He will be sorely missed, and never forgotten, so long as this review exists. Please remember him in your prayers.

Along with *Single Issues* ($12.95) and *An Even Dozen* ($10.00) the Foundation still has available copies of John Noonan's *A Private Choice* ($11.95). All three books plus Bound Volumes and back issues may be obtained from the Foundation. See inside back cover for details.

Finally, *The Human Life Review* is available in microform from both University Microfilm International (300 N. Zeeb Road, Ann Arbor, Michigan 48106) and Bell & Howell (Micro-Photo Division, Old Mansfield Road, Wooster, Ohio 44691).

EDWARD A. CAPANO
Publisher

THE HUMAN LIFE REVIEW

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INTRODUCTION

"THE REAL QUESTION today is not when human life begins, but, *What is the value of human life?* The abortionist who reassembles the arms and legs of a tiny baby to make sure all its parts have been torn from its mother's body can hardly doubt whether it is a human being. The real question for him and for all of us is whether that tiny human life has a God-given right to be protected by the law—the same right we have."

So wrote President Reagan in the lead article of our last issue. One critic said that Mr. Reagan had evoked "the moral passion of Abraham Lincoln against slavery." And indeed the President did make the slavery/abortion analogy: "This is not the first time our country has been divided by a Supreme Court decision that denied the value of certain human lives." And he noted that the infamous *Dred Scott* decision of 1857 "was not overturned in a day . . . or even a decade" because "At first, only a minority of Americans recognized and deplored the moral crisis brought about by denying the full humanity of our black brothers and sisters; but that minority persisted in their vision and finally prevailed."

A decade after *Roe* v. *Wade*, the current Supreme Court has chosen to reaffirm the decision that legalized abortion on demand. And in our lead article in this issue, Professor John T. Noonan Jr. gives you his analysis of the "curiously abstract" manner in which the Court has defended its discovery of a constitutional "right" to abortion. (Is the Court's strange language related, *post hoc, propter hoc*, to the President's article? Certainly Mr. Reagan had emphatically stated "abortion on demand is not a right granted by the Constitution.")

Professor Noonan concentrates on the Akron decision, the most important of the several cases decided last June 15, and finds that the Court's current pro-abortion majority "has not only learned nothing but has paid almost no attention to comtemporary discoveries in medicine, currents in politics, or critiques of judicial imperialism." He concludes that the best description of Justice Lewis Powell's opinion is "Unworkmanlike, undemocratic, insensitive"—and you will find that Professor Noonan supports *that* opinion with vigor.

Miss Mary Meehan follows with what we consider a remarkable arti-

cle, if only because she addresses with *great* sensitivity the most difficult aspect of the whole abortion controversy—those "hard cases," real and imagined, which provided the "best" arguments for legalized abortion. The worst such cases are, of course, all too real. But there is another side to the heartrending realities involved, and Miss Meehan presents it here with arguments both logically and emotionally compelling. For instance, in regard to the most detestable of "hard cases," she reminds us that "Rapists are no longer executed in our country; their children, the totally innocent results of crime, should not be executed in their place."

She also makes the point—one which cannot be made too often or too loudly—that the vast majority of the 15,000,000 abortions the President mourns have been perpetrated on perfectly normal, healthy unborn children whose only handicap was to be unwanted. Thus her final quote (from a famous play about Sir Thomas More) strikes home: "Well . . . finally . . . it isn't a matter of reason; finally it's a matter of love."

We wish the Court had read Miss Meehan's article before handing down its latest *fiat*. And we wish it had read our next article before it acted at all. Professor Francis Canavan, S. J., can make arguments as powerfully as any writer who has ever graced our pages (and, in all modesty, that is powerful praise). Here, he provides a critique of "Pluralism" that is simply devastating. But always charitable, e.g., *in re* abortion, he allows that "it is doubtful if the Supreme Court claimed a power that God Himself might envy, that of making a live fetus dead merely by declaring it so." And his conclusion provides hope: "Societies do face moral issues to which they must give moral answers." *Amen.*

Next, another formidable exponent of right thinking, Joseph Sobran, tackles a subject many would gladly avoid. If you are aware of the North American Man/Boy Love Association, you must already have a strong opinion about what it stands for. Mr. Sobran explains what its existence *means*, and wonders whether any society can long support the death-wish it represents.

About here, we usually try to give you a change of sorts, something different, and lighter, if possible. Well, the reader may well find considerable if bizarre amusement in the spectacle described by Mr. Terry Eastland—a perfectly-healthy two-year-old romping about the courtroom while the mother was being awarded $100,000 in "damages" for his "wrongful birth"! But the deeper meaning of the story is as disturbing as Mr. Sobran's, and for many of the same reasons. Indeed, both raise an awful question: What will our own children—at least those who survive our "modern" holocausts—charge against us hereafter?

Finally, Rep. Henry Hyde (a household name to our readers) force-

fully explains the unavoidable "connection" between the again-proposed Equal Rights Amendment and abortion. Mr. Hyde writes just as he speaks—with contagious *conviction*. If you require convincing as to what the ERA could mean, you'll find "the right stuff."

Our appendices are few and brief, but straight to the point. Appendix A is an unusual commentary on President Reagan's article. We could have chosen many others (we are pleased to record the fact that there *were* far too many to run here), but thought that this one, by Mr. Colman McCarthy, was better than representative—it comes from a columnist who has rarely agreed with Mr. Reagan on anything else (as Mr. McCarthy himself makes clear). Appendix B comprises two columns by Joseph Sobran, the first also a commentary on the President's historic article, the second a fascinating footnote on the Supreme Court's (or at least Justice Powell's) *expertise*. Appendix C gives you Professor Hadley Arkes on the still-unresolved "Baby Doe" regulations.

* * * * *

Let us here praise famous men—famous in their chosen professions, and for having championed the cause of the unborn child. New Zealand's Dr. Albert William Liley, the "Father of Fetology," died June 15 (aged only 54). He pioneered treatment of the "patient" in the womb, and traversed the world to uphold the rights of the unborn to "treatment just like any other patient"—we quote from his eloquent 1974 testimony before a U.S. Senate committee, the full text of which appeared in our own Vol. 1, No. 1 (Winter, 1975). In this issue, Professor Noonan upbraids the Court for not having consulted Dr. Liley's famous work, *Modern Motherhood*, before confirming the barbarous *dictat* that pain in the unborn is "impossible to determine."

On June 18, Mr. Joseph O'Meara, Dean Emeritus of Notre Dame's law school, also passed on (aged 84). His obituary described him as "a well-known critic of the 1973 U. S. Supreme Court decision which legalized abortion." Indeed he was: nobody wrecked greater damage on the claim that abortion was a "private" matter than Dean O'Meara in "The Court Decides a Non-Case" (which first appeared in our Fall, 1975 issue). He was a gentleman and a scholar.

And a personal note: our Publisher (see inside front cover) records the passing of James W. O'Bryan. Jim never "appeared" in these pages. Yet no pages at all would have appeared without him; he was always with us, in all we have done here. And, to all who knew him, always will be.

J. P. McFADDEN
Editor

The Akron Decision:

A Pragmatic Politician's Parody of Solomon

John T. Noonan, Jr.

PRAGMATISTS who believe that in any dispute you can split the difference have looked at the life and death issue of abortion and have come up with what they think is a workmanlike, democratic, sensitive compromise. The abortionists get the unrestricted right to legal abortion. The anti-abortionists get the right not to fund it. A fair division, they suppose. Half a loaf, they say. Half a baby, they imply. They would have resolved the trinitarian conflict of the fourth century by believing in one and one-half Persons. Here the pragmatists say: They can kill, you don't have to pay for it. Or: They get the blood, you can keep the money. This nice division of non-negotiable demands is the explanation of *Akron* v. *Akron Center for Reproductive Health*, the United States Supreme Court's latest decision in the matter of abortion.

I speak of a decision "in the matter of abortion" advisedly, for like the Court's other decisions in the area, this decision has a curiously abstract air, as though it were not determining a contest between real persons but were the draft of a legislative program. An actual woman seeking an abortion is not before the Court; the actual abortion clinic with the Orwellian name which is the plaintiff—its business methods, its business motives—is never mentioned; the party most at interest, the unborn child, is unrepresented.

Abstractly structuring the pragmatist compromise, the Court affects the lives of millions of human beings. It does so not as judges deciding a concrete controversy but as designers of a political solution—a "final settlement" as President James Buchanan said of *Dred Scott*.[1]

John T. Noonan, Jr., is professor of law at the University of California, Berkeley, and the author of *A Private Choice* (The Free Press, Macmillan, 1979), which is generally considered the most important book yet written on the Supreme Court's 1973 Abortion Cases.

Written by Justice Lewis Powell on behalf of himself and five of his male colleagues, *Akron* shows that the old *Roe* v. *Wade* majority has not only learned nothing but has paid almost no attention to contemporary discoveries in medicine, currents in politics, or critiques of judicial imperialism. Locked into the medicine of a decade ago, uncomprehending of the present political climate, disdainful of conscientious remonstrance and academic criticism, the entrenched majority declares that a "fundamental right to abortion" is to be found in the Constitution.

Unworkmanlike, undemocratic, insensitive—these are the principal characteristics of the opinion. Let us look at *Akron* in terms of these characteristics.

Unworkmanlike. Justice Powell begins by noting "legislative responses" and "arguments" that "we erred in interpreting the Constitution." He continues: "Nonetheless, the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm *Roe* v. *Wade*."[2]

What does Justice Powell mean when he says that *stare decisis*—that is, the obligation to follow precedents—is "perhaps never entirely persuasive on a constitutional question"? Fifty years ago Justice Brandeis compiled a list of over a dozen instances on which the Court had reversed itself on constitutional questions—where the principle of *stare decisis* had not been observed.[3] The Court since the 1930's has been more cavalier with precedent than the pre-New Deal Courts. Explicitly or *sub silentio*, it has discarded many more constitutional decisions than its predecessors had done. Conservatively estimated, at least forty times the Court has corrected itself on the meaning of the Constitution.

"Perhaps never entirely persuasive"! An accurate historian would say, "Often unpersuasive." Surely Justice Powell knows this. And why does he qualify his already qualified acknowledgement with a "perhaps"? The same judicial stutter appeared in *Roe* v. *Wade*, where Justice Blackmun suggested that "perhaps" the liberty he was inventing could be found in the Ninth Amendment.[4] "Perhaps" in these contexts is a telltale mark of a judicial conscience struggling against an implausible assertion. For Justice Powell, a learned and experienced member of the Court, to state

flat out that precedent was "not entirely persuasive" was too much for him to do when a candid sense of his craft required him to acknowledge, "On constitutional issues, the question is never settled until it is settled right."

Having overplayed the place of precedent, Justice Powell makes a truly desperate maneuver—he links the observance of precedent to "the rule of law." If observing precedent were essential to the rule of law, the institution of which Justice Powell has been a prominent member would have to be pronounced subversive. It has smashed precedents right and left—one need only read its decisions on marriage, divorce, and the family to see how careless it has been in preserving them. *Akron* itself announces three new requirements of the Constitution different from those stated in earlier abortion cases. Justice Powell's linkage gives us no choice—we either do not have the rule of law or the Supreme Court has not been doing what it has been reported to be doing for the past four decades. Either alternative is unacceptable. Justice Powell fails to make a valid equation between preserving the rule of law and not overruling an outrageous decision.[5]

A footnote answering the dissent adds two special reasons for not abandoning *Roe*. 1) *Roe* was argued one year, put over, and re-argued the next. Justice Powell does not note that the first year was a presidential election year and that, like *Dred Scott*, *Roe* by re-argument was moved to a year when the political consequences of a political decision would be less immediately damaging to the decision-makers. 2) *Roe* has been applied "repeatedly." Justice Powell does not observe that the reason it has had to be repeatedly applied is because of the general detestation in which elected legislatures have held it.[6]

Special irony attends the appeal to precedent in *Akron*—it overrules a case decided only two years ago. Even if the Court is going to flip and flop, one would think that it could flip the same way two years running. Such, however, is not its course with abortion. In 1981 it decided *Gary-Northwest Indiana Women's Services, Inc.* v. *Orr*. There a three-judge District Court had held that Indiana could constitutionally require hospitalization for second-trimester abortions. The Supreme Court summarily affirmed. The District Court, after all, had merely applied *Roe* v. *Wade*.[7]

Two years later the *Akron* majority finds that *Roe* and *Gary* have been "misinterpreted." Accepted medical practice is now said not to require hospitalization during "the early weeks of the second trimester." The change in medical practice requires the Court to change the constitutional requirement. The underlying fact on which the medical practice depends is that the safety of second-trimester abortion "has increased dramatically." Such abortions now kill only 7 women per 100,000 abortions instead of 14 women. A change of survival rate of seven is greeted as a dramatic increase, an increase so dramatic that the Court's recent precedent must be formally overruled. To make matters even more embarrassing for Justice Powell, the statistics he cites so triumphantly must have been available when the Court went the other way in 1981. Respect to the rule of law is indeed endangered when the Court, in 1981, cannot find the statistics it dredges up in 1983 to reverse itself on a requirement of the Constitution.[8]

Precedent is usually thought of as not merely the bare holding of a case, but also the reasoning which underlies the holding. Just six years ago Justice Powell wrote the opinion upholding the right of a state not to fund abortion. In the course of that opinion Justice Powell declared that the state had a "strong and legitimate interest"—"an interest honored over the centuries"—in "encouraging normal childbirth." The state also had, he wrote, "a strong interest in protecting the potential life of the fetus."[9]

In *Akron*, Justice Powell finds it unconstitutional for the law to set up a twenty-four hour waiting period in which a woman seeking an abortion might have a chance to weigh the consequences of her choice. Twenty-four hours is not very long to be asked to wait. It is, no doubt, a small encouragement to a choice in favor of the child and a choice in favor of birth. If the state has strong interests in these subjects, one would suppose that a single day was minimal acknowledgement. Not so Justice Powell. Tacitly repudiating his own reasoning, he describes even a one-day wait as "arbitrary and inflexible" and, speaking as if he were the Constitution, condemns it.[10]

Six years ago, upholding a state's choice not to fund, Justice Powell wrote: "We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great

a degree as the courts.'" Justice Powell's reminder was a quotation from Justice Holmes, stating what became the accepted wisdom of the law schools: judges have no business reading their private social views into the meaning of "liberty" in the Constitution. It is in repudiation of this accepted doctrine—far older and far more fundamental than *Roe* v. *Wade*—that Justice Powell lets his predilections determine that that liberty prohibits the very small restraints *Akron* attempted to put on abortion.[11]

Unworkmanlike failure to achieve consistency with recent decisions and his own opinions—a glaring deficiency—is excellently illuminated in the skillful dissent of Justice Sandra O'Connor, joined by Justices Byron White and William Rehnquist. Justice O'Connor begins by quoting Justice Powell's own standard in the funding case: a regulation is not unconstitutional unless it "unduly burdens the right to seek an abortion." She cannot see how such regulations as a one-day wait can be found undue burdens. She thinks it extraordinary that the Constitution *requires* the States constantly to re-adjust their health regulations to conform to medical practice. She wonders if the Court, to carry out such a concept of the Constitution, will have to function as "the nation's *ex officio* medical board." She points out the Court's double standard: health *includes* emotion and psychology when abortion is to be justified; it means only *physical* safety when law regulating abortion is to be justified. She shows how Justice Powell's invalidation of *Akron*'s parental consent requirement for the abortion of girls under 15(!) does not square with the Court's 1977 decision in *Bellotti* v. *Baird*. She demonstrates that Justice Powell's invalidation of *Akron*'s informed-consent requirement in effect holds three other cases expounding the Constitution were wrongly decided. She quotes back to Justice Powell his previous reminder from Holmes that legislatures too are the guardians of liberty, and—what Justice Powell himself had once believed—that "in a democracy," the *appropriate* forum for the resolution of such "extremely sensitive issues" is the legislature. She demonstrates that the whole shaky trimester division of *Roe* v. *Wade* has collapsed in the face of medical improvements. In short, she makes mincemeat of Mr. Justice Powell's opinion.[12]

With the shoddiness of the majority opinion made apparent by

the dissent, Justice Powell cannot resist adding a footnote bent on refuting Justice O'Connor. Her dissent, he writes, "rejects the basic premise of *Roe* and its progeny." Justice Powell has some difficulty pointing to where this basic rejection occurs. The nub of his accusation appears to be that Sandra O'Connor defends the waiting period out of a belief that the abortion decision "has grave consequences for the fetus." Quoting her observation, Justice Powell remarks: "This analysis is wholly incompatible with the existence of the fundamental right recognized in *Roe* v. *Wade*."[13]

A single day to think over the grave consequences for the child is "wholly incompatible" with the abortion liberty. In this brusque denunciation of the dissent, Justice Powell reveals his mind openly. He wants nothing to inhibit the choice of abortion. Every restriction is an "interference." He is impatient with the lines carefully drawn by the Akron ordinance. The raw abortion right he and his colleagues invented is not to be curbed at all.

The *Akron* legislators, respectful of the rule of law, had worked within the space apparently left open by *Roe* v. *Wade*. The three-judge District Court, mindful of the precedents set by higher authority, had followed *Gary-Northwest Women* and upheld hospitalization. The O'Connor dissent, relying on Justice Powell's own recent reasoning, finds the Akron regulations valid. But Justice Powell has no patience for this close reading of *Roe*, this conscientious application of precedent, this craftsmanlike invocations of his own ideas. Inhibition of the abortion choice in the smallest degree becomes denial of the fundamental right. The unworkmanlike character of his opinion follows on the zeal of the judge to sweep the board.

Undemocratic. Akron compels the state to accept the standard prevailing in the medical profession. Indeed it compels the state to do somersaults to keep up—the American College of Obstetricians and Gynecologists changed its standards on hospitalization *after* the Akron trial; the Court holds that the new standards determine the constitutionality of the Akron rule. In the past, the states have set the standards for medical practice, incorporating professional standards where the state has found them appropriate. *Akron* subordinates the decision of the lawmaker to the judgment of the interested professional.[14]

We are using "the model" of "a conscientious physician," writes Justice Powell (for him as for Blackmun, doctors are always conscientious and always "physicians"). Why is the government compelled to accept this fantasy as the basis for its regulations? Any aware citizen knows that a large number of abortions are performed in mills. The modern abortionist is not the family doctor by his patient's bedside. The well-known exposé of modern abortionists in Chicago by the *Sun-Times* put before everyone the kind of doctor—careless of his patients, callous to their sufferings, greedy for his money—that the Akron regulations were aimed at. Ignoring the real world and insisting on the dream doctor of the judges, the Court tramples on the experience reflected in the democratic legislative process.[15]

The court makes a great deal of this exemplary fellow, the conscientious doctor. Nothing is to be interposed between him and his adult patient. *Roe* itself, Justice Powell admits, had pointed to "the central role of the physician" in "consulting" with the patient about an abortion. He himself writes: "It remains primarily the responsibility of the *physician* to ensure that appropriate information is conveyed to his patient" (emphasis supplied). But where the Akron ordinance requires that the physician give consulting advice about the operation to his patient, he strikes a different note. The critical factor for Justice Powell becomes that the patient obtain "the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." It becomes unconstitutional to insist that the physician give counsel. Wonderfully overlooking the kind of half-baked social workers or past victims of abortion likely to be willing to take such lowpaid work, the Court grandly and vaguely holds that "qualified" persons can be required to do the counselling. The Court fails to make clear why the judges have the expertise to say that a class of qualified non-doctors exists to inform potential abortion patients what awaits them and their children.[16]

Putting the professional abortionist above the lawmaking process of democracy, using an unrealistic model of the ideal abortionist, inconsistently setting the doctor aside when he became an inconvenience, the Court does not even pay lip service to judicial self-restraint. Not once does Justice Powell ask how he has the

knowledge or experience to decide the care necessary for a woman's health or the encouragement she needs to protect her baby's life or the information she should have to make an intelligent decision. The fiction is maintained that Justice Powell is merely "interpreting" the Constitution.[17]

In the year 1983, on the brink of *1984*, this kind of fiction is peculiarly unpersuasive and peculiarly unappealing. Anyone who can read knows that the Constitution does not say one word about abortion. There is no liberty of abortion in the Constitution. To say there is such a liberty one has to believe that the judges are free to make up the meanings they like and engraft them in the manner of constitutional amendments to the original text.

No one doubts, of course, that genuine interpretation can expand general concepts to cover new discoveries, for example to bring television within the Freedom of Speech. No one doubts that experience incorporated in American laws and reflected in American beliefs and tradition can provide a gloss on ambiguous provisions. The pre-1972 cases which Justice Powell, following *Roe*, invokes for "freedom of personal choice in matters of marriage and family life" reflect the *sacredness* of marriage and the authority of parents, values *older* than the Constitution, and deeply engrained in American experience. When an action has been criminal in every state, when American traditions of the family and American beliefs in the sanctity of life have run exactly counter to the action, when the action is no new discovery but an ancient and barbarous way of killing the helpless—to say that *this* action is protected by the Constitution's pledge of liberty is to add a new clause to the Constitution, to amend our basic law by the undemocratic method of judicial command.

Roe v. *Wade*, of course, wrote the new amendment. *Akron* merely reaffirms it. But after ten years of relentless criticism of the constitutional fallacies in *Roe* v. *Wade*, did not the Court have an obligation to explain and defend itself? To state what was the *basis* of its extraordinary assumption of power? For a decade, critics of all persuasions on abortion had been unable to discover a rational basis for *Roe*. Did not even minimal respect for the rule of law and the decent opinion of mankind call for the Court to assert a basis other than arbitrary power? The judges must be powerfully insu-

lated from reality if all they know of are "legislative responses" and "arguments" suggesting they erred. The nakedness of their assertion of power in *Roe* has been exposed to the view of everyone. They now have nothing better to offer than *Roe*. Nothing better than *Roe*? Then they have nothing at all. They exercise the power of their office without reason, and with profound injury to the rule of law.

