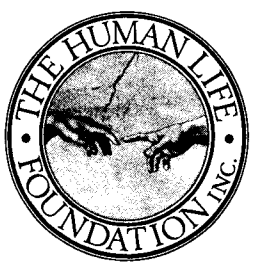
the HUMAN LIFE REVIEW



WINTER 1983

Featured in this issue:

Also in this issue:

Senator Jesse Helms • Judge Robert H. Bork • Dr. Anne Bannon
Ann O'Donnell, R.N. • Dr. Alan A. Stone • Rabbi Seymour Seigel

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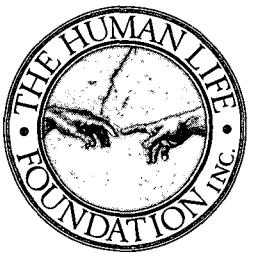

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. . . FROM THE PUBLISHER

With this issue we mark the start of our 9th year of publication. A remarkable feat when you consider that 1982 was not a banner year for the "life" issues. But we have shown an extraordinary resiliency and, with your help, continue to grow. Also, if you will permit us to crow a little, we have clearly become "the source" for the publishing and education areas of the anti-abortion movement. More and more pro-life publications are appearing, many of them asking the *Human Life Review* for permission to reprint past articles. A feather in our cap, surely. We realized from the first that publishing would become a major factor in the movement, and a journal to bring forward the best available arguments a necessity. (It also speaks well of our contributors.)

Last year at this time we announced the establishment of the Human Life Press with the publication of Ellen Wilson's *An Even Dozen.* This year, we take great pleasure in announcing the publication of the second book with the HLP imprint, *Single Issues,* by Joseph Sobran. It is a collection of his essays (all of which first appeared in this Review), and is now available (at $12.95 per copy) directly from the Human Life Press (see inside back cover for details).

In Mr. Muggeridge's account of his conversion to Catholicism (Appendix A) he gives much of the credit to Mother Teresa and the effect she has had on his life. For those of you who are not familiar with it Mr. Muggeridge has written a book, *Something Beautiful for God* (Harper & Row Publishers, Inc., 10 East 53rd Street, New York, N.Y. 10022, $7.95), which provides the best-available account of this remarkable woman and her work.

All previous issues (and bound volumes of the years 1975-82) remain available; see inside back cover for details. We also have available *An Even Dozen*, at $10 per copy. Finally, *The Human Life Review* can be gotten 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

INTRODUCTION

WITH this issue we begin our ninth year of publishing; we also note the tenth anniversary of the U.S. Supreme Court's *Abortion Cases* (handed down on January 22, 1973), which provided the *raison d'être* for this review.

Fittingly, we begin with another fine essay by Mr. Joseph Sobran. He contributed to our first issue, and almost every one since then; he has, by now, written as much—and perhaps thought more—about the abortion dilemma than anyone else we know. You will note that he wastes no time going to the heart of the matter with his opinion of at least one beneficial result of the Court's abortion-legalization *fiat*: "More than any other Court decision in our history, perhaps, it stimulated a wave of reassessments of the Court's role and powers." Sobran then proceeds to give you his own powerful assessment, concluding that we should no longer pretend that we live under the basic law that was propounded by the Founding Fathers and ratified by our nation—that, constitutionally speaking, "we are living in sin."

Mr. Sobran makes another point which we think has been largely overlooked: if the Congress has "the constitutional *power* to limit the Court's excesses, then it also has the *duty* to do so"; whereas the current "pretense" is that the Congress has a duty *not* to exercise this constitutionally-mandated power "no matter how wildly the Court's rulings defy morality, reason, tradition, and common sense." We expect to have more on this subject in coming issues.

Then the Reverend Francis Canavan, S.J., contributes a droll story which, as it happens, concerns another of the Court's bizarre actions. We nominate the good Father's lead here as probably the funniest single paragraph we've ever run, and have no doubt that, if you read *it*, you will

devour his entire description of a whimsical case that richly deserves the account he gives of it (would that his brief were twice as long).

The next brief essay returns us abruptly to sober discussion of what the Court wrought in *Roe* v. *Wade*. Indeed, John Baker, Esquire, focuses on many of the same problems that trouble Mr. Sobran, albeit from a quite different viewpoint. But we hope that you will read the two pieces in tandem (despite the fact that we couldn't resist inserting Father Canavan's piece between them, as a delightful change of pace). Together, they raise a good many important questions that deserve not only thoughtful attention but also some positive action, such as Mr. Baker's suggestion that the Court be required "to abide by the Constitution."

Well, having aired some of our many disputes (and had some fun) with the High Court, we make another abrupt turn, to another of our familiar concerns, the family. Professor Thomas Molnar is well-known as a teacher and writer—he is a *thinker*, really, but that honored title is nowadays usually applied only to those who think the same things; Mr. Molnar has quite distinctive ideas. Here, he explains why the much-discussed "destruction of the family" is "not a haphazard, piecemeal" affair but rather the prime goal of those ideologues who would remodel us all. It is certainly an argument that will jolt the complacent, and we are happy to have it (and Mr. Molnar, at long last) in our pages.

But let us assume that you find the notion of the *deliberate* destruction of the traditional family too, well, diabolical (we don't); you will still have to deal with Mr. Allan Carlson's well-documented point that much harm *is* being done to families—and the health of our society—by some quite mundane governmental actions. Specifically, the laws that once buttressed families (and made *large* families economically possible) have been turned around: they now work *against* the "nuclear" family—just look (Mr. Carlson provides the statistics) at what's happened to the tax laws, etc. And he too lays the blame on the kind of *ideological* nostrums that Mr. Molnar describes. Here again, the two articles go very well together, and call for action while there remains time to act.

Also again, the reader may appreciate a refreshing change of subject, and we have just the thing handy: another fine article from Professor R.V. Young, the young scholar whose first piece in these pages was the memorable "Taking Choice Seriously" (HLR, Summer 1982). This time, he discusses subjects dear to him (he currently teaches "English" at a Southern University), but *not* to all too many of his students. There is much humor here, however sad, and much more for the serious citizen to ponder. For instance: "The illiterate hedonist is an ideal subject for the

omnicompetent welfare state"—a clear echo of Mr. Molnar's thesis, we'd say. (All these years, we've amazed ourselves at how often our "different" articles produce tones in unmistakable harmony with our "regular" themes.)

Saving the best for last is another thing we've often indulged in: this time, as a kind of Ninth Anniversary present to ourselves, we run once again "the Slippery Slope," by that good man (and incomparable vendor of words, etc.) Malcolm Muggeridge. Originally a speech given to a Canadian anti-abortion group back in 1977, the author reworked it for us, and it first appeared in our Fall, 1977 issue. It is thus "dated" in a few particulars, e.g., the "some three years" of legalized abortion has stretched into a decade *via* those millions of "safe, legal procedures." And we should perhaps note that the Beethoven "family history" is in fact accurate. What we're sure we need not do is urge you to read Mr. Muggeridge—you will, of course.

Indeed, you can read him twice in this issue. He recently sent us an article done for the London *Times*, on the occasion of his (and his wife Kitty's) reception into the Roman Catholic Church, which he ascribes in part to his strong feelings about abortion and related issues. That is in part why we print it here as Appendix A; the other (main) reason is, that it is a testament of faith so beautifully written that we couldn't resist including it in our permanent record (call it another anniversary present, if you will).

Appendix B is something else we couldn't resist, and it brings us right back to the Supreme Court and abortion. It is an article by Dr. Alan Stone (then, as now, a professor of both medicine and law at Harvard) which was written *very* soon after *Roe* v. *Wade*; it first appeared in a medical journal (intended for doctors) on April 30, 1973. We consider it a remarkable example of the "shocked disbelief" the Court engendered, even among those who supported legalized abortion. It certainly makes fascinating reading now, ten years after.

Appendix C is a recent discussion of the proper role of the courts by Judge Robert Bork, who is not only a highly-regarded legal scholar but also (in the opinion of many) a likely nominee, in due course, for the U.S Supreme Court. Naturally, this prospect heightens the general interest in the judicial philosophy he outlines here.

Appendix D also concerns the Court and abortion, being a kind of public *amicus curiae* brief to the Court *in re* new abortion cases now pending (at this writing). The authors are both medical professionals (Dr. Anne Bannon is a pediatrician, Mrs. Ann O'Donnell is a registered

nurse) who have long been involved in the abortion controversy.

Appendix E is another document which we believe should take its honorable place in our continuing record. As our constant readers will remember, this journal first published Mr. Stephen Galebach's original proposal for a Human Life Bill (HLR Winter, 1980) that became the focus of extensive debate—and controversy—both in the Congress and elsewhere, culminating in the attempt by Sen. Jesse Helms (Republican of North Carolina) to bring a variation of the bill to a Senate vote last year. A "liberal" (i.e., pro-abortion) filibuster prevented any vote, but not Mr. Helms' strong arguments, which we reprint here exactly as they appeared in the *Congressional Record.*

Appendix F is another important document, which stresses a point too often lost in the abortion controversy: that Judaism (never mind what many American Jewish organizations say) maintains its ancient and *strong* "bias for life," as Rabbi Seymour Seigel describes it most tellingly here.

Our final item (Appendix G) probably should have been "F"—surely the grade due the "student" of Professor Young who submitted it to him (and him to it)? We hope it provides a final and welcome touch of amusement to what we admit is one of our more densely-packed issues. We'll try to make our next (Spring) one appropriately lighter.

J. P. McFADDEN
Editor

The Constitution: A Naive View

Joseph Sobran

In 1973 SEVEN MEN struck down the laws of fifty states, and affirmed that the U.S. Constitution implies a right of privacy that precludes any legislation forbidding abortion. The ruling was attacked as woolly-minded even by many legal scholars who personally opposed any abortion ban; for instance, John Hart Ely of Harvard Law School.

This summary action raised the question whether the Supreme Court itself had summarily aborted the process of self-government. Right or wrong, the ruling was controversial, not only in its consequences for millions of human beings, but in the boldness with which it ascribed to the Constitution an unheard-of inference from a constitutional "right" of privacy that itself was inferential. More than any other Court decision in our history, perhaps, it stimulated a wave of reassessments of the Court's role and powers.

I should stress at once that I am no constitutional scholar. In what follows I mean only to sketch out a view of the Constitution and the Court that seems to me to leap out from a basic acquaintance with our founding documents and our national experience. Since I have not seen it elsewhere, I submit it for the consideration of wiser and more learned heads. I confess that inasmuch as it seems to me a common-sense view, I am humbly curious as to why it seems to be mine alone!

My starting-point is a pair of well-known facts about the position of "Publius" in *The Federalist*. (I shall for convenience refer to him as if he were one wholly consistent author.) We all know that Publius a) favored (in No. 78) judicial review but b) opposed (in No. 84) the addition to the Constitution of a bill of rights. These facts are, as I say, familiar, but they have been taken together far less often than they might be.

Nowadays we tend to think of judicial review *primarily* as the

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Joseph Sobran, our long-time contributing editor, can and does write about almost everything.

judicial act of detecting in a legislative act a transgression of the Bill of Rights. But what if there *were* no Bill of Rights? What then? What form would judicial review take? If he didn't want to see a bill of rights enacted, what did Publius expect the Supreme Court's role to be? On what grounds would it find a legislative act unconstitutional?

He might have meant simply that the Court would be on hand to defend the right of habeas corpus or to strike down *ex post facto* laws, in the event that Congress were to fly in the face of such obvious provisions in the body of the Constitution. But this seems unlikely. First, because Congress would hardly dare pull such a coup against the provisions in which its own powers are set forth. Second, because such a coup would hardly present a problem of judicial interpretation, and certainly not a problem against which a mere opinion from the bench would prove effective. Third, because an entire branch of government would hardly be necessary for the sake of such emergency contingencies.

The real clue to Publius's intentions lies, it seems to me, in the word "encroachments." We need only to recall his many warnings against the "passions" of "faction" and "the spirit of encroaching power." He is at pains to assure his readers that the judiciary "may truly be said to have neither FORCE nor WILL, but merely judgment," and "can take no active resolution whatsoever." (The word "active" strikes an ironical note for us, accustomed as we are to hearing paeans to the "activist" role of the modern judiciary.)

Plainly—it *is* plain, isn't it?—Publius sees the Court's role as one of *checking* power. And the principal power it would have to check would be the power of Congress.

It is worth remembering Publius's argument against a bill of rights. His main line of argument is that a list of personal rights makes sense under a system in which sovereignty resides in, say, a king, but not where the people themselves are sovereign. Under an absolute monarchy, for instance, the people may gain rights (as in the Magna Carta) by wresting from the monarch a series of stipulated exceptions to his general power. But he points out that under the new Constitution, the government is to have only such power as the people themselves delegate to it. No unlimited power exists such as would warrant a limited list of rights. Bills of rights, there-

fore, would be bound to contain "various exceptions to powers which are not granted." So "why delcare that things shall not be done which there is no power to do?"

Any bill of rights, Publius goes so far as to say, would actually be "dangerous," since it would "furnish" to "men disposed to usurp," a pretext for assuming precisely the sort of unlimited (and, we may perhaps add, "un-American") power that is not, under the Constitution, presumed to exist. In America, to put it briefly, freedom is the rule, and power the exception—a reversal of European monarchical systems. A bill of rights would only serve to confuse this fundamental principle of self-government.

Publius's point carried so much weight that it formed the basis of the Ninth and Tenth Amendments, which affirm that a) even though a bill of rights has been added to the Constitution, it does not constitute an exhaustive enumeration of rights "retained by the people," and b) the powers not delegated to the federal government are reserved to the states and the people.

Unhappily, these two amendments are no longer taken seriously. Logically they are actually prior to the first eight amendments, but nobody seems to notice. Publius's worst fears have come true.

About the Tenth Amendment there has been needless confusion. An older understanding of the Constitution held that the federal government had only those major powers *expressly* delegated to it. Liberal advocates of expanded government have done their successful best to slur this point, but it is clearly Publius's view. "[Federal] jurisdiction," he says plainly in No. 39, "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." In No. 45 he is equally emphatic: federal powers are to be "few and defined," leaving all others, "numerous and indefinite," to the states.

As for the "general welfare" clause, which has been leaned on so heavily in recent decades to justify the creation of new federal powers, Publius (in No. 41) is simply contemptuous of the argument that it could ever be used in this way; he sneers that the anti-federalists only betray their desperation by seeing in it the possibility of abuse: "No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction." He points out that the sentence in

question, taken whole, plainly refers to the *raising of money* for "the common defense and general welfare"—which is to say, the general welfare so far as the federal government is enabled to promote it under the "enumeration," "definition," and "specification" of its powers in the neighboring passages of the Constitution. It would have been needless to list those powers, he adds, if the Constitution had, *per impossibile*, meant to constitute "an authority to legislate in all possible cases." If the Constitution meant to confer so unlimited an authority, why bother to specify powers so narrow as, e.g., the power to build post offices and post roads?

This is the typical note of Publius and of the Constitution in general: specification, definition, enumeration. *Precise* powers were sought (and conferred). Any act of Congress *ultra vires* would therefore be unconstitutional, an "encroachment," and a candidate for judicial nullification. Absent a bill of rights, that was where judicial review would enter the picture. This explains why, as Willmoore Kendall has put it, the Tenth Amendment expresses "the theory of the Constitution" in a nutshell.

A nutshell that has been tossed away. For although this reading of the original constitutional system seems clear to me, it is at any rate clear to all that this is *not* a description of the system under which we now live. The Supreme Court almost never strikes down federal legislation on grounds that it exceeds the mandate of Congress. If it did, we would have no Department of Health and Human Services, no Department of Education, no Social Security Administration, . . . We would have very little, in fact, of the present structure of "social programs." Not only the Tenth Amendment but the essence of Article I, Section 8 has fallen into oblivion. And if they are ever recovered, it will not be by the insistence of the Supreme Court as we now know it.

The salient fact about the Supreme Court today is that it very seldom acts as a check on the tendency to centralize power in the federal government. On the contrary. It is itself an *agent* of centralization. For every act of Congress it strikes down, it strikes down dozens of state laws, local ordinances, and school regulations.

The Court's current role derives from the Fourteenth Amendment, hardly at all from the original plan. More precisely, it derives from the "incorporation" theory of the Fourteenth Amend-

ment, a theory that has sprung up, essentially, since 1925. According to this now-prevalent theory, the Fourteenth Amendment makes the rights enumerated in the first eight amendments binding on the states. The novelty of the last two decades, including the Court's ruling in *Roe v. Wade*, is to apply even the Ninth Amendment to the states, through an exercise of truly tortuous (and utterly specious) reasoning. Thus the *unenumerated* rights, whatever they may be, remaining with the people are to be enforced *against* the states (and localities) *by* the federal government. This represents the very inversion of the principle of self-government Publius asserts: the principle that there shall be no general sovereignty of government (particularly the national government) over the people. The new, virtually unlimited power exercised through the Court as well as Congress assumes, in its judicial guise, a constitutional concern for our now-undefined "rights" as improvised by the Court.

It was Kendall who most succinctly posed the problem raised, but not at all solved, by the incorporation theory: does the Fourteenth Amendment repeal the Tenth? There is no historical evidence whatever (as far as I know) that the framers of the Fourteenth intended it to do so, that the possibility of its having the effect of doing so ever so much as crossed their minds. They assumed that they were adding to the Constitution, not subtracting from it.

At this point we are bound to ask: What has happened? The jurisprudence that has been used to justify the Court's new "activist" role has lately come under withering attack, especially since *Roe*. Even Ely, today's foremost advocate of activism (of a sort), has abandoned the old defense of incorporationism.

We have enough historical perspective on the Warren Court by now to say, I think, that the Court has been ideologized, that it has become obsessed with what Alexander Bickel called "the idea of progress," that it has tended strongly to read a "progressive" agenda into the text of the Constitution; and, even more important, to ignore all the constitutional obstacles to the creation of unenumerated federal powers. In the era of liberal hegemony in Congress and the media, it pulled a daring series of judicial coups simply because it knew it could get away with it; could count on

congressional acquiescence and favorable publicity for each of its "historic" decisions.