Akron strikes one new blow against democratic government. It muzzles the legislative organs of the people. *Roe* declared that the state could not choose what the Court was pleased to Call a "theory of life" in protecting the unborn child by the criminal law. *Akron* declares that the state cannot even choose to have the truth spoken that the child is a child, is human, and is alive. To prescribe that the physician speak these words is, according to Justice Powell's opinion, "inconsistent" with *Roe* v. *Wade*'s teaching that a state "may not adopt one theory of when life begins to justify its regulation of abortion." Or, as Justice Powell puts it in his own words, a state may not have "regulations designed to influence the women's informed choice between abortion and childbirth."[18]

By the same token, it would appear impermissible for the State to educate its children in modern biology, for modern biology teaches that the distinctive human karyotype is present at conception and that the newly-conceived being is alive. If the transmission of this information impedes a decision in favor of abortion—as it surely does—it must be an interference with the Court-proclaimed fundamental right. Such information certainly influences the informed choice of all who reject abortion. It would be instructive if the American Civil Liberties Union would seek an injunction prohibiting the use in the public schools of textbooks containing this harmful information. The Court might gag on Powell's principles logically applied. Its present holding that the Constitution acts as a censor and prevents a regulation requiring disclosure of the facts is only a little less extreme.

Insensitive. The first kind of sensitivity all of us have is sensitivity to pain—to our own pain first and then, as we become civilized, to the pain of others. Insensitive persons are insensitive to the pain of others, do not want to know about it, care to do nothing about

it. The majority of the Court in Akron reveal a startling insensitivity to the pain of others.

A substantial body of physiological evidence indicates that the unborn child reacts to pain—moves to avoid discomfort, distinguishes bitter sensations from sweet, and much more. The Akron regulation required that a woman be informed of the child's "tactile sensitivity, including pain." The District Court said that there there was "much evidence" that the sensitivity to pain was "impossible to determine."[19]

Instead of consulting the relevant medical literature, instead of using such a well-known handbook for pregnant mothers as William Liley's *Modern Motherhood*, the Court treats the District Court's conclusion as final. The Court, which felt free to rely for other medical data on such partisan productions as the National Abortion Federation Standards does not discuss the findings of standard physiological investigations of uterine life. The person who deliberately denies himself knowledge that others are in pain which he could alleviate is fairly described as lacking in elementary sensitivity. What shall one say of a Court that denies the states the opportunity to inform their citizens of pain they may not want to inflict upon their own children?[20]

On a different level, the Court shows itself insensitive to the politics of the country even as it engages in open politics—for a decision lacking in constitutional bases, and undefended by reasoning, can only be called political. The Court has not noticed how much most of the country deplores an anti-family stance. The majority of the Court has not read the opionion polls that show the great majority of Americans do not want the radical abortion right conferred upon them—do not want it for themselves, do not want it as an amendment to the Constitution. The Court majority has not observed that at least half of both Houses of Congress and the Chief Executive do not believe in the abortion amendment the Court has constructed.[21]

In deciding *Akron*, it may be said the Court is playing politics in a minor league. It is knocking down a city ordinance alone. Yet the court did have the benefit of a brief from the Solicitor General of the United States solidly on the side of the city. The Court, even within its insulated walls, was surely aware that the President of

the United States had declared that "we cannot survive as a free nation when some men decide that others are not fit to live and should be abandoned to abortion or infanticide."[22] The Court has been unresponsive to the several States of the United States which have tried to find ways of shielding their unborn children only to have their laws struck down by the Court or its surrogates. The Court is now unmoved by the Executive Branch.

Unfeeling about pain, deaf to the voices of the people's representatives, the Court is curiously uninterested in medical advances on behalf of the unborn. Viability now comes earlier than the "seventh month" (i.e., about the 27th-28th week) which *Roe* said was "usual." Justice O'Connor reminded the majority that an infant could now be viable at 22 weeks, and stated bluntly, "The *Roe* framework, then, is clearly on a collision course with itself."[23]

As viability undeniably moves backwards, *Roe* should permit the States to protect the life of the unborn at earlier and earlier stages. If the *Roe* rationale is to be accepted, if precedent is to be respected when it works *against* abortion, the *Akron* regulations are constitutionally salvageable just because they *do* safeguard the state's interest in viable life. Yet Justice Powell, with Justice O'Connor's facts in front of him, did not care to take note of them, or say a word as to how the new information on viability shattered *Roe*'s restriction of any protection of the child until the last two months.

There is only one explanation for this kind of blindness when the information is spread out before one—the *parti pris* of ideology. How awkward to find that new medical data tells against abortion; how embarrassing to say that states must study medical literature, and to discover that, if they do, they will regulate abortion *earlier*. If one is convinced that he has invented a fundamental right, it is certainly easier not to believe that the fundamental right will be eroded by medical technology. It may even be necessary not to acknowledge the facts that would support such a belief.

Ideology, too, accounts for the grim determination not to admit in any way that abortion involves the killing of a human being. "Terminate her pregnancy" is Justice Powell's opening locution. "Unborn child" in the Akron ordinance is at times translated "fetus." He religiously applies the rubric "potential" to life in the

womb. (If a moving, kicking, urinating baby is only potential life, it would be instructive to know what actual life is). He once, as we have seen, falls back on the *Roe* language which reduces the real child still further to a kind of ghostly existence as a "theory of life." At no point is he sensitive to the maternal language that speaks of the child as a baby.[24]

Ideology blocks out the accents of our mother tongue. It leads to one final enormity. The Akron ordinance required abortionists to dispose of "the remains of the unborn child" in "a humane and sanitary manner." In *Franklin* v. *Fitzpatrick* the Court in 1976 had upheld such a standard. Unfortunately for the respect due the role of the law, the majority were prepared to strike down all the works of the Akron City Council. They overruled *Franklin* and threw out this provision with the others. Their ingenious reason was that the statute might be construed to "mandate some sort of 'decent burial' of an embryo at the earliest stages of formation."[25]

As the use of the phrase "decent burial" in quotation marks suggests, it is repugnant to the judges to consider that *humane* human beings might want to bury decently even a very young child destroyed by abortion. As the Court is here quoting the Sixth Circuit, it is inferable that Justice Powell has no appetite for considering the grisly reality of what should be done with the dead. If decent burial is too good for the early embryo, Justice Powell seems to reason, then the whole statute is void for vagueness. The conscientious doctor cannot tell what he is supposed to do.

In a case (*Simopoulos*) decided the same day, an abortion was described in which an aborted child of five and one-half months was deposited in the wastebasket of a motel. Even the majority might concede that that was not humane and sanitary disposal. Normally courts construing a statute are satisfied if they can say specifically what the statute prohibits. What criminal statutes are without grey areas of uncertainty? It required no speculation for the Court to say that wastebaskets and garbage dumps could not be used by abortionists obeying this ordinance. The judges themselves add the gloss "decent burial" in order to impute vagueness.[26]

The real offense of the ordinance on "humane disposition" was that, however weakly, it suggested that the slaughtered being was not vegetable or animal, to be run through a dispose-all; not a

theory of life to be written off in a sentence; not mere potential, which had no actual beating heart and functioning brain, but rather human flesh, like ourselves. Asking for a humane manner of disposal, the ordinance was sensitive to the fact that abortion is a way of visiting death on a human being. The Court is not sensitive to that fact.

Solomon's famous decision was designed to discern who really loved the child. He did not suppose the child would be actually divided. Possessed of less then Solomonic wisdom, the Court seems to suppose that its unworkmanlike, undemocratic, insensitive solution will actually be carried out; that the country will accept the division.[27] The Court could not be more mistaken. Prayer and love, work and education, action by the Congress, leadership by the President, constitutional response by the people—these must, and someday will, right the wrong now written into law.[28]

NOTES

1. James Buchanan, Third Annual Message to Congress, December 17, 1859, *Messages and Papers of the Presidents,* ed. J. Richardson 4, 3085.

2. *Akron* v. *Akron Center for Reproductive Health,* Slip Opinion, June 15, 1983, p. 2.

3. *Burnet* v. *Coronado Oil and Gas Co.* 285 U.S. 393 (1932) at 407-409 (dissenting opinion by Brandeis, J.).

4. *Roe* v. *Wade* 410 U.S. 113 at 154.

5. *Akron* announces a new requirement of the Constitution on hospitalization contrary to *Roe* v. *Wade supra,* n. 4 and *Gary-Northwest Indiana Women's Services, infra,* n. 7; on humane burial of a child killed by abortion contrary to *Franklin, infra* n. 25; and on informed consent contrary to *Bellotti, Planned Parenthood,* and *H. L., infra,* n. 12. For a discussion of constitutional changes in family law, see Noonan, "The Family and the Supreme Court," *Catholic University Law Review* 23 (1978) 255-262.

6. *Akron* at p. 2, n. 1. For the *Dred Scott* parallel see Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978) 290.

7. *Gary-Northwest Indiana Women's Service, Inc.* v. *Orr* 451 U.S. 931 (1981), *affirming* 496 F. Supp. 894 (N. D. Ind. 1980). As Justice O'Connor points out, Justice Powell's attempt to distinguish this case "simply ignores" what the district court held, Slip Opinion, Dissent 5, n. 3.

8. *Akron* at 14 ("misinterpreted"); at 17 ("has increased dramatically"). The statistics depended on are cited in footnote 22; they are for 1977 from a book published in 1981 and presumably as available to the Court as to the book's authors.

9. *Maher* v. *Roe* 428 U.S. 464 (1977) at 478.

10. *Akron* at 32.

11. *Maher* v. *Roe* at 479 quoting Holmes, J. in *Missouri, Kansas and Texas Ry. Co.* v. *May* 194 U.S. 267 (1904) at 270.

12. *Akron,* Slip Opinion, Dissent at 2, 12-13 (unduly burdens); 2-3 (trimester framework "completely unworkable"); 5-6 (nation's medical board); 12 (double standard); 14 (legislature the right forum); 21 (indicates that *Planned Parenthood of Central Missouri* v. *Danforth* 428 U.S. 52 [1976]; *Bellotti* v. *Baird* 443 U.S. 622 [1977]; and *H. L.* v. *Matheson* 450 U.S. 398 [1981] are now held to be "incorrect" on informed consent.)

13. *Akron* at 2, n. 1.

14. *Akron* at 18.

15. Compare the Chicago *Sun Times* November 12, 1978 through November 22, 1978.

16. *Akron* at 25 ("primarily the responsibility of the physician"); at 29 (identity does not matter).

17. *Ibid.* at 2.

18. *Ibid.* at 25 ("designed to influence"); and 26, citing *Roe* v. *Wade* at 159-162.

19. *Akron Center for Reproductive Health* v. *Akron* 479 F. Supp. 1172 at 1203 (N. D. Ohio 1979) (per Leroy J. Contie, J.). Unfortunately District Judge Contie did not state what the "much evidence" consisted in. Citing Judge Contie, Justice Powell has no more information than other readers of his opinion as to what he had in mind. Compare Noonan, "The Experience of Pain by the Unborn," *Human Life Review* (Fall 1981) 7-19.

20. National Abortion Federation Standards are invoked by the Court at 29, n. 387.

21. On the opinion polls, see Noonan, *A Private Choice* (New York: The Free Press, Macmillan 1979) 73.

22. Ronald Reagan, "Abortion and the Conscience of the Nation," *Human Life Review*, (Spring, 1983) 16.

23. *Akron*, Dissent at 7.

24. *Akron* at 1 and 2 ("terminate her pregnancy"); "potential human life"; 13, n. 15, ("fetus").

25. *Ibid.* at 32, citing 651 F. 2d at 1211 (6th Cir. 1981). Technically the Court "distinguished" *Franklin* v. *Fitzpatrick* 428 U.S. 401 (1976) affirming 401 F. Supp. 554 (E. D. Pa. 1975) because *Franklin* did not involve a criminal statute. Realistically and practically, the *Franklin* precedent was discarded, as Justice O'Connor makes plain in her dissent, p. 24.

26. *Simopoulos* v. *Virginia*, June 15, 1983, Slip Opinion, p. 2 (opinion by Powell, J.).

27. In footnote 33 of *Akron*, Justice Powell offers the compromise explicitly: "A State is not always foreclosed from asserting an interest in whether pregnancies end in abortion. In *Maher* v. *Roe* 432 U.S. 297 (1980) we upheld governmental spending statutes that reimbursed indigent women for childbirth but not abortion."

28. Compare President Ronald Reagan, in his *Human Life Review* article "Abortion and the Conscience of the Nation," p. 15: "Prayer and action are needed to uphold the sanctity of human life."

Facing The Hard Cases

Mary Meehan

DEBATES ON ETHICS have a fearsome way of reaching hard cases in very short order. At times we torture ourselves with excruciating hypotheticals: "Lying is wrong; but how about a lie to save someone's life?" Few ever face that choice. Rather, people tell lies to avoid embarrassment, to avoid hurting someone's feelings, or to gain a psychological or financial advantage.

In the abortion controversy, people ask: "How about abortion in the case of rape or incest? Or when we know the child has Tay-Sachs disease, which is always fatal in the first few years of life? Or when pregnancy endangers the mother's life?" Yet most abortions are performed for social or economic reasons.

The pro-abortion lobby is skilled in using hard cases to put right-to-life forces on the defensive. If anti-abortionists refuse to accept abortion for the hard cases, they are accused of extremism and insensitivity to wrenching human problems. If they do agree to exceptions, they find that the exceptions are the front end of a battering ram that knocks down the gates to abortion on request.

The recent legal history of the abortion issue in the United States illustrates the problem. Until the 1960's, nearly all states banned abortion except to save the life of the mother. Then advocates of legal abortion started placing other exceptions in many state laws.[1] The exceptions undermined the philosophical position of a right to life, so defenses were weak when abortion proponents made their drive for abortion on request.

A key case was provided by a Georgia statute that permitted abortion in cases where pregnancy would endanger a woman's life or cause serious and permanent damage to her health, where the unborn child apparently had a serious and permanent defect (either mental or physical), and where pregnancy was due to rape.[2] The lawyer who defended the Georgia statute before the U.S.

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Supreme Court in 1972 had great difficulty explaining the state's commitment to protect the unborn in view of the exceptions allowed. One of the justices underscored the weakness of her case when he asked: "Is there any other statute in Georgia which says under certain conditions you can kill somebody?"[3] The Supreme Court struck down the Georgia law in *Doe* v. *Bolton*, a 1973 decision that allowed abortion for virtually any reason.

In asking his question of the Georgia lawyer, the justice had struck the Achilles heel of exception statutes with a sledge hammer. Most anti-abortion groups have not forgotten that lesson. But they realize that answers to the hard cases are not needed only for legal reasons. If a "pro-life" philosophy is to hold together, it must do so at the points where there is greatest strain. If it holds for the hardest cases, surely it will hold for the easy ones.

They also realize that it is important to consider the hard cases for the sake of those affected by them. The fact that hard cases are infrequent does not make them easier to bear; indeed, it may make them harder to bear because of the feeling that one is isolated in fear and desperation. No one who heard the testimony of a rape victim before a Senate subcommittee in 1981 could fail to be appalled by the facts she related: a brutal rape in the 1950's; her terror at the thought of "giving birth to the offspring of a literal fiend"; and a painful abortion at the hands of an illegal abortionist, an alcoholic "who was drinking throughout the whole procedure." The woman said:

> . . . I am not a mean, or uncaring, or immoral person. I have never willfully done anything in my life to hurt another person, and when someone did hurt me, when that cruel and twisted person raped me, and brutalized me, and impregnated me, and sliced open my abdomen, and left me for dead, it should not have been the prerogative of society to compound that crime, to say to me in effect, "All right, you have survived this. Now you can go see an alcoholic quack and let him take a whack at you . . . "[4]

A case like this demands much more than a debater's reply or a slogan. It demands a sharing of the woman's pain, as well as a plea for the new life at stake.

In considering cases of rape, incest, fetal handicap, and danger to the life of the mother, we have occasion to remember that the protection of life sometimes requires great hardship and even hero-

ism. This is an ancient truth, though not a fashionable one. It is well to face it honestly.

RAPE

"Rape" and "abortion" are two of the cruelest words in our language. What should we say when the first is used to justify the second? We can say that relatively few children are concieved through rape and that it is wrong to remedy violence with more violence. Both statements are true, but they are not enough to meet the feelings of fear, disgust, humiliation, and great injustice that rape victims undergo. So deep is the loathing of the crime, and so widely is it shared by non-victims, that many people find it hard to say that abortion should be barred in rape cases. Dr. Mildred Jefferson, a veteran anti-abortion activist, notes that the revulsion people feel for the crime carries over to the rape victim and any child who "may have resulted from the unwelcome union." For some people, she remarks, rape is "an unpardonable sin which taints sinner and victims alike. The child is never thought of as an entity deserving of consideration—only a blot to be removed."[5]

Yet the child is innocent, and should not be punished for the father's crime. Rapists are no longer executed in our country; their children, the totally innocent results of crime, should not be executed in their place. Our commitment to equality would be radically compromised if we were to say that children's right to life depends on the circumstances of their conception. Moreover, as Doris Gordon suggests, "Victimization by rape does not release women from the general obligation not to harm innocent people. Children conceived in rape are innocent of causing their mother's situation and are victims, too."[6]

Honesty requires us to say that it is unjust that a woman must carry to term a child conceived through rape, *but that it is a far greater injustice to kill the child.* This is a rare situation in which injustice cannot be avoided; the best that can be done is to reduce it. The first injustice lasts for nine months of a life that can be relieved, both psychologically and financially. The second injustice ends a life, and there is no remedy for that.

The view of both mother and child as victims is the key to a genuinely compassionate response. Certainly this should hold in

cases where the rapist and the woman are of different races. The child may be at greatest risk in such a case, because to many Americans the mixture of rape and race is even more explosive than that of rape and abortion. In short, much of the support for abortion in rape cases is due to racial bigotry. Lobbyists for the Medical Association of Georgia did not hesitate to use it in 1968 when urging then-Governor Lester Maddox to support a bill allowing abortion for rape and other hard cases. They asked him how he would feel "if a white girl got raped by a Negro and then became pregnant."[7]

Abortion proponents are sometimes embarrassed by the way the racial issue surfaces. The National Abortion Rights Action League (NARAL), at its 1980 convention, showed members a "pro-choice" film that included an appearance by a woman who said that she had been raped by a black man. After the showing, a viewer asked that the reference to the rapist's race be deleted from the film; NARAL president, Robin Chandler Duke, responded, "I couldn't agree with you more."[8] The next year, however, the NARAL newsletter reprinted a column by journalist Tom Braden supporting abortion in the case of pregnancy caused by rape. Braden said that one of his daughters had become pregnant after being gang-raped. She could not identify her assailants adequately for police: "All five assailants were black men and a hysterical white girl's repeated description of them as being 'black' was not definitive."[9] When the Washington *Post*—a liberal, pro-abortion newspaper in a heavily black city—ran the same column, it deleted the sentence identifying the rapists' race.[10]

Rape is a terrible crime, one of the worst; but it does not become more or less of a crime according to the race of the man who commits. Abortion proponents who appeal to bigotry when speaking of rape undoubtedly pick up support this way, but they should not be proud of it. As Dr. Carolyn Gerster suggests, aborting a child because its father is black amounts to "intrauterine lynching."[11] It might be added that most rapes apparently involve two persons of the same race.[12]

All of this, of course, does not answer the feelings of a woman who is pregnant as a result of rape. Besides the usual discomfort and restrictions, she is likely to feel great anger and hatred toward

the rapist and may transfer those feelings to the child. She must also worry about the reactions of husband or boyfriend, parents, other family members, and friends. The woman who testified before a Senate subcommittee about her rape was married and the mother of two when she became pregnant by the rapist. Her doctor suggested that she carry the child to term and release it for adoption:

> He didn't suggest, however, how I might explain such action to a frowning society—much less to a frowning mother-in-law: "Yeh, well, gee, mom, its like this, see, I just decided I didn't want the third kid, so I gave it away."[13]

The woman must also confront the financial costs of pregnancy and, if she chooses adoption, whatever time and effort may be involved in that process.

How can we relieve these burdens? The financial ones can be met through restitution provided by the assailant or through state programs of compensation to crime victims. Such programs must, of course, be handled in a way that protects the privacy of rape victims. The psychological problems are more difficult to handle, since they involve the tendency of many (especially men) to "blame the victim" in rape cases.[14] Feminist writing and demonstrating have changed some attitudes, but much remains to be done. And it would be impossible to overstate the importance of psychological support from a woman's family and friends. There is a great need to assure that, no matter what the circumstances of conception, there should never be any embarrassment about bringing a child into the world.

There is also a great need to assure the woman that crime is not hereditary and that, in fact, rape is one of the rare instances in which good can come from evil. The classic case is that of the late black singer and actress, Ethel Waters, whose conception resulted from rape when her mother was twelve years old. Waters was born at the turn of the century, out of wedlock and unwanted, to a poor girl in a slum. Yet she contributed far more to the happiness of others, including many foster children, than most of us do. Eventually she even brought happiness to her mother, although this was not easy for either of them. In her autobiography, Waters revealed that she was well into middle age before her mother finally indicated love and approval of "her unwanted one, whom she had

borned so long ago in such great pain and sorrow and humiliation."[15]

Another case was described by journalist Jerry Hulse, whose wife had been adopted shortly after birth. When doctors needed a family medical history for his wife, who faced critical surgery related to vascular disease, Hulse started looking for her birth mother. His search led to a woman who had been raped at the age of fifteen and, as a result, had given birth to Hulse's wife, who was released for adoption, and to a twin brother, who was reared by his grandparents. The mother, who had not wanted to give up either child, was happy to be reunited with her daughter, as the twins were to be reunited with each other.[16]

To say that good can come from evil is not to accept the evil itself. As one "pro-lifer" remarked, "The answer to rape is not abortion, it's stopping rape."[17] Yet many people are resigned to rape; they assume that it has always been with humanity and always will be—an attitude remarkably similar to the one many have toward abortion.