Besides sheer popular ignorance of the Constitution (except in such disreputable quarters as Southern congressional chairmanships, whose opposition could be laid to the mania for segregation), the Court has enjoyed the benefit of a gentleman's agreement that it would be permitted to take an "active resolution" in areas where liberal congressmen preferred not to vote if voting could be avoided: abortion, school prayer, racial busing, pornography, and the like. If the Court could provide a "constitutional" rationale for its blows for progress, without implicating Congress, why, Congress would go along, piously disclaiming responsibility or "interference" in the Court's constitutional "role" of "interpreting" the Constitution, under the hallowed principle of the "separation of powers." No decent congressman approves of X-rated movies; but if the Supreme Court says they are "protected" by "freedom of expression," it is not for Congress to butt in against the Bill of Rights.

The Court, it should be stressed, has been discreet about challenging Congress, which, in a pinch, can fight back—as states and localities can't. And so federal power has grown, and grown, and grown, by order of the (selectively activist) Court.

The new wave of conservatism has brought in a new body of congressmen who are at last willing to assert congressional prerogatives against the runaway judiciary. They have been, predictably, damned for presuming to "tamper" with not only the Court but the Constitution itself, which is held to be identical with what the Court says it is. Senator Max Baucus of Montana, a liberal Democrat, has assailed the "court-stripping" moves of colleagues like Jesse Helms.

Yet the "court-stripping" power of Congress is mentioned expressly in Article III, Section 2, wherein the Court's appellate jurisdiction is made subject to whatever "exceptions" and "regulations" Congress sees fit to impose. Judicial review, like so many liberal shibboleths, is not mentioned at all. It appears that the framers were willing to *allow* judicial review, but only provisionally, arming Congress with weapons sufficient to counteract any "active resolution" it disliked for any reason.

It would be strange if it were otherwise. Despite all talk of the "balance of powers" that would be "upset" by curbing the Court, a system in which one of three branches can unilaterally impose vast social changes, without any workaday check by the other two, is anything but balanced. Congress would hardly have allowed its own prerogatives to sleep so long if it had not had an interest in doing so—just as the "imperial presidency" was tolerated, even celebrated, while Congress found the incumbents congenial. It took Richard Nixon to call forth the constitutional anxieties of liberal opinion.

As things have stood, Brent Bozell has pointed out, Supreme Court rulings have had virtually the force of constitutional amendments; a point underscored by the Court's current defenders' insistence that the proper way to reverse an "unpopular" ruling is by the amendment process. This is a ludicrous prescription. Congress itself has a duty to uphold the Constitution, and this doesn't mean, and cannot mean, simply giving the Court its head at every turn, while requiring a virtual popular uprising to impose restraint.

If Congress has the constitutional *power* to limit the Court's excesses, then it also has the *duty* to do so. The confidence game has been the pretence that Congress has a duty *not* to exercise any such power; that it must accept the Court as the incontrovertible oracle of constitutional meaning, no matter how wildly the Court's rulings defy morality, reason, tradition, and common sense.

The Constitution is, after all, a highly accessible document, as it was meant to be. It expresses the Enlightenment faith in a universal human rationality, the very rationality that makes possible personal freedom and collective self-government. Its recent mystification under the rubric of judicial expertise, would have struck the framers as monstrous; as it is.

John Marshall's argument for judicial review succeeds only up to a point. As Carrol D. Kilgore observes in his brilliant but neglected book *Judicial Tyranny*, Marshall's logic can be turned against the Court itself. If an act of Congress conflicting with the Constitution must fall, then so must a faulty judicial reading of the Constitution. Kilgore applies this insight to the rule of *stare decisis*, which, in common law, means simply that judges must abide by precedent, but which, in constitutional law, has meant that the

whims of the high Court itself assume quasi-constitutional status. Kilgore contends that by Marshall's own logic judges in the lower courts must be free to prefer their own understanding of the Constitution to Supreme Court precedents. He writes:

> No judge, carefully considering the words of his oath of office, can conclude on the basis of reason that he is either obligated or permitted to support and defend some other judge's ideas as to the meaning of the Constitution, when the judge finds those ideas completely opposed to the results of his own thoughtful study.

Courts properly rule only on the merits of the case at hand; to the extent that their rulings are made binding on other courts, they are not adjudicating specific cases but making general laws—which is not the function of a court. The force of precedent under *stare decisis* obviously arms the Supreme Court with something more powerful than the mere "judgment" which Publius calls its sole weapon. (Lest it be thought that Kilgore is simply hostile to the Court, he stresses that his approach would give more influence to well-reasoned dissenting opinions of the justices.)

Marshall's logic extends the right and duty of constitutional interpetation to Congress. If the Court parts company with the Constitution, Congress must act. So far the only remedy against judicial abuse has been mutterings about "restraint," usually from dissenting justices in moments of defeat, and meaning only self-restraint rather than structural restraints from outside the offending body.

It is clear that we can't depend on self-restraint. Publius's whole philosophy of government holds that power must be checked by power, one institution restraining another reciprocally. The Constitution clearly provides for this; only Congress isn't willing to assume its role in the process.

Even conservative members of the Court, including preeminently the most serious of them, William Rehnquist, have not raised the fundamental question whether we have fundamentally corrupted the original system. In all likelihood it is simply too disturbing a question to ask. What if the entire federal government *has* been acting unconstitutionally for decades? If so, the Court is even guiltier than Congress. And if the court were now to reassert the original principles of Publius, would it not thereby undermine its own

authority in the very attempt to correct itself, much as the Pope would undermine papal authority by reversing his predecessors' pronouncements? Would the Court even dare reverse itself on specific issues, like abortion?

If I am right, then we are left with the conclusion that Publius's system has already been so seriously damaged that it may be, politically, beyond recovery. We all know that something is very wrong; the current movement for a new amendment requiring a balanced budget and setting a top limit on taxation strikes me as a somewhat desperate stopgap that seeks to limit the size of the federal government crudely, quantitatively, since the structural and qualitative limits signified by the Tenth Amendment no longer exist.

The new amendment may be desirable. The pity is that we have been driven to it. The old Constitution so glibly praised for all the wrong reasons (those who call it a "living document" apparently think it grows like a fungus, formlessly) was and remains a most beautiful plan. I seriously doubt that we can ever restore it now. At most, the new amendment will control congressional spending without at all confining the federal government to its enumerated powers, or impelling judicial reform.

We arrive, for all I can see, at an impasse. Should we even go on pretending we live under the same Constitution we ratified in 1789? Not, I am inclined to say, if it means accepting more and more "progressive" impositions in the name of that Constitution. But what is the alternative? Perhaps an *ex post facto* amendment to legitimize the deformations?

There, alas, I must leave it. I have set forth my view: we are living in sin. I almost hope I am wrong, for the sake of the future. But it would be a treason to the past—a very glorious past—for me to pretend to hold a different view of the present. My only task has been to tell what I think is the truth. Someone else will have to find a happy prospect in it.

The Girl in the Glass Box

Francis Canavan

IMAGINE, IF YOU WILL, that you are kidnapped, hustled into a plane, and flown for many hours, in what direction you do not know. In the middle of the night you are equipped with a parachute and shoved out into the dark. You come to earth on a brightly lighted street in a foreign city. The signs you read and the words you hear people speaking are in a language that is completely strange to you. Then your eyes light on a display of pornography. Would you not exclaim: "Thank God, I'm in a liberal democracy!"

Of course you would, for you know, as we all know, that pornography is the hallmark of the modern democratic state, the outward sign with which we distinguish the substance of liberty from tyranny. Liberals will lay their hands upon their hearts and assure you that, while as mature and sophisticated adults they have of course seen *Deep Throat* and read *The Story of O*, they found both these works of art boring and that their firsthand acquaintance with pornography is in fact very limited. Nonetheless they will fight to the death for the pornographer's right to produce the stuff and the customer's right to buy it, because they know that it is the foundation stone of liberty. If it crumbles, the whole edifice of freedom collapses.

The thinking that leads to this conviction is admirably illustrated by the opinion of the U.S. Supreme Court in the Case of the Girl in the Glass Box (*Schad et al. v. Borough of Mount Ephraim*, 452 U.S. 61) which was decided on June 1, 1981. Justice Byron R. White wrote the opinion of the Court, and students of his earlier opinions in First Amendment cases may find his views here somewhat surprising. But, although Justice White is a very intelligent man and ordinarily says intelligent things, he is a judge and as such is bound by precedents. Presumably he felt that the prece-

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dents dictated the conclusion at which the Court arrived here. *Stare decisis* is a sound rule but it does exact a price.

But let us turn to the facts of the case. The glass box was located in an "adult" bookstore in Mount Ephraim, N.J., a small dormitory suburb lying between the cities of Philadelphia, Pa., and Camden, N.J. The bookstore in question sold "adult" books, magazines and films and also had, in the Court's words, "coin-operated devices by virtue of which a customer could sit in a booth, insert a coin and watch an adult film." At a later date it installed a similar device that allowed the customer, by inserting a coin, to watch a young woman dance in the nude in the glass box. How long he got to watch her is not mentioned in the Court's opinion but a report in the New York *Times* (Feb. 10, 1981, p. B6) on the flourishing sex industry in New York City states that in a similar establishment off Times Square, one coin bought "about 60 seconds of viewing." Mount Ephraim may have been more generous than the Big City—small towns usually are—but the viewing time bought by one coin was still doubtless short. Those who wished to view longer could, of course, insert more coins.

The installation of the glass box led to the prosecution of Messrs. Schad et al., owners of the bookstore, and they were fined in the municipal court for violating Mount Ephraim's zoning ordinance, which forbade all live entertainment in the area zoned for commercial use. The State courts upheld their conviction on appeal, and the U.S. Supreme Court then took their case for review. "Their principal claim," as that Court stated it in its opinion, "is that the imposition of criminal penalties under an ordinance prohibiting all live entertainment, including nonobscene, nude dancing, violated their rights of free expression guaranteed by the First and Fourteenth Amendments of the United States Constitution." On the issue thus defined, Mount Ephraim lost and its zoning ordinance was declared unconstitutional.

Mount Ephraim evidently had made a rash attempt to prevent the kind of entertainment going on in the glass box by laying down a blanket prohibition of all live entertainment in its commercial zone. Its real and deeper fault, however, was to overlook the essential difference between nonobscene nude dancing and obscene nude dancing. The latter is a distinct legal category. There seem to be no

known examples of it but we may be sure that if the municipal authorities ever should discover a certifiably obscene nude dance being performed in Mount Ephraim, the Supreme Court would agree that it was *not* protected by the First and Fourteenth Amendments. In the meantime, the Court will regard nude dancing as nonobscene and protected against heavyhanded efforts to ban it.

But, some quibbler will ask, how do we know just what was going on in the glass box? The Court did not address itself to this question (the most interesting facts in this case are the ones that the Court leaves out of its opinion). Since I have not myself made the journey to Mount Ephraim and inserted the requisite coin in the glass box, I cannot pronounce apodictically on what was going on inside it. But it seems a safe assumption that the young woman was not doing solo numbers from *Giselle* or *Swan Lake*. More likely, she was simply gyrating or, when she got tired of standing in one place, prancing about in the nude.

Was this, in any proper sense of the term, dancing? Again, the Court did not say and it is easy to understand why it did not. After all, a Court that cannot decide when human life begins will hardly venture to determine the point at which mere physical motion becomes dancing. The presumption therefore had to be that the girl was dancing.

Since she was dancing, she was engaged in "expression" and "communication." What was she expressing, what message was she trying to communicate? There is no hint in the Court's opinion that any one thought to ask her (and she might have been astonished if the question had been put to her). I do recall that when the Court of Appeals of the State of New York struck down as unconstitutional a law prohibiting nude and seminude "dancing" in barrooms, a newspaper reporter asked one of the dancers for her opinion. "Listen," she said, "there are a lot of sick guys out there, and it's better they should be in here looking at me than outside molesting women." Your professional nude dancer, untutored in the law though she is, and surely innocent of any knowledge of sociology, sometimes has an earthy realism that would repay study by the members of the Supreme Court. The Justices, however, did not ask what the girl in the glass box was doing or thought she was

doing, and were content to argue from the Cartesian premise, "I dance, therefore I express myself."

They were thus able to wrap the girl, if we may so phrase it, in the mantle of freedom of expression which, as everyone knows, is guaranteed by the First Amendment. It is true that the Amendment does not use the term, "expression." Instead it says: "Congress shall make no law . . . abridging the freedom of speech, or of the press." The Amendment, therefore, in its own terms, guarantees the freedom of speech and press, and a careless reader might jump to the conclusion that the framers of the Amendment intended the right to utter and to print *words*. He might also conclude that the use of words is protected only against abridgement by Congress, not by the States or municipalities. But this would only betray the reader's ignorance of constitutional law. This, as fashioned by the Court in a long line of precedents, tells us that "the freedom of speech, or of the press" in the First Amendment really means "freedom of expression," and that, through the Fourteenth Amendment, this freedom is protected equally against infringement by the national, State, or local levels of government.

We thus move through a series of abstractions: nudity, as such, is not obscene; nude dancing is nonetheless dancing; dancing is a form of expression or communication; freedom of expression is the meaning of the freedom of speech or of the press in the First Amendment; and the First Amendment binds every government in the country. As we progress through these abstractions, the concrete reality which is the subject matter of the case drops out, i.e., the girl in the glass box. The Court thus puts itself in the position of the judge who will not allow himself to know what everyone knows. As Chief Justice Burger said in his dissenting opinion, in which Judge Rehnquist joined him,

> the issue *in the case that we have before us* is not whether Mount Ephraim may ban traditional live entertainment but whether it may ban nude dancing, which is used as the "bait" to induce customers into the appellant's book store. When, and if, this ordinance is used to prevent a high school performance of "The Sound of Music," for example, the Court can deal with that problem.

The Court's answer to the Chief Justice was that the issue was the constitutional validity of a zoning ordinance which on its face

would ban "The Sound of Music" as well as nude dancing because it prohibited all live entertainment. If the ordinance adversely affected a mere property interest, the Court said, it might well stand as an exercise of "municipal power to control land use." But this ordinance could not be allowed to stand because it "totally excludes all live entertainment, including nonobscene nude dancing that is otherwise protected by the First Amendment."

But to say this is only once again to subsume the girl in the glass box into an abstraction. The reality with which the case was concerned, as the Court itself described it, was a peep show and nothing but a peep show. In the key move in its opinion, on which all else depended, the Court chose to turn the peep show into a form of expression protected by the First Amendment and equally entitled to protection with all other forms of expression. On this premise our most fundamental democratic liberties are supposed to stand.

That is why pornography prevails throughout the democratic world. The writ of the U.S. Supreme Court does not run beyond our borders and one cannot attribute to its decisions the flourishing state of pornography in other countries. But the reasoning is everywhere the same: freedom of expression is a seamless robe, and we cannot pull one thread out of its fabric lest the whole garment should unravel. Expression is expression is expression, and all forms of it stand or fall together. This conviction has little to do with devotion to democracy, for there is no reason to believe that the successful operation of democratic institutions depends on the availability of peep shows. It really rests on the liberal belief that all expressions ultimately express tastes and preferences, all of which are equally entitled to protection because they are all equally subjective.

It would be cynical to see in the liberal view a desire to buy off the masses with a mindless freedom of expression in order to win their submission to the yoke of ever-increasing state regulation of the rest of their lives. It is kinder and probably more just to assume that liberals really believe what they say. The question is whether the rest of us should believe it.

The Continuing Constitutional Crisis

John S. Baker, Jr.

THE CONSTITUTIONAL CRISIS over civil rights, which almost came to a climax in the last session of Congress, remains very much with us. The chief characters, however, have reversed their historical roles.

It is a southerner, Senator Jesse Helms, who is championing the cause of the latest "discrete, insular minority," the preborn. Liberal senators, usually seen searching for the poor, the weak, the defenseless, have fled instead to the infamous filibuster.

This is not to say any newspaper or television report is likely to describe Senator Helms as the leader of a "civil rights" movement, any time soon. The popular media have chosen to characterize abortion, like prayer in schools and busing, as merely a "social issue."

The label "civil rights" is reserved for worthier causes. Guardians of the public orthodoxy do not lightly bestow such an honorarium. To characterize a cause as one of "civil rights" is to confer respectability, to intimidate elected officials, and to ostracize the opposition. The label "social issue" carries no such moral authority; indeed, it relegates a matter to a rank below even economic issues, which themselves are no match for "civil rights."

Today's molders of opinion are as neutral in classifying certain causes under civil rights as once southern states were "color blind" in classifying certain voters under a literacy test. Not since the *Dred Scott* case, however, have the racial biases of some influenced the controversial areas of constitutional law quite to the extent that the anti-traditional biases of some do today. Only the vagaries of opinion among members of the popular and scholarly media, not constitutional law, can account for the creation of a "right to abortion" in *Roe* v. *Wade*.

Legal scholars—many personally in favor of abortion—have

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almost universally condemned *Roe* as a perversion of the Constitution. Ironically, many of these same legal scholars must share in the responsibility for *Roe* because it represents the logical extension of the reigning theory of sociological or legal realist jurisprudence which, in the most controversial cases, reduce the Constitution to a Gallup poll presided over by judges.

As Supreme Court doctrine has constitutionalized intellectual fashion in an assault on traditional values, the "social issues" movement has risen in rebellion. The movement's show of strength in the 1980 elections, in turn, has motivated the opinion-makers to escalate their rhetoric and to enlist reinforcements.

In 1981, as prospects improved for passage of legislation to restrict federal court jurisdiction, the legal establishment, led by the American Bar Association, mobilized against any Congressional attempt to rebuke the federal courts. In apocalyptic language, once thought reserved to evangelical preachers, law professors, former attorneys general, and leaders of the bar warned of threatening the independence of judges, subverting civil liberties, and overthrowing the rule of law under our Constitution.

Actually the subversion of the Constitution was more or less complete before 1981. This had taken place over a number of years during a "continuing constitutional convention," in which activist lawyers, law professors, judges, and other cognoscenti participated, but to which the electorate was not invited to send representatives. In all of this, Congress generally was a silent partner, occasionally making noises for the "folks back home," but largely ignoring its responsibilities to oversee those matters designated, under our theory of separation of powers, as essentially legislative.

The doctrine of separation of powers produces a tension among the branches of government which inevitably sparks confrontations. This fact alone should answer the argument which equates opposition to the Supreme Court's view of the Constitution with armed revolution. If not, our political history certainly exposes the expediency of the argument.

Presidents Jefferson and Jackson, successors of the Anti-Federalists, were among the most prominent opponents of the doctrine of judicial review enunciated in *Marbury* v. *Madison* (1803). Nevertheless, their political heirs alternately have embraced the

Supreme Court in defense of *Dred Scott*, rejected the Court during the New Deal, and in recent years rededicated themselves to defending the Court. The arguments remain the same; only the positions of the partisans change.

Another confrontation with the Supreme Court, building now for some time, may be necessary in order to restore the balance of powers in government. This implicates a concern not only for passage of certain controversial legislation, but also for a re-examination of our governing document in the context in which it was passed—particularly apropos as the bicentennial of the Constitution quickly approaches.

Those who drafted, passed, and initially construed the Constitution would wonder under what rubric federal judges today presume to do the things they do. Admittedly the Anti-Federalists, in opposing the Constitution, predicted the federal judiciary would abuse its power. Nevertheless, early proponents of judicial review would be incredulous to learn judicial review, enunciated as a necessary corollary to a written constitution of limited powers, has become the justification for the exercise of unlimited judicial power.

Even many so called "conservative" or "strict constructionist" legal scholars and judges, such as Robert Bork, have strayed far from the Founders' intentions. While opposed to an "activist" judiciary, they nevertheless accept uncritically the notion of judicial supremacy. They may distinguish between the Constitution itself and the decisions of the Supreme Court for purposes of academic debate. For purposes of government, the only purpose for enacting a Constitution, they nevertheless equate the Constitution with what the Supreme Court says.

Not even the strongest supporters of judicial review at the time the Constitution was approved or after *Marbury* v. *Madison* was decided would have accepted any notion of judicial supremacy. Neither Alexander Hamilton, arguing for ratification in the *Federalist*, nor Justice Joseph Story, articulating the constitutional theory for the Federalist court of John Marshall, equated the Constitution with what the justices say. Both understood judicial review in the broader context of separation of powers, which

shaped the entire document of the Constitution and bound the Supreme Court.

The poverty of our present public understanding about our governing documents is epitomized by pronouncements on behalf of the American Bar Association. Its chief spokesman against "anti-court legislation" has positioned himself with Lincoln on the *Dred Scott* case, contending Lincoln reluctantly accepted the *Dred Scott* decision as binding absent a constitutional amendment.

Much to the embarrassment of that august lobbying group, Lincoln's position was exactly the opposite. During his debates with Judge Douglas and in his inaugural in 1861, Lincoln insisted some few decisions of the Supreme Court so clearly conflict with the Constitution as not to be the binding law of the land, i.e., *Dred Scott*. He even stated: "If I were in Congress and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that *Dred Scott* decision, I would vote that it should."

In other words, Lincoln's position *vis a vis Dred Scott* was the same as Jesse Helms' *vis a vis Roe* v. *Wade*. The American Bar Association instead tracks the position of Judge Douglas's defense of *Dred Scott*:

> Whoever resists the final decision of the highest judicial tribunal, aims a deadly blow to our Republican system of government—a blow, which if successful would place all our rights and liberties at the mercy of passion, anarchy, and violence.

Lawyers, today as then, tend to equate reverence for the Supreme Court with respect for the Rule of Law. They are not synonymous. Abraham Lincoln, who in 1838 began to promote a reverence for the Constitution and laws as "the *political religion* of the nation," understood the difference. Should we not again dedicate ourselves to reverence for the laws by reasserting that difference and by requiring the Supreme Court to abide by the Constituion?

The Destruction of the Family

Thomas Molnar

IT IS BEST to put our subject in perspective at the beginning, the better to estimate more exactly later the phenomenon of the family's destruction in the western world. The perspective is needed in order to delimit specifically the type of "destruction" we will discuss, and which I call a "utopian procedure." There are, and always have been, families harmed by historical events, invasions, deportations, and certainly by human agents acting under what they would call the force of circumstances. What is new at present is the ideologically-motivated dismantling and de-structuring of the family. "Historical forces" as such have nothing to do with it.

Let me give two examples of families badly damaged by circumstances which, however terrible, I would call nevertheless "human." Many Nepalese families, from birth to death exposed to extremely harsh conditions in their native Himalayas, send their children to India to earn some money. In too many instances girls become servants and prostitutes, boys go to work in the mines. The latter hardly ever see the light of day. They are most wanted when they are small, so that they may drag bags full of coal and such through very narrow openings from one shaft to another. One is reminded of horses in the old mines which were blinded and spent all their lives in the labyrinth, pulling carriages along endless corridors.

So too the Nepalese children. They may never reach their own country again, and are lost to their families. UNICEF, "the Year of the Child," and other western bureaucratic inventions have no impact on their lives, except in a statistical sense: it is established, by what criteria I do not know, that there are some eighty million slave-children in the world. (I wonder if these include the little Egyptian girls who, like their Nepalese, Indian, Thai, and other counterparts, go from village to town when only eight or ten, to become domestics at bourgeois households, bear a child or two to

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the master or the young masters, and find themselves on the street before turning 13. If this is not destruction of the family, I do not know what is.)

Another illustration, from Africa. Once in South West Africa I had the occasion to visit a school-and-settlement for black girls, run by a German nun, Sister Leopoldina. She had spent 45 of her 68 years in Africa, educating girls whom entire tribes, following the chiefs, entrusted to her care. Her main problem was (the year was 1966) that poor families sold their daughters long before puberty to old and rich tribesmen who possessed up to a half-a-dozen of them, exploiting them sexually and sending them out to the field to work from morning to night. The child-wife may never have children from the old collective husband, she is tempted by younger men in the village, but when caught she is severely punished. Thus two families are harmed by this custom: the girl's original one who had sold her for a few pots and pans and a measure of cloth, and the one in which she lives under abnormal circumstances. (Sister Leopoldina's task consisted in teaching the girls useful occupations and the household arts, so that they may become good partners in a Christian, thus monogamous, marriage.)

Such are the historical, social, economic and cultural circumstances which damage families. However, they are products of life and of the human condition, not of calculated, "scientific" efforts and blueprints devised to reshape and restructure the fundamental unit of society and the warming, preparing environment that every individual needs. The two examples above describe vast tragedies for which, however, scheming minds bear no responsibility. What I am going to discuss now is a kind of laboratory experiment, and could be called less the destruction than the abortion of the family: nipping the family in the bud by taking over its functions, replacing and even abolishing it.

Not that the family has always and everywhere been identically structured. From the observations of Herodotus to the fascinating studies of Phillipe Ariés, from the extended to the nuclear family, researchers have turned up changing configurations, determined not only by religion, mores or economic conditions, but also by the size and arrangement of the dwelling: palace, hut, cave, caravan, or apartment. Even the Chinese family, perhaps the most tenacious,

undergoes stress and change, not only in the forced barracks-living in communes on the mainland—that can be sabotaged—but also in small modern apartments in the free world. In Singapore and Hong-Kong, oldsters are literally thrown out in the streets by their children who are unable to give them living space in the "one-and-a-half" modern flat in a highrise. However, Americans who place their old parents in questionably-run old-age homes ought not to cast the first stone.

What I suggested we call "the abortion of the family" is not motivated by circumstances but by ideology. The ideology: marxist, Skinnerian, radical-humanistic, or whatever, is based on utopian theories the argument for which is the following. Mankind is one, yet history shows it divided into nations, races, classes, religions, interest groups, families. All these aggregates gather around a selfish core, a fact which creates conflict, war, inequality, exploitation. But just as the sun shines equally on all (this is a much-used comparison and model throughout the history of utopias and utopian literature), and just as nature serves us indiscriminately (a false argument since some know better than others how to make nature serve), mankind's ideal objective must be the elimination of all such divisive factors. This must obviously begin at the foundation, the family, which is the model of all segregation. Once the family is dismantled and its members scattered, the rootless individual unit, without protection and without being promoted by "selfish parents," will become the creature of the community, a participant without second thoughts in the collective enterprise. Instead of, say, eight hours, he will devote sixteen to the collective interest, and thus enhance progress toward the ideal society. Not backed up by family ties, not rendered selfish by parental ambitions for his individual success, man will accept living among institutions shaped by the collective will. Institutions? No, because they too are divisive; only *one* institution, the State, or Utopia, or the Brave New World, or the World Empire, or World Government, the blueprint of which takes everything into consideration and whose gently and benevolently coercive force looks out for everybody's wellbeing.

The attack on the family is thus the foundation stone, if I may use this expression here, of all utopias. Since in the twentieth cen-

tury we live under more or less coherently proposed utopian systems, this attack has gone very far; but always behind the blueprints we find the whole traditional line of past utopias. The fact that the anti-family proposals come under two disguises—one is science, the other is the collective good—should not mislead us. The proponents may be in good faith, yet their postulates are anti-human, mechanistic, robotizing. They are also impelled by a strange passion, that of abolishing all passions because they create unforeseen obstacles on the way to the scientific and collectivistic paradise.

Utopian literature, past and present, is full of instruction on the control and curbing of the family. For example, some of last century's utopias suggested the removal of servants from the young child's home environment, arguing that these "primitive country people instil superstitions in the immature mind." We are better aware today of what was meant by "superstitions": one of the greatest enemies of the Soviet regime, after priests, are grandmothers, too old to work, staying at home, and teaching the child not only prayers, but also the old wisdom that the Party strives to uproot. (Incidentally, we have here a hint why utopian ideologues encourage euthanasia for the old: they are not only useless in the production process, they are also harmful in countering the indoctrination of youth).

Thus before abolishing the family, a long-range project, it must be controlled, and the agenda invariably begins with the control of sexual life by the supreme authorities and their ubiquitous agents. The most radical form of this supervision is of course to produce children *in vitro*, as so to exclude parental ties from the beginning—that is, to have the state as the only parent. In Aldous Huxley's *Brave New World* this is finally accomplished, the Greek-lettered beings are manufactured in alambics, according to a pre-calculated dosage of the ingredients. Today, it is instructive to read certain organs of the left-liberal press where we sense the jubilation each time that the so-called "riddle of life" is cracked and it is found that babies have just been fabricated in some scientist's miracle laboratory. Mere love of science does not explain this enthusiasm. What explains it is the hope that a "new man" may be brought into being who a) will be the exact outcome of the calcu-

lated ingredients, and not a chance-product with unpredictable impulses, and b) will be the easily manipulable product of scientific authority. While the ideological press—leftist and extreme-rightist, such as the neopagans—can only afford for the time being to jubilate quietly, communist regimes are freer to put the idea into action. In Mao's China and in Pol Pot's Cambodia, kindergarten pupils were taught that they could count less on father and mother than on the Party and its chairman. If in all communist countries after the daily work there is also "volunteer work" and hours of indoctrination sessions, it is not only to assert and reassert party-doctrine, but also to prevent family life, even the few precious moments during which the exhausted parents might be reunited with their school-indoctrinated offspring. (This was indeed the main reason, Chinese refugees told me in Hong Kong a decade ago, why they risked their lives and escaped. In Hong Kong they were willing to undertake the most wretched tasks, just to have their families around them in the undisturbed hours of rest.)

One cannot sufficiently emphasize the role of sex-control in utopian literature, a role that has nothing to do with pornography—on the contrary, utopian regimes are puritanical, anti-passion, anti-imagination, and generally against the pre-occupation with the opposite sex. But to achieve the purpose of ultimate sex-control, the existing society must be dissolved, among other things through moral collapse by excessive sexual indulgence. Blatant immorality and the "scientific" manipulation of sexual conduct go hand in hand. Again, two illustrations from utopian literature.

Cyrano's *Voyage to the Moon* (17th century) presents a scientifically-organized society in which couples are not authorized to mate before the State physician's nightly visit, prescribing or forbidding copulation, including the number of times it is permitted. In the next century, Diderot appended, without being asked to do so, a "Supplement" to Bougainville's voyage to Tahiti, in order to celebrate the islander's completely free sex life. Bougainville's own diary mentions that this sex life was if anything oppressive, and that concubines by the dozens were put at tribal chieftains' disposal. Diderot simply falsified these data, attributing to the Tahitian his own fantasies. Mothers and sons, lied Diderot, the meticulous editor of the Encyclopedia, see no evil in copulating,

and the same is true of father and daughter, brother and sister. Thus all are happy in this utopia where there is no religion and no police, people live in an informal freedom, and social ties work out spontaneously, according to everybody's whim.

Put side by side the utopias of Diderot and Cyrano, and you obtain this formula: existing moral ties are calculatedly undone, until society becomes defenseless; the resulting amorphous conglomerate of sexualized beings is then reshaped along totalitarian lines. But compare these two attitudes, those of our authors above (not to speak of their combination in the pages of the Marquis de Sade), to the attitudes advertised and encouraged today. On the one hand, there is the straight face of dealers in sex education in school who have managed to have it legalized, with the pretext that science comes to help solve society's problems; on the other hand, there are the sex-shops in San Franisco where incest can be performed on a paying-customer basis, not to speak of the increasing number of films presenting incest as an acceptable form of sexual fulfillment. In other words, society is first morally liquefied, then taken in hand and rigorously controlled, with sex, like everything else, dehumanized, mechanized. While Soviet agents are sent to the West to preach sexual freedom, drugs, and other methods of weakening family and society, the regime which entrusts them with this task describes jeeringly the "dissolution of western society," but prohibits these methods at home as subversive, destructive, even immoral. Note that this is not hypocrisy, it is just another form of germ-warfare: the illness-causing moral microbes are dispatched to the enemy, but they are exterminated at home where the rulers want disciplined, hardworking subjects.

Yet, those who claim that it is exclusively the State as such which today takes control of the family put the cart before the horse. It is mostly because the State itself has fallen into the hands of utopian-minded intellectuals and bureaucrats that we can speak of a State-directed destruction of the family. In fact, to use the community's traditional tripartite division, family, civil society and State, it would be reasonable to argue that in contemporary conditions the family has most to fear from civil society, with its concentrations of intellectuals and ideologues into quasi-feudal power centers: media, university, cultural pressure groups such as founda-

tions, large enterprises of the culture-market, etc. It is in the interest of these groups to detach the child from the family, to turn him into a consumer of merchandise and programs, of culture fads and what goes by the name of education. After all, who if not these feudalistic concentrations of civil society are setting up programs like the following, to mention only two.

The first such "experimental" program a few years ago (in New York) asked school children between the ages of eight and ten to answer questions about home life, their own treatment by parents, their opinion of father's and mother's aptitude to bring them up, the relationship between mother and father, including the intimate moments that the child was able to observe. It would be superficial to say that this "program" followed from the prurient interest of certain teachers and education officials. In various forms, such questionnaires figure in the utopian literature of the past, and curiosity concerning the answers is not so much motivated by the appeal of obscenity as by the desire to show the child that his parents are not exceptional beings, just ordinary joes whose authority over him or her may be unjustified. In extreme cases, the morally orphaned child will accept the implied suggestion that he may trust the educational bureaucrats and counselors more than his parents.

The other example is from New Jersey (although I am sure that elsewhere too similar experiments have been conducted, as also in the first case). With or without the parents' agreement—they can be easily browbeaten in the name of "science"—mixed groups of boys and girls were set up, for the purpose of treating the boys as girls and vice versa. Boys were taught traditionally girls' activities (sewing, cooking, child care), and girls were taught auto repair and rough games. The objective of the program was to break the "traditional roles" and to show that male and female behavior is merely socially acquired, the result of conditioning. Nobody addressed himself to the question who conditioned the first males and females to behave as they do, but then we do not expect—do we?—philosophical questions from our would-be programmers. The result was, anyway (and the controllers were both surprised and disturbed by it), that boys kept associating with boys and rein-

venting their rough games, and girls with girls, still preferring to play with dolls.

The cultural climate today is so favorable to, and permeated by, utopian thinking that the government and its semi-intellectualized bureaucrats are very willing to finance such "experiments," but the ideas and projects themselves emerge from and are formulated by groups in society. The frightening aspect of this situation is that while historically the adversary of the family used to be the State (in the form of over-taxation, forced induction in the army, injustices committed by the courts), a fact which necessitated and justified the intermediate bodies to protect the family, now Society turns against it also. By "society" I do not mean only groups of crazy educationists, but primarily institutions independent of the State, such as, in the first place, schools and churches. These used to be moral and intellectual guardians of the family, and their protection extended *ipso facto* to the political sphere too. The principle of subsidiarity is harmonious with this situation, in fact it consciously meets it: the family takes care of itself, and when it cannot do so, intermediate bodies help it to fulfill its functions. This has now changed, and herein we can see a historic threat to the family's integrity. I repeat: by the State in totalitarian regimes, by Civil Society in the liberal-democratic West.

It is still only a threat, so let us not do more here than ring the alarm bell. But it is increasingly concretized. In proportion as it is, the *political space*, brought about by the beneficient tension between Church and State, then between State and Society, will shrink, and possibly disappear, squeezing the family out of existence. More concretely: in case State or Society absorbs the other—in marxist regimes the State has absorbed Society, but the opposite may also occur—the family has no recourse. At any rate, it has no recourse now *vis-a-vis* sex-education and the legalization of abortion. Sad to say, neither school nor Church may be counted upon for help.

It is more than just the life of the conceived but unborn that is at issue when statements like this can be made and reported: a woman, as quoted by *Newsweek*, declared that she is disgusted by being obliged to carry for nine months an "alien organism" in her body, and that she thinks society has no right to force her to bear

it. It is thus possible for a mother, actual or prospective, to call the living body in her womb an alien organism, as if it were a cancer. Or, at the other end of the life-cycle, it will soon be possible (it is already in some places) for the sick and the old, indeed for anybody, to take his own life, as if he too were an alien body to himself. It is incorrect to refer back to Gnosticism and to the gnostic hatred of life, a manifestation of the evil of matter. The gnostics lived in a society where State and religion condemned their theory, so they had to hide in small groups like criminals, somewhat like the Manson "family" in our time. Today, however, the media, then pressure groups, take up such matters, until finally the legislator approves them. In other words, the embryo and the old man may be today legally "persuaded" to renounce life, with the single argument that they are "alien bodies" (to mother, to family, to society) not, or no longer, wanted.