While we may never eliminate all rapes, we probably can eliminate most of them if we have the will to do so. This is an area where anti-abortion activists could and should work with feminists. They might concentrate, for example, on changing male attitudes that encourage rape, especially those attitudes promoted by the pornography industry. They might cooperate in training women for self-defense. As that "manly art" becomes more and more a womanly art, fewer rapists will be successful in their missions; fewer, perhaps, will even want to try. Finally, the two groups could work together on the "Take Back The Night" marches that protest pornography strips and rape.

The unborn have a right to life and to freedom from assualt. So do women.

INCEST

Sexual intercourse between persons who are closely related by blood or marriage causes revulsion that is both moral and aesthetic. So strongly are we repelled by incest that most of us prefer not to think about it. Those who advocate abortion when pregnancy results from incest subconsciously may hope that, by taking

away the most obvious result of incest, they can take away the act itself, make it as though it did not happen. They may also have two conscious reasons: first, that inbreeding multiplies a child's chances of inheriting a genetic defect if there is one in the family; second, the belief that negative effects of incest upon the girl or woman may be intensified if she carries the child to term.

The classic idea of incest is that of intercourse between consenting adults, such as the Roman Emperor Gaius (Caligula) and his sister.[18] Of such cases one observer has noted: "Incest is a monstrous kind of justification for the taking of the life of another human being because the parents of the child were partners in the crime that resulted in his conception."[19]

But incest between two adults appears to be relatively rare. The more typical case involves a teenager (or sub-teenager) who is victimized by her father, stepfather, brother or uncle. Most state laws class incest as a felony, and some may charge a man with statutory rape as well as incest. But there are few indictments and even fewer convictions. The victims usually have no witnesses and are afraid to complain to the police. Many mothers refuse to believe their daughters' complaints or fail to act on them.[20]

Reading the literature on incest is like trudging through a sewer. It is full of cases in which the male offender starts using the girl when she is as young as seven or eight and continues the relationship until she runs away, marries, complains to legal authorities, or becomes pregnant. In this, as in many other cases, abortion is a great convenience for the male; here, it destroys evidence. In a German study of thirteen cases in which incest resulted in pregnancy, three of the male partners suggested abortion and three others actually tried to abort their own daughters or stepdaughters. (Two were successful in doing so.)[21] An ancient precedent was provided by the Roman Emperor Domitian, when his niece was pregnant by him. He forced her to have an abortion, which killed her as well as the child.[22]

The victims of incest, many of whom know nothing about sex until an adult abuses them, generally suffer physical pain at the outset of the relationship. Many are infected with venereal disease, and most undergo great psychological suffering. Even though they have not consented to incest, they are likely to feel guilty, terribly

alone and afraid, and unable to find a way out of the situation. Certainly incest is one of the greatest crimes against children. It is one encouraged by the lucrative child pornography industry and by those who say that the incest taboo is prudish and obsolete, one from which we should all be liberated.[23]

When pregnancy results from incest involving a teenager, two children's lives are involved. As in the case of rape, both are victims and need great compassion and aid.

The eugenic argument for abortion has no meaning when the incestuous relation is one of marriage (affinity) rather than of blood (consanguinity). This point is of great importance because the pregnancy cases often involve stepfathers, so that there is no increased risk of genetic defect. But where there is a close relation of blood, and where there is a genetic defect or disease in the family, the chances of the child's inheriting it are much magnified. Three studies reported since 1967—one British, one American, and one Czechoslovakian—indicate that children of father/daughter incest and brother/sister incest are far more likely than other children to suffer mental retardation or physical handicaps (or both). About one-half of the children in the three studies were handicapped and/or died at an early age.[24]

The question of abortion for fetal handicap will be treated separately below. Suffice it to say here that anyone who seriously maintains that all humans have an equal right to life must say that this applies regardless of physical or mental handicap. Part of the evil of incest is that it places the child at great risk of disability. To then kill the child because it is (or may be) handicapped is to compound the evil, to punish one who has committed no offense. It is sometimes argued that the child in this case would be "better off dead." But as Norman St. John-Stevas has said: "No human being has the right to make any such judgment about another human being. Even if one had the right, there would be no guarantee of making a correct decision."[25]

The other rationale for abortion in incest cases is concern for the young mother. "Sometimes the very young teen-age mother is set apart into a high-risk category," writes Dr. Bernard Nathanson, "but this is a social problem rather than a strictly medical one." He says that the "higher rate of difficult pregnancy is not due to the

very young mothers' age, but to the fact that they do not consult physicians readily or often enough."[26] Moreover, an incest victim is likely to be far along in pregnancy before her state is discovered, and a late abortion is more dangerous than childbirth.[27] With abortion, as Dr. Mildred Jefferson notes, "one risks compounding both physical and psychological problems,"[28] The last thing an incest victim needs is the added trauma of guilt over abortion.

In the German study of thirteen girls who were pregnant by their fathers or stepfathers, it was reported that nine of them "experienced the pregnancy as a psychological burden." Three of the thirteen cases were ended by abortions (with two done by the fathers). In the other cases, "Six of the ten girls adopted an absolutely positive attitude, did not want to be parted from their baby in any way, and tried to cope with their maternal duties as best they could."[29] Children and victims themselves, they were sensitive to the other child-victims involved.

Children of incest who escape major handicaps and who are released for adoption can lead normal and happy lives. One book on adoption relates the story of a middle-aged man who had been reared in a permanent foster home. The man was "a respected, contributing member of his community with an excellent work record, a happy marital relationship, and a healthy active family. He was deeply involved in amateur theater and light-opera productions and enjoyed performing immensely." After deciding to seek the facts of his birth, he found that his maternal grandfather was also his father. The relationship between his mother and her father had occurred when the mother was a teenager.

> The social worker who gave him the facts of his birth was surprised at how accepting he was of the information; how undisturbed he appeard to be. In a later interview, he reflected upon the meeting and his subsequent feelings:
>
> "I really wanted to hear that my father had money and that someday I would inherit. That would make up for his never being a father to me, and validate my lifelong dream of him. My prop was knocked out from under me, and that was really the hardest thing for me to cope with."
>
> . . . At his age and with his self-esteem, his knowledge of his origins was not devastating, but he reflected that at an earlier age, it might have caused him great problems. . . . [30]

This story had an ending better than anyone could expect, but many other children of incest have not been so fortunate. And

their mothers often suffer psychologically throughout life from abuse received at the hands of adults they once trusted. Anyone with human feeling experiences real anguish for the victims whose bodies, minds, trust and innocence have been so cruelly betrayed.

Public education programs, some addressed to offenders and others to potential victims, may help prevent the great evil of incest. One hopes, too, that the prophets of sexual liberation will take another look at the results of their glorification of lust.

FETAL HANDICAPS

There is a tendency to speak of the handicapped unborn as "defective," a cold designation that makes them sound like consumer products. "Is the toaster defective? Can't be fixed? Repairing it would be too expensive, more trouble than it's worth? Then let's just throw it away." This is what happens to "defective" unborn children whose handicaps are detected through amniocentesis, a procedure of withdrawing amniotic fluid and examining it for evidence of fetal handicap.

A bit of modesty, even humility, is needed in facing this issue. We are all defective in one way or another. As the mother of one handicapped child remarked: "I have met few people . . . whom I would consider 'perfect,' and I must ask who has the power to set the requirements that one is acceptable only when able to lay aside crutches, hearing aids, girdles, false teeth, etc."[31] One might add a few items to her list: eyeglasses, make-up, cosmetic surgery, back braces, walkers, inhalers, and so on. How many of us would measure up as perfect throughout our lives without such aids? And where is the person who has achieved moral perfection? Certainly the *moral* cripples of our century—Adolph Hitler, Joseph Stalin, Idi Amin, to name a few—have caused more misery than have any number of severely handicapped people.

Rev. Daniel Berrigan, S.J., best known as a poet and peace activist, has also worked in a home for the dying. Describing a child in a coma, he suggests a need for humility about our knowledge of life and death:

> A child who has been with us for the past two years came to us comatose. His medical report said he was "totally unresponsive." We find that this is simply not true. . . . He has a strong sense we are at his side. He has grown physi-

> cally, very beautifully. He is the darling of the place, not just of the nurses, but of the dying. . . . I'm drawing analogies that are very important about all people, including the unborn. When we know so little about life and death we had best not tamper nor limit the possibility of response, survival, and inclusing into life. . . . This child is the nearest thing to the mystery of the silence of the unborn.[32]

Some argue for abortion of the most-severely handicapped, such as children with anencephaly or Tay-Sachs disease,[33] in order to save their parents the expense and emotional devastation of watching their babies die. Perhaps equally devastating, however, are the cases of adults who die of amyotrophic lateral sclerosis (the disease that killed Lou Gehrig) or Huntington's chorea (the one that killed Woody Guthrie) or a long and ultimately hopeless battle with cancer. Few now suggest that adults with terminal disease be killed in order to ease their families' suffering. Instead we try to help patients and families through good medical care, the support of friendship, and the compassion of the hospice movement. We do not say, "Let's kill them now, because they are going to die anyway." All of us are "going to die anyway." But it matters a great deal to us how we die.

Although the case for abortion of the handicapped is often presented in terms of anencephaly or Tay-Sachs, many children are aborted because of handicaps that can be alleviated through surgery, therapy and special training. Dr. C. Everett Koop tells what happened in one case when such a child was not aborted:

> A young man now in graduate school was born without arms below the elbow and missing one leg below the knee. He was the victim of the prescription of Thalidomide to his pregnant mother at the time of limb budding. When his father stood at his bassinette in the hospital where he was born, he said only this: "This one needs our love more." With that love and muddling through, it had a happy ending—which is really now only the beginning of this young man's productive life. . . .
>
> Here is how the young man feels today: "I am very glad to be alive. I live a full, meaningful life. I have many friends and many things that I want to do in life. I think the secret of living with a handicap is realizing who you are—that you are a human being, somebody who is very special—looking at the things that you can do in spite of your handicap, and maybe even through your handicap."[34]

Others are aborted because amniocentesis reveals that they are male and thus in danger of inheriting a parent's sex-linked disease such as hemophilia—even though it is not known whether they

have the disease. Some are aborted because amniocentesis shows that, although they are normal, they happen to be girls when their parents would prefer boys.[35]

All of this proves that we humans are not nearly as smart as we would like to think. (The "slippery slope" theory could just as well be called the "we're not so smart" warning.) Distinctions that at first seem clear to us quickly crumble once we agree that some lives are more valuable than others and that we have a right to decide who may live and who must die. We proceed from abortion of children with anencephaly, to abortion of Down's Syndrome and spina bifida children, to abortion of children who are healthy but regarded as social or economic burdens.

Handicapped children need a great deal of care, but so does any child. All of us were burdens to our parents at one time or another, some of us most of the time. Charlie Brown of "Peanuts" fame had a good answer when his little sister suggested that Snoopy "is more trouble than he's worth." Said Charlie Brown: "Most of us are."[36]

LIFE OF THE MOTHER/LIFE OF THE CHILD

Although pregnancy and childbirth are far safer for women than ever before, there are still cases in which a woman's life may be endangered because pregnancy aggravates a pre-existing condition such as heart disease, kidney disease, or advanced hypertensive disease.[37] There are also cases in which medical treatment to save a mother's life may harm or indirectly kill the child. Examples include some cancer treatments, hysterectomy in the case of a cancerous or severely traumatized uterus, and salpingectomy (removal of a fallopian tube) in the case of tubal pregnancy.

Most doctors and ethicists support normal medical treatment urgently needed by the mother even if it poses danger to the unborn child.[38] They reason that the mother's right to life includes a right to medical treatment, including what is sometimes called "indirect abortion." (It should be stressed that this is not a legal term.) Thus a cancerous uterus must be removed to protect the mother's life; when this is done in early pregnancy, the embryo or fetus cannot live outside the womb. But there is no intent to kill the child, and a hysterectomy does not directly attack the child. Nor does removal of a fallopian tube which is about to rupture

because the embryo is in the tube instead of in the uterus. Yet the embryo cannot, under current medical conditions, live after the removal.[39] This situation will change if an artificial womb is developed or if doctors can devise a way to transfer the embryo from tube to uterus. Possibly medical technology, which has given us so many moral dilemmas, will in this case resolve one.

Although there is general agreement on the indirect cases, there is much dispute on whether direct abortion is justified when the mother's life is endangered. So great is the sympathy for the mother in such a case that the question causes division even within the anti-abortion movement. Dr. Bernard Nathanson, for example, supports direct abortion in such cases, arguing that this is a matter of self-defense. He rejects the contention by some that self-defense does not apply because the unborn child is innocent:

> It is not immoral to defend oneself against a life-threatening person, even if that person is not "responsible." One could licitly kill an imbecile who has no understanding of his homicidal assault, or a person in the ocean who unwittingly and desperately grabs at one so wildly that both will drown otherwise. True self-defense is always justified.[40]

Others argue that equality means that we cannot prefer one life over the other when two lives are at stake, that instead we must try to save both. They believe that an automatic preference for the mother's life tends to undercut the entire sanctity-of-life philosophy. On what is that preference based—except that we know the mother, but not the child, and that the mother has legal and financial power while the child does not? They note that abortion in such a case does not always save the mother's life; indeed, the abortion may even hasten her death.[41] And suppose the mother's life cannot be saved (for example, she is dying from injuries sustained in an automobile accident), but the child might be saved by emergency caesarian section: Should not a doctor try to save the child in this case? When it is not possible to save both mother and child, they say, we should save the one we can—without, however, directly attacking either.[42]

Years of debate on this question finally led, in 1981, to the drafting of a human life amendment to the Constitution which appears to have broad support within anti-abortion movement. It is called the "Unity Amendment," and its key clause reads:

> No unborn person shall be deprived of life by any person: Provided, however, that nothing in this article shall prohibit a law allowing justification to be shown for only those medical procedures required to prevent the death of either the pregnant woman or her unborn offspring, as long as such law requires every reasonable effort be made to preserve the life of each.[43]

Although introduced in both houses of Congress, this proposed amendment has not been the subject of hearings or floor debate. Yet it seems safe to predict that, if hearings and debate are held, they will show that the amendment would allow induced labor or caesarian section to protect mother and/or child and would allow "indirect abortion" in cases such as tubal pregnancy. The amendment might also be said to allow direct abortion in the rare case where, if it is not performed, both mother and child will certainly die—in other words, where only the mother can be saved.[44] But the doctor would have an obligation to save both lives if possible, and the burden of proof would be on him.

Some might object that allowing the taking of human life in any way, direct or indirect, or for any reason, constitutes state approval of homicide. This is not necessarily the case. There is a major difference between "approving" an act and "excusing" it. The great English legal authority, Sir William Blackstone, wrote in the 1700's that there is "very little" guilt attached to excusable homicide (self-defense).[45] Two recent commentators noted that Blackstone "sees how the right to defend may be mistaken as the right to kill, and his exhortations on the respect for human life with their Old Testament vigor, are intended to restore to Law a sense of its original moral imperative."

> . . . it may be difficult to understand why a man who is defending himself from an apparent threat of death should be faulted in even the slightest way. But from Blackstone's point of view, a homocide, albeit excusable, is still the taking of a life, a violation of the laws of Being, and he recognizes what today might be called psychological value in not permitting an individual to dismiss lightly the killing of one member of society by another.[46]

Others might say that abortion should be permitted whenever there is any threat to a woman's life and that the requirement to try to save both lives is too strict. But if we believe in equality of rights, how can we demand that one of the two persons involved be free of risk and that the other be sacrificed to guarantee such freedom? The protection of innocent life often involves risks. In

pregnancy, the unborn child may have to undergo serious risks from medicine or therapy required to treat the mother's illness. And the mother may have to undergo risks from efforts to protect the child. Usually a good doctor can see both of them safely through all dangers.[47]

Pregnant women, it should be noted, are not the only people who must sometimes take risks to protect innocent children. A long-standing rule of warfare, accepted both in natural law theory and in international law, forbids direct attacks on non-combatants. But in guerrilla warfare, young children and other civilians sometimes act against soldiers on the other side. This fact, however, would never justify soldiers in entering a village and shooting the children and other civilians so that none of them could set a booby trap or throw a grenade. In other words, the soldiers must risk their lives in order to avoid killing the innocent.

A FINAL WORD

People on all sides of the abortion issue spend much time and energy discussing the hard cases, but sometimes forget to ask how such cases might be avoided. Certainly, as suggested above, the incidence of rape and incest can be greatly reduced. Birth defects due to environmental factors can be prevented through better nutrition and through elimination of hazardous chemicals from food and working environments. Birth defects due to genetic factors can be prevented by the avoidance of intermarriage between members of the most severely affected groups.

When birth defects cannot be avoided, there is much that can be done to alleviate them through surgery, therapy, and "mainstreaming" of the handicapped. Parents of seriously-handicapped children can also be helped by "respite care" made available by public agencies or private volunteers. The adoption alternative can be encouraged for parents who cannot cope with rearing a handicapped child or one who, through no fault of its own, is a constant reminder of an incident of rape or incest.

Doctors can find new ways to reduce the medical risks of diffcult pregnancies.

All of these things can be done and should be done. But while they will greatly reduce the number of hard cases, some are bound

to remain. A good model for families affected by them is Sir Thomas More, a reluctant but most attractive hero. In Robert Bolt's great play, *A Man For All Seasons*, More's daughter Margaret accuses her father of choosing heroism. In prison and in peril of his life for following his conscience, More replies:

> If we lived in a State where virtue was profitable, common sense would make us good, and greed would make us saintly. And we'd live like animals or angels in the happy land that *needs* no heroes. But since in fact we see that avarice, anger, envy, pride, sloth, lust and stupidity commonly profit far beyond humility, chastity, fortitude, justice and thought, and have to choose, to be human at all . . . why then perhaps we *must* stand fast a little—even at the risk of being heroes.

With great emotion, Margaret says, "But in reason! Haven't you done as much as God can reasonably *want*?"

More's response: "Well . . . finally . . . it isn't a matter of reason; finally it's a matter of love."[48]

NOTES

1. *Roe* v. *Wade*, 410 U.S. 113 (1973) at 139, 140.
2. *Doe* v. *Bolton*, 410 U.S. 179 (1973) at 183.
3. U.S. Supreme Court, Transcript of Oral Argument in *Doe* v. *Bolton*, No. 70-40, Washington, D.C., October 11, 1972, p. 28.
4. Sherry Matulis in U.S. Senate, Committee on the Judiciary, Subcommittee on the Constitution, Hearing on *Constitutional Amendments Relating to Abortion*, 2 vols., 97th Cong., 1st sess., December 16, 1981, vol. 1, p. 1159.
5. Mildred F. Jefferson, "Rape and Incest Emotional Issues," *International Life Times*, March 14, 1980, p. 13.
6. Doris Gordon, "Abortion is Aggression: Libertarianism is Pro-Life," an unpublished paper, n.d. Gordon is coordinator of Libertarians for Life.
7. Sagar C. Jain and Laurel F. Gooch, *Georgia Abortion Act 1968: A Study in the Legislative Process* (Chapel Hill, N.C.: University of North Carolina, 1972), pp. 56-57. The physicians also "stressed the importance of the bill in holding down the number of retarded children; they warned Maddox that if HB 281 were vetoed, the state could expect an ever-increasing financial burden in caring for such children." Maddox let the bill become law without his signature; but he signed another bill (revising the state criminal code) with a similar provision on abortion. In *Doe* v. *Bolton*, the Supreme Court struck down that law.
8. The writer's notes on National Abortion Rights Action League Annual Meeting, Washington, D.C., June 1, 1980. The film, "So Many Voices," was financed partly by a group of abortion clinics called the Preterm Consortium.
9. Tom Braden, "A Father's Story," *NARAL News*, July, 1981, p. 5.
10. Tom Braden, "A Father and Sen. Helms," Washington *Post*, June 5, 1981, p. A-17.
11. Carolyn Gerster, in workshop on "The Hard Cases," National Right to Life Convention, Cherry Hill, N.J., July 16, 1982 (from a recording of the workshop).
12. Also, black women have a higher rate of rape victimization than do white women. Duncan Chapell *et al.*, *Forcible Rape: The Crime, The Victim and the Offender* (New York: Columbia University Press, 1977), pp. 91 & 95; Batelle Law and Justice Study Center, *Forcible Rape* (Washington: U.S. Government Printing Office, 1978), p. 16; Thomas W. McCahill *et al.*, *The Aftermath of Rape* (Lexington, Mass.: D.C. Heath and Company, 1979), pp. 7-8.
13. Sherry Matulis, *Never Again* (Madison, Wis.: Protect Abortion Rights, Inc., 1981), reprinted in U.S. Senate, *op. cit.*, p. 1165. Matulis wrote that her husband did not want her to have an abortion because he feared it might kill her. He thought "that once the baby was born, we could both accept it as our own. . . . But I could not, not ever."
14. Sandra Kathleen Mahkorn, "Pregnancy and Sexual Assault," in David Mall and Walter F.

Watts, ed., *The Psychological Aspects of Abortion* (Washington, D.C.: University Publications of America, Inc., 1979), pp. 53-72.

15. Ethel Waters and Charles Samuels, *His Eye Is On the Sparrow* (Garden City, N.Y.: Doubleday & Company, Inc., 1951), pp. 3-5 & 277-278.