No wonder that at every juncture the solidity and continuity of the family are subjected to tension and doubt. I admit that many families I know maintain their integrity, most of them quite cheerfully, without "problems." But the number of those is growing where, after years, even decades of apparent stability, cracks occur, often ruptures. The standard story I hear from parents, a composite story for the sake of illustration, goes like this: everything was fine until X (a young man or woman between the age of 16 and 28) took up pacifism (or drugs, radical company, refusal to study or work), and told us he would leave. We were unable to dissuade (or to bribe) her, she left for a California commune (or India, Crete, the Riviera, Nepal), started an affair with a married man who then left her, she has a child (or she aborted), works at odd jobs. In protest against the war (or nuclear armament, Vietnam, Salvador, apartheid) she had her head shaved (or has become promiscuous, got herself arrested, is following a guru). Etc., etc.

I deliberately shifted in this, alas, standard description, from *him* to *her*, because the *devergondage*—loss of shame—itself has become bisexual or, if you wish, sexless, as if to reproduce the general confusion of minds on yet another level. Anyway, the story with variations becomes almost typical at every main juncture: the bringing up of children, in school, at work, in marriage, at the birth of children or their pre-natal suppression, at dealing with old

people, at death. An increasingly desacralized society is now either seeking new forms of the sacred, as some anthropologists, psychologists, and mythologies try to persuade us, or is rejecting all norms not devised by the individual or by his semi-clandestine manipulators.

We are told, even by some of those who deplore it, that the institution of marriage is in the process of shedding its old skin, and that we should expect new forms of family (or more simply: living together) to emerge, with changing roles for man, woman, and child. And it is true that legislation leads the way—or follows the courts—when it authorizes homosexual "marriages" and child adoption, when it makes place for the absurdity that a husband "rapes" his wife, when it explores the area of "palimony," recognizing as legitimate the extra-marital affair. Each of these laws, decisions, precedents, and occasions for legal debate consecrates some form of anti-family behavior. One recent example was provided by ex-vice president Walter Mondale who came to New York to address a gala public dinner of a homosexual club, thus giving pederasty social respectability and political clout.

It is then quite natural that progressive anthropologists make their appearance, suggesting that we practically pick and choose among "family models" available in textbooks about tribes, matriarchates, promiscuity, and the early initiation of children into sex so as to avoid ignorance, embarrassment, and trauma. This is how we are conditioned by politicians, media, and science to accept "civilizational change," and are persuaded that the traditional family fulfilled its function in the past, but it is deplorably inadequate to do so in the future.

What of this utopian future that is planned, what kind of *family* is supposed to find its fulfillment there? The basic duality of utopian thought makes itself manifest in the prediction of the form the family will take. As we have seen, the two parallel trends betweeen which utopians forever oscillate are *hedonism* and puritanical *rigor*. Some years ago, television programmed a series of debates on the essential features of utopia, during which the participating luminaries—pedagogues, psychologists, futurologists, literateurs and political scientists—came up with some serious and some jocular proposals. But all agreed on a few indispensable components of

utopia. Consensus was easiest about the way to bring up "utopian" children. The program was presented before women's rights became an issue, so only boys were discussed. In Utopia, the participants opined, older women were assigned the task of initiating youngsters at an early age into the pleasures of love. The panel did not refer to Rabelais's "Thélème Abbey" (16th century) where indeed the "religious vocation" consisted of the pursuit of pleasure and the kind of soft eroticism that the discussants had in mind. But substitute the mother for the "older woman" and you have, as I mentioned above, Diderot's incest among the Tahiti islanders, and the films of today where an embarrassed but later uninhibited affair is depicted between mother and son, or father-substitute (the mother's lover) and the Lolita-type daughter. (The initial embarrassment is introduced the better to lure the spectator with the promise of spicier stuff.)

From this composite image we can infer that our utopians propose a family where the concept of love is reinterpreted to mean sexual promiscuity, the only kind that modern mechanized man, the plaything of violence, brutal advertising techniques, and explicit pornography, is willing to accept. This acceptance is made easier by the objectives and techniques of contemporary education. The overall purpose seems to be to squeeze out of the curriculum any serious subject matter which leads to independent thinking about classically-treated themes, and to squeeze out simultaneously the teachers of such material. They are replaced by all sorts of "orienters"—guides, advisors, psychologists, and therapists, all of them acting *in loco parentis* in a fashion far beyond any such role ever claimed by teachers. The difference is that the teacher mediates the mysteries of the universe, with the added implicit message that it is within the power of the human mind to understand them. The "orienters" act in the name of ubiquitous Society, and their guidance and therapy serve the purpose of adjusting the pupil's reflexes and impulses (*not* his intelligence) to what Society prescribes for its own "goals."

In this light, sex education becomes a logical step. The sex-educator (counselor, therapist, expert, guide) adjusts the youngster to society's sex requirements, which ultimately focus on the easy-going, fun-filled pleasure, a release for the bored nine-to-five

employee that the youngster will soon become in offices, workshops, and bureaucratic cubicles. Just last year, a sex-therapist and sex-talk show "personality," a woman of sixty, came to my university. In a kind of verbally-orgiastic peptalk she suggested that everything in sex is fine provided it leads to pleasure. Details went from copulating in the bathtub to self-induced euphoria. The whole session, with the students relating their own problems and preferences, had an official air about it; it was, in the prevailing jargon, a "learning situation" for young adult males and females.

In this process, the parent has of course no part. In fact, he is told he is incompetent; it is the agents of Society who take over from him, whether in sex-education, in reporting his own, or the parent's, sexual activity, in the sexual role-playing of his children, and in all matter of other occupations in life. The parent is shut out and Society's agents step in. As Lawrence K. Frank writes, "the advanced industrial civilization cannot function according to the unmotivated choices and decisions of uninformed individuals. .. . [Citizens] should act under the education and persuasion of counseling and orientation services." What is more logical than that counseling should extend to sex when the popularized trend is increasingly for children manufactured *in vitro*? The California-based Repository for Germinal Choice was formed, according to reports, "to help produce exceptionally gifted children through artificial insemination of intelligent women with sperm from eminent men." Confronted with the accusation that this leads to Hitlerite race selection, a research officer of the Repository had only this comment: "We want the entire human race to be a master race."

Master race or any other race that future "World Controllers" (Huxley's term for the authorities in *Brave New World*) may wish to produce—under such circumstances the family is more surely destroyed than it would be in Chinese communes. In the mind of our new manipulators the family is a mere pre-scientific means of producing workers for Utopia—until such time when this haphazard method may be discarded in favor of laboratory-fabricated alfas, betas, and deltas. In that happy state all biped-robots will fit the slot for which they were planned. The undifferentiated social landscape, without asperities, obstacles, or family-egoism, will be

the terminal for history.

The destruction of the family is not a haphazard, piecemeal program on the legislator's desk, nor is it the action of confused bureaucrats. It is the central item in the planning of Utopia, the chief ambition of power-crazed ideologues bent on remodeling the human race.

Taxes and Families

Allan C. Carlson

IN A NORMATIVELY healthy society, the most vital aspects of human and national life are assumed. Take the abortion question in America. As late as 1960, no one of significance even considered the liberalization of state anti-abortion statutes to be a matter of public debate. The major pollsters, with a proclivity for asking virtually any question, did not even deign "do you favor making elective abortion up to three months of pregnancy legal?" worth raising until the mid-1960s. It would have been like inquiring, "do you favor premeditated murder?" or "do you favor incest?" No *normal* American, in the strict sociological sense of that word, would have answered "yes."

For most of this nation's history, the conjugal or nuclear family structure enjoyed the same unquestioned status. When state legislatures constructed laws governing marriage and family, they invariably presumed the Judeo-Christian pattern of a monogamous, heterosexual union involving a lifetime marital commitment, a first marriage, procreation as an essential element in the relationship, and a sex-determined division of labor within the family.[1] When Congress created the Social Security system in the 1930s, it again presumed the general existence of intact marriages and of women devoting themselves to home and family. It skewed benefits accordingly and provided widows pensions and ADC allowances to broken, fatherless families. When the U.S. Bureau of the Census came to define "family" in the late 1940s, it adopted—without audible dissent—the phrase, "two or more persons related by blood, marriage or adoption." A less than rousing affirmation of familial love and solidarity, to be sure, but a definition in keeping with common normative perceptions.

The same, almost unconscious presumption of a given family structure accompanied the introduction of the modern federal tax

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code in 1948. As the progressive income tax grew for the first time into a significant peacetime burden, Congress constructed it in a manner giving recognition to the importance *and* special burdens of families with dependent children. Prior to 1948, there was only one rate schedule affecting married persons, heads of households, and single persons alike. Starting that year, though, joint returns effectively providing lower rates for the single-income, intact family became law. Moreover, Congress set the personal exemption for dependents at $600. Given the wage levels prevailing in that era, this single act removed the vast majority of families with two or more children from significant income tax liability.

There were at the time no "pro-family" groups lobbying for this special treatment of families. Nor were there any organized groups lobbying against it. The family was so basic an aspect of American identity, so deeply ingrained in the normative convictions shared by Americans, that recognizing the special financial burdens and social responsibilities of families with children within the tax code occurred without opposition. Even confirmed twentieth century American socialists, according to New Left critic James Weinstein, "put themselves forward as the defenders of the family and Victorian sexual relations and criticized the capitalist society for destroying the family and encouraging 'immorality'."[2] The family formed the solid, unchallenged core of America's national identity.

Hence the surprise which greeted U.S. Treasury Department economist Eugene Steuerle, when he recently turned to an analysis of the changes in relative tax rates since 1960 and discovered that the progressive income tax burden had shifted dramatically since then onto the backs of *families with dependent children.* Single persons and married couples with no dependents, he found, would face essentially the same average tax rates in 1984 as they did in 1960. However, a family with two children confronted an increase of 43 percent in its average rate over the same period, while a couple with four children could anticipate a *223 percent* increase in its average tax rate. For larger families, the increase would be still higher.[3] While an oversimplification, one might conclude that the vast explosion in the scale and scope of the federal government since 1960 has been financed largely by the parents of small children.

How did this bizarre and previously unrecognized reversal in basic national priorities come about? There is, of course, a technical explanation. While inflation steadily eroded the value of the dollar since the mid-1960s, Congress left the personal exemption relatively unchanged. Set at $600 in 1948, it is worth but $1000 today. If the exemption were to offset the same percentage of per capita income as it did in the late 1940s, though, it would have equalled $4600 in 1981 and would rise to about $5600 by 1984.

Instead of raising the personal exemption, Congress chose to make regular increases in the standard deduction, or the "zero bracket amount." But while the latter does make a distinction between single and joint returns, it does not differentiate tax liability relative to the number of dependents in a household. Moreover, responding to charges that the tax code discriminated against unmarried people, Congress lowered the tax rates on "singles" in 1969. When this action increased the "marriage penalty" affecting some two paycheck families, the latter screamed foul. So Congress responded again in 1981 by allowing a new partial deduction for the earnings of the spouse with a lower income. In all this, the single-income family with dependent children was simply forgotten.

Yet as Steuerle notes, there is a more disturbing explanation to the change. "If families with dependents lower their standard of living more through payment of taxes than do families without dependents," he writes, "then the former group may indirectly come to believe that society places little value on dependent care. *More likely, however, societal values influence the tax policy rather than flow from it.*"[4]

Indeed, the evidence seems irrefutable that the "societal values" found in the United States relative to family, marriage and children have undergone sweeping changes in a mere two decades. According to pollster and social analyst Daniel Yankelovich in his fascinating—if flawed—book, *New Rules*, the traditional normative values surrounding American family life have nearly disintegrated. Marital fidelity, the bearing and rearing of children, and the making of sacrifices on behalf of one's family, he concludes, "have all been drained of much of their symbolic significance."[5]

During the 1950s, Yankelovich notes, "an extraordinary cohe-

siveness" resting on shared familial and moral values resulted in a surprisingly homogeneous nation. Being an American in that era meant "the acceptance of self-denial for the sake of the obligations that bind the individual to others—the family, the religion, the race, the community, the nation." These powerful symbols of respectability delivered to individuals in a sense of self-esteem and identity. They reinforced and were, in turn, reinforced by the economic growth and general prosperity of that era. They also linked internalized private goals to the humanly necessary tasks of procreation and the nurturing of children. Simply put, the American normative system found in the 1950s "worked."

By the early 1980s, however, "an explosive pluralism" and "the search for self awareness" had turned that world upside down. In the wake of this transformation, the shared meaning of respectability and a sense of common American identity have lost ground to an obsession with the self. "A traditional family life is no longer the prime symbol of respectability," Yankelovich writes. "[C]onversely, you no longer lose your respectability if you are divorced, choose to live alone, refuse to have children, belong to a household in which both spouses work or engage in discreet sexual experimentation."[6]

These centuries-old mores collapsed with staggering rapidity. As late as 1967, 85 percent of the parents of college-aged children condemned all premarital sex as morally wrong. In 1981, 61 percent *condoned* such acts. In 1957, 80 percent of all Americans thought it "neurotic" or "immoral" for a woman to remain unmarried by choice; by 1981, 75 percent not only believed that such action was appropriate, but also affirmed that it was acceptable for unmarried women to bear children. Only minorities of adults report discomfort in 1981 "at having friends who were homosexuals."

Along with this loss of a traditional sense of normalcy surrounding family life has gone the aura of moral rightness and the sense of common identity that once bound the nation together. In fact, their very opposites—rigid moral neutrality and an absolute pluralism—have come to dominate the popular culture, with disorienting results. "Nothing feeds social resentment so much," Yankelovich suggests, "as [the] conviction that obeying rules no longer makes sense."[7] Even among those still loyal to the traditional

ways, anger, suspicion and finally cynicism can set in. With the latter, the all important social bond begins to dissolve. Significantly, the vast majority of Americans (81 percent) now believes that those who follow the rules inevitably get cheated, while those who know the angles and ignore the rules get ahead.

What caused this upheaval in the nation's normative arrangements? Yankelovich parrots a long string of "postindustrial" theorists and attributes it to an understandable, seemingly inevitable, and possibly beneficial stage in human evolution; an effort to move "our industrial civilization toward a new phase of human experience."[8] But essayist Leopold Tyrmand seems closer to the truth in attributing the change to the actions of what he calls "the Behavioral Left." Committed to the destruction of the old order and revelling in whatever is novel, abnormal, or obscene, this decadent offshoot of classical liberalism came to infect our nation's music, literature, educational structure, "helping professions" and media during the late 1960s and 1970s. Its adherents—ranging from Larry Flynt to "value neutral" family counselors, From Gore Vidal and Kiss to post-Freudian psychoanalysts—have produced "a tremendous number of children who are disconnected from any communications with parents, of people who have been so brainwashed that they can no longer understand words like 'virtue,' 'civility,' 'normalcy,' who are isolated from religion and deracinated from history."[9]

In such a milieu, politics cannot remain unaffected. *Anomie*—that sense of disarray that comes when norms collapse—creates anxiety and distrust, emotions directed not least towards those who govern. In the early 1960s, 72 percent of Americans believed that the federal government was "run for the benefit of all, rather than for a few big interests." By the late 1970s, 65 percent were convinced that "big interests" ran the show. With this disappearance of America's sense of a "public interest" has come the fragmentation of the polity into an immense variety of private pressure groups, each determined to protect or enhance its own share of an apparently shrinking economic pie. Yankelovich concludes that "the majority of the American people can be expected to react angrily, cynically and suspiciously to political initiatives *not* directly responsive to their economic concerns."[10]

It is this emergence of hundreds of moral-ethical ghettos within our political culture which accounts for the family's onerous new tax burden. In a "value plural" nation, Congress can no longer be the place where shared convictions on how to live might play some role in guiding policy; it becomes merely the site where private interests meet, clash, and divide the spoils. So "singles" think their taxes are too high? Cut them! So two income families think their taxes are too high? Cut them! No one's heard from intact families with dependent children? Then let inflation quietly and indirectly raise their taxes. After all, someone must pay for the increased costs of government.

In truth, though, Congress probably never gave the matter this much reasoned consideration. Unguided by any value concensus, it simply responded, amoeba-like, to outside stimuli.

But vague, value-neutral, semi-conscious actions soon solidify into theory. Indeed, part of the background noise in congressional chambers since the mid-1960s has been provided by neo-Malthusians warning of the horrors of American "over-population" and assaulting such "pro-natalist" incentives as the personal income tax exemption. Their howls seemed only to increase in volume when the USA's birthrate plunged to historic lows in the 1970s, fertility levels well below those needed to replace the existing child-bearing generation. Reflecting the populationist mind set, it is noteworthy that current congressional debates on the worrisome demographics of social security, military manpower needs, and immigration policy have all but ignored the obvious common denominator: this country has too few children.

Marriage and procreation, moreover, when stripped of their normative symbolism, have begun to appear among some tax experts as no different from any other private economic transaction. As Steuerle notes, the trend towards the equalization of tax burden regardless of the number of dependents implicitly suggests *that raising children is primarily an act of consumption*, with human offspring holding a status no different from that of an English sheepdog or a home video game. Some tax theorists also are arguing that the services of a fulltime wife-mother are provided primarily to her spouse, rather than to her children. They conclude that the spouse receiving such "services" ought to be taxed at the lat-

ter's real market value.

The nascent, pro-family movement in America emerged in the last few years to battle the "social issues"—abortion, school prayer, the Equal Rights Amendment, pornography, government interference with religious schools, the excesses of sex education and official sanction for the "secular humanist" ethos. With but a few exceptions (*e.g.* tuition tax credits), pro-family groups have given little positive attention to the bread and butter issues which preoccupy most Washington lobbies: grants, tax credits, government contracts, exemptions, and so on. To a degree, this reflects the enormity of the cultural crisis facing this country, an altogether proper inclination to address that crisis in non-monetary, non-coercive ways, and an awareness of the federal government's limited influence in the key cultural arenas. Moreover, a majority of family advocates share a strong distrust of all government activism, even if it be motivated by positive goals.

Yet there are also hints that many defenders of the family still want to believe that familial economic interests are being watched over by a benevolent Congress; that once the foolish idiocies of the applied social sciences and the adverse court decisions of the past twenty years are countered, the nation's underlying, if somewhat dormant, normative concensus on family life will re-emerge. By instinct, family activists reject the idea of becoming just one more special economic interest.

These sentiments are understandable. Indeed, to become but another lobby is to concede an enormous tactical and rhetorical advantage. Yet the changes in the relative income tax burden described above suggest the consequences of remaining unsullied. Some group or tax category will pay for the ever-rising costs of being governed. Ronald Reagan's heroic efforts to trim the budgetary sails have only slowed, not halted, the tax-and-spend machine. Recent experience suggests that Congress will continue to shift taxes onto those groups or categories which protest the least or rest passive; even (indirectly) onto small children, it appears, if no other option emerges. Until the cultural resources have been mobilized to restore a family-based value in this country, America's families literally cannot afford to remain unorganized and silent.

NOTES

1. See: Lenore J. Weitzman, "Legal Regulation of Marriage: Tradition and Change," *California Law Review* 62 (October 1974), pp. 1164-1277.
2. James Weinstein, "The Left, Old and New," *Socialist Revolution* 2 (July-August, 1972), p. 55.
3. Eugene Steuerle, "The Tax Treatment of Households of Different Size." Revised version forthcoming in *Taxing the Family*, edited by Rudolf G. Penner (Washington, D.C.: American Enterprise Institute for Public Policy Research).
4. Steuerle, "Tax Treatment," p. 35. Emphasis added.
5. Daniel Yankelovich, *New Rules: Searching for Self-Fulfillment in a World Turned Upside Down* (New York: Bantam Books, 1982) pp. 119-21.
6. *Ibid.*, p. 145.
7. *Ibid.*, p. 211.
8. *Ibid.*, p. xix.
9. Leopold Tyrmand, "Notes on How to Live: The Behavioral Left Unmasked," *Imprimis* (March 1982).
10. Yankelovich, *New Rules*, p. 212.

Literature, Literacy and Morality

R. V. Young

THE RELUCTANT SCHOLARS gathered under my tutelege fidget restlessly in the sultry heat of July. In the awkward jargon of academe, which sometimes discloses more than it intends, this is a "terminal course" in English, *Studies in Fiction.* These students have chosen to endure the weather of the summer session in order to "get their lit. requirement out of the way" as quickly as possible. Few of them—as they pursue their several callings in textiles, parks and recreation management, food science, computer science, accounting, assorted other occupations for which the university provides training—will ever again open a book of non-utilitarian character (unless, here and there, some have acquired an addiction to Harold Robbins or Harlequin romances). To such a group, under such circumstances, I am attempting to introduce the stylistic mysteries and moral discriminations of Henry James's *The Pupil.*

Always the resourceful pedagogue, I spot a sentence that promises to appeal, if not to their interests, at least then to their experience: "It was a houseful of Bohemians who wanted tremendously to be Philistines." Panning the room with relentless gaze, seeking an unaverted set of eyes, I pose the hopeful query: "What is meant by these two terms, *Bohemians* and *Philistines*?" With no reply forthcoming, I try to make it easier: "Who are the Philistines in the Bible?" After all, I reason, this is the "Bible belt," and, if nothing else, we may at least salvage a lesson about the development of words and concepts, and the relation between Sacred Scripture and literature. But still there is no response, and, in the absence of a volunteer, I select a victim. After much throat-clearing he avers that, although *Bohemian* is a term altogether unknown to him, he will venture the guess that the Philistines were "the people that David was king of." "Do you all agree?" I Question, eyes once again sweeping the room; and from a class of twenty-five college sophomores, juniors, and seniors, there is no demur.

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Now I tell this story not because it is shocking or even unusual, but because it is so typical. Any teacher at virtually any college or university in the United States could recount similar incidents by the score, and such anecdotes as mine serve continually to regale the assemblages of faculty lounges all across the country. Aleksandr Solzhenitsyn might well ask, "What is all the laughter about?"[1] These are the rising citizens of the world's leading democracy, and they are almost totally ignorant of the most important book of Western civilization. Hence they are simply disqualified for any discussion of the ethical and political issues confronting that civilization; indeed they are only vaguely aware of the existence of Western civilization. My original intent had been to use James's clever inversion of the common relation of the terms—Philistines longing to be Bohemians—as a means of gaining a purchase of the novella's slippery moral surface. Perceiving that the class's awareness of even the usual Philistine/Bohemian dichotomy was, at best, problematic, I then prepared to recite a pocket lecture on how Matthew Arnold, in his relentless war on Victorian materialism, had taken over from Heinrich Heine and German student slang term *Philister*. But this will hardly serve with students for whom the Scriptural identity of the Philistines remains mysterious. I am reduced to telling Bible stories.

It is my contention, drawn from an abundance of trying experience, that students who are so utterly unable to read Henry James will be equally unable to write about him, or about any other topic of academic significance. Such a view would hardly seem remarkable if it did not, in fact, belie the tacit assumptions behind much of the current discussion of educational decline in the United States. Almost invariably, when the issue of what is widely perceived to be a growing literacy crisis arises, some one will vigorously proclaim that standards have been lowered, and that what is needed is a return to the "basics"—as if conjugating verbs and diagramming sentences would help my students identify the Philistines and the Bohemians. What is, moreover, wholly lacking in this standard response to the problem of literacy is an awareness that reading literature and writing about it is an exercise of the moral imagination; that is, of the capacity for moral judgment and moral discrimination which raises man above the level of the beast.

To be sure, Henry James is going to be difficult for college students no matter how well prepared they might be; he is *difficult* for professional scholars. But that is hardly the problem in the incident I have narrated. These students of fiction—all too typical of the denizens of colleges and universities in our day—are too bemused by the ordinary conventions of literacy and intellectual discourse ever to confront the specific rigors of James's artful prose. Obviously it is otiose to present the stories of Henry James to those so unacquainted with the Bible that they cannot distinguish between the parties of David and Goliath, so innocent of even the most elementary sophistication that *Philistines* and *Bohemians* are opaque terms. Moreover, the problem is not simply the matter of boredom or laziness. Ignorance of these two terms represents only the tip of an appalling iceberg of ignorance. Teachers of English literature have, to a degree, been reduced to teaching English as a foreign language to American students who, though they may be native speakers, are hardly native readers and writers. For increasing numbers of them, even those with an adequate grasp of grammar and everyday usage, English as a medium for Western culture, as an idiom for philosophic, moral, or aesthetic reflection, is as "dead" a language as Latin or Greek. For today's typical undergraduate, a page of Henry James (or of Joseph Conrad, Jane Austen, or Flannery O'Connor—not to say John Milton or Alexander Pope) is hardly more accessible than a page of Cicero's Latin. One might inquire why my students were not simply told to look up the unfamiliar words. But if *Philistine*, even in its straightforward Biblical sense, is unfamiliar, how many other words and expressions in a Henry James story are also likely to be unfamiliar? The picture of our student, dictionary in hand, looking up a dozen words per page as he slogs through *The Pupil*, is only too exact a parallel to the process of translation from a foreign tongue. In any case, once he has "looked up" the definitions of these terms, he no more knows what they *mean* in James's story than a second year Italian student knows the meaning of the title of Puccini's opera after he has looked up *la boheme* in an Italian-English lexicon. Without the skill and experience to apply them to specific contexts and to relate the contexts to traditions of literary and learned idiom, the definitions are useless.

The kind of illiteracy presently under discussion must not be confused with illiteracy in the absolute sense; that is, with the inability to sign one's own name (except, perhaps, by rote) or read the labels on cans, newspaper headlines, and advertisements. This is a serious and pathetic situation, but not, I think, as insidious as what might be called collegiate, or literary illiteracy. Absolute illiterates know exactly what their condition is. If they can be found and their reluctance to reveal their condition overcome, then the educational problem can be solved fairly easily. Indeed, insofar as this problem is educational rather than social, it is a matter of organization or administration; for absolutely illiterate adults are persons who have slipped through the cracks in the public school system. To be sure, some commentators on adult illiteracy will not be satisfied with a minimal verbal competency as an answer to illiteracy. Jonathan Kozol, for example, regards the mere ability to read notices, instructions, and orders as merely a way of making the poor more useful to the system that oppresses them. "Functional literacy," Kozol maintains, must include "(1) the ability to question the legitimacy of all such instructions, orders and directions; (2) the capacity, furthermore, to participate in the operation and, if necessary, in the transformation of a system, corporation or society, whenever it appears that individual and community interests have been sacrificed to national and corporate interests."[2] In such a politicized version of education, literacy still remains a mere tool; it provides the "prisoners of silence" with the keys to the warden's office, not membership in a cultural community and hence with intellectual and spiritual transformation. Literacy is a commodity to be possessed, rather than a change within a person.

In any case, collegiate illiterates rarely recognize the full dimensions of their problem. They can, after all, read not only cereal boxes and road signs, but even feature stories in *People*, record jackets, and the television section of the local newspaper. They may even be able to handle the "textbooks" widely used in some curricula: large-format digests of information printed on glossy paper with plentiful illustrations, review questions, and summaries in bold-face type. What they cannot read are books or serious essays (much less poems). The collegiate illiterate is a prisoner, not (often regrettably) of silence but of sensations and subjective

impressions; he cannot enter into the experience of another through the medium of written language and is, as a result, isolated from most of the humane cultural tradition.

This literary incapacity is not of interest only to aesthetes and English teachers: it has moral and even political implications. I recently asked a class of freshmen to write essays in response to "A World Split Apart." In this landmark Harvard commencement address, Aleksandr Solzhenitsyn notes that a decline in the arts (with a pointed reference to "intolerable music") and a lack of great statesmen are sure symptoms of a decaying civilization.[3] One very indignant student was incredulous at such accusations: "Art is thriving and expanding to new horizons of impact on human emotions," he insisted. "Modern music is more popular than music has ever been." He also maintained that we have no shortage of great statesmen: "Only a great statesman can be elected president of the United States, who must have the support of millions of people." The naive vulgarity of such opinions seems merely pathetic until it is recalled that the student in question can already vote and in due course will have a college degree and be accounted an educated man. For reasons that will be considered presently, it is unlikely that the process of acquiring this degree will materially alter his illiteracy.

The collegiate illiterate can affect an apparent sophistication. During the spring of 1982, when the Equal Rights Amendment was once again before the North Carolina Legislature and the walls of my departmental office building were festooned with feminist slogans and political announcements, I placed on the bulletin board outside my office a photostat of an article from the *Dallas Morning News*, "Dr. Greer Changes her Feminist Tune, " by Erika Sanchez.[4] The article is an account of a lecture given by Germaine Greer before the Women's Alliance of the First Unitarian Church of Dallas. Speaking on "The Politics of Fertility," Greer stunned her audience by expressing her disenchantment with government-sponsored contraception programs, her indifference towards the ERA, and her skepticism about the world's alleged overpopulation. Ironically, her general disillusion with the feminist agenda seems to have resulted from her tour of rural villages in the Indian state of Maharashtra under the auspices of the Family

Planning Association of India. The famous feminist was expected to encourage the villagers to limit the size of their families by the use of contraception and sterilization, but it was the Indian peasants who influenced her thinking. She was deeply moved by a culture in which there were no "unwanted children," in which family life was strong and sex regarded as something other than an "indoor sport," in which the women's role in family and village life was important and honorable.

None of my colleagues commented on this article, but a young lady in one of my classes was properly scandalized. "Why is that on your bulletin board?" she demanded with an inquisitorial air. When I explained that I found the change in Germaine Greer an interesting example of moral growth, her disapproval was mingled with perplexity. One remark remains with me vividly: "I can understand her [Greer] feeling that way while she was over there, but you'd think she'd get over it once she got back to normal society." But there is more. When it emerged in the course of our conversation that I am opposed to abortion because, as I pointed out, it is a biological fact that abortion constitutes the taking of a human life, her reply was a splendid *non sequitur*. "People say they're against abortion but they really aren't. I know this girl who is supposed to be a really religious Baptist, but she got pregnant and was afraid to tell her parents and got an abortion."

One can lament the illogic of such a rejoinder, but an undergraduate can hardly be faulted for repeating what she has heard from her elders. There are no good arguments for abortion, and hers is no worse than *Roe* v. *Wade*. More troubling was her response to the article about Germaine Greer, for it suggests a complete incapacity to rise above the brittle subjective world of the liberated coed of the 1980's; that is, to attain moral maturity. According to the *Dallas Morning News*, one woman in Greer's audience complained, "India is very interesting, but what does it have to do with us?" The speaker replied, "I was hoping that you could see yourselves through the eyes of foreigners."[5] Obviously my student could not thus see herself from the perspective of another; she lacked the imaginative resources for self-knowledge and self-criticism. Most distressing of all is her sheer ignorance of the realities of history. Could anyone who had read—really *read* and

assimilated—Dante, Shakespeare, Dr. Johnson, and Faulkner conceive of the fleeting slogans of the contemporary media as permanent contributions to the accumulated wisdom of mankind? Could anyone embarked on a liberal education with even the rudiments of humane literacy routinely assume that "normal society" comprises abortion on demand, the sexual revolution, radical feminism, and gay rights? A depressing postscript: the young lady I have been describing plans a career in journalism and is already active on the school newspaper.

The problem of literary illiteracy is not merely the result of a failure to expose students to the Western tradition. Most current students are so steeped in the barbaric miasma of contemporary society that their minds and sensibilities are opaque to the literary presentation of Judeo-Christian culture. I received an incredible illustration in response to an essay question on the midterm examination in a survey of American literature. The students had been asked to compare the free-thinking, rags-to-riches *Autobiography* of Benjamin Franklin with the meditative *Personal Narrative* of his Puritan contemporary, Jonathan Edwards. One young lady in the class began a section of her essay by observing that "both men had important sexual experiences." In Franklin's case this is an unexceptionable comment, and the essay duly recounts Franklin's attempts to seduce "Mrs. T." and similar escapades mentioned in his work. Edwards, however, is another matter, and I was curious about what sort of "sexual experience" she had spotted in the spiritual autobiography of this austere Calvinist. Her explanation was breath-taking: "Jonathan Edwards must have had a kind of homosexual relation with God because he said he was always having ejaculatory prayers."

It is not surprising, though it is distressing, that an American college girl of our day should have encountered only one meaning of the word *ejaculation*; however, there is real cause for alarm in her thoughtless application of the one meaning of the term supplied by her previous education and experience. Presumably, it never occurred to her that she *needed* to look the word up, and this suggests that the text of Edward's *Personal Narrative* was virtually meaningless to her. Although she had, in one sense, "read" the work with sufficient attention to pick out the phrase "ejacula-

tory prayer" (it never came up in class); nevertheless, the process by which one might conclude, from a perusal of *Personal Narrative*, that Edwards entered into a "homosexual relation with God" can no more be called "reading" than verbal mimicry by a sailor's parrot can be called cursing. One is especially baffled by the young lady's mental contortions with a glance at the sentence which supplied her inspiration: "And I was almost *constantly* in ejaculatory prayer *wherever* I was" (emphasis added).[6] Besides, what could an unnatural relation with the Creator possibly be? Fortunately, the young lady seems to have had no very clear idea herself, since the sentence I have quoted is the last in her paragraph on "important sexual experiences."

This bit of interpretive grotesquery results not only from the student's inability to deal with a literary text as such, but also from the displacement in her mind of the ordinary moral and religious outlook of the Judaeo-Christian tradition by the amoral, secular materialism regnant in our day. She lacks the intellectual training necessary to cope with a subtle verbal pattern, but she also lacks the moral and imaginative formation necessary to put Edwards into the appropriate context. Her only recourse is to force unfamiliar attitudes and experiences into the confines of her own views and experiences, as they have been shaped by the unchecked influence of the mass media. Somewhere in the back of her mind there may be a hazy recollection of the popular psychology of sex education in which religious devotion is reducible to "sublimated" sexual drives. Hence this young lady—served by history's most opulent and elaborate system of education and communication—remains hopelessly provincial, a prisoner of her own time and social environment. Above all, she is captive to the very technological wonders which were to set everyone free by making knowledge instantly and universally available. For her, as for an increasing number of supposedly educated young people, what cannot be condensed into a headline or the caption of a photograph, what cannot be rendered in the tracery of a beam of electrons on the inner surface of a cathode ray tube, cannot be known or understood at all. It hardly bears pointing out that the news and public interest programming generally available on radio and television is leftwing and secular in its ideology and sensationalist in its tone,

and that the entertainment offerings, when not merely banal and meretricious, are scandalously immoral.

No claim is made here that the problem of illiteracy among college students has gone wholly unnoticed. Indeed, a former colleague of mine, Suzanna Britt Jordan, drew national attention some years back with a column in *Newsweek* excoriating the stupidity and laziness of students;[7] and the year before Gene Lyons blamed the "Higher Illiteracy" on the snobbery and laziness of professors of English, who are interested merely in obscure research and "look with condescension upon lowly teachers of basic writing skills."[8] Now despite the fact that Jordan and Lyons put the blame in precisely opposite camps, there is no contradiction in conceding that, in some respects, both are right: students and faculty alike have been self-indulgent and self-serving for a number of years, and declining academic performance—at all levels—is the result. However, there is a curious and distressing coincidence in the arguments of these critics of college English teaching: both stress the "basics of grammar" (Jordan's phrase) at the expense of literature. Lyons is, in fact, overtly hostile both to the teaching of literature in the classroom and to literary scholarship and criticism. "The business of the American English department," he complains, "is not the teaching of literacy; it is the worship of literature." A bit further in his essay he describes literary scholarship as "hobby-horse 'research' of a kind that used to be done primarily by potty Church of England vicars when it was too rainy for croquet."[9]

Of course it is doubtful whether anyone could be found to defend all that passes for "research" in academic journals these days (though I must add that anyone who is interested in literature owes a debt of gratitude to "potty Church of England vicars" like Skeat and Grosart for the great labor of providing the earliest modern editions of many classics of medieval and renaissance poetry), and I happily endorse Lyons' call for all members of English department faculties, from full professors on down, to teach freshman composition at least some of the time. For that matter, I think that composition should be a principal concern in *all* English classes. What troubles me is the assumed conflict between literature and literacy, the frequent outcry—echoed by Lyons—that instructors are "smuggling" literature into freshman composition

classes.[10] I am convinced that the alleged clash between literature and literacy is more than a verbal paradox; it is a sheer contradiction. Prescinding for the moment from the importance of literature in the formation of the moral imagination, there is the simple but necessary role of literature in learning composition: a student has to learn to read before he can learn to write, and it is the process of reading that teaches writing. To be sure, good teachers, beginning in the primary grades, offer instruction in vocabulary, spelling, punctuation, conjugation and declension, paradigms, and even syntactical structure. Later on this instruction should become criticism of diction, coherence, and of overall organization and conception. But none of this actually teaches anyone *how* to write any more than correcting pronunciation, or chiding someone for talking with his mouth full, teaches him how to speak. And in fact we learn to write in much the same way we learn to talk: as small childen we imitate the speech of our parents and friends, and later of teachers and a generally wider circle of acquaintance. In the modern world children also imitate the voices of radio and television, from Dan Rather and Howard Cosell to Kermit the Frog and the Fonz.