16. Jerry Hulse, *Jody* (New York: McGraw-Hill Book Company, 1976), pp. 98-105 & 133-145.

One woman who kept a child conceived through rape described her daughter's birth as a "very rich blessing." An alcoholic who had been raped while "in a state of drunken helplessness at a party," she said that her relatives "wanted me to get an abortion; but I do not believe in just killing little children. The people at my church stood by me, supported and helped me; and now I have this lovely little girl, Robin, that God has allowed to be my daughter. . . . Through the fellowship of Alcoholics Anonymous, I can hang in there one day at a time and not drink alcohol." Josie Beattie, letter to the editor, *P.S.* (newspaper of Prolifers for Survival), May-June, 1982, p. 14.

17., Valerie Evans, quoted in Mary Claire Blakeman, "New Generation of Right to Lifers," *Los Angeles Times*, September 16, 1980 part 2, p. 5.

As one male writer notes, "It is men who rape and men who collectively have the power to end rape." He stresses that: "The ways in which the threat of rape alters the meaning and feel of the night and nature, inhibits the freedom of the eye, hurts women economically, undercuts women's independence, destroys solitude, and restricts expressiveness must be acknowledged as part of the crime." Timothy Beneke, *Men on Rape* (New York: St. Martin's Press, 1982), pp. 169-170.

18. Gaius Suetonius Tranquillus, *Suetonius*, trans. by J.C. Rolfe (Cambridge, Mass.: Harvard University Press, 1970), 2 vols., vol. 1, p. 441. The incestuous relationship apparently started when Caligula and his sister were minors, but continued into adulthood.

19. David Granfield, *The Abortion Decision* (Garden City, N.Y.: Doubleday & Company, Inc. 1969), p. 192.

20. Judith Lewis Herman and Lisa Hirschman, *Father-Daughter Incest* (Cambridge: Harvard University Press, 1981), pp. 47, 162-176, 221-259; Ruth S. Kempe and C. Henry Kempe, *Child Abuse* (Cambridge, Mass,: Harvard University Press, 1978), pp. 43-56.

21. Herbert Maisch, *Incest*, trans. by Colin Bearne (London: André Deutsch Ltd., 1973), pp. 210-211.

22. Suetonius, *op. cit.*, vol. 2. p. 383.

23. For criticisms of pro-incest arguments, see Benjamin DeMott, "The Pro-incest Lobby," *Psychology Today*, March, 1980, p. 11 ff.; and Marcia Yudkin, "Breaking the Incest Taboo," *The Progressive*, May, 1981, pp. 27-28.

24. C.O. Carter, "Risk to Offspring of Incest," *Lancet*, vol. 1, no. 7487, February 25, 1967, p. 436; Morton S. Adams and James V. Neel, "Children of Incest," *Pediatrics*, vol. 40, no. 1, July, 1967, pp. 55-62; Eva Seemanová, "A Study of Children of Incestuous Matings," *Human Heredity*, vol. 21, no. 2, 1971, pp. 108-128. In cases of parent-child and sibling incest, as Seemanová notes, "the risk due to deleterious recessive genes is expected to be 4 times greater than for the offspring of first cousin matings."

25. Norman St. John-Stevas, *The Right to Life* (New York: Holt, Rinehart and Winston, 1964), p. 15.

26. Bernard N. Nathanson and Richard N. Ostling, *Aborting America* (Garden City, N.Y.: Doubleday & Company, Inc., 1979), p. 244. An obstetrician and gynecologist, Dr. Nathanson was once a leading advocate of legalized abortion but is now a pro-life activist.

27. U.S. Senate, *op. cit.*, p. 150.

28. Mildred F. Jefferson, "About Incest and Rape," *International Life Times*, April 11, 1980, p. 3.

29. Maisch, *op. cit.* pp. 211-213.

30. Arthur D. Sorosky *et al.*, *The Adoption Triangle: The Effects of the Sealed Record on Adoptees, Birth Parents, and Adoptive Parents* (Garden City, N.Y.: Anchor Press/Doubleday, 1978), pp. 154-155.

31. Karen S. Freeman, letter to the editor, Washington *Post*, November 24, 1979, p. A-14.

32. Daniel Berrigan, "The Dying and the Unborn" (interview), *Reflections* (Amherst, Mass.), Fall, 1979, p. 1.

33. In anencephaly, part or all of the brain is missing; the child usually dies hours or days after birth. Tay-Sachs disease involves a severe enzyme deficiency; it results in blindness, paralysis, and death when the child is very young.

34. C. Everett Koop, "The Family with a Handicapped Newborn," *The Human Life Review*, vol. 7, no. 1, Winter, 1981, p. 117. Dr. Koop, a pediatric surgeon, is now Surgeon General of the U. S. Public Health Service.

35. Victor Cohn, "Fetuses Aborted to Prevent Child of 'Wrong' Sex," Washington *Post*, September 6, 1979, pp. A-1 & A-5; Douglas Colligan, "Making Baby's Sex a Parental Option," *Parade*, November 25, 1979, p. 6; "A Furore Over 'Sex-Test Killings,'" *Asiaweek*, August 20, 1982, p. 20.

36. Charles M. Schulz, "Peanuts," Washington *Post*, October 30, 1980, p. D. C. 15.

37. Nathanson, *op. cit.*, pp. 244-247.

38. With careful management, damage to the child can often be avoided. See Laurel Lee, *Walking Through the Fire: A Hospital Journal* (New York: E. P. Dutton, 1977).

39. Surgery in these cases is often justified under the principle of double effect. See John R. Connery, *Abortion: The Development of the Roman Catholic Perspective* (Chicago: Loyola University Press, 1977).

40. Nathanson, *op. cit.*, p. 242. See, also, Germain G. Grisez, *Abortion: The Myths, the Realities, and the Arguments* (New York: Corpus Books, 1970), pp. 340-341 & 429-430.

41. Richard A. Watson, "Urologic Complications of Legal Abortion," in Thomas W. Hilgers *et al.*, ed., *New Perspectives on Human Abortion* (Frederick, Md.: University Publications of America, Inc., 1981), pp. 140-141.

42. Charles E. Rice, "Separate Report to National Right to Life Committee," *National Right to Life News*, January 27, 1981, pp. 10-12; "The Life Principles & the Human Life Amendment," *March for Life Program Journal* (Washington: March for Life, Inc., 1983), pp. 38-41.

43. "NRLC Board Reaches Historic Consensus on HLA Wording," *National Right to Life News,* October 13, 1981, pp. 1 & 8. In the 98th Congress, the Unity Amendment has been introduced in the Senate as S. J. Res. 9 and in the House as H. J. Res. 114.

44. This is only the writer's conjecture. The point would have to be addressed in congressional debate.

45. William Blackstone, *Blackstone's Commentaries* (New York: Augustus M. Kelley Publishers, 1969, reprint of an old 1803 ed.), 5 vols., vol. 5, p. 177. Blackstone was not speaking here of abortion, but the analogy is obvious.

46. Frederic S. Baum and Joan Baum, *Law of Self-Defense* (Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1970), p. 6.

47. See Arnold W. Cohen, ed., *Emergencies in Obstetrics and Gynecology* (New York: Churchill Livingstone, 1981) for information on how doctors do this.

48. Robert Bolt, *A Man for All Seasons* (New York: Vintage Books, 1962), p. 81. A non-believer (someone like the late Albert Camus, for example) might be heroic for love of humanity, a believer for love of God as well.

The Pluralist Game

Francis Canavan

THE UNITED STATES IS a pluralist society. That is a commonplace and is taken as stating the problem to which the American relation between religion and the law is supposed to furnish the solution. The general principle of that relationship is an official governmental neutrality among all creeds, one that respects all beliefs but grants no favor to any of them. The name of the game is pluralism and the rules of the game can be summed up in one word: neutrality.

Unfortunately, however, our pluralism keeps changing. Today's pluralism is no longer that of even a quarter of a century ago. As the divisions on matters of fundamental belief became more and more pronounced in our society, the principle of neutrality becomes more difficult to apply to it.

As recently as 1960, the late John Courtney Murray, S.J., described the religion clauses of the First Amendment as "the twin children of social necessity, the necessity of creating a social environment, protected by law, in which men of differing faiths might live together in peace."[1] The faiths did indeed differ, and that fact constituted a political problem. It was also true, however, that all of the religions that had adherents numerous enough to matter shared a common Judeo-Christian tradition. Moreover, it was the respects in which they were substantially the same, namely, their moral teachings, that were politically significant and made the living together of their followers in peace a practical possibility. Now we must take notice of the fact that the differences both in faith and morals are steadily becoming deeper.

"Disintegration is the defining experience of the culture of modernism," a young professor at the Harvard Law School has written.[2] This was, to be sure, a somewhat delphic statement, but a few quotations from other writers will suggest what he meant by it.

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". . . [O]ne of the reasons why the novel has suffered so many strange mutations this century," an English literary critic has remarked, "is simply that the old shared assumptions about the nature of reality—the way of things, the why of things—have broken down. Increasingly, people are left bewildered at the workings of the world around them."[3] An important reason for this breakdown is the increasingly successful struggle of the individual self to free itself from the constraint of social norms.[4] According to the American critic, Lionel Trilling, the "particular concern of the literature of the past two centuries has been with the self in its standing quarrel with culture."[5]

A group of sociologists explain in more detail that

> modern identity is *peculiarly individuated.* The individual, the bearer of identity as the *ens realissimum,* quite logically attains a very important place in the hierarchy of values. Individual freedom, individual autonomy and individual rights 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. This basic right is elaborately legitimated by a variety of modern ideologies.[6]

This view of the individual and his rights has found its way even into the U.S. Reports, as this passage from the pen of the late Justice Douglas reveals.

> Many of [the rights referred to in the Ninth Amendment] in my view come within the meaning of the term "liberty" as used in the Fourteenth Amendment.
>
> *First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.*
>
> These are rights protected by the First Amendment and in my view they are absolute, permitting of no exceptions.[7]

Admittedly, Justice Douglas was as thoroughgoing an individualist as ever sat on the nation's highest bench, and he wrote the above words in a concurring opinion in which no other Justice joined him. Nonetheless the attitude he expressed permeates contemporary American society and is shared by many who could not tell the Ninth Amendment from the First but are convinced that the Constitution endows them with an armory of absolute rights.

What follows from this degree of individualism has been pointed out by Iredell Jenkins: "Our skepticism regarding judgments of moral value springs from the fact that we are uneasy about what

man should be; the ideas of freedom and equality have seduced us into accepting the doctrine of the ultimacy of the individual, with the result that every man becomes the sole judge of his own good."[8]

A handful of quotations such as these of itself proves nothing, of course. But it would be easy to fill a book with passages taken from a wide range of publications that reveal a growing awareness that the moral and intellectual consensus on which our society has lived is disintegrating. There is a widely diffused feeling that we are ceasing to agree even in basic respects on what man should be and how he should live. In consequence, much to the distress of politicians and political commentators, moral issues are being injected into law and politics which they would prefer to keep out. But given the nature of American pluralism today, it is hard to see how they can be kept out or how our traditional response to "divisive" issues can continue to work.

For we are no longer a pluralist society composed of a multitude of religious branches that spring from a common stem. Lush as the variety of creeds in America has always been, by far the greater part of them held the Bible in common and in most respects taught substantially the same moral code. Historians will be quick to point out how large the number of the unchurched was even in colonial times, how soon the influence of the Enlightenment made itself felt on these shores and how much indifferentism and outright skepticism coexisted almost from the beginning with religious faith. They are right, too, but only up to a point.

There never was a religious Golden Age in this country, or in any other for that matter. Nor was there ever a static period in which the religious situation in America stood still for decades. But recognition of these facts should not blind us to the extent to which a common religious and moral tradition perdured through centuries of change and fragmentation. As late as 1931 the U.S. Supreme Court could declare: "We are a Christian people. . . ."[9] It is a measure of the distance we have come in the last half-century that one cannot imagine the Court saying that today.

Our pluralism has increased and is increasing. This is, to be sure, a not unexpected development. It means only that a profound cultural shift that began centuries ago on the other side of the Atlan-

tic has finally eroded what remained of the earlier religious and moral tradition in the minds of multitudes of Americans. It has incidentally also left millions of other Americans with the feeling that they are now strangers in their own land. Today we are forced to ask whether the picture of an impartial state presiding with what Chief Justice Burger has called "benevolent neutrality"[10] over the peaceful coexistence of a multitude of sects still fits the facts to a serviceable degree. In the face of the new pluralism that is emerging we must inquire how realistic is the ideal of neutrality as we have understood it up to now.

The neutral state, as we have inherited it, is the liberal state. The historical genesis of liberalism and the state it formed is no simple thing. It was the product of many factors, and what they were and how they interacted is a matter of considerable dispute among scholars. But for our present purpose it is safe to say that liberalism was a response to the situation created by two great movements, the Reformation and the Enlightenment. One of these replaced the unity of medieval Christendom with a multiplicity of churches. The other, as Lester G. Crocker has put it, was "the beginning of the godless age"[11] in which Christianity in any form eventually ceased to be the common religion of Western culture.

An early response to the religious divisions that followed the Reformation was crystallized in the phrase, *cujus regio, ejus religio.* That is to say, the government of a country would determine its religion and require all inhabitants to conform to it. But since this policy, far from ending strife, made control of the government an object to be gained by armed force, the solution that eventually prevailed was to take religion out of politics.

Doing this did not necessarily require a formal "separation of Church and State" such as was established in the United States by the First Amendment. Great Britain has shown that a formal religious establishment can become compatible with a high degree of religious liberty. But it did require that a man's freedom to follow his own religion or no religion should not be denied or seriously burdened by governmental action.

Freedom of religion was but one instance of liberalism's instinct for taking neuralgic issues out of politics. Liberal politics must be confined to matters of secondary importance like war and taxes

(curious as it may sound to say that) because bitterly though citizens may disagree about these things, they do not usually take up arms against each other about them as they did over religion. Not only religious issues, however, but all issues that engender more emotion than the political system can bear must be excluded from politics. Preeminent among these are moral issues because they both deeply affect the way people live and are closely connected with their more general fundamental beliefs, be these religious or secularist.

Liberal government therefore is neutral government. But to make this assertion only raises the question: neutral about what? The answer to that question turns out to be itself a political and even a moral issue. Robert Dahl, for example, has discussed a number of ways in which people who believe in political equality, and therefore in democracy, may yet protect themselves against majority decisions which they regard as overbearing and oppressive. One of them is this:

> . . . sometimes a matter about which we disagree can be turned over so completely to the domain of personal choice that no generally binding decision is required. Two familiar issues of this kind are the religious instruction, if any, to be given one's own children and whether they are to be educated in public or private schools. A few years ago the Supreme Court of the United States affirmed that the use of contraceptive devices falls in this domain. One might call this alternative a solution by Autonomous Decisions.[12]

We may thus seem to have an answer to our question. Government should be neutral about matters that belong in the area of Autonomous Decisions. But Dahl immediately points out that the boundaries of this area are themselves a subject of continuing controversy. He explains:

> Judgments as to the appropriate domain of Autonomous Decisions are constantly changing. Efforts to define the domain once and for all have always failed. Thus in the United States, owning and driving a machine that emits exhaust fumes is rapidly moving out of the domain of Autonomous Decisions to regulation by collective decision . . ., while sexual practices among consenting adults are moving from collective regulation to the domain of individual choice.[13]

Even more important is the following consideration:

> To be sure, once we have agreed that a particular matter belongs within the domain of Autonomous Decisions, the possibility of conflict between minority and majority is eliminated with respect to *that matter*. But to

> determine what remains in or out of the domain of Autonomous Decisions requires a collective decision; decisions of this kind are often a source of very profound conflict. . . . What properly belongs within the domain of Autonomous Decisions or Consumers' Choice has been a perpetual point of controversy between majorities and minorities.[14]

What belongs in the area of Autonomous Decisions is, therefore, a question that requires a public and political decision. In making such a decision the people, through their representatives, take a public stand on what they will leave to individual choice and what they will subject to legal regulation. Leaving a matter to individual choice is as much a public decision as deciding to regulate it and implies some public scheme of values quite as much as a decision to regulate does.

In practice, of course, the controversy over a question of this kind gets such settlement as it does get through a political process in which expediency and rhetoric play a large part. Slogans such as "You can't legislate morality" and "No group has a right to impose its morality on others" are freely used. If at all possible, the First Amendment is invoked on the absolute necessity of separating Church and State. In fact, however, the size and (perhaps even more important) the financial power of the groups involved, and the importance that both sides attach to the values at stake, have more to do with the way in which the dispute is settled than does any appeal to principle.

The American people in the nineteenth century felt few qualms about banning polygamy throughout the United States, even though John Stuart Mill had warned them against doing so in Utah. Since Mormons had exiled themselves to a remote and previously uninhabited territory in order to practice polygamy, he said, "it is difficult to see on what principles but those of tyranny they can be prevented from living there under what laws they please, provided they commit no aggression on other nations and allow perfect freedom of departure to those who are dissatisfied with their ways."[15] But the Mormons were few in number and without influence, while on the other hand monogamy was solidly embedded in the religious and moral beliefs of the great majority of Americans.

The U.S. Supreme Court, as was fitting in a First Amendment case, found a secular and political reason for upholding the federal law against the practice of polygamy in the territories. The Court declared that "polygamy leads to the patriarchal principle, and

which, when applied to large communities, fetters the people in stationary despotism, while the principle cannot long exist in connection with monogamy."[16] The ban on polygamy, according to the Court, struck a blow for political liberty. One may suspect, however, that the Court was in fact reflecting the moral conscience of the people at large.

Conversely, one may suspect that if the polygamous minority were not so small—if, say, 45 per cent of Americans believed in polygamy and many of them wanted to practice it—the Supreme Court (today's if not yesterday's) would find polygamy to be in the domain of Autonomous Decisions or, as the Court prefers to put it, to be included in the right of privacy. The Court would of course also have to try to gauge the feelings of the 55 per cent majority who still objected to polygamy. How strong are their feelings? Will the majority swallow a flat declaration that prohibiting polygamy is beyond the constitutional powers of government? Or must we take a more gradual approach by finding one anti-polygamy statute after another vague and overbroad while maintaining that in principle government may regulate polygamy? These would be difficult and delicate questions to answer. But one way or another, the Court, along with the other agencies of government, would search for a means of taking the divisive issue of polygamy out of politics.

The reason for doing so would be the practical one of lessening social and political strife. The principled justification for doing it, however, would be the neutrality among conflicting beliefs to which government is committed in a liberal society. But the justification would only raise once again the questions of the matters about which government ought to be neutral, how far it should go in the quest for neutrality, and to what extent neutrality is ultimately possible.

We must admit that a liberal society has a permanent bias in favor of neutrality. The liberal state is founded on no such vision of human excellence as informed the political theories of Plato and Aristotle, no such hope of earthly and eternal happiness as inspired the medieval *res publica Christiana.* The liberal state aims only at equal liberty for all under impartial general laws. The use that men make of their liberty and the goals they pursue are for them to

decide. Any attempt by society or its agent, the state, to make the decision for them must be rejected as an effort by some citizens to impose their conception of excellence, virtue or happiness on others.

The liberal state therefore aims low and attempts only to establish the conditions of ordered liberty in which men can peacefully pursue their essentially private ends. Such a state obviously never existed in its pure form. The laissez-faire state of the nineteenth century was probably the closest approach to it in actuality. It must also be remembered that the implications of the liberal view of man as a naturally sovereign individual motivated by his subjective concept of his own interest were worked out only very gradually over a period of several centuries. Liberalism reached its apogee in the Victorian era when it could still be assumed that ladies and gentlemen had a common code of manners and even of morals, and when one could still hope—with whatever misgivings —to civilize the masses through popular education and good literature. The proposal to free the individual to follow his preferences and to choose his own way of living took certain built-in checks for granted. It is only today that we begin to fully understand what liberal individualism really implies.

The liberal ideal of governmental neutrality ought to require (and in the nineteenth century was thought to require) a minimalist conception of the state. A state which aims at achieving neutrality by leaving to private choice those matters on which beliefs and values differ should try to do as little as possible. When it does act, it should do so only in areas of common material concern about which general agreement can be assumed, *e.g.*, paving the streets and providing protection against fires. When it finds it necessary to intervene in matters that transcend the merely material, it should help people to carry out their own decisions rather than decide for them.

Thus for example, if it is judged that a liberal democracy needs an educated citizenry, the state should not run schools but should content itself with obliging parents to send their children to school and should provide them with the means of doing so if that is necessary. For, as John Stuart Mill remarked in 1859, "[a] general State education is a mere contrivance for molding people to be

exactly like one another" and "establishes a despotism over the mind, leading by natural tendency to one over the body."[17]

It is true that Mill later changed his mind on this point, and that it is not surprising. He was, after all, one of the heralds of the shift in liberal thought that took place around the turn of the century and led to the welfare-state liberalism of the present age. With the advent of the welfare state, the problem of governmental neutrality clearly becomes more acute. A state that acts vigorously on a number of fronts to promote people's welfare must have some idea of what their welfare is. That necessarily implies some conception of what is good for human beings and what is bad for them. Having such a conception, the state cannot pretend to be neutral about it.

One can, to be sure, defend the neutrality of welfare liberalism by asserting that the welfare state does no more than try to guarantee to all citizens the minimum conditions in which they may effectively pursue their private goals. In a modern society, the individual needs a basic education, a place in which to live, a job to give him an income and a pension to support him in old age. Government does not abandon neutrality by taking action to insure that he has these things, for it leaves him completely free to think, say, read and view what he pleases, and to act on any life-plan that does not violate the rights of others.