I would not diminish the importance of the "basic of grammar" and "coherent paragraphs," yet I maintain that the heart of the problem lies elsewhere, in the fact that we have produced a generation of non-readers. A person who has not read widely and thoughtfully among important works of literature—and I include Plato and Aristotle, Augustine and Aquinas, Galileo and Pascal, Newman and Huxley, Freud and Santayana, as well as classics of fiction, poetry and drama under the rubric "important literature"—such a person, I say, will never write well. Anyone who learns to write only, or even mainly, by studying paradigms and doing composition "exercises" will write English as if it were a second language. Having taught for a number of years at a university with large technical and industrial components and hence heavily stocked with third-world students, I have been struck with the extent to which many native Americans write English with as little grasp of the idiom of the language as foreigners. They are as dependent on thesaurus as Taiwanese students are on their

Chinese-English lexicons, and the resulting rhetorical performances are not altogether dissimilar.

Recall the sentence from our ingenuous scholar of American literature: "Jonathan Edwards must have had a kind of homosexual relation with God because he said he was always having ejaculatory prayers." There are no errors of grammar, spelling, or punctuation in this thoroughly illiterate sentence. Though it is obviously wordy, awkward, and simply fatuous, the "rules" it breaks are either vague or tautological. Yet no one with an ear for decent English would employ the vague filler, "kind of," or compose an ugly, unidiomatic phrase like "having. . . prayers." Then there is the outrageous blunder in what, for want of a better term, we shall call *diction*, in the young lady's misunderstanding of "ejaculatory." All in all, it is the sort of sentence that might be expected from a native speaker of, say, Roumanian, who had taken a crash course in English in order to be able to read a menu and make hotel reservations. Lying behind this ghastly sentence is the student's inability to read a standard work of American colonial literature with sufficient comprehension of tone and atmosphere and historical background even to be able to recognize the unfamiliar use of a familiar word; and of course behind the unfamiliar phrasing there is an encounter with an unfamiliar experience, which is, after all, an important purpose of a liberal education. In short, this young lady, who at the time already had the vote and who has by now, in all probability, proceeded to the B.A. degree, had arrived at college without the ability to read and comprehend a fairly ordinary piece of English prose, and hence without the ability to make even a moderately sensible comment on a critical episode in American cultural history (the Great Awakening) which has not ceased to have reverberations in contemporary society.

My erstwhile Jonathan Edwards scholar suffers intellectual disabilities not unlike those of the critics of Solzhenitsyn and Germaine Greer mentioned heretofore. All three students are blind to literary traditions of Western civilization, and insofar as all three are typical products of modern education and media influence, we have an important clue to the rapid decline of contemporary society into irresponsible hedonism and the subjective nihilism that characterizes the anti-life mentality now so prevalent. It is the

imaginatively apprehended and sustained sense of what is just and honorable that strengthens the character of most men and women when purely logical argument fails. "I had sooner play cards against a man who was quite sceptical about ethics," C.S. Lewis writes, "but bred to believe that 'a gentlemen does not cheat', than against an irreproachable moral philosopher who had been brought up among sharpers."[11] Anyone who has attempted to convince an audience of college or high school students of the immorality of, say, sexual promiscuity or abortion will understand Lewis' remark. Their knowledge of even the recent past is so meager and distorted, their vision of human reality itself so warped by the pandering fantasies of popular films and records, that it is difficult for them to conceive that for centuries intelligent and honorable men and women regarded such commonplace modern practices as vicious and criminal. Such is their view of "normal society."

There is no easy way to restrain, much less to reverse, the continuing degeneration of our society's moral vision. In a famous essay, "Tradition and the Individual Talent," T.S. Eliot argues, "No poet. . .has his complete meaning alone. His significance, his appreciation is the appreciation of his relation to the dead poets. . ."[12] This characteristic of poetry may be taken as a special case of the condition of all discourse. Just as single words have actual meaning only in particular utterances and not in isolation, even so an essay or literary work of any kind has its meaning only in the wider context of literary culture. For this reason no work of literature can be understood wholly on its own; in order to understand one book, you must read many. (Hence I am troubled by dust-jacket blurbs that begin, "If you are only going to read one book this year. . . ." If you are only going to read *one* book, why bother?) A book is a contribution by one author to a continuous, multi-faceted conversation that began centuries ago with the birth of the world of humane letters. Literacy—the ability to read and write—is the ability to participate in some measure in this long-running dialogue about the nature and condition of humanity. It ought to be self-evident that anyone who intends to make even an intelligible contribution—not to say a significant one—had best spend a good deal of time listening and finding out what has already been said before he starts talking. Today we are bestowing

college degrees on increasing numbers of young men and women who are only vaguely aware that any intellectual dialogue is going on.

In my own experience the difficulties of the teacher of literature have converged with those of the pro-life spokesman. The function of literature survey courses—the generalized studies aimed at all students fulfilling humanities requirements—is precisely to provide a framework for understanding the development of ideas, styles, movements of thought in a given national culture or generic mode (e.g., drama). In other words, the teacher furnishes a context for his students' enhanced comprehension and appreciation of books. But if the students have not generally read books? Do not really know how to do so? After all, elementary school reading programs are almost universally conducted on the basis of artificially concocted, junk-food texts, not actual imaginative literature; and the situation hardly improves in many high schools. The instructor of a survey course is then faced with the task of presenting the sweep of, say, two hundred years of American literature to students who could profitably spend an entire semester on one or two books. What is more, his explanations of collateral influences are made in a vacuum to students who have never read *Hamlet*; who have never *heard* of *The Advancement of Learning, Paradise Lost,* or *The Pilgrim's Progress*; who cannot give the haziest account of the political and religious tensions which prompted the migrations of the Pilgrims and the Puritans in the seventeenth century. By the same token the typical student audience faced by a right-to-life speaker is unfamiliar even with the Bible, the *Declaration of Independence*, and the U.S. Constitution. Hence one can hardly expect from these youthful audiences an awareness of, much less a responsiveness to the civic virtue and piety espoused by a Cicero or an Edmund Burke, or the patience and humility of an Augustine or a John Henry Newman. For the typical young person of today, reared in an atmosphere of affluence and self-indulgence, cut off from the traditional exemplars of virtue and responsibility, freedom means doing as one likes without external interference or inner check.

A critical factor in our current moral decadence is, then, a failure to pass on genuine literacy. Unfortunately most of the atten-

tion that has been directed towards the "higher illiteracy" in recent years in no way addresses, indeed may be said to exacerbate, the particular form of illiteracy which is my present concern. Much has been made of the increasing numbers of students who are barely ahead of the absolute illiterates described by Kozol. They are the principal targets of remedial reading and composition programs, the principal inspirers of the "back-to-basics" hue and cry, which would dispense with "frills" like poetry and drama. One can, of course, teach such students the rudiments of English usage, but they are hardly then "literate" in any humane sense. They have been merely promoted into the more numerous ranks of students whose gibberish is spelled and punctuated correctly; and, though I am the last to disparage the value to the commonwealth of a citizenry capable of taking drivers' tests and reading *The National Enquirer*, such accomplishments hardly merit the conferral of the bachelor's degree, or require attendance for sixteen years in costly educational establishments.

In any case, the combination of remedial courses and sloganeering is unlikely to prove effective in raising literacy above the level of simple grammar-and-usage competency. Robert B. Heilman, formerly chairman of the English department at the University of Washington, has suggested that one of the aims of literary study is to help the student grow up, to help him to "the realizing of certain qualities or attitudes that are potentially present in man but that have to be cultivated if he is to become truly 'human'."[13] Because literacy in this sense involves the attainment of maturity, it is necessarily a matter of gradual, organic growth—child prodigies are exceedingly rare in literature. Hence it is doubtful whether a remedial course in literary sensibility, even if such a course could be conceived, would ever work. Responsiveness to books, to the written word, is a habit of mind engendered by the slow ripening of the imagination and intelligence. How many young men and women, already in their nineteenth or twentieth year with yet no glimmering of the spell of language, will still be susceptible to it?

> Twice five years
> Or less I might have seen, when first my mind
> With conscious pleasure opened to the charm
> Of words in tuneful order, found them sweet
> For their own *sakes*, a passion and a power. . . .[14]

Granting that we can hardly expect the average undergraduate to share the literary enthusiasm of a Wordsworth (even at the age of ten), nevertheless, a college freshman utterly devoid of verbal sensitivity is unlikely to recover the lost years in three or four semesters of composition courses and literature.

The sensual anti-life mentality—the vulgar nihilism—of modern American society did not simply happen; it is causally related to the situation of modern education, and this situation is a scandal. What is worse, it is a scandal of which the cause is known to virtually everyone in academic life. Worst of all, the solution to the problem is at the same time both obvious and probably unattainable. In an interview published in a national weekly, John R. Silber, President of Boston University, was asked to identify the cause of the present catastrophic decline in American educational standards. He responded with candor uncharacteristic of university administrators: "We've seen a denuding of the curriculum, largely driven by professional educators who wanted to design a program in which no one could fail." Incidentally, Silber singles out "English—reading and writing"—as the worst area in the public school curriculum.[15] This gloomy diagnosis is confirmed by the "Underground Grammarian," Richard Mitchell. In his entertaining but painful diatribe, *Less Than Words Can Say*, he conjures up instance after instance of shoddy, incoherent writing produced by various sorts of bureaucrats, administrators, and professors; but the dominant group by far consists of those entrenched in schools of education. The education "professionals," as Mitchell points out, have turned their attention from the teaching of reading and writing to the inculcating of "sensitivity" and social adjustment by means of values clarification techniques; they turn out graduates as certified teachers who cannot compose a coherent letter.[16] But plunging scores on standardized tests and the general malaise that has settled over the school system have only led to demands for more money by the educationist establishment to seek solutions to problems largely of its own making. "American public education," Mitchell writes, "is a remarkable enterprise; it succeeds best where it fails."[17]

The problem with public education is, then, the educationist bureaucracy which runs it to the extent of exercising legal control

over the process of certification throughout the United States. Hence access to public school classrooms is unavailable to those most likely to accomplish beneficial change. There is an alarming number of unemployed men and women with doctoral degrees in the humanities who could be hired to teach history, civics, English, and foreign languages in the public schools; however, they do not qualify for certification because they have not learned proper "methodology" or child psychology in a school of education. According to the standards of contemporary educationists, a man with a Ph.D. in English—even a published scholar—lacks the credentials to teach high school students how to write; while a man with a B.A. in English education, who may be incapable of writing a mature, intelligent letter, is certified because he has received instruction in writing on the blackboard, making colorful posters, and "interpersonal relations" of the encounter group variety. It is no wonder that many excellent secondary school teachers, who are not especially avid scholars, now languish in redundant Ph.D. programs rather than submitting to the indignity of renewing certification by taking more education courses. John Silber comments acidly on the fate of the promising M.A.T. programs of the late sixties, which sought to put more scholarly teachers in the classrooms:

> Now here was a wonderful success story that was killed by the state teacher colleges and the unions. The issue was certification. Teachers had to be certified, and the education establishment insisted that teachers take all those mindless, jargon-filled courses that teacher colleges promote. When the credentialing issue came up, the leading universities chose not to fight it, and all those wonderful M.A.T. people left the classrooms for good.[18]

Here we have the educational variant on Gresham's Law: bad teachers drive out good.

Let there be no illusion that the schools of education and the state certification agencies merely need "reform." The very notion that such a field as education exists, apart from specific scholarly disciplines and bodies of knowledge, is intrinsically false. When education per se is detached from the teaching of particular subjects, it inevitably embodies a program of radical social change by the manipulation of the minds of school children. Public education as we know it today originated in the common schools of nineteenth-century New England, which were a principal mode of

realization of the social program of the Unitarian liberalism which displaced Puritanism as the prevailing ideology of New England's "Brahmins." Lawrence Cremins, Horace Mann's (sympathetic) editor, observes that for Mann "social harmony" was the "primary goal of the school." And he adds, "Yet even social harmony was instrumental to the larger purpose of social progress, an end closely tied to Mann's limitless faith in the perfectibility of human life and institutions."[19] For John Dewey, *eminence grise* of modern educationism, the school must have "a chance to affiliate itself with life, to become the child's habitat, where he learns through direct living, instead of being only a place to learn lessons having an abstract and remote reference to some possible living to be done in the future. It gets a chance to be a miniature community, an embryonic society."[20] Inspired by such grandiose conceptions, modern educationists have tended to neglect more mundane matters such as reading, writing, mathematical calculation, history, and the like. Moreover, the educationists' attempt to expropriate the functions of home, church, and other institutions has not yielded a notably happier world. Ironically, the program of Mann, Dewey, and their successors has contributed to the disintegration of "social harmony"; for an illiterate society, a society cut off from its cultural roots, is a society which has lost its vision and purpose. Moreover, in calling for a "child-centered" education, Dewey inverts the normal course of education.[21] Etymologically as well as logically, this word means *to lead out, to bring forth.* Its goal is to make the child responsive to the world around him, not to his own whims and desires. Children who are subjected to "child-centered" education are likely to become self-centered, self-indulgent adults.

Ultimately, the literacy crisis portends a moral, political, and spiritual crisis. Students who cannot distinguish between bohemians and philistines, who think that Jonathan Edwards had "a kind of homosexual relation with God," are not really equipped to confront the crucial issues of the world. Such a student is likely to respond to the prophetic utterances of a Solzhenitsyn by insisting that the Rolling Stones are great artists because they sell a great many records and pack in the mobs on American tours. Such a student is likely to sneer at a society in which children and motherhood are prized, as backward or even abnormal. A cynic might see

in the decline of American education a conspiracy by the NEA to enhance its own political positions. The illiterate hedonist is an ideal subject for the omnicompetent welfare state. On the other hand, the moral relativism of high school sex education classes may well lack credibility among students steeped in Dante and Shakespeare rather than *One Day at a Time* and *The Young and the Restless*. Clearly we cannot yield to the rough beast slouching towards Berkeley. The maintenance of civil society depends upon the literate civility of its citizens (the Latinate puns are intentional). As Robert Heilman observes, a nation governed by democratic institutions cannot cherish the intellectual maturity of its citizens too highly.[22] The capacity to read and listen critically and sympathetically, to write and speak with clarity and force, is surely as valuable as any specific occupational training available at universities.

But universities themselves seem no longer to recognize this. More and more institutions of "higher learning"—private colleges in financial trouble as well as state campuses—are becoming little more than glorified vocational schools. At a time when university faculties ought to be rising in unison against the debauchery of the public school system which furnishes most of their students, when they should be drumming the fraudulent educationists out of their ranks, virtually the opposite is occurring. Colleges and universities, rather than demanding rigorous standards and a positive commitment to learning from the public school system, are instead acceding to the same pragmatism, trendiness, and general shabbiness. Scholars in the humanities find their work increasingly irrelevant and incomprehensible to an increasingly illiterate public; and scholarship itself becomes increasingly specialized, arcane, and simply absurd, deprived of its natural relationship with the all but vanished nonspecialist but literate reading public. It is not at all improbable that somewhere an ambitious academic even now is "deconstructing" Edwards' *Personal Narrative* and discovering in the work's "intertextual matrices a psychic valence towards homoerotic relationship structures transmogrified into transcendental category variants." If he knows how to play the game properly, his study will be published and move him up the ladder of tenure and promotion.

I should like to be able to close on a hopeful note with a crisp, tidy solution to the problem herein expounded, but it may be too late to reverse our slide into technocratic barbarism. We have lost, during the past ten or fifteen years, virtually an entire generation of young men and women who, with rare exceptions, are essentially cut off from the tradition of Western civilization and the power this tradition gives to judge the contemporary world intelligently. Every class that graduates under present educational conditions serves to increase the numbers of Americans for whom this civil, literate tradition is all but unknown and hence of no concern. Thus the extreme difficulty of dislodging the educationist bureaucracy by political means is aggravated. Indeed, it is difficult to imagine the dismantling of this establishment—so deeply entrenched is it in our governmental system—without the collapse of society itself. It hardly needs pointing out that the moral values of a culture are ill served by anarchy.

One effort toward the alleviation of the decline of letters has been the founding of a number of small, private liberal arts colleges, many of them religious, where a more traditional approach to learning is fostered. But even in such havens, where the students are likely to be far more eager for learning than most, much of the effort will be, in effect, remedial. Although private elementary and secondary schools are enjoying a resurgence, it is inevitable that most parents will bow to economic pressures and send their children to "free" public schools. By the same token, for the foreseeable future, most of our higher education will be conducted at large state universities; and the good accomplished there can only be the work of diligent individual teachers struggling against a tide of utilitarian mediocrity and ideological malice.

The moral crisis of contemporary American society with its various legal and political consequences is, therefore, at least partially related to the disastrous decline in literacy; but the restoration of liberal education cannot be expected to alleviate the crisis. The legalization of abortion and "no-fault" divorce, the *de facto* legal toleration of euthanasia, and the general prevalence of flagrant sexual promiscuity are connected not only to each other but also to the rapid shrinking of a literate public reinforced by traditional standards and sufficiently articulate to resist the ceaseless propa-

gandizing of our journalistic and educational establishments. But although literary culture can be a powerful enhancement of moral and spiritual values, or an equally powerful solvent of those values, it cannot serve to reinvigorate them once they begin to decay; it is not the origin or principle of the spiritual and moral life. It is worth remembering that the universities, chief vehicles of humane letters in the Western world, were founded not for cultural but for religious motives—this is quite as true of the great American universities, originally founded to educate Congregationalist clergymen, as one of the great universities of medieval Christendom. Literary culture was important and necessary, but still ancillary, and the realm of humane letters by itself lacks a principle of regeneration. For this reason we can be neither too sanguine nor too despairing about the outcome of any particular political contest (the Human Life Amendment) or educational reform. The ultimate struggle is over the minds and souls of individuals, and since most of our institutions—certainly our large public establishments—are corrupt, the restoration must be carried out gradually and personally, in small groups or among friends and acquaintances. Before a literate, intellectually alert public can be reconstituted we must reawaken in individual men and women the virtues of patience and humility and dedication to the common good. Without the achievement of such a revival of the spiritual life among a significant number of thoughtful, articulate persons, any political victory we might gain will prove inevitably ephemeral.