Preserving this kind of neutrality in a welfare state turns out, however, to be somewhat more difficult than welfare liberals care to admit. The difficulity is most obvious in education because of its inevitable intellectual and moral content, though it by no means appears only there. Forty years ago Alexander Meiklejohn pointed out the problem in these words:

> If, then, political governments are taking the place of the churches in the making and directing of education it follows that we must ask what are the beliefs and values which those governments express and represent. The city of New York, or San Francisco, or Middletown, has schools whose task it is to prepare young people for living. What do those cities believe about living? What lessons do they have to teach? Does New York City believe anything? Has it any values or convictions out of which a scheme of teaching may be made?[18]

Does New York City believe anything? One answer to that question, an answer which seems to find favor with the U.S. Supreme

Court, is: No, but New York can still educate. As Justice Brennan explained in a concurring opinion, the state's concern in education is simply

> an interest in ensuring that all children within its boundaries acquire a minimum level of competency in certain skills, such as reading, writing, and arithmetic, as well as a minimum amount of information and knowledge in certain subjects such as history, geography, science, literature and law.[19]

Public education, in Justice Brennan's view, consists solely in imparting skills and factual information. These constitute objective knowledge which is value-free and neutral in content. New York, therefore, or any other city can teach them from no particular point of view and without believing anything about life.

The premise of this position, however is a distinction between facts and values, between scientific "knowledge" and religious, philosophical or ethical "faith." But this distinction itself derives from a particular, sectarian and today much-controverted theory of the nature of knowledge. Its name is positivism and one can hardly maintain that positivism is now universally accepted in informed and intelligent circles. To make it the premise of a theory of education, therefore, is not neutrality.

Furthermore, it is questionable whether Justice Brennan's word accurately describe what public schools actually do. These schools today teach children about subjects as diverse as sex and citizenship, history and histology, law and literature. All of them are no doubt worthy subjects of study. But it requires some exercise of the imagination to believe that they can be taught merely as sets of objective facts, without value judgments and without implying criteria of evaluation, decision and action.

The sincere effort at neutrality would seem to defeat itself. To teach children, for example, that they have interesting and complementary sexual anatomies, but that teacher, being neutral, can say no more about the proper use of them than that they are differing schools of thought on the question, appears likely to tilt the balance in favor of regarding sexual conduct as simply a matter of taste and preference, of no social consequence so long as precautions are taken against unwanted offspring. Many people today, operating through well-financed organizations (often, in fact,

federally-financed), do advocate that view and try to propagate it in the schools. But siding with them is presumably not what we mean by neutrality.[20]

One can state the problem in more general terms. Decisions on public policy concern the use of means to achieve social goals. In a society where a strong consensus on the general goals of policy exists, the decisions need not concern anything other than the choice of means to the agreed-upon goals. The goals in turn are agreed upon because they derive from a prevailing view of the nature of man, of what is good for him and of what his basic social relations ought to be. As consensus on these matters breaks down, the choice not only of means but of ends becomes a subject of controversy, and this fact cannot be indefinitely obscured by appeals to the neutrality of the state and the equality of citizens under the law.

Affirmative action programs, for example, are designed to promote equality. But they rest upon largely unexamined and uncriticized assumptions about the nature of the equality to be promoted. The most basic of these assumptions is the conception, inherited from seventeenth and eighteenth century social contract theories of mankind as a multitude of autonomous individual subjects of rights whose relations with one another and with society are voluntary and contractual. This conception today underlies the picture of the adult and adolescent population of the United States as made up of actual or potential jobholders who may, if they wish, marry and raise children as an avocation, but whose equal access to jobs without distinction by race, sex, creed, or sexual preference is the overriding concern of the law.

The point being made here is not that this theory of equality is false, but merely that it is neither demonstrably true nor universally accepted. The exercise of human intelligence does not automatically and necessarily commit us to so radically individualistic a view of human nature or to the kind of equality that follows from it. Still believing in the basic equality of all human beings, it would be possible to conceive of man in more communitarian terms and to think of men and women as persons whose relations flow from their complementary sexual natures. In this view, differentiation of social roles that took sex into account would make sense.

Let us push the matter a little farther. The principle that the state may deny to no person the equal protection of the laws has not been understood to forbid all legal classifications but only those which are arbitrary and unreasonable. But what is reasonable? The classic liberal answer was that the allocation of social status and rewards on the basis of merit, but on no other basis, was reasonable. A man has a right to what he has earned, disproportionate though it may be to what others get, but he has a right to no more. But, as Roberto Mangabeira Unger points out, in a liberal society, belief in meritocracy itself eventually comes under attack.

> Every conventional criterion for the allocation of social advantages falls under the suspicion that it, too, is arbitrary. Even reliance on merit becomes suspect when its dependence on the distribution of genetic endowments is taken into account, for people may begin to doubt whether a man's social place should be determined by a fact of which he is not the author.[21]

One may indeed ask why he should be expected to go to the end of the line when the good things of life are distributed, merely because he was born to poor, culturally deprived and perhaps genetically inferior parents. Followed all the way through, Yves Simon explained, this line of questioning leads to the conclusion that all children should be taken from their parents at birth and raised in state nurseries, lest one child be more "advantaged" than another.[22] Given today's biological technology, one can dream of the day when children will not be born at all but will come out of genetic blenders in state hatcheries, so that no child will be even genetically superior to another.

Simon's answer to this line of argument was that we limit the principle of equality of opportunity when it begins to destroy the very things for which we wanted opportunity in the first place: ". . . a policy of equal opportunity begins to be harmful when it threatens to dissolve the small communities [primarily the family] from which men derive their best energies in the hard accomplishments of daily life."[23]

But Simon belonged to the school of philosophical realism and believed in an objectively real common nature of man. He was, in fact, a Thomist, therefore a sectarian. Yet the opposing and ultimately nominalist school of thought is fully as sectarian. All doc-

trines of equality rest upon some philosophy and some conception of the nature of man. No state can promote equality without consciously or unconsciously, explicitly or implicitly, adopting one view or another. It has been the genius of the liberal pluralist society to avoid raising such questions of fundamental philosophy so far as possible. But as the issues that surface in debates on public policy become more profound, avoiding these questions becomes correspondingly less possible. Pretending that they can be dealt with by plain, blunt common sense without resort to premises of a higher level is at best a refusal to face the issues. At worst, it is an effort to play the pluralist game with a stacked deck.

Shifting the issues over into the area of Autonomous Decisions also proves to be no escape. The U.S. Supreme Court tried to do this with the abortion issue in *Roe* v. *Wade*[24] and subsequent cases[25] by holding that the right to decide on an abortion belongs only to the expectant mother, advised by her physician, without interference by the state, her husband or her parents. Thus, it was alleged, the state achieved neutrality on the subject of abortion: no woman could by law be required to have an abortion or prevented from having one, since the Constitution as interpreted left the decision to her alone.

The import of this holding has at times been exaggerated. For instance, Chief Circuit Judge Clement Haynsworth, speaking for a three judge federal court, has said that "the Supreme Court declared the fetus in the womb is neither alive nor a person within the meaning of the Fourteenth Amendment."[26] But it is doubtful if the Supreme Court claimed a power that God Himself might envy, that of making a live fetus dead merely by declaring it so. The Court's decision, rather, was an assertion, not that the fetus lacked life, but that the value to be attached to its life was only what its mother chose to give it. If she wanted a baby, its prenatal life was a value which the state could protect but only because she wanted it. If she did not want a child to be born, its life could be destroyed by abortion. That is to say, at least for the first two trimesters, its life had no intrinsic value that the state could recognize and protect independently of the will of the mother.

The Court therefore did not really achieve neutrality by making abortion a matter of private choice immune from public control.

Instead, it committed the United States to a value judgment on prenatal life. The same question will arise in regard to postnatal life when, as seems likely, euthanasia becomes a constitutional issue. According to the New York *Times*, it has already become the subject of "an emotional debate in Britain" occasioned by the publication of a booklet entitled "How to Die with Dignity" that described various methods of suicide. This debate, the *Times* reported, centered on the questions, "Is there a 'right to commit suicide,' as basic as the right to live? And if there is, is it proper to help people kill themselves, either actively or by advising them?"[27]

The issue thus posed is both basic and unavoidable. The person whose life is to be terminated by euthanasia wants to die. He therefore claims the right to end his life, or to have it ended by a doctor, on the premises that the only value of life is a purely subjective one, and his life is no longer a value to him. The argument against letting him choose death—when all subsidiary and distracting arguments about fully informed consent have been settled—must invoke the principle that human life is a value in itself, an objective human good, that the state exists to protect. Faced with this issue, the U.S. Supreme Court could not pretend to be neutral by finding euthanasia to be included in the constitutional right of privacy, thus making life and death objects of private choice. So to decide would be to come down on one side of the controversy, that side which holds that life has only subjective value.

Similarly, arguments for recognition of the civil rights of homosexuals, to the extent that they are a demand for public acceptance of heterosexuality and homosexuality as separate but equal ways of life, pose an issue to which there is no neutral answer. This is a demand that the public commit itself to a particular view of the nature and function of sex in human life. Faced with this demand, the public and its government cannot take refuge in a specious neutrality by leaving the matter to individual consciences.

To do so would be a public declaration that in the eyes of society and its laws, sexual preferences are merely that—personal and subjective preferences of no objective validity and no public importance. That view may arguably be the correct one, but it is not a neutral refusal to hold any view at all. Nor, if adopted,

would it succeed in relegating questions of sexual preference to the purely private domain.

Consider, for example, the case of *Belmont* v. *Belmont*. A divorced and remarried father applied in the New Jersey Superior Court for a change in the custody of his children from his former wife to himself on the ground that she was living in a lesbian relationship deleterious to the welfare of the children. According to the *Family Law Reporter*, the court "found him to be suitable as a custodian in all respects." Nonetheless, it rejected his application and ruled that "the mother is not to be denied custody merely because of her sexual orientation. Her sexual preference and her living arrangement with her lover are only two of the many factors to be examined in determining the best interests of the children . . ."[28] In so ruling, the court committed the State of New Jersey to the proposition that a homosexual union is, or can be, as acceptable a one in which to raise children as is a heterosexual one dignified by matrimony. This is something more than a decision to leave sexual preferences up to individuals. It is a public stand in regard to the institution of the family.

Viewed from a certain angle, the ultimate liberal ideal appears to be normlessness. In its extreme form (which for some curious reason is now regarded as "conservative"), this ideal is called libertarianism. The most radical brand of libertarianism holds that there should be no social norms enforced by the state, and indeed no state to enforce them. The only norms should be those which emerge from the consent of individuals who voluntarily join a variety of social groups. But all forms of liberalism, even the most statist, regard the ideal situation as one in which the individual freely—and, of course, intelligently—sets norms for himself. If regulation is necessary, as most liberals concede and even insist that it is, its ultimate justification is that it contributes to the individual's freedom to shape his life as he will.

Normlessness, however, turns out to be itself a norm. It is a steady choice of individual freedom over any other human or social good that conflicts with it, an unrelenting subordination of all allegedly objective goods to the subjective good of individual preference. Such a policy does not merely set individuals free to shape their own lives. It necessarily sets norms for a whole society,

creates an environment in which everyone has to live and exerts a powerful influence on social institutions.

This is particularly apparent in a welfare state where, for example, the argument is constantly urged that it is unjust to allow the rich and the middle class to do what the poor cannot afford to do. The first stage of argument is that the hand of the law must be withdrawn from any activity found to be included in the right of privacy. Once it has been established, however, that contraception, abortion, or divorce, for example, are little or no business of government, the argument moves into its second stage. These activities are now constitutional rights and, as such, are presented as positive claims on government. Those who cannot afford to engage in them with their own resources must be subsidized, so that they may exercise their constitutional rights as effectively as the more well-to-do. What was originally withdrawn from the power of government should now, we are told, become an object of government policy.

The U. S. Supreme Court, as we know, has refused to turn this argument into a constitutional command.[29] That does not change the fact that government is under constant pressure—to which it frequently yields—to use its power to promote or enforce new norms in the guise of leaving normative decisions to individuals. The net result is not no norms but different norms and a reshaping of the institutions of society.

A similar result would follow even in a classically liberal society that did not maintain a welfare state. Such a society would not subsidize the exercise of private rights but it would nonetheless have to make up its mind on the nature and content of the rights which it would recognize and protect. Merely by making this decision it would set social norms.

For example, Anglo-American law has always given a privileged position to the institution of marriage, and to a large though lesser extent it still does so. Marriage entails obligations and some of them are legally enforceable. But it it also entails rights—economic as well as strictly marital and familial ones—which find a place in the law in a multitude of ways. Now, the preferred position of marriage creates social norms. No other sexual relationship, even if tolerated by law, enjoys the same legal protection and consequent

social prestige as marriage. The law discriminates systematically in favor of marriage.

In principle, a liberal society could rectify this discrimination. Doing so would require reducing marriage to the status of a private contract like any other, to be entered into and dissolved at will, subject only to the limitations created by the legitimate interests of other persons that may have arisen from the contract (the children will always be a problem in even the most liberal Garden of Eden). The content of the contract, of course, would have to be left to the contracting parties. It could include provisions for extramarital larks, *ménages à trois* and homosexual as well as heterosexual unions. The only function of the state would be to enforce the contract while it lasted.

We must ask, however, whether a society that went that far in its quest for equal freedom for all would have eliminated discrimination and achieved neutrality. At first glance, it appears that it would have. Individuals would still be free to contract heterosexual, monogamous and life-long marriages, just as before, and the state would enforce these contracts, too. All that would have happened would be the removal of an invidious distinction in favor of one form of sexual union.

But to take this position is implicitly to assert that the only value of marriage is a purely private one. The best sexual relationship is the one that best pleases the individuals who participate in it. Their pleasure is the norm because no other norm is admissible. But accepting that proposition is not normlessness. It is the clear choice of one basic social norm over all others, a choice which has far-reaching consequences for all of society.

After all, the Supreme Court had a point when it said in the Mormon polygamy case in 1878: "Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social . . . obligations and duties, with which government is necessarily required to deal."[30] Since marriage is a highly visible social fact, government must take *some* attitude toward it. To regard marriage and the family as the foundation of society, as the Court did in 1878, is to adopt a particular view of man and society. This view

inevitably becomes the basis of coercive laws, such as those which prohibit bigamy and polygamy. But it is an equally particular view of man and society to regard marriage and its alternatives as matters of purely private concern. If they are so regarded, then private decisions about them are entitled to protection from interference and infringement, for example, by laws to prevent landlords from refusing to rent apartments to couples who wish to cohabit without being married. Either way, some view concerning sexual relationships gets enforced by the power of law. What is impossible is to take no view at all and call it neutrality.

A pluralist society must perforce strive to be neutral about many things that concern its divided citizens. But it cannot be neutral about all of them. If it tries or pretends to be neutral about certain issues, the pluralist game becomes a shell game by which people are tricked into consenting to changes in basic social standards and institutions on the pretense that nothing more is asked of them than respect for the rights of individuals. Much more, however, is involved: on the fundamental issues of social life, one side or the other always wins.

To say this leaves unanswered the question, which issues are of fundamental importance. That is a question which any given society will as a matter of fact decide for itself. The only point that need be made here is that a society may make this decision because it must make it. There is no way of avoiding decision since the ostensible refusal to decide is itself a decision.

Nor is there any neat line that can be drawn between political issues and moral issues, or between law and morality. As we have said, the decision to leave certain moral issues to individual choice is a public decision that reflects an underlying public moral judgment. Public decisions to leave certain matters to individual consciences may be and often are wise and right, but neutral they are not.

There is also no neat line that can be drawn between religion and morality. The state, under our Constitution, is not permitted to enforce the Ten Commandments on the ground that they have been revealed by God. On the other hand, the state is not barred from enforcing certain principles of the Ten Commandments for the reason that some of its citizens believe that they have been

revealed by God. Which of the commandments may or should be enforced, to what extent they should be enforced and by what legal means are open questions for public moral decision.

There is inescapably a public morality—a good one or a bad one—in the sense of some set or other of basic norms in the light of which the public makes policy decisions. These norms are moral norms to the extent that they include fundamental judgments on what is good or bad for human beings, therefore on what it is permissible or obligatory to do to them or for them. Public morality is a secular morality inasmuch as it aims only at secular goals, at the welfare of men in this world. It is not therefore a secularist morality. When discussing the welfare of human beings in the here and now we are not limited to the vision of man and his good that happens to be held by those who call themselves secular humanists. Secular humanism is not the least common denominator of all American beliefs about human welfare. It is but one sectarian view among many, and any American is free to believe that he derives from his religion a richer, fuller and more truly human image of man. He is also free to use it as a basis for the views he advocates on public policy.

Leo Pfeffer has announced the Triumph of Secular Humanism, which he seems to regard as the resolution of the Issues That Divide.[31] That victory may or may not be a fact; one sometines has the impression that the battle is not over yet. But if it proves to be the fact, we should at least not delude ourselves about what has happened. It will not be the advent of a truly neutral state but the replacement of one view of man, with the ethic and the legal norms based on it, by another view.[32]

In the meantime the Issues That Divide will continue to divide our people ever more deeply. The pluralist game will continue to be played, of course, because there is no other game in town. But there is no need for it to keep on being a confidence game in which one side proclaims its cause as neutrality and the other side is gullible enough to believe it. Societies do face moral issues to which they must give moral answers. The answers we arrive at through the political process in our pluralist society are likely to be rather messy, somewhat confused and certainly less than universally satisfactory ones. Answers nonetheless will be arrived at, and they will

have definite effects on our society. We shall play the pluralist game more honestly, perhaps even with better results, if we admit openly what the game is and what stakes we are playing for.

NOTES

1. J. Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* 57 (1960).
2. R. Unger, *Knowledge and Politics* 26 (1975).
3. Tanner, "The Great American Nightmare," 216 *The Spectator* 530 (Apr. 29, 1966).
4. One of the best descriptions of this process is P. Rieff, *The Triumph of the Therapeutic: Uses of Faith After Freud* (1966).
5. Quoted in Kluckhohn, "Have There Been Discernable Shifts in American Values in the Past Generation?" in E. Morison, ed., *The American Style* 196 (1958).
6. P. Berger, B. Berger & H. Kellner, *The Homeless Mind: Modernization and Consciousness* 79 (1973).
7. *Doe* v. *Bolton*, 410 U.S. 179, 210-11 (1973) (Douglas, J., concurring).
8. Jenkins, Book Review, 16 Am. J. of Jur. 302, 316 (1971).
9. *United States* v. *Macintosh*, 283 U.S. 605, 625 (1931).
10. *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970).
11. Presidential Address of Crocker in L. Milic, ed., *The Modernity of the Eighteenth Century* XVIII (*Studies in Eighteenth Century Culture*, Vol. 1) (1971).
12. R. Dahl, *After the Revolution? Authority in a Good Society* 19 (1970).
13. Id., at 19-20.
14. Id., at 24-25.
15. J. S. Mill, *On Liberty*, Bobbs-Merrill Library of Liberal Arts (1956), p. 112-13.
16. *Reynolds* v. *United States*, 98 U.S. 145, 166 (1878), citing Lieber, "The Mormons: Shall Utah be Admitted into the Union?" *Putnam's Monthly*, March 1855, at 225.
17. Mill, *supra* note 15, at 129.
18. A. Meiklejohn, *Education Between Two Worlds* 5 (1942).
19. *Lemon* v. *Kurtzman*, 403 U.S. 602, 655 (1971) (Brennan, J., concurring).
20. For a report on sex-education programs in public schools that reveals how thin the pretense of neutrality often is, see Horner, "Is the New Sex Education Going Too Far?" The New York *Times Magazine*, Dec. 7, 1980, at 137 ff.
21. R. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* 172 (1976).
22. Y. Simon, *Philosophy of Democratic Government* 225 (1951).
23. Id., at 228-29.
24. 410 U.S. 113 (1973).
25. *E.G., Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), *Bellotti* v. *Baird* 428 U.S. 132 (1976).
26. *Floyd* v. *Anders*, 440 F. Supp. 535, 539 (D.S.C. 1977).
27. Borders, "Suicide Guide Stirs a Debate in Britain," New York *Times*, Sept. 28, 1980, at § 1, p. 7, col. 1.
28. *Belmont* v. *Belmont*, 6 FLR 2785-86 (N.J. Sup. 1980).
29. *Harris* v. *McRae*, 448 U.S. 297 (1980).
30. 98 U.S. 145, 165 (1878).
31. Pfeffer, "Issues that Divide: The Triumph of Secular Humanism," 19 J. of Church & St. 203 (1977).
32. For a cold-bloodedly realistic assessment of what will be involved in this shift of views, see the editorial entitled "A new Ethic for Medicine and Society," 113 *Cal. Medicine* 67 (1970).

The Moderate Radical

Joseph Sobran

PUBLIC SCANDALS often have shadows, which are unreported scandals closely related to those that are reported. During the Watergate era somebody leaked President Nixon's tax return to the press. This was a federal offense—a crime punishable by imprisonment—and an invasion of personal privacy more serious, in a sense, than breaking into an office. The tax return was treated as news. The method by which the return was gotten was not treated as news—at least not the sort of news that calls for investigative journalism and a chorus of editorial indignation. The shadow scandal went unreported because it served the interest of the merchants of scandal themselves.

Another shadow scandal accompanied the story of a homosexual kidnaping that appeared late in 1982 in the New York press. Members of a group called the North American Man/Boy Love Association (NAMBLA) were implicated in several kidnapings. A spokesman for NAMBLA, David Thorstad, held a press conference at which he refused to back down from the group's position that sex between adults and small children should be legal.

The reporters at the press conference were indignant. Every journalist I know of found NAMBLA repulsively perverse. Some who were ordinarily liberal on issues like homosexuality and capital punishment were ready to form a lynch mob, to hear them talk.

According to police, NAMBLA members had been taking young boys to a cottage in Massachusetts in which was found 200 pounds of child pornography. Several of the group's members had already been arrested and in some cases convicted of related offenses. Thorstad denied, however, that NAMBLA was engaged in kidnaping. What the press failed to make clear was that according to the NAMBLA philosophy, a six-year-old who can be persuaded to accompany an adult to a sex lair voluntarily is not being kidnaped.

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And if the six-year-old can then be coaxed into engaging in homosexual acts, he is not being sexually abused. On the contrary. He is being "liberated."

The press had its own dirty little secret in the NAMBLA affair. NAMBLA has existed since 1978. It has been visible and audible all the while. It is only one of three known organizations in England and America that seek to legalize adult-child sex. Even before NAMBLA's founding, the Gay Activists Alliance had called for the repeal of age-of-consent laws for sex, and the New Jersey state legislature actually lowered the age of consent to *13 years* until a public uproar forced immediate rescission.

Sometimes only analogy will serve to make a point. If Catholic nuns appear holding crucifixes at an anti-abortion march, the media like to focus on them as a way of defining or characterizing the crowd. This is a way of implying that the "so-called right-to-life movement" is a dogmatic Catholic cause. If the Ku Klux Klan makes itself visible at an antibusing rally, the media likewise cover its presence copiously. Klan participation is felt to say something essential about the occasion.

But NAMBLA has been demonstratively active in the homosexual movement (never referred to in the media as "the so-called gay rights movement," oddly enough) for several years, and the media have gone out of their way to ignore it. NAMBLA members march in parades and advertise in homosexual newspapers and publish their ideology. But they embarrass the movement, and the media obligingly ignore them.

Would it be unfair to treat NAMBLA as part of the movement, under the circumstances? Certainly it would be unfair to suggest that all other homosexuals welcome it (though no more unfair than suggesting that all busing opponents welcome the Ku Klux Klan). But the media should not engage in suppression of facts. A full treatment of NAMBLA would present *both* its existence *and* the dissension it causes in the movement, because both these facts are part of the full story.

Unfortunately, we have had neither. The media have been friendly to the goals and ideology of the so-called gay rights movement from the beginning. No hard questions have been raised about the movement or the pathology of homosexuality itself.

Homosexuals are presented dramaturgically as victims of discrimination, as on a recent *60 Minutes* segment. Nobody seems to want to consider whether NAMBLA was implicit in the very idea of "gay rights"—or, more fundamentally, the "new morality."

As it happens, I first heard of Thorstad in 1978, before he helped found NAMBLA or even admitted to a sexual interest in boys. A friend sent me a copy of the *Gay Community News* (in which I was attacked for another of my polemics against the movement) containing an interview with Thorstad, who was "currently a spokesperson for New York City's Coalition for Lesbian and Gay Rights." He called himself a Marxist-Leninist; he had served with the Bertrand Russell War Crimes Tribunal, and had been a staff writer for the Socialist Workers Party newspaper, *The Militant.*

Clearly Thorstad did not confine himself narrowly to sexual issues. In the interview he insisted on the relation between his homosexual goals and the question of social order. In his view, "Christianity and capitalism have destroyed the ability of most people to even recognize in themselves the ability to love someone of the same sex." He stressed that "the exclusive heterosexual in this society has not chosen to be heterosexual." Instead, "this society" had, oppressively, *forced* them to behave heterosexually.

One of the peccant institutions was the family. "The most fundamental question here," he said, "is whether children have any rights. In our society I think it's pretty clear that children don't have any rights, let alone the right to decide what to do with their own bodies. Their parents, priests, and straight teachers have decided these things for them.

"Those who have broken out of the stranglehold of their parents and who have experimented with gay sexuality, as well as heterosexuality, are in a very difficult position because they can't get out of the home to go and meet gay people. I think it's extremely important that the gay movement support boy-lovers, who are, by the way, people who are active in our gay liberation movement as well. I think it's terrible that there's this silence about this." He added: "It's a very frightening thing to be a pederast in this society."

Thorstad offered an interesting reason for making legal claims for pederasty: "I think that pederasty should be given the stamp of

approval. I think it's true that boy-lovers [i.e., pederasts] are much better for their [*sic*] children than the parents are . . ."

There. He said it: the child is better off with a child molester than with a parent. The word "their" even implies that the child *belongs* to the child molester; at least as much as he belongs to the parent.

And this has been the theme of NAMBLA's propaganda from the start. The family is evil; the parent should have no power to control the sexual behavior of the child; the child needs to be protected only from violence. Here are some samples of NAMBLA's thinking:

> NAMBLA takes the view that sex is good, that homosexuality is good not only for adults, but for young people as well. We support all consensual sexual relationships regardless of age. As long as the relationship is mutually pleasurable, and no one's rights are violated, sex should be no one else's business.
>
> Sexual liberation cannot be achieved without the liberation of children . . . Children need to gain control over their lives, a control which they are denied on all sides. They need to break the yoke of "protection" which alienates them from themselves, a "protection" imposed on them by adults—their family, the schools, the state, and the prevailing sexual and social mores.
>
> The child himself should have the right to decide whom to live with, whether a lesbian mother or a gay father, the "natural" parents, a boy-lover, or someone else.
>
> There is no age at which a person becomes capable of consenting to sex. The age of sexual consent is just one of many ways in which adults impose their system of control on children.*

The *Gay Community News* interviewer noted that Thorstad also considered circumcision "a form of anti-sexual mutilation" and "a serious political issue." Strangely, it could be. Presumably Thorstad would have the law forbid parents to have their infant sons "mutilated"—a challenge to all parental authority, and an especial affront to Jews, since it would make a fundamental Jewish practice illegal.

*These quotations from NAMBLA literature are gathered in the book *The Homosexual Network*, by Enrique T. Rueda (published by the Devin-Adair Company, Old Greenwich, Ct. 06870). Note the mocking reference to the "natural" parents, implying that parents have no natural right to govern their children. A "boy-lover" is, of course, a pederast.

It is no wonder, then, that members of NAMBLA have been indicted for kidnaping, since they do not regard coaxing children to leave home willingly as kidnaping at all. The child, they insist, has the right to make his own sexual choices. No harm is done thereby. On the contrary: homosexual experience, properly administered, is *good* for him.

It is no wonder, either, that the homosexual movement and its allies in the media have played this issue down. As posed by Thorstad, it is a direct challenge to the entire traditional social order of the West (to say nothing of the East). The usual liberal approach in these matters is gradualism: denying and disguising the implications of pet "reforms," presenting them as pragmatic when in truth they are, in their piecemeal way, deeply radical. Anyone like Thorstad who is too overt upsets the whole strategy. He must be allowed to do his evangelizing in receptive circles without the burden of too much publicity.

Yet the most striking thing about him is that he is consistent in his thinking—and also consistent with the various ideologies of "liberation" that have become suddenly conventional among us. He is an atheist; he rejects the Judaeo-Christian tradition; he regards all sexual activity as essentially good and all sexual norms as repressive. Above all, he regards all family relations as what we have learned to call "accidents of birth" and he takes the further step of denying that they constitute any basis for moral authority whatever.

NAMBLA has natural allies, all right, but they are not at all exclusively homosexual. Liberalism, socialism, and Communism have been making their own assualt on the family for decades. The New York *Times*, the American Civil Liberties Union, and the United States Supreme Court have taken the position that neither a husband nor a parent should have any legal say over the individual decision, even by a minor, to get an abortion. The New York state supreme court ruled that child pornography was protected by the First Amendment, and the *Times* agreed. The *Times* has sarcastically denounced "the squeal law" under which parents must be informed if their children receive federally-funded contraceptives. All these positions assume that a child's sexual conduct is none of

his parents' business. That is what David Thorstad, for his own reasons, has been trying to tell us.

The remarkable fact is that so many liberal journalists are directly averse to NAMBLA, without perceiving their own philosophical affinity with it. We should be grateful that they do draw the line somewhere, but at the same time we should notice that it is a wholly arbitrary line; and we are entitled to ask them, when they express their opposition to NAMBLA, "Upon what principle?" If sexual pleasure for its own sake is a good thing, then why should we condemn sex between a man and a boy, provided it gives pleasure to at least one of them without inflicting injury on the other?

In recent times some psychologists have tried to replace the idea of the good with the idea of the healthy, on the assumption that certain forms of behavior are obviously unhealthy or expressions of abnormal development. But this approach has been called in question: many psychiatrists and psychoanalysts now deny that homosexuality is necessarily a mental illness. (For that matter, Thomas Szasz leads a school of thought that holds that "mental illness" is a misleading expression.) What if it could be proved that a man who sodomized a boy was in all other respects well-adjusted? What if the boy suffered no ill effects from it? Then what?

When we are asked for a reaction to pederasty, we are likely to say something like "That's sick!" But this is not a clinical judgment. It really means "That's perverse!" It is a moral, not really a pathological, judgment.

This sort of reaction shows that we do still have a lingering sense of the sacred, of the sheer *profanation* of the child. We may (to our loss) try to disguise it as a sense of the healthy, but this only reduces it to something of less import than it is; and also places on us the burden of proving that there is something pathologically wrong with the deviant behavior. This may be not only unprovable, but actually false. The attempt to diagnose evil behavior as "sick" sounds like a hangover from a more naive era, when normal middle-class behavior was assumed to be natural for all mankind, and the deviant was thought to be in the grip of subconscious compulsions which he could neither understand nor resist.

Although NAMBLA's natural allies may run for cover in its

hour of need, they have more in common with it than the mere position that parents have at most only a limited stake in their minor children's sexual activity. I mentioned that Thorstad called himself a Marxist-Leninist. I am willing to take him at his word, but I think the radical posture itself has a more generic meaning.

The *Times*, the ACLU, and the courts have adopted a modified version of the radical posture: not an overt rejection of once-sacred social institutions, but a progressively more detached stance toward them. Chesterton once observed that the theory of modern education seems to be that anyone is more likely to love a child than its parent. And this assumption, though never stated, works to undermine the tie between parent and child. We hear of the evils of child abuse; the state assumes ever more authority to supervise family relations and, if necessary, to dissolve the family, upon demand by either parent. The family as an institution is weakened, child abuse increases, and the voices of reform point to the suffering as evidence that we need more state supervision of the family. Some even call for the family's total abolition. Thorstad takes the hidden assumption all the way to its obscene conclusion by saying that a pederast is preferable to a parent. Yet it is not the Thorstads who are denounced in the *Times*, but the Jerry Falwells.

Where Thorstad is deliberately provocative, the *Times* is deliberately bland. It never attacks the target institutions frontally, but always poses as their reforming friend, eager to restore them to full health. Let us call this posture moderate radicalism.

The moderate radical seeks to normalize the abnormal, without alarming normal people. Far be it from him to call for the confiscation of wealth! Instead he points lachrymosely to the poor, and speaks of compassion; laments the inequitable distribution of wealth, the sharp need, the danger of leaving the status quo uncorrected. He notes that the arts deserve public support; who would be philistine enough to dispute that? He finds other causes equally deserving: medical care, social security, education, legal services, subsidies to various worthy groups. He condemns the greed of those who oppose him, and the narrowness of those who worry about deficit spending. Later, he will agree that the deficit is excessive, and conclude that taxes must be raised. The taxes must of course be graduated, so as not to favor the rich. When it is pointed

out that a tax increase has already occurred through inflation, he denounces attempts to index tax rates to correct this process. In the end the state winds up with an enormously increased share of the national wealth, but of course this was never the moderate radical's intention. He is merely a pragmatist who takes issues as they come. Those who see a single great principle running through all these issues are ideologues. They would turn back the clock; they make war on the poor.

We should note that any increase in social services is mechanically identified with "compassion," while any attempt to reduce the burden of the taxpayer is denounced as "greed." What is really at stake, however, is a pair of rival principles of social order. One sees people principally as members of families, which it is the duty of the state to respect and protect; the other sees them as members of an ill-defined entity called "society," which may be reshaped by the state in the name of distributive justice.

Although private property is now widely identified with greed, it is, rather obviously, a *defense* against greed; that is, against the unbridled rapacity of power. As Nikolai Tolstoy makes clear in his book *Stalin's Secret War*, the Soviet tyrant was probably the richest man who ever lived: every inch of much of Asia and, eventually, a large part of Europe was his to dispose of. He had so much because the smallest farmer or worker had no title to his own land, labor, or earnings.

Property is the material base of the family. A Treasury Department study recently found that the $600 personal exemption created by Congress in 1948 would be worth about $4600 in 1981 dollars, while the actual exemption had only increased to $1000. This clearly makes having children far more costly today than when the present tax system was imposed. It may also explain why three times as many mothers hold jobs now as did thirty years ago. Yet remarkably little has been written about the growing economic pressures against the family. Again we find an apparently unintended policy consequence that is not being addressed by adequate policy changes.

Why not? For the simple reason that the powers that be, in government and in the great organs of public opinion, do not hold the family to be among the paramount social values. It need not be

destroyed by direct or even consciously hostile policies. It can be done in organically, so to speak, by the natural processes that set in when competing values monopolize the attentions of policy makers.

Even so, the reassertion of the family's claims has been greeted with derisive and open hostility by the moderate radicals. They obviously sense a real threat to their own vision of social order, in which wealth produced is drained off by the state and distributed by the agents of what Irving Kristol has called "the New Class"—the profiteers of social change. The more overt radicals have, as usual, been more blunt and strident in identifying the pro-family movement as a harbinger of "fascism."

The pattern is too clear, too persistent to be accidental. But it is part of the moderate radical strategy to pretend there is no pattern at all. "Ideology" is ascribed only to the other side, the side that resists. The moderate radicals describe themselves as "pragmatists." They profess to be "civil libertarians," despite the great incremental growth of state power they sponsor; they try to saddle their opponents with the authoritarian label for favoring laws in support of traditional family morality. In this way rhetoric keeps the real battle-lines blurry.

But the hostility of the moderate radicals to moral traditionalists is clear enough. In a way this in itself proves there are two definite ideological systems, or (to put it more kindly) social philosophies, contending for primacy. Ordinary people, who would probably lean to the traditionalist side, may not detect any philosophical contest, but philosophers, like card sharps, are quick to find each other out. Each feels the enmity implicit in the other's every gesture. When the *Times* denounces as "the squeal law" a requirement that parents be informed that their children are receiving contraceptives, there is a world of meaning in the phrase; just as the *Times* rightly senses a world of meaning in the law.

When the Reagan Administration formally promulgated the "squeal" rule, the Washington *Post* blandly reported that this act was being fought by "family planning groups." What a wonderfully Orwellian name, I thought. These groups have plans for the family, all right; but they seem to prefer that the family be kept in the dark about them. Sexual freedom used to be pleaded for on grounds

that sex is a private activity, in which society—even at the local level—had no interest. Now we find, if we penetrate the smokescreens of catchphrases, that sexual activity is a matter in which the federal government itself has an interest, even though the parents of children who engage in it do not.

In his superb but neglected book *The Socialist Phenomenon*, Igor Shafarevich points out that socialism always targets the family, private property, and religion for destruction, since these rival the state as independent centers of power and authority. Under the moderate radicals the destruction is disguised as reform: sexual liberation, social justice, and "demythologized" religion.

In 1981 the two sides engaged in a sharp debate as to whether there was a meaningful distinction between two kinds of undemocratic government, the "authoritarian" and "totalitarian" models. Conservatives said Yes. Radicals, overt and moderate, said No—in keeping with their general strategy of playing down the ideological import of changes they favor.

The truth is that the distinction is plainly valid. The radicals themselves have showered their approval on totalitarian regimes (even if the approval was disingenuously phrased in terms of "recognizing realities" and "normalizing relations"), while condemning authoritarian ones for fostering "privilege" and "human rights abuses." (Has anyone noticed that the totalitarian abolition of private property is never accounted a human rights violation?) What the radicals like in totalitarian countries is precisely the grandiose ambition of remaking society ("building a new society") through the state.

I recently happened on another confirmation, issued long before the clumsy terms "authoritarian" and "totalitarian" gained currency. In 1930, a veteran observer of Russia, E. J. Dillon, returned from the new Soviet Union and published his observations, as impartially as possible, in a book titled *Russia: Today and Yesterday*. The very first sentence of the dust jacket blurb makes the point:

> Bolshevism differs from the French Revolution in that it attacks fundamentals like religion and the family, says Dr. Dillon, instead of such superficialities as forms of government.

Dillon himself noted that whereas "it never occurred to the most

iconoclastic of the French revolutionists to do away with the conception of the family or of the wide-ranging power of the father as head of the family, to abolish marriage, to modify the current idea of property," Bolshevism, by contrast "is first of all a relentless destroyer of the roots of past culture, religious, social, pedagogical, and also of those champions of that culture who remain true to it, refusing to be converted and live."

Dillon was no anti-Soviet polemicist. He stood in awe of the Communist experiment, and even said it had been made necessary by "the injustice and iniquities that infect our superannuated civilization." (Shafarevich, interestingly, sees socialism as issuing from a collective death-wish.) But he added:

> Sovietism is no mere philosophy content to assert itself or even to indoctrinate others by convincing, persuading, or cajoling them. It is not a community whose members are grouped and held together by identity of views which they are satisfied to profess or spread by means of the written or spoken word alone; it is not even a quasi-religious sodality content to expound its precepts in meeting houses and conventicles. Yet most nations behave as though it were one of those harmless corporations. *It is a live revolutionary center for the kindling and spreading of revolutions on all sides.* Its function now and for all time is to generate "whirlwinds of tempestuous fire" among capitalist peoples. That is Bolshevism in its international aspect; and when it loses its fire or damps it it has ceased to exist.

For good or evil, he concluded, "it is certainly a stern reality, smelling perhaps of sulphur and brimstone, but with a mission on earth, and a mission which will undoubtedly be fulfilled."

Most of the moderate radicals are by no means consciously pro-Soviet. In fact many of them criticize the Soviet Union harshly—*but never for being socialist.* Indeed it is almost as if they intentionally attack the Soviet Union for marginal reasons so as to preempt and control the terms in which the Soviet Union may be criticized, knowing (or sensing) that their traditionalist enemies will, if allowed the initiative, make far more fundamental ("ideological") criticisms.

Dillon, we must remember, lived in a world in which the democratic idea was still somewhat novel and local. He took for granted the prevalence of unelected, "authoritarian" governments. Yet he was immediately struck by the unprecedented scope of state power under Bolshevism. The distinction between czars and commissars was overwhelmingly obvious to him.

Why is it less obvious to us? I submit that it is because the socialist idea has metastasized, has spread into our cultural bloodstream so thoroughly that it no longer looks very radical. In a rarefied form, stripped of its specifically Soviet trappings and of old-fashioned fellow travelling with its Soviet embodiment, it has achieved much of its "mission"—and not because there are Soviet agents among us. On the contrary. There are Soviet agents among us for the same reason there are anti-Soviets among us: because, as Shafarevich and Solzhenitsyn have said again and again, ours is a civilization with a death-wish.

That death-wish finds many expressions, some of them unconscious. Unlike Dillon, we can no longer spontaneously *see* how radically we have changed. Most of us were born into the flux. What for our ancestors were monstrosities have become, for us, policy options—the seizing of property, abortion, even sex with children. We ask, not "*Should* we do it?" but "*Shall* we do it?"

Albert Jay Nock once mused on how a man would know he was entering a new Dark Age. The point is precisely that most people would not know. They would be too far out of touch with their own history to realize they were becoming abnormal. If a man who knew the past were to see his own children, oblivious and indifferent, joining the unremembering mass, losing the last sense of identity with what had gone before, totally absorbed in the kaleidoscope of sensation, then, at last, he would know the moment had come.

"This society is a real cesspool," says David Thorstad. Maybe so; but hardly for the reasons he would give. He and his kind actually want children to leave their parents and cut themselves off from the past. The new social order that is shaping up is well tailored to this morbid hope. And it is essential to this brand of social change that as few people as possible should realize it is going on.

Who Put the Wrong in "Wrongful Births"?

Terry Eastland

ONE AFTERNOON LAST SUMMER I picked up the afternoon newspaper in Norfolk, Virginia, and, turning to the section on local news, was seized by this headline: "Abortion failed, $100,000 awarded." According to the story, a 37-year-old mother of four children became pregnant by her husband. She had been awaiting surgery for sterilization, and decided she didn't want the child she was now carrying. She underwent a suction abortion when the fetus was at least six weeks old. Later, though, she complained of nausea and believed she was still pregnant, a fact her doctor confirmed some seven weeks after the abortion attempt. He told her he didn't do abortions past the 12-week stage, however, and referred her elsewhere.

Her pregnancy now at least 14 weeks old, she was informed by the new doctor that she could have a saline abortion. But she declined it out of fear that medication she was taking for multiple sclerosis would increase the hazards of the procedure. She wanted a suction abortion, apparently, or none at all.

The woman wound up having the child, a boy named Bryan. Months later she decided to sue the first doctor for malpractice. According to the story, a psychologist told the court she was suffering continuing depression because, "although she loves the child, she is constantly reminded by his presence that she once tried to kill him."(The second edition of the story substituted the phrase "tried to prevent his birth" for "tried to kill him".)

Court testimony indicated that the woman's doctor failed to read the pathology report after he performed the abortion. What he had sucked from her womb was not the embryonic young Bryan but merely uterine tissue. Testifying in his own defense, the doctor said the pathology report had been misplaced by an office employee.

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The Norfolk jury found against the doctor and awarded Bryan's mother "damages and costs involved in rearing the boy"—that was the $100,000. The boy was perfectly healthy and, as the story neatly noted in this bit of detail, "romped in the courthouse hallway during the two-day trial."