NOTES

1. Cf. "A World Split Apart," in *Solzhenitsyn at Harvard*, ed. Ronald Berman (Washington, D.C.: Ethics and Public Policy Center, 1980), p. 13: "But the fight for our planet, physical and spiritual, a fight of cosmic proportions, is not a vague matter of the future; it has already started. The forces of Evil have begun their decisive offensive. You can feel their pressure, yet your screens and publications are full of prescribed smiles and raised glasses. What is the joy about?"
2. *Prisoners of Silence: Breaking the Bonds of Adult Illiteracy* (New York: Continuum, 1980), p. 55.
3. *Solzhenitsyn at Harvard*, p. 13.
4. Reprinted in *Fidelity*, January, 1982, p. 8.
5. *Ibid.*
6. Jonathan Edwards, *Basic Writings*, ed. Ola Elizabeth Winslow (New York: New American Library, 1966), p. 86.
7. "My Turn," *Newsweek*, November 14, 1977, p. 23.
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14. William Wordsworth, *The Prelude* (1850), V, 552-56.
15. "Today's High School Diploma Is Fraudulent," *U.S. News and World Report*, September 7, 1981, p. 53.
16. *Less Than Words Can Say* (Boston & Toronto: Little, Brown, 1979). For values clarification see pp. 79-95; for examples of educationist prose see pp. 96-103.
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18. "Today's High School Diploma," p. 54.
19. *The Republic and the School: Horace Mann on the Education of Free Men,* ed. Lawrence A. Cremins (New York: Teachers College Press, 1957), p. 8.
20. *The School and Society*, intro., Leonard Carmichael (1915—rpr., Chicago: Univ. of Chicago Press, 1956), p. 18.
21. *Ibid.*, p. 34.
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The Slippery Slope

Malcolm Muggeridge

WE HAVE NOW had legalized abortion in England for some three years, and it is a terrible thought that during those three years more than one million babies have been murdered. In other words, there have been more deaths, as a result of our Abortion Act, than in the First World War. I was brought up to believe that one of the great troubles of the Western World was that in the First World War we lost the flower of our population. Well, now we have destroyed an equivalent number of lives, in the name of humane principles, before they were even born. I'm not going to go over the arguments in this controversy—they have been endlessly repeated, and you all know them, at least as well as I do. I'm not going to rake over all that because I don't think it will serve any useful purpose in an assembly of this kind. But what I do want to say to you is this: that though in worldly terms the battle has been lost, and abortion is now legalized throughout Europe, and in the Western Hemisphere, it still remains the most important issue confronting us, and that nothing can take away the importance of that issue. The fact is that government after government has surrendered on it, not, notice, in response to pressure from public opinion, but out of a weird kind of inertia or fatalism which seems to be inculcated by the media, as though somehow or other this is an inevitable step. Though that's happened, and though all over the Western World this dreadful slaughter of the innocents is taking place, and though, speaking for England and I imagine other countries, gynecologists cannot in fact become consultants unless they are prepared to perform abortions—despite all that, the issue remains a *live* issue, and it is of *highest* importance that gatherings like this should take place and that protests such as we propose to make, *should* be made. Also, that the *contrary* proposition of the

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Malcolm Muggeridge needs no introduction to readers. This article is adapted from a speech he gave in 1977 to the Festival for Life in Ottowa, Canada; it first appeared in the Fall, 1977 issue of this review, and is reprinted with Mr. Muggeridge's ("delighted") permission.

sacredness of the process whereby new beings come into this world, should constantly and by every possible means find expression. It's interesting in this connection, and something that I find rather wonderful and hopeful, that, strangely enough in India, a country which we refer to as "underdeveloped" or "backward," and talk a lot of nonsense about a population explosion there—that in India even the ramshackle machinery of Parliamentary democracy operated in *defense* of the right of people not to be sterilized—which was happening to them, and happening, sometimes, by force. Yes, the Indian people, in our terms an illiterate people, rose up and voted, and the issue on which they voted was this very one—that God has given us the stupendous gift of *creativity*, which we must reverence and cherish. When you are as old as I am, the most beautiful thing in the world is your grandchildren. As your life comes to an end, so you see new lives beginning. And those new lives bear in their faces, in their words, in their bearing, hints of the beginning of it all, which was your marriage, your children. This is the most beautiful thing that life has; this is the most *solacing* thing that life has, when you get to the end of your days, as I'm getting to the end of my days. All the rest seems a lot of worthless rubbish. But *that* is a real thing, as these Indian women who had been *pressurized* by every sort of means, including physical force, recognized in the way they cast their votes. Why, at one point they were actually offered in return for agreeing to be sterilized—what?—a transistor set! Imagine, an allegedly advanced civilization reaches the point of sending out to an ancient one transistor sets to be the reward for giving up the most vital and beautiful creativity that's in us. That's black humor for you, and I can't help envying the future Gibbon who will have the great satisfaction of describing it. Well, I won't go on all about that. But I would say that, looking around the world today, it saddens me beyond words to note in countries like Italy, where Catholicism has been such a strong force, that now there is legalized abortion; that in France, where the medical profession, especially the Catholic doctors, put up such a magnificent fight against it—that there, too, there is legalized abortion. However, every cloud has a silver lining; I heard the other day that on the present basis of population and abortion and contraception, Sweden, in 100 years' time, will have

no population. There will just be nobody there at all. That prospect at least is a tiny compensation for what we all have had to endure.

I have spoken and written about the work of Mother Teresa, which of course is something that I hold very dear, and which has, through my first accidental acquaintance with it, and with her, so enormously enriched my own life. She, as it seems to me, though a simple nun with her sisters, represents most magnificently the mighty *contrary* force to what is going on in these so-called civilized Western countries. Those of you who saw the TV program called "Something Beautiful for God"—which is Mother Teresa's description of what she is seeking to do—will remember, I'm sure, a shot of her holding a baby girl so tiny, that it seemed extraordinary that she could go on living at all. And I say to Mother Teresa in the film: "Are you *sure*, Mother, that the tremendous efforts you and the sisters make in this economically-desolate country, to keep these little creatures alive are really worth while?" Some of them brought in, as this baby was, from dustbins. For answer she holds up the baby—such a tiny little creature—and says: "Look, there's *life* in her!" Now *that* to me is the picture we should all keep in our minds when we are deluged with statistics and arguments and propositions about this question—the picture of Mother Teresa holding up a tiny little creature that had been thrown away into a dustbin, and saying with such exultation: "Look, there's *life* in her!" When I contrast that with, as I gather has happened, some sort of humanist presentation to Dr. Morgentaler [*a Canadian abortionist*] of an award as the humanitarian of the year, I feel delighted beyond words, unspeakably joyful and grateful to be on Mother Teresa's side.

Of course it would be quite wrong to think that the offensive which is being mounted on our Christian way of life will stop at abortion, and already there are the rumblings of a new, strong push in the direction of euthanasia. I have absolutely no doubt that this will be the next great controversy that will arise. The fact is that because it's so costly in money and personnel to keep alive people about whom the medical opinion is that their lives are worthless, the temptation to get rid of the burden by killing them off will be even greater. And thus disposing of them will of course

be dressed up in humanitarian terms as an act of humanity and compassion. Almost all the evil things that have been done in the world in the last decades have been done in the name of justice, equality, compassion, etc. There's a wonderful saying of Dr. Johnson—that wise and good man—that I like very much: "Why," he asks, "Is it that we hear the loudest yelps for liberty among the drivers of slaves?" And this is of course true: it is in the name of humanitarianism that these terrible proposals are made. There would, I feel sure, have been an intensive pressure for euthanasia before now had it not been for one circumstance—that the only government so far in the history of the *world* to put a euthanasia law into effect is the government of the Nazis. *No* other government in the *whole* of recorded history has ever actually *enacted* a euthanasia law. But the Nazis did. And to a considerable extent the German medical profession cooperated with them. The law, I should add, was widely applied throughout the Reich. I happened a few years ago to be visiting a Lutheran settlement for sick and deranged people at Bethel near Bielefeld in West Germany. And there they told me all about how this monstrous piece of legislation had been enforced. They, in common with all institutions, were asked to produce particulars of the patients that they had in their care. And they refused to do this, because they knew quite well that it would be a prelude to getting rid of a lot of them. So, in due course they were visited by an official who wanted to know why they hadn't sent the required particulars, explaining to them that the definition of a person whose life was useless was an inability to communicate. In that case, they said, there was no one in their institution who was in that category. And they proved it, demonstrating that, because their institution was run on the basis of Christian love, *all* the patients in response to love answered with love, and so were able to communicate. Anyway, the long and short of it was, that almost alone in the whole of Germany, their institution escaped the application of the Nazi euthanasia law.

But we shall not be so fortunate when the agitation for legalized euthanasia really gets going in our part of the world. In the first place, it will be argued—which is, alas, true—that in many hospitals in the Western world the lives of patients considered unfit to live are already *being* terminated by the adminstration of excessive

sedation. So, the contention will be that there's no point in retaining a legal prohibition which is already being disregarded. Secondly, the argument will be used that the resources needed for disabled people—not just the old and senile, but also the Mongols and others who are badly disabled and not fully conscious—can be better employed in other ways. The quality of life, it will be argued, requires that the drastically handicapped should be got rid of. We shall of course resist this, we should all—every single Christian—find such a proposal utterly abhorrent. But I feel certain—and I think everybody should get ready for it—that before long euthanasia will be legalized like abortion, like Family Planning, because all these things are closely related. They're all a slippery slope, one leading inexorably to the other.

I wanted to tell you about a little playlet that some friends of mine devised, because I think it illustrates what I'm talking about better than any kind of argument. The scene is a doctor's consulting-room in Vienna round about 1770. A peasant woman comes in and tells the doctor that she is in her second month of pregnancy, that her husband is an alcoholic and has a syphilitic infection; that one of her children is mentally incapacitated, and that there is a family history of deafness. The doctor listens, and finally agrees that there is a case for her to have her present pregnancy terminated. And so he has to fill in a form. Filling in the form he asks her name, but he can't quite hear when she tells him, so he says: "Please spell it out." And she spells out "B-E-E-T-H-O-V-E-N." And then the Sixth Symphony strikes up. Now I think that little drama tells what we're concerned with. *How* can we ever know that such a life shouldn't be born? Or, that such a life should be terminated? On what *conceivable* basis can we in our arrogance make such decisions as that? It is out of all relation to the great Christian traditions in which our society was born, and on the basis of which it has grown up, becoming a great civilization. We have a duty, in all circumstances, to say that men are not bodies; men have souls. That our narrow, self-interested human values cannot be applied to decide the fitness, or otherwise, of a God-created human being to go on living. That in the womb, when this marvelous process of gestation takes place, a life comes into existence that, like all other lives, is an infinitesimal particle of God's

creation. And that that particle of creation contains within itself all the potentialities that exist in every other God-created life. If we *ever* depart from seeing it so, then it is *not just* that we've abandoned our religious faith and that we can no longer participate in the great drama of the Incarnation from which our whole way of life is derived, but we have ceased to deserve to be known as civilized men and women. That is the issue. The attack has been made in terms of this terrible legalized abortion which is upon us. It *will* be followed up, in terms of legalized euthanasia. First, of getting rid of the old and senile, and then of deciding that such and such and such persons don't rate being allowed to go on living. Out of the Christian notion of a human family has come all that is most precious to us. We have to guard it. We have to treasure it. We have to stand up for it, whatever may happen governmentally and administratively. That is our essential duty and our privilege.

I am an old man, and I shall soon be dead. Old men have a strange thing that happens to them. They often wake up in the middle of the night, at two or three o'clock, and they can see between the sheets the battered old carcass that they will soon be leaving, and it seems like a toss-up whether you go back to it to live through another day, or whether you make off. It's a moment, dear friends, of very good perceptiveness, this moment when in a weird sort of way you stand between life here and life in eternity, and you see in the distance, like you see when you're driving, the glow of a city. You see the lights of St. Augustine's City of God. And in that situation, you have some very sharp convictions. One of them is of the sheer beauty of our earth—the beauty of its shapes and foliage and its animals and its trees and its rocks—*everything*, the incredible beauty of it. Also, of the great beauty of human relationships: between parents and children, between husband and wife, between friends, between sweethearts—all these beautiful human relationships. Of the wonder of human work and human creativity. Of all that human beings have been able to achieve. *But you also see* that all this wonder derives not from *men*, but from the participation of men in a creation which has been provided for them by a Creator. And that therefore, in existing even at the fag-end of a life, existing as this tiny, tiny part of God's creation, you are a participant in God's purposes. And that

these purposes are creative, and not destructive. These purposes are loving, and not hating. These purposes are universal and not particular. *Above all*—and this relates so closely to what's drawn us here together today—*above all*, they relate to a *surrender*, an abandonment to God's purpose for men, so that on *that* relationship reposes all that is wonderful in our life. And that whenever we arrogantly, or seemingly with good intentions but still with the dreadful conceit of scientists, think to intervene *ourselves*, shape our genes, rearrange our genes as we want them, make sure that all the creatures that come into the world are beauty queens and Mensa I.Q.'s; when we seek to do all those things, to eliminate from the world whatever seems to *our* eyes imperfect or askew, that *then* we shut ourselves off from that wonderful light that awaits us. Then we shall relinquish our citizenship of the City of God, which is our precious, unique birthright. That's what I have to say to you, and God bless you all.

APPENDIX A

[*The following article appeared in the* Times *of London on the day of the event which, as Mr. Muggeridge explains, might not have taken place but for the author's strong feelings on abortion and related issues. It is reprinted here with permission from the* Times *of London, November 27, 1982 (©1982, Times Newspapers Limited).*]

Why I am becoming a Catholic

Malcolm Muggeridge

It might seem rather absurd for someone like myself well into his 80th year to be seeking admission to a particular church—in my case, the Roman Catholic Church. Like taking out a life insurance policy when one's life is almost at an end. Yet since membership of a church is to do with eternity rather than time, years are scarcely a consideration. After all, babies are baptized before they can understand the significance of baptism, so why should not octogenarians be received into a church shortly before leaving it in a coffin?

Becoming a Catholic is something I have brooded over for many years; longing to take the step, and yet mysteriously held back. I have a vivid memory of walking with Mother Teresa round the Serpentine and discussing this very matter. She was eager to see me a fellow-Catholic; I was more than eager to please her—so much so that it was a positive temptation to do what she wanted just to please her.

Words cannot convey how beholden I am to her. She has given me a whole new vision of what being a Christian means; of the amazing power of love, and how in one dedicated soul it can burgeon to cover the whole world.

Mother Teresa had told me before in Calcutta how the Eucharist each morning kept her going; without this, she would falter and lose her way. How, then, could I turn aside from such spiritual nourishment? I tried to defend myself by quoting Simone Weil to the effect that God needs some outsiders in His service, and how in her case it had been ordained that she should be alone, a stranger and an exile in the world.

This cut no ice with Mother Teresa, who, like her namesake of Avila, combines mystical insight with shrewd practicality and delight in laughter. Nor did my grumbles about dissident priests and prelates in her

church impress her. Jesus, she said, hand-picked 12 disciples, one of whom proved to be a crook and the others ran away. Why, then, should we expect popes and such to do better?

In our spiritual lives, I suppose, some sort of subterranean process takes place whereby, after years of doubt and uncertainty, clarification and certainty suddenly emerge, and like the blind man whose sight Jesus restored, we say: "One thing I know, that, whereas I was blind, now I see."

Or, like Pascal at his supreme moment of illumination, cry out: "Certainty, certainty, joy, peace. . . Oblivion of the world and of everything except God." This having happened, one sets about finding out how and why, but *after* the clarification, not as part of the process whereby it is realized.

First, then, there is the church's sheer survival. Through the turbulent history of 2,000 years, despite lapses and confused purposes, every day, perhaps even every hour, someone somewhere will have been handing out the body and blood of Christ in sacramental form at the alter rail. Then there are the saintly, from the Apostle Paul to Mother Teresa, all of whom in one way or another have contributed towards reanimating the faith which is the church's mainstay from generation to generation.

My own favourite has been Augustine of Hippo whose *Confessions*, with artistry as well as conviction, show how worldliness and carnality can be transmuted into a life dedicated to the service of God. St. Augustine lived at a time in some ways very like ours, when the great Roman Empire was visibly collapsing, and decadence—what we call permissiveness—was everywhere apparent. When news was brought to him in Carthage that Rome had been sacked by the barbarians, he told his flock to turn away from cities like Rome which men build and men destroy, and concentrate their attention on the City of God, which men did not build and cannot destroy. Then he devoted the remaining years of his life to his great work, *The City of God*, thus providing, as it were, a blueprint for the emergence of Christendom from the ruins of the pagan world.

Now, what we continue to call western civilization is in very much the same plight as was the Roman Empire in St. Augustine's time, due, not as the media and the politicians would have us believe, to economic and political factors, but to an overall moral crisis. The Catholic response to this crisis has always appealed to me. For instance, *Humanae Vitae*.

Forbidding the use of contraception devices seems absolutely correct; the separation brought about by the use of these devices between sexual-

ity and its purpose, which is procreation, and its condition, which is lasting love, can only be morally disastrous.

Likewise, legalized abortion, which now results in the murder of an unborn child every three minutes, and inevitably brings in its train legalized euthanasia. So there comes to pass a kind of "humane" holocaust far outdoing Hitler's in the numbers slaughtered and the debauching of the young, and transforming the traditional image of a Christian family whose loving father is God into one of a factory farm whose only concern is for the wellbeing of the livestock and the profitability of the enterprise.

Thus the practicalities of becoming a Catholic, but there is something else more difficult to convey. A sense of homecoming, of picking up the threads of a lost life, of responding to a bell that has long been ringing, of finding a place at a table that has long been left vacant. Not does this in any way involve separation from other fellow-Christians. On the contrary it brings one nearer to them.