Fascinated by what was, according to the story, a "wrongful birth malpractice case believed to be one of the first in the nation involving a healthy child,"[1] I was curious to see how the morning newspaper, whose editorial page I then edited, would play the story the next day. When I finally found it, I discovered it was merely a rewrite of the evening paper's version. The piece was lying next to the obituaries, a position that indicated the case's relative merits as a story. Or perhaps, it was placed there in unintended irony.

Asking a newsroom editor why the story had not merited more substantial treatment and better placement, I was told that of course the woman's claims make sense—the doctor *was* negligent and she deserves the money. That's all there is to it, I was told.

But as it happens, that's not all there is to it. A newspaper, working under constraints of space and time, perhaps should be forgiven for failing to look behind the details of a court case. Even so, such a story as the one centering on Bryan and his mother and her doctor is interesting not simply as a malpractice suit involving a physician's negligence. For "wrongful birth" cases, which have become common only in the past ten years, take us far beyond the law of tort in which they have found legal expression. They reflect—even as they reinforce—what increasingly more Americans are thinking and believing these days about such fundamental matters as conception, birth, and children—even about the nature and purpose of life itself. A phenomenon so new, and yet so much a part of the modern ethos, deserves to be examined.

A Blessed Event

Wrongful birth cases have been tried, almost without exception, in state courts, where there have been more than 100 such cases, according to one student of the law. It is here that one must look to see the trends now developing, and to glimpse where the future might lie.

The best place to start is at a time that seems, in the light of events today, quite another century. It was, in fact, not 50 years ago—1934. A Minnesota man underwent a vasectomy in order to avoid the anticipated health hazards of another pregnancy to his wife, who had experienced substantial difficulty during the birth of her first child. But apparently the operation was unsuccessful, as later he fathered a healthy, normal child. The man sued his doctor, but lost in both the trial and appellate courts.

What he claimed, and the damages he asked for, seem remarkable today. He was not sufficiently modern to claim that the failed operation resulted in the birth of an unwanted child, or that he should not now have to bear the costs of rearing the child. He claimed rather that the physician had been "deceitful" in guaranteeing that the operation would protect his wife from the dangers of another pregnancy, including the possible loss of her life. The only damages he asked for were the costs incidental to the pregnancy and delivery of the baby.

The trial court dismissed the man's suit, asserting that such a vasectomy operation as his was against public policy. In what was the nation's first appellate decision in a wrongful birth case, the Minnesota Supreme Court rejected that reasoning, but did dismiss the suit, on grounds that the claimed damages were too remote from the stated purpose of the vasectomy—which was to save his wife from dangers related to pregnancy, not to spare him the expenses of childbearing. His wife had survived childbirth, noted the court, and now he was "blessed" with another child. The Court commented that so remote were the expenses of childbirth from the purpose of vasectomy that the father might as well have charged the physician with the cost of nurturing and educating the child during its minority.

The Minnesota case was decided at a time when contraception was not as widely accepted as today. But the case was also decided at a time when there was no question as to the meaning of children. They were a "blessing," and because they were, in the court's view, damages for not only the expenses of childbirth and pregnancy but also for such "remote" expenses as the nurture and education of the child were denied.

State courts more or less maintained this view of children for

many years, saying as well that even the life of handicapped children is a blessing that should outweigh any "damages" to the parent. Perhaps the clearest statement of this view was articulated by the New Jersey Supreme Court in 1967, in a wrongful birth case involving a handicapped baby. Following the birth of their seriously impaired child, a boy named Jeffrey, a couple sued their doctors, asserting negligent failure to inform the mother that the German measels she had had during pregnancy could adversely affect her baby. The couple claimed that they were thus denied the opportunity to seek an abortion. The mother sought damages for emotional distress, the father for the cost of rearing the handicapped child.

The New Jersey court took it to be fact that the doctors "affirmatively misled" the mother by telling her that the German measels she had during the first month of pregnancy would have no effect on her child. And the court assumed that "somehow or somewhere" (at that time New Jersey law forbade abortions) the mother could have obtained an abortion for "eugenic considerations."[2]

Still, the court denied recovery on grounds that it is impossible to weigh "the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood . . . against the alleged emotional and money injuries." While accepting that an abortion could have been obtained elsewhere, the court said that "substantial public policy reasons prevent this Court from allowing tort damages for the denial of the opportunity to take an embryonic life." Explaining itself in unambiguous language, the court said:

> It is basic to the human condition to seek life and hold on to it, however heavily burdened. If Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects against no life at all. "For the living there is hope, but for the dead there is none." Theocritus . . . The right to life is inalienable in our society. A court cannot say what defects should prevent an embryo from being allowed life such that denial of the opportunity to terminate the existence of a defective child in embryo can support a cause for action. Examples of famous persons who have had great achievement despite physical defects come readily to mind, and many of us can think of examples close to home. A child need not be perfect to have a worthwhile life.

There were dissents in this case, dissents that in time would

become the opinion of not only the New Jersey court but others as well. One justice focused on the physicians' legal duty to apprise plaintiffs of their high risk of having a deformed child, and argued that denying parents damages "provides no deterrent to professional irresponsibility." He was unmoved by the notion of the preciousness of life, and even noted that the New Jersey statute against abortion should be "construed with reference to conditions under which we live today"—meaning eugenic abortions should be legal.

Opening the Door

Four months after the New Jersey court spoke, a case was decided in California that has proved to be the watershed wrongful birth case. A couple with nine children didn't want any more, so the wife had a sterilization operation. But a year later she became pregnant with her tenth child, which was born a healthy, normal baby. The couple sued the doctors and asked recovery of not only medical expenses but also compensation for rearing the child—$1.4 million in all.

The case was dismissed by the lower trial court. But reviewing most of the wrongful birth cases in other state courts to that time, the California Court of Appeals concluded that there had been no direct holding on the question of a parent's recovery for the expenses of childrearing. The court held that if the parents were able to show a breach of some duty by the physician, they should be reimbursed at least for the cost of the unsuccessful sterilization operation. Thus, the court did not let the notion of the preciousness of life terminate this cause of action; indeed, the California court specifically argued against the Minnesota case of 1934, not only saying that "the birth of a child may be something less than [a] 'blessed event,'" particularly where sterilization was sought in order to prevent the birth of a defective child, but also by saying that childrearing costs are *not* remote from the purposes of a sterilization and may be compensable. While the court also said that any damages demanded by the parents must be offset by plaintiffs' "benefits" from the successful pregnancy, it plainly had opened the door to recovery in wrongful birth claims.

The next few years witnessed the success of several more wrong-

ful birth cases, but they seemed markedly to increase in number after 1973, when in *Roe* v. *Wade* the Supreme Court announced the almost unrestrictable right of a woman to seek an abortion. *Roe* v. *Wade* blunted the force of ideas that had prevented recovery in wrongful birth litigation. To many courts, life did not seem so "precious" anymore, nor did every child seem to be a "blessing." Wrongful birth opinions after 1973 routinely referred to the new "public policy" implicit in *Roe* v. *Wade.*

Within the past dozen years, medical science has developed reliable techniques for detecting and predicting the most serious defects, such as Down's syndrome. *Roe* v. *Wade* dovetailed with these advances to facilitate successful wrongful birth cases involving the birth of a handicapped child. The most important of these were decided in New York (1978) and New Jersey (1979). In both it was ruled that a doctor negligently failed to warn the mother (37-years-old in New York, 38 in New Jersey) that her baby might be born with Down's syndrome, a possibility that increases after age 35 and a condition discernible through amniocentesis. The courts ruled that the mothers were denied the option of seeking an abortion.

In the past 15 years the states allowing recovery in wrongful birth cases include not only Virginia, California, New York and New Jersey, but also Michigan, Delaware, Connecticut, Ohio, Minnesota, Missouri, Florida, Pennsylvania, Illinois, Wyoming, New Hampshire, Alabama, Texas, and Arkansas. Only Wisconsin, by my count, has refused recovery altogether. And the acts considered tortious by courts allowing wrongful birth suits include failure to fill a birth-control perscription, an unsuccessful sterilization, an unsuccessful vasectomy, inaccurate pre-pregnancy counseling, inaccurate pregnancy counseling, the failure even to diagnose a pregnancy, the failure to offer amniocentesis to a woman whose age makes her a "high-risk" pregnancy, and, as in the Norfolk case, unsuccessful abortion.

Although there is no complete count available, wrongful birth suits seem almost evenly divided between those in which the child born has been healthy and normal and those in which the child is afflicted with a serious handicap, such as Down's syndrome. All of the recent cases involving the latter situation have allowed some

form of recovery to the parents, although the measure of damages approved by the courts has varied. Some states, for example, have allowed recovery for the medical expenses of rearing the impaired child, but not for parents' emotional distress, while others have done just the reverse.

As for the cases involving a normal, healthy child, while not every state recognizes a cause of action in these instances, the trend clearly is in favor of trying these cases and allowing recovery. And the measure of damages has varied. Some courts have limited the items of damage, some have reduced damages by the value of the benefit the child gives to the parents, some combine these approaches, and some allow plaintiffs to recover all damages including the cost of rearing and educating the child.

Future Shock

Wrongful birth cases seem inescapably a part of the future. It seems safe to say that the rest of the states will in time recognize wrongful birth cases and permit recovery. It also seems safe to say that the major issue in wrongful birth litigation will continue to be what it is today—the nature and extent of damages parents may be awarded for the negligence of health professionals.

This issue will continue to interest health professionals and insurance companies, who seek to minimize damages; parents who seek damages; and of course lawyers on both sides. Obviously, wrongful birth cases will have economic consequences. But this may not be their only effect, nor even their most important.

The courts punish tortfeasors in part to deter further negligent conduct. Most of the wrongful birth cases involving a healthy, normal child have arisen from a negligent sterilization procedure. Such operations may continue to fail at the same rate as before the advent of wrongful birth litigation—sterilizations can "fail" not only because of negligence on the part of the doctor but also because of the natural regeneration of the severed tubes. But such lawsuits may well encourage doctors who perform sterilizations to try to avoid liability by improving both their counseling and their post-operative fertility testing. In particular, these doctors may now refuse to make guarantees as to the effectiveness of the operation.

Wrongful birth litigation thus could encourage a more careful practice of medicine in respect to birth control. I doubt that many people would find fault with this result. Far more problematic in my judgment, however, would be other effects of wrongful birth cases involving the birth of a handicapped child.

In order to avoid liability, doctors now may deem it wise to inform every woman age 35 and older that hers is a high-risk pregnancy which may be diagnosed for genetic defects through such tests as amniocentesis. Given the fact that today abortions routinely follow amniocentesis showing serious fetal abnormalities, the ultimate effect of this kind of defensive medicine could be the abortion of most defective fetuses carried by women 35 and older.

It is not hard to imagine a further consequence. No one would want to give birth to a handicapped child just to have one; obviously every parent wants the best for his children. But the widespread use of abortion to eliminate handicapped fetuses in women over 35 suggests a certain attitude against bearing and raising handicapped children, one that could "trickle down." The standard of care expected of physicians dealing with women under 35—and thus, in legal terms, the duty owed them—could come to include extensive genetic counseling, if not also information regarding amniocentesis and other such fetal tests. Again, in order to avoid liability, doctors may find themselves encouraging the elimination of the handicapped unborn, thus reinforcing the already existing animus against handicapped persons.[3]

Physicians also may find themselves tempted to encourage the infanticide of handicapped newborns. Having failed to detect a defect in utero, or having failed to tell the parents of it, a physician, seeking to avoid or limit liability, might now try to persuade parents that the best choice for all involved is the death of the child. This may seem a far-fetched consequence, but not long ago the very idea of the infanticide of handicapped newborns—as illustrated by the case involving "Infant Doe" in Bloomington, Indiana—seemed far-fetched, too.

I recognize that some geneticists, some doctors, and some parents would applaud a future in which no deformed child was born or allowed to live, and thus they would applaud wrongful birth litigation if it encouraged this future. But ultimately at issue here is

how we regard human life. And deciding who should live and who should die, according to the quality-of-life standards usually invoked in those discussions, is not as easy as it may seem. There are, for example, both mild and severe cases of Down's syndrome, and the degree to which a Down's child is afflicted may not be known for several years. Furthermore, and more fundamentally, there is a gross presumption in saying some should live and others should die. It is an understatement to say that wrongful birth litigation involving the birth of a handicapped child promises to do nothing to encourage the spirit of generosity this society is trying to extend handicapped individuals.

I have referred to doctors who may act in certain ways in order to protect themselves from malpractice law suits. But there are also many doctors who would not wish to practice such defensive medicine, because it may require them to be involved, even indirectly, with an abortion. Ironically, the right to refuse to participate in abortions, now protected by the Supreme Court, may be in jeapardy as the standard of care expected of physicians comes to include extensive genetic counseling and testing.

Wrongful birth cases, particularly those involving a handicapped baby, also may affect the thinking of judges on wrongful life claims. These have routinely been brought on behalf of handicapped infants, usually at the time of their parents' claim for wrongful birth. They have, however, been routinely rejected, usually on grounds that had the physician not been negligent—i.e., had he provided the requisite amniocentesis or abortion—the infant would not have been born, and that life, after all, is preferable to non-life. Now, however, this reasoning is under challenge. Dissents have been registered in wrongful life cases in some state courts, and in 1980 California became the first state to recognize wrongful life claims. California rejects the notion that under all circumstances impaired life is preferable to non-life, and holds that awarding damages in a wrongful life case does not "disavow" the value of life. Persuasive to the California Supreme Court is the view that if parents in wrongful birth actions are permitted to recover medical expenses incurred on behalf of a handicapped child, the child itself should be allowed to recover also (although—an

awkward point for the court—both cannot recover the same expenses).

In time, not just medical expenses but the cost of the entire handicapped life may be awarded in damages. And underlying the notion of wrongful life would be essentially the same quality-of-life ethic that supports wrongful birth involving handicapped newborns. Courts may use language like the following from a 1977 New York birth case to support an action on wrongful life: "The right not to have a child extends to instances in which it can be determined with medical certainty that the child would be born defective. The breach of this right may also be said to be tortious to the fundamental right of a child to be born as a whole, functional human being." This language indicates the philosophical distance travelled by one court from the New Jersey court in 1967, which asserted that a child need not have a perfect life to have a worthwhile life.[4]

Wrongful birth cases do not, of course, materialize of themselves. They are to be expected in a society that not only accepts birth control and abortion (we have moved far beyond where the Minnesota court was in 1934, and even quite beyond where the Supreme Court led us in 1973) but also increasingly fails to make a distinction between the two. I do not think it inadvertant that an article in a recent *Virginia Law Review* on wrongful birth happened to denominate both sterilization and abortion as "birth-control methods."

State court judges, moreover, are not only faced with changing social attitudes but they also have before them a seemingly relevant body of law. The classic common law principles of negligence—those of duty, breach of duty, proximate cause, and damages—seem to apply in wrongful birth cases, although often there seem to be difficulties with causation and damages. Moreover, striclty from the standpoint of tort law, it makes no sense to let health professionals off the hook; the denial of a cause of action for wrongful birth seems, in effect, a grant of immunity to health professionals for their negligent acts. The law of tort is grounded in one of the deepest moral principles—that a wrong should not go unredressed.

Nonetheless, and quite apart from the directions in which the wrongful birth cases may point, such cases are a measure of a fun-

damentally unhealthy society. It is one thing to use birth control; it is another to seek an abortion. Yet it is quite another to believe that childbirth is a "wrong" or "injury" that deserves compensation obtained through the power of the courts. The idea that children can constitute "injury" to parents is barbaric; every one of us, by one definition or another, could be said to be an injury to our parents. We are making distinctions and choices about our progeny today that fortunately our parents did not make about us. Perhaps the reason is that earlier generations understood that not every "wrong" should have an associated remedy in law. And of course it doesn't. Life is not like that. Some "wrongs" require personal accomodation, adjustment, acceptance. A mature society understands this; ours, continually seeking a perfection unavailable on this earth, apparently doesn't.

In the end there is the child to consider. And it is a measure of our cunning that the child's "best interest" is frequently put forward now as an argument for damages. It is soberly argued that the "compensation" can outfit the child with all of life's best things—education, clothes, vacations, the lot. Without such compensation, it is believed, as one court put it, that the child may be doomed to status as a "second-class citizen."

All of this on behalf of the "wrongful birth" child, and yet it will be noted that in wrongful birth cases no one represents the child. Health professionals who were supposed to prevent his conception or even abort him have their own bank accounts to consider. Parents seeking damages have the quality of their own lives to weigh. There is no advocate for the child, who someday must learn that health professionals were supposed to have prevented his conception or "terminated" him, and, worse, that his parents thought it better that he did not exist. Bryan, the two-year-old who romped in the Norfolk courtroom while his mother was awarded $100,000 in damages, and all other "wrongful birth" children, should romp while they can, in the days of their youth, while the evil days come not, nor the years draw nigh.

NOTES

1. As I later would discover, the case was not "one of the first in the nation involving a healthy child." Numerous other wrongful birth cases involving the birth of a healthy child have been reported. In another respect, however, the Norfolk case is a leading one: It is only the third I could find in which a healthy child has been born following a failed abortion.

2. The court's recognition that this would have been a "eugenic abortion" is worth noting; it is a measure of our distance from 1967, and also from truth, that today abortions of defective fetuses are routinely called "therapeutic."

3. Nothing in the developing tort law in this area would seem to preclude still another development: wrongful birth cases involving babies of the "wrong" sex. If, as the Supreme Court recognizes, couples have a right to practice contraception, and if, as the court also recognizes, the woman has an almost unresitrcied right to seek abortion, the failure of a doctor either to offer amniocentesis, which also reveals the sex of the fetus, or to tell a couple of the test's sex results, could constitute negligence in tort law. Nothing in the right to plan families, or the right to abort, restricts such sex selection of children, which is already happening today. Here, once again, tort law could at once reflect the attitudes of society and reinforce them.

4. Perhaps it is not too early to wonder whether, if there is such a thing as wrongful life, there should not be the mutually entailed concept of rightful life. For as Daniel Robinson, professor of psychology at Georgetown University, has noted, "to argue that it is negligent to permit [life] in some cases is to accept that it is (symmetrically) negligent to prevent it in others." May not normally developing fetuses have a cause of action against doctors who prevent their entry into this world? Or against their parents, who request it? However improbable it may seem, perhaps the just desert for a society that so easily takes the life of the unborn would be the expansion of their rights, through the law of tort, against those already living.

The ERA-Abortion Connection

Henry J. Hyde

IS THERE A connection between the proposed Equal Rights Amendment and abortion or abortion funding?

Logically, there should be no connection. But, as Justice Holmes has reminded us, the life of the law has not been logic; it has been experience. And recent experience suggests that the ERA, if it is proposed and ratified without an explicit provision against its use as a pro-abortion device, will in fact be used to sweep away the minimal protection of unborn children that the courts currently allow, and also to mandate tax funding for abortions.

Laws, including constitutional amendments, should be interpreted in accordance with the intentions of those who wrote and adopted them. Some of the most important supporters of the ERA have argued and stated publicly that they regard restrictions on abortion—and even the refusal of legislatures to finance abortions—as a form of "sex discrimination." And judges, including some Justices of the United States Supreme Court, have given reasons to believe that they will be receptive to such arguments.

One important source of evidence about how the ERA would be interpreted is litigation under the *state* Equal Rights Amendments in various state constitutions. In several recent controversies involving state ERA's, it has become clear that the pro-abortion movement regards ERA as a valuable tool in the fight against abortion-funding restrictions.

In the 1978 case of *Hawaii Right to Life* v. *Chang*, a group of doctors argued that they had a constitutional right to be paid for abortions with state funds. The abortionists were represented by the American Civil Liberties Union, which has been prominent both in the pro-abortion and the pro-ERA causes. They argued that the state ERA secured a right to abortion funding because:

> Abortion is a medical procedure performed only for women; withdrawing

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> 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.

In the 1980 case of *Moe* v. *King*, the Massachusetts affiliate of the A.C.L.U. urged that state's highest court to hold that:

> 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.

In the 1983 Pennsylvania case of *Fischer, Planned Parenthood, et al* v. *Department of Public Welfare,* the American Civil Liberties Foundation of Pennsylvania argued that it is unconstitutional under the Pennsylvania State ERA to deny state tax funds for abortions because:

> Pregnancy is unique to women. 62 P. S. §453 and 18 Pa. C.S.A. §3215 (c) which expressly deny benefits for health problems arising out of pregnancy, discriminates against women recipients because of their sex. 62 P. S. §453, 8 Pa. C.S.A. §3215(c) and the regulations issued pursuant thereto constitute a gender-based classification in violation of the Pennsylvania Equal Rights Amendment, Article I, §28 of the Pennsylvania Constitution.

These Hawaii, Massachusetts and Pennsylvania cases were decided on other grounds (albeit favorably to abortion funding). The argument advanced by the abortionists in all three cases, however, is firmly grounded in past decisions of the United States Supreme Court. The Court's holdings have denied the constitutional right to a government-financed abortion on the ground that poor women who desire abortions are not within any of the so-called "suspect classes" against whom no law can discriminate without triggering "strict scrutiny" by the courts.

"Strict scrutiny" almost always results in the law's being struck down as unconstitutional; if either sex or poverty had been designated by the Court as a "suspect classification," then the Court would almost certainly have found a right to abortion funding. Since 1970, the ERA advocates have emphasized that the Amendment's principal legal effect would be to make sex a "suspect classification" under the Constitution.

The most important "suspect classification" at present is race. If sex discrimination were treated like race discrimination, govern-

ment refusal to fund abortions would be treated like a refusal to fund medical procedures that affect members of minority races. Suppose that the Federal Government provided funding for procedures designed to treat most diseases, but enacted a special exclusion for sickle-cell anemia (which affects only black people). The courts would certainly declare that exclusion unconstitutional.

Other laws regulating abortion would be treated similarly. "Conscience clauses," for instance, which give doctors and nurses in state-supported institutions the right to refuse to participate in abortions, would be treated like laws giving state officials the right to deny services to blacks but not to whites.

Nor would it avail the state to plead that abortion deserves special treatment because of the interests of the unborn child: the Court's decision in *Roe* v. *Wade* expressly declared that argument impermissible, at least where a woman is seeking an abortion during the first six months of her pregnancy.

It should be remembered that the abortion-funding cases were decided by a divided Court. A shift of two votes in the 1977 cases, or of only one vote in the 1980 case, would have resulted in a Supreme Court order that abortions be funded on the same basis as other operations. Unless abortion-related cases are clearly and explicitly excluded from the scope of ERA, this constitutional amendment making sex a "suspect classification" would provide the A.C.L.U. and other pro-abortion litigants with the argument they need to persuade the crucial Justice.

Some of the principle architects of the ERA have been vague or silent about the effects of the amendment on issues such as abortion funding. One reason for this is suggested by the newsletter of the Civil Liberties Union of Massachusetts, explaining the organization's decision to argue the connection between abortion and the ERA:

> 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. . . . [I]t was our hope to be able to save Medicaid payments for medically necessary abortions through the federal court route without having to use the 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.

If a Federal ERA were ratified, there would be no need for silence or evasion, so we would see all laws regulating abortion challenged vigorously on the argument that they are unconstitutional discriminations against women.

In the meantime, many of those who are committed both to abortion and to the ERA will continue to avoid discussing the connection. A particularly egregious example of one frequently-encountered evasive tactic is found in the conflicting statements of Professor Thomas Emerson of Yale Law School, the co-author of a 1971 article in the *Yale Law Journal* that is frequently cited by ERA proponents as the authoritative guide to the Amendment's legal effects. Testifying before the Connecticut legislature, Professor Emerson said:

> 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.

In a letter written in 1974, however, Professor Emerson took a different view:

> 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.

Professor Emerson gave a hint about the nature of this "indirect" effect in a brief he filed with the United States Supreme Court in *General Electric* v. *Gilbert* (1976), along with the other co-authors of his 1971 ERA law journal article. Urging the Court to hold that a pregnancy exclusion in a health insurance plan violated Federal laws against sex discrimination, these pro-ERA scholars stated that, if the ERA were ratified, pregnancy-related classifications would be "subject to strict scrutiny," and that state laws discriminating against women with "disabilities related to pregnancy and childbirth would not survive the scrutiny appropriate under the amendment."

Thus according to Professor Emerson and his co-authors, the Supreme Court's "right to privacy" may be *sufficient* to secure a right to abortion, but if the ERA is ratified the "right to privacy" will no longer be *necessary* as a basis for abortion-related constitu-

tional claims. Indeed, the ERA will then provide a basis for striking down *all* laws that discriminate against "pregnancy-related disabilities"—the most important of which are the abortion-funding restrictions and other abortion regulations that have survived challenges based on the "right to privacy."

Among the lawyers who joined Professor Emerson and his co-authors in their brief on "pregnancy-related disabilities" was Ruth Bader Ginsburg, who was then the preeminent legal scholar of the ERA movement and who is now a Federal judge. This is significant not only because it shows that the ERA movement's scholars and advocates are virtually unanimous in their belief that ERA will ban "pregnancy-related" discrimination, but also because it reminds us of *who* will be interpreting the ERA.

It is not *logically necessary* that the Federal judiciary hold restrictions on abortion unconstitutional under the ERA; but it was not necessary—indeed, it was palpably, grotesquely incorrect—for the courts to create a constitutional right to abortion in the first place. In 1973 the federal judiciary found a right to abortion as a corollary of a "right to privacy" that is not even mentioned in the Constitution. The judiciary is quite capable of finding an even broader right to abortion and abortion funding in the ERA, whose advocates have already provided the arguments for such a right. Congress should not give the courts this opportunity.

Supporters of the ERA have said that an amendment which expressly excludes its application to abortion is unacceptable to them. One is left to ask why. A question has been raised about the possible effects of a constitutional amendment being considered by Congress. This is a serious question about an important question of public policy. Those who argue that pro-life people must *prove* that the ERA will enhance the right to abortion are misallocating the burden of proof. Nobody can prove what the judges will do with the amendment. As legislators, however, it is our responsibility to answer the questions that we can answer, rather than leaving the judiciary free to choose whatever answers the judges like.

I can only explain the resistance to the insertion of clarifying language in the ERA as additional evidence that many of its proponents do intend to use it as a tool in the abortion struggle. Indeed, in February 1983 the sponsors of a proposed state ERA in

Minnesota *withdrew* the amendment after a committee added a clause to exclude abortion from the scope of the amendment. I believe it is unprofessional for us as legislators—whether or not we particularly care about abortion—to leave such an important and sensitive question unanswered after it has been raised. It would be especially tragic if legislators who *do* wish to minimize the killing of unborn children were to give pro-abortion lawyers and pro-abortion judges a new and powerful tool with which to enhance and extend the abortion right, especially by mandating the use of tax funds to pay for abortions.

An effort will be made to insert clarifying language in the ERA so that it cannot be used to expand abortion rights. There is simply no good reason for the rejection of such a clause, unless the ERA *is* intended as an abortion rights and abortion-funding amendment. By voting for clarifying language to exclude abortion and abortion-funding from the scope of ERA, members of Congress who are genuinely committed to the ERA and who are also genuinely committed against the expenditure of tax funds for abortion will have an opportunity—perhaps their only opportunity—to honor both commitments.

APPENDIX A

[*The following column first appeared in the May 21, 1983 Washington* Post. *Colman McCarthy is a regular columnist for the* Post, *and the author of several books. This article is reprinted with permission (©1983 by the Washington Post Co.).*]

On This Issue, Reagan is Morally Right

Colman McCarthy

For readers who might be unfamiliar with Ronald Reagan as an author, the editors of the *Human Life Review* identify him as "the fortieth President of the United States." The president's article, "Abortion and the Conscience of the Nation," appears in the current issue of the quarterly, a publication that devotes a fair portion of its pages to anti-abortion axgrinders and browbeaters.

Reagan's piece is different. It makes the case—in direct, unornamental prose—that abortion is an issue of power and powerlessness. "We are talking about two lives—the life of the mother and the life of the unborn child," Reagan writes. Arguing that abortion is not merely a personal decision, the president correctly centers the issue: fetal life has "a God-given right to be protected by the law—the same right we have. . . . It is not for us to decide who is worthy to live and who is not."

Reagan's essay is needed for the debate. Until now, he has not gone much beyond code words fit for posters, nor has he used any forum except the occasional paragraph in a speech or the bewrenched reply to a press conference question. That he speaks out now suggests a move toward authentic leadership on a question that haunts the national mind no matter which side is taken. Reagan refers to the assessment of Mother Teresa, that "the greatest misery of our time is the generalized abortion of children."

With 15 million lives stopped by legal abortion in the United States since 1973, Reagan's effort to rally the country against abortion could help prevent the devastation of millions of deaths in the decade to come.

There is a context, certainly, to Reagan's article. In the past month, he has been reestablishing his ties with such core support groups as the National Rifle Association. He sang sweet notes to Jackie Presser, the new Teamsters president, and put him on the guest list for an upcoming White House banquet. His anti-abortion piece may well be more preaching-to-the-choir politics designed to keep pro-life groups pro-Reagan.

Whatever the motivation or maneuvering, Reagan narrows to a fine line—but a visible, uncrossable line—the reality that "the humanity of the unborn child" should not be ended by violence. It is usually at this point that anti-abortionists are tempted to become finger-wavers against pro-abortion "baby-killers."

Instead of shouting-match arguments that have long travestied the discussion, Reagan illuminates one of the least recognized strengths of the pro-life movement: that its members are not just compulsive one-noters. He mentions such groups as Sav-a-Life in Dallas and the House of His Creation in Coatsville, Pa., that provide care for women who might otherwise be left with no alternative to abortion.

Groups like this have always been a powerful force within the pro-life movement, though they receive a fraction of the publicity given by the media to abortion clinics. The media have not much exerted themselves either in reporting that pro-life groups tend to attract people whose humanitarianism is broad. In "Rachel Weeping," James Burtchaell tells of the Indiana Right-to-Life chapter. In 1980, a survey was made of the 229 members who came to the group's regional convention. Sixty-seven were involved in voter registration, 81 distributed free food and clothing, 116 were volunteers in neighborhood organizations like scouting or meals on wheels, 176 were teachers' aides or tutors in schools, 47 had taken pregnant women, refugees or foster children into their homes.

This isn't a portrait of reactionaries who think that community service means firebombing the local abortion clinic. The Indiana group, as well as others like it across the country, draws citizens whose personal service to others is anything but narrowly focused on opposition to abortion.

This fact also belies the stereotype that only the right wing is active on this issue. Three years ago, the Chicago Tribune carried a story about Feminists for Life, a group that at the time was backing both the Equal Rights Amendment and the Human Life Amendment. The organization's president was quoted: "Feminism grew out of the anger of women who did not want their value to be determined by men. How can we turn around and arbitrarily devalue the fetus? How can I support a Nestle boycott and turn around and support the destruction of life in utero?"

Reagan is not pro-life on other issues: disarmament, gun control, food programs. On the sanctity of unborn life, though, he is. The law of averages might be at work: eventually there had to be some issue he was right about. To the country's benefit, Reagan picked well to be morally sound on this one.

APPENDIX B

[*We reprint here two recent newspaper columns by Joseph Sobran, our Contributing Editor. The first, issued last April 29, comments on the article by President Ronald Reagan in our Spring issue. The second, issued June 14, concerns the Supreme Court decisions about which Professor Noonan writes in our lead article. Both are reprinted with permission (*©1983 Los Angeles Times Syndicate*).*]

The Issue of Life

Joseph Sobran

The spring issue of the *Human Life Review* includes an article by none other than the president of the United States. It is rare for a sitting president to use the medium of a periodical to state his position on a major issue, but in this case the issue is a big one: life itself.

We are often reminded that it is our duty to speak out against any future holocaust. The grim fact is that a holocaust is already in progress, here, now, among us: the commercialized killing of the unborn.

"Abortion to 24 weeks. Board-certified gynecologist." Prices run from $49 to $120. Pregnancy tests and pills are included.

One wonders: Will there someday be a Nuremberg trial for all those who participated in these assembly-line deaths for money? Will there be a memorial to the tiny victims? Or will they be treated as so much garbage for the short remainder of what once was our civilization?

President Reagan is blunt: "Since 1973, more than 15 million unborn children have had their lives snuffed out by legalized abortions. That is over 10 times the number of Americans lost in all our nation's wars."

He continues: "Make no mistake, abortion-on-demand is not a right granted by the Constitution. No serious scholar, including one disposed to agree with the court's result, has argued that the framers of the Constitution intended to create such a right . . . Nowhere do the plain words of the Constitution even hint at a 'right' so sweeping as to permit abortion up to the time the child is ready to be born. Yet that is what the court ruled."

Far from being an isolated "single issue," Mr. Reagan sees abortion as having consequences for the whole moral fabric of society: "We cannot diminish the value of one category of human life—the unborn—without diminishing the value of all human life. We saw tragic proof of this truism last year when the Indiana courts allowed the starvation death of

'Baby Doe' in Bloomington because the child had Down's syndrome."

Somewhat sentimentally, perhaps, the president says the death of Baby Doe "tore at the hearts of all Americans." There are plenty of Americans who took that death in stride and even defended the decision to let the baby die. The arguments for infanticide have since then begun to come out of the closet, as people who favor that sort of thing have made the encouraging discovery that there are others who feel as they do. What might have been a disgraceful opinion for one individual becomes acceptable and respectable for no better reason than that it is widely shared.

But the president is right about one thing: the issue in the Baby Doe case was not "whether Baby Doe was a human being." The fact was undeniable. We knew he was alive even before he was allowed, by order of the court, to die. This was not a death we found out about later, a death we could disclaim foreknowledge of and responsibility for. We were all witness to it. His life was in the balance. He died, in effect, before our eyes.

He was, as we say, a defective infant. Human, but. The court found, in Mr. Reagan's words, "that retardation was the equivalent of a crime deserving the death penalty."

The president's peroration deserves to be quoted in full: "Abraham Lincoln recognized that we could not survive as a free land when some men could decide that others were not fit to be free and should therefore be slaves. Likewise, we cannot survive as a free nation when some men decide that others are not fit to live and should be abandoned to abortion or infanticide. My administration is dedicated to the preservation of America as a free land, and there is no cause more important for preserving that freedom than affirming the transcendent right to life of all human beings, the right without which no other rights have any meaning."

Powell Strikes Again

Joseph Sobran

In 1979, Justice Lewis Powell told an interviewer some revealing things. "It's well to bear in mind," he said, "that the court is composed of judges who are elected for life. We are therefore not directly responsible to the people in any political sense." An interesting use of "elected."

He went on: "Yet our independence does give the court a freedom to make decisions that perhaps are necessary for our society, decisions that the Legislative Branch may be reluctant to make." It was the court, he pointed out, that "made the difficult decision, one the Congress apparently did not want to make, to lower the voting age to 18. There was nothing in the Constitution that could have suggested that result. In the simplest of terms, the Court decided . . ."

Later, to his mortification, Powell realized that Congress had indeed lowered the voting age. And far from being a difficult decision, it had been so popular that the country had swiftly enshrined it in a constitutional amendment. No. 26.

Thus, did we learn that a Justice of the Supreme Court, charged with telling us what the Constitution *means*, didn't even know what the Constitution *says*.

The scandal, such as it was, was fleeting, and Powell did not feel compelled to step down from the Court in disgrace. Some things are simply too embarrassing to talk about, and the political establishment in this country could hardly afford the loss of prestige it would suffer if the people were to meditate at length on the astounding incompetence of one of its unelected rulers. The subject was quickly dropped.

It was as if the surgeon general were to display his ignorance of the function of the pancreas. Such a revelation says less about the individual than about the system that elevates him to power.

The incident should have taught Powell humility. Instead, it appears to have instilled in him the arrogance of a man who knows he can get away with anything. He has now struck again, supplying a clumsily assertive majority opinion in the latest abortion cases to reach the Supreme Court.

At a time when the country has begun to question the reasoning behind the court's ruling in *Roe* v. *Wade*, Powell, for the six man majority, declined to offer a reasoned defense of that ruling, falling back instead on the doctrine of "stare decisis"—the principle that precedents must be respected, which is an excellent principle until it is taken to the extreme to which Powell has taken it by implying that the errors of the

past are pretty much irreversible. Even so, he says that the "right" to get an abortion (or, as he calls it, to "terminate a pregnancy") is "fundamental."

How do you distinguish "fundamental" rights from those which are merely constitutional? Presumeably, a right is constitutional if it is in the Constitution. But it is fundamental only if Justice Powell *remembers* it is in the Constitution.

Actually, Powell has confessed that he does not feel inhibited by the Constitution's content. What counts, for him, is what is "necessary for our society," and that if the legislative branch is "reluctant" to make a "difficult decision," the court must do it.

In this notion we see ignorance and arrogance wedded. The Court was meant to be a check on federal power, ensuring the lawful behavior of the president and Congress. Instead, it is bearing down on the state legislatures, which are themselves defenseless against the lawlessness of the federal judiciary.

What checks? What balances? What is the state's remedy when its laws are struck down by men like Powell, whose powers of reading and reasoning may be defective, but who can be neither overruled nor removed by anything short of a Congressional impeachment?

Besides, no justice can or should be impeached for the inability to think straight. But there ought to be other remedies. A vast Republic should not be at the mercy of judicial idiosyncrasy. That is not constitutional government; it is idiocracy.

APPENDIX C

[*The Washington* Post *ran the following column on April 17, 1983—just two days after the anniversary of the Bloomington Baby's tragic death. Professor Arkes has appeared frequently in this journal; he is currently the William Nelson Cromwell professor of jurisprudence at Amherst College. This article is reprinted with permission (©1983 by the Washington Post Co.).*]

'Baby Doe': It's Not a 'Medical' Question

Hadley Arkes

Why is it that the terms of our public discourse—and our familiar canons of reasoning—are suddenly suspended whenever we are faced with the questions of medical treatment for newly born children? There was nothing especially complicated or esoteric about the regulations that were recently announced by the Department of Health and Human Services: hospitals were required to post, in their maternity wards and nurseries, a notice that the "discriminatory failure to feed and care for handicapped infants in this facility is prohibited by federal law."

But the American Academy of Pediatrics challenged those regulations in a federal district court, and its position was upheld, for the moment, on a procedural ground: the administration failed to persuade the court that it was acting quickly "to protect life from imminent harm" and that it was reasonable to forgo, in this case, the usual waiting period for public comment before new rules are put into effect.

Still, when this procedural issue is finally resolved, the question of substance will remain. On that point Judge Gerhard Gesell managed to express—quite early, and quite gratuitously—his hostility to the measures of the administration.

From the remarks of the judge and the reactions of the public commentators, one would gather that the administration had addressed a problem too inscrutable to yield to ordinary language or to the judgments of the law. Ellen Goodman worried, with many doctors, that the regulations would not allow a distinction to be made between the child handicapped by Down's syndrome and the child handicapped by the absence of a brain, or by other afflictions so profound that his prospects were hopeless. For the critics, these were matters properly left to the "medical" judgment of doctors and to that delicate, private relation between a physician and his patients.

It has become a common reflex among doctors these days to regard

any matter as a "medical" question if physicians are somehow involved in it. But with the benefit of more strenuous reflection it should become apparent that the new regulations raise no question that is distinctly "medical." Nothing in the regulations would foreclose the need for doctors to make assessments, from one case to another, on the condition of patients and the prospects for treatment. What the new regulations reach are those cases in which the afflictions of the child could be treated practicably by surgery; where the doctors and the parents would agree to operate; but where the decision is made, nevertheless, to hold back medical treatment *because* the child is retarded or "handicapped."

The judgment, at that point, does not pivot on any medical issue but on a question of "principle": Is there something in the very condition of being retarded which establishes that people *deserve* to perish or that they have a lesser claim to live? Does the presence of infirmities justify a policy of withholding from the "handicapped" services or benefits that should not be affected by their disability (such as their access to education)?

When stated in this way, it should be evident that the principle engaged here is the same principle that has underlain our statutes on the treatment of the handicapped. And that is in fact the provenance of the new regulations: they were drawn by the administration under the authority of the Rehabilitation Act of 1973. To my knowledge, none of the critics who find the regulations dangerously imprecise has ever raised a question about the clarity of that statute—or of the law that has been built up now for a decade in protecting the "handicapped" from all species of unwarranted harms and exclusions.

Of course, the notion of being "handicapped" cannot be free of ambiguity. But it hardly raises problems of interpretation that are any graver than those generated by other statutes, which have not excited anything near the same alarms. Can we define, after all, everyone who is part of a "minority" that suffers "racial discrimination"? Would a preference for people with "Spanish surnames" extend to the child of Mendoza, but not to the child of Mendoza's sister, who married a man named Flynn? Is a restaurant a facility involved in "interstate commerce," even when it is separated from the highway by a dirt road, and when it seeks no interstate business? Ellen Goodman, who thought the language of the new regulations fatally sweeping and categorical has not apparently suffered any discomfort over the Equal Rights Amendment, which would ban, in a categorical, sweeping way, all discriminations based on sex (even though its proponents have been quick to assure us that they do not mean to go quite that far).

Suppose for a moment that the new regulations had declared that "it is prohibited by federal law to withhold treatment from infants on the basis of their race." Is it imaginable that the American Academy of Pediatrics would now be in court arguing that rules of this kind interfere with the "medical" judgment of doctors and the privacy of their patients?

The academy is more likely to recognize that the regulations express a *principle*, and that the principle cannot be affected, in its validity, by the variety of personal experiences that are brought into view from one case to another: no set of novel circumstances, no "medical" facts disclosed in any case, can possibly bear on the question of whether it is right or wrong to withhold treatment on the basis of race. And what can be said here in regard to race would have to be said, with equal force, in regard to the withholding of medical treatment from the retarded or handicapped.

The doctors are no doubt aware that parents who withhold food or medical care from their children would be subject to prosecution even if they starved their children in the privacy of their homes. The physicians must understand then, as well as anyone else, that when the law "interferes" with this disposition of the parents, it does not interfere with anything the parents have a "private right" to do. And what is not within the privacy rights of the parents surely cannot be brought within that domain when the action shifts to a hospital and the collaboration of doctors.

If the pediatricians and their friends have been made uncomfortable by the new regulations, it is not because the administration has invaded a sacred sphere of privacy or encroached on "medical" judgment. The problem for the doctors, rather, is that the administration is challenging precisely, in principle, the moral understanding on which they have been willing to redefine their missions as doctors.

The American Academy of Pediatrics has good reason now to believe that most of its members do indeed reject the principle behind the law: in one national survey of pediatricians, carried out in 1977, 85 percent of the doctors in the sample expressed their willingness to withhold surgery for children with Down's syndrome if that were the preference of the parents. More recent surveys suggest that this perspective has retained its dominance.

The pediatricians apparently think it is legitimate to withdraw medical care from the retarded, for the same reason that they have been willing to honor the decisions made by parents to end the life of the infant in the womb who is thought to have Down's syndrome. For years doctors have been allowed to conceal, behind their claim of "medical judgment," a

doctrine for taking life that cannot arise from anything in their field of competence. What they feel now, in these new regulations, is the sting of reproach; and in this case, the law has directed that reproach to the proper place.

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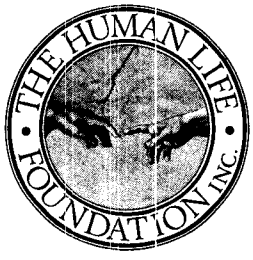
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