One of the few benefits of appearing on television is that, since I became known as an aspiring Christian, people quite often come up to me or write to me indicating that they, too, are Christians. I might be leaving a restaurant, and a waiter comes padding after me, not to complain of an inadequate tip, but to proclaim himself a fellow-Christian. Or in the make-up room—of all places—a girl attending to my battered visage manages to whisper in my ear: "I love the Lord."

On turning a corner in a London street I run into a huge Caribbean who shouts out cheerfully: "Dear Brother in Christ!" It is a delightful experience, and makes me aware that contrary to the finding of public opinion polls and sociological studies, there exists a Christian fellowship ranging between Soviet labour-camps and Los Angeles film studios, and taking in even such weird assemblies as the House of Commons and the United States Senate. Thanks be to God.

One other point—I have described becoming a Catholic as though it was a solitary experience. Actually, my wife for 54 years has been at my side all the way. Nor have we needed even to discuss the matter at issue, but proceeded as one person.

APPENDIX B

[*The following article first appeared in the April 30, 1973 issue of* Modern Medicine *(Volume 41, pps. 32-37); thus it was written very soon after the U.S. Supreme Court handed down the* Abortion Cases *January 22, 1973. Dr. Stone was then a professor in both the faculties of law and medicine at Harvard (as he still is). We reprint the article here, without alteration, with permission. (*© Modern Medicine, *1973).*]

Abortion and the Supreme Court: What Now?

Alan A. Stone, M.D.

Not even the most enthusiastic advocates of the right to abortion could have anticipated such a sweeping Supreme Court decision as occurred in *Roe* v. *Wade*. Their jubilation was counterbalanced by the horror of those who for moral and religious reasons had spoken out for the right to life. Now that the initial furor has begun to subside, it is appropriate to review Justice Harry A. Blackmun's decision and ask what its legal ramifications are, what legal or social policy inspired it, and what its implications are for the medical community. Although I was an early champion of the right to abortion, it seems essential in examining this "victory" to consider what in winning we may have lost.

The Blackmun decision was greeted by some legal scholars with shocked disbelief: shock that the U.S. Supreme Court had gone so far on an issue where the public is still so divided, and where the legal and moral questions are still so ambiguous; disbelief that the Nixon court, chosen as "strict constructionists," could author such an exercise in *ipse dixit* (an assertion without proof).

Criticism of the decision came even from legal scholars who were sympathetic with its results. Some shared Justice Byron T. White's dissenting opinion that "This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs." Others shared Justice William H. Rehnquist's view that "The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the state may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment."

These legal criticisms rest on some basic considerations. First, many constitutional authorities believe that the Supreme Court should always move in small steps deciding narrow issues. In addition, such decisions should rely as much as possible on legal precedent and constitutional doctrine. Finally, the Supreme Court's role is to interpret the Constitution, to rely on the intentions of the framers, and not to create the kind of law that is appropriate for a legislature.

These are technical criticisms, but they are important nonetheless, and beyond them lies the uneasy feeling that the Supreme Court has once again taken a highly political and legally unnecessary giant step that will further undermine public confidence in the court.

Effect of *Doe* v. *Bolton*

The sweeping implications of Justice Blackmun's decision for the medical profession were highlighted in the companion decision, *Doe* v. *Bolton*, which has received insufficient attention. There, ruling on the liberalized abortion statute of Georgia, the court found that the statutory requirement that abortions be performed in hospitals accredited by the Joint Committee on Accreditation of Hospitals and "the requirement(s) as to approval by the hospital abortion committee, as to confirmation by two independent physicians, as to residence in Georgia are all violative of the Fourteenth Amendment."

Perhaps no one will ever know why the court chose to go so far. During its long period of deliberation on the abortion question, rumors were rampant: Chief Justice Warren E. Burger was delaying the decision beyond the November election for political reasons; Justice Blackmun was spending the entire summer reading medical literature at the Mayo Clinic; Justice William O. Douglas was furious about the delays and about the Chief Justice's attempts to control the decision. But no one had the slightest inkling that when the decision came it would go so far, that it would carry by 7 to 2, and that Justices Burger, Blackmun and Lewis F. Powell, Jr., all Nixon appointees, would find the "right to abortion" in the "right to privacy."

The right to privacy does not exist as a specific articulated right in the Constitution. It has been formulated in its parameters over the past several decades, most recently in such cases as *Griswold* and *Baird*, which dealt with contraceptives. It would be impossible to explain the reasoning behind this right to privacy in any brief summary. Indeed, different justices have different theories about its justifications and where they are to be found in the amendments to the Constitution. Justice Blackmun has perhaps the most simplistic approach. He writes:

> The constitution does not explicitly mention any right to privacy. In a line of decisions, however, going back perhaps as far as . . . 1891, the court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the court or individual justices have indeed found at least the roots of that right in the First Amendment . . . in the Fourth and Fifth Amendments . . . in the penumbras of the Bill of Rights . . . or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. . . . These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty". . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing and education. . . .
>
> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the district court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Where the decision leads

What will this "right to abortion" lead to in practical terms? American physicians may well be requested to perform at least one million abortions, and perhaps as many as two million or more in the coming year. These figures are based on the experience in other countries such as Japan and Hungary, where national abortion laws similar to ours were introduced. It is hazardous to extrapolate from the experience in other settings, particularly since we have more contraception available and we are already in a phase of declining birth rate.

Nonetheless, the data from New York state give some indication about the probable extent of the demand. Whether abortion rates continue at a high level in the years to come will depend in large measure on the responsibility the medical profession assumes in the distribution of contraceptives and education in their use. Practical sex education must assume the highest priority. Widespread sex education in turn will produce a major change in sexual attitudes. The sequence seems inevitable. Some believe it is long overdue.

We may never know whether the court considered this sequence, and we can only look to their written decision to discover the "legal reasoning" that justifies its conclusion.

The court's reasoning

The questions posed by the court can best be understood as follows: It is possible to argue that only those abortion statutes that allow abortion to save the life of the mother are legally defensible. They would be comparable to criminal statutes that acknowledge self-defense as an excuse for murder. Such an analogy assumes that a fetus is a human life that has the legal standing of any other human life. The mother and her doctor

cannot destroy it except to save the mother's life.

Justice Blackmun, reviewing the history of the common law and the English and American statutes, demonstrates rather convincingly that historical evidence "makes it now appear doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus." As to the statutory history, he concluded that in the past "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most states today." He further noted that in the early stage of pregnancy (before quickening), there has been a long legal tradition making abortion either not a crime or a lesser crime than abortion of a quick fetus.

These historical arguments all suggest that the fetus was not accorded the same legal status as post-natal life, and therefore the self-defense analogy fails. What, then, are the ultimate state interests in the regulation of abortion? Justice Blackmun recognizes only two interests, dismissing out of hand the argument that abortion statutes might discourage illicit sexual conduct.

The first interest is the protection of the health of the mother from the dangers of what was once a perilous medical procedure. Here Justice Blackmun quotes medical evidence that the procedure has a mortality rate "as low or lower than the rates for normal childbirth." Some medical readers will doubtess quibble about such data. For example, Justice Blackmun fails to consider morbidity, particularly in the case of repeated abortions, and he also fails to consider that maternal mortality rates are by no means an absolute risk rate in that they to some extent reflect the quality of medical care available.

Yet it seems clear that the medical evidence now available convincingly demonstrates that the state has very little justification in claiming that stringent criminal abortion statutes are meant to protect the health of the mother. Justice Blackmun, it would seem, is quite correct in concluding that to the extent the state wishes to protect the health of the mother, it should regulate abortion "like any other medical procedure" with the added proviso that the longer the pregnancy, the more significant becomes the state's interest in protecting health. This is the rationale for his invoking the medical concept of first and second trimesters and transforming them into legal guidelines.

The second basis for the state's interest is the protection of prenatal life. It is this question that reaches all of the moral, ethical and religious values. Justice Blackmun's review of this question wil satisfy no one who holds the belief that all life, including prenatal life, is sacred. His opinion

reviews various religious beliefs, but it amounts to a summary of the conclusions to which the great religions have come, and it does not address itself in any serious way to the moral values such conclusions are based on. Thus, the opinion avoids confronting the deep moral sensibilities that are offended by the decision of the court.

Justice Blackmun also emphasizes the inconsistency of religious doctrine. The dilemma he highlights, of course, is that reverence for life is tied at least in logic to the question of when life begins; on that issue religious doctrine has not been consistent. Granted, there has been such inconsistency in both legal and religious doctrine. There still is no doubt in my mind that no previous generation in western civilization would have condoned the court's decision that protectable life begins in the third trimester.

There is one tradition that has been consistent throughout the ages on the question of abortion, and that is the medical tradition of the Hippocratic oath. The oath has several historical versions, but all contain words to the effect that "I will not give to a woman an abortive remedy." Justice Blackmun devotes several paragraphs of his decision to this bit of consistency. He relies heavily on "a theory" of the late Dr. L. Edelstein, which suggests that the Hippocratic oath's proscription of abortion was the product of Pythagorean doctrines that do not reflect the mainstream of Greek opinion.

"Thus," suggests Dr. Edelstein, "it is a 'Pythagorean manifesto and not the expression of an absolute standard of medical conduct.'" This manifesto became popular at the end of antiquity with the rise of Christianity, and has remained largely unchanged.

Justice Blackmun writes: "This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic oath's apparent rigidity. It enables us to understand in historical context a long accepted and revered statement of medical ethics."

Obviously Justice Blackmun implies that to understand is to dismiss.

What the Court Left Out

Beyond this historical ratiocination, the court says little about the nature of the state's interest in prenatal life. One can assume that advocates of right to life would have argued that the state has a right to prevent abortion because it offends the moral sensibilities of its citizens. Such a right is implicit in other legislation that now may become even more controversial—for example, homosexuality, sodomy between consenting adults, fornication, prostitution, adultery, gambling, dueling, suicide, bullfighting, drug abuse. Indeed, all of the so-called victimless

crimes can be viewed in this same class: namely, behavior that offends moral sensibility.

There is an even more powerful argument to be made than that of moral sensibilities. Justice Blackmun was confronted with the question of where in prenatal life he would draw the line—or, when does a victim exist? Amazingly, he seems to have convinced himself that the court could sidestep drawing such a line: "We need not resolve the difficult question of when life begins."

Having written those words, he goes on to delineate in absolute terms that the state can only proscribe abortion in the third trimester. Even then, the physician is expected to perfom an abortion to protect the life or *health* of the mother. The court thus places the health of the mother above the "viable" life of the child. This is a strange moral calculus; it obscures the line between feticide and infanticide, and it suggests the court's failure to come to grips with the fundamental questions it raised.

In practical terms, it poses the following question: Does the physician perform an abortion or a Caesarean section on a pregnant woman who in the eighth month requests an abortion for genuine reasons of health? The court has drawn its line beyond quickening, beyond the point where any religion has assumed that life begins, beyond the time when abortion is a simple procedure, and beyond the point when most physicians and nurses will feel the procedure is victimless. It is also beyond the point that would have satisfied many like myself who were long-term supporters of the right to abortion.

Why Did the Court Go So Far?

It is reasonable to assume that a majority of the court accepted the argument that a woman's right to privacy allowed her to request an abortion early in pregnancy. Their problem then was to draw a line that would be clear enough to avoid hundreds of new cases that might be brought seeking to extend that line. The court may have chosen to draw its line at a point where no further case could arise. In doing so, it was influenced by past cases such as reapportionment and pornography, where its failure to draw clear lines had led to endless litigation. If this theory is correct, then the court acted not only on the cases before it, but on those it imagined in the future. What makes this hypothesis tenable is the evidence that some members of the Supreme Court now seem convinced that its case load has become unbearable. A recent advisory committee purportedly influenced by the views of Chief Justice Burger has suggested such radical remedies as a new mini-Supreme Court to deal with certain appeals.

It is always easier to criticize, and therefore it may be appropriate to follow a more difficult course and present an alternative remedy that has more legal, moral and medical justification. The Supreme Court, in its earlier *Griswold* decision, recognized a zone privacy around the use of contraceptives that the states could not control or regulate. That decision was not terribly shocking; it recognized what was by then a social reality. It is clear that the individual's contraceptive right does not conflict with the rights of any other valid interest. The only objection was founded on the moral sensibilities of religious groups, but even their reaction had softened.

Griswold implied that the Constitution recognized a citizen's right to control the reproductive potential of sexual activity by the use of contraception. However, the use of contraception has included the intrauterine device and various other medical technics that have blurred the line between contraception and abortion. The medical profession and the public have largely overlooked this blurring because (1) moral sensibilities are less outraged by early abortion and (2) we recognize the importance of the contraceptive right. I believe that the contraceptive decision can be seen as the sole right of the individual. A woman should have the legal right to use or not to use a contraceptive, as should a man. If there is disagreement between husband and wife, then that might be grounds for a divorce. But no husband should be able to force his wife to conceive a child against her wishes.

The problem, as we know, is that for emotional, psychologic, economic and other reasons the woman fails to exercise her contraceptive choice—or, as in the case of rape, is prevented. I think the appropriate remedy is to allow her to make the contraceptive decision after pregnancy as well as before. The social policy would be to expect the woman to make a decision as soon as possible after she has learned that she is pregnant.

Sixteen weeks would be more than sufficient to permit this goal. The immediate response, of course, is that such a practice simply is an attempt to rationalize and obscure an abortion decision by labeling it a contraceptive decision. It is more than that, however. It means that as a society faced with a conflict—the right of a mother versus the potential life of the fetus—we refuse to repudiate potential life as a matter of policy. We resolve the conflict by recognizing the clearly defined autonomous right of the mother, and allow her to elect abortion on that basis as early as possible. Beyond 16 weeks up to the point when the fetus is viable outside the mother, abortion could be proscribed or not by the various states as their legislatures would determine.

Such a decision would recognize the state's interest in the life of the fetus. It would accept a historically valid distinction; namely, before quickening, it would strike a balance between the autonomy of the mother and the sanctity of life. It would allow the different states the opportunity to express local values after 16 weeks, and it would encourage abortion during a peroid when it is medically a safer procedure. Finally, it would not ask as a matter of national policy that the medical profession extinguish viable life at the request of the mother.

What the decision means

Chief Justice Burger, in this brief concurring opinion to *Doe* v. *Bolton*, attempts to reassure those who recognize how far the court has gone. "I do not read the court's holding today as having the sweeping consequences attributed to it by the dissenting justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the court today rejects any claim that the Constitution requires abortion on demand."

These are pious phrases about the medical profession, but they are hardly a reality. They represent a futile hope that the medical profession will assume some significant responsibility for the abortion decision. This hope is futile simply because there are no clear medical indications for abortion in the vast majority of cases. Where there are no indications, there is no room for clinical judgment. Furthermore, the medical profession includes many who genuinely believe that a woman's request is sufficient medical indication to perform abortion.

The court's decision makes it clear that abortion need not be performed in a hospital. It endorses the concept of freestanding clinics suitably equipped for abortion during the first trimester. Such clinics, organized by abortion advocates, will routinely honor the woman's request so that no distinction will in fact exist between demand and request.

Medical regulation of abortion, to be of practical consequence, cannot rely on individual physicians. It must have recourse to abortion committees, to heirarchical regulation. All this the court has ruled unconstitutional if required by state law. The question remains: What if the majority of physicians in a given state were to organize and adopt their own standards for abortion, standards such as those regarding the health of the mother? The answer seems to be that this is within their power as long as their action is not based on law.

But such a group, for example a county medical society, could not invoke any legal sanction against a member who proceeded on a different course of action. Thus, what is left to the medical heirarchy is no more than the power of persuasion and the sanction of social ostracism. These will surely be applied in some communities, but they seem inadequate to still the tide; indeed, such measures are nowhere contemplated in the court's opinion, which has placed the abortion decision squarely in the hands of the individual physician.

The court also makes it clear in *Doe* v. *Bolton* that hospitals can on their own initiative organize or retain their abortion committees and regulate the quantity of abortions in their hospitals if they choose. More important, based on its interpretation of the Georgia statute, it has indicated it would accept state laws that allow denominational hospitals, doctors and perhaps nurses to refuse to participate in abortions if they so opt for moral reasons or for religious reasons.

Many public officials feel such exceptions are insufficient, and there is already evidence that various states, through legislation and by imposing various administrative hurdles, will try to circumvent the right to abortion provided by the Supreme Court. There is very little doubt that such attempts will eventually be struck down by the courts. The sole remedy at this point seems to be a constitutional amendment that would declare the fetus a person.

The rights of the father

There remains one rather serious practical problem for the physician. The Supreme Court in a footnote states: "Neither in this opinion nor in *Doe* v. *Bolton post*, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, requires written permission for the abortion from the husband when the woman is a married minor; that is, when she is less than 18 years of age. If the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional."

This footnote foretells that there may well be future cases. But until they have been decided, how shall the physician act? Should he require the husband of his adult married patients to sign a release? The prudent physician may well adopt such a policy to protect himself from the possibility of a lawsuit not simply because he has violated some ambiguous

right of the father, but to protect himself from a possible tort action. Precedent for such cases does not exist. Similar problems arise in the case of minors, and the physician will operate at his own risk without adequate release.

Some profound effects

When the Supreme Court acts as it did in these two abortion cases, it affects American society in ways that are profound and incalculable. Presumably, the court hoped to give women a right to control their lives. This is a noble cause and one that I fully endorse.

However, decisions in society are made by those who have power and not by those who have rights. Husbands and boyfriends may in the end wield the power and make the abortion decision. Many women may be forced to have abortions not because it is their right, but because they they are forced by egocentric men to submit to this procedure to avoid an unwanted inconvenience to men. To the extent this happens, and it has happened in other countries, neither the dignity of life nor the dignity of women will be enhanced.

Fighting with a divided spirit

Some of us who fought for the right to abortion did so with a divided spirit. We have always felt that the decision to abort was a human tragedy to be accepted only because an unwanted pregnancy was even more tragic. The future will tell us whether the court has struck a proper balance between these two tragic results.

APPENDIX C

[Judge Robert Bork is currently on the U.S. Court of Appeals for the District of Columbia; he was formerly U.S. Solicitor General and a professor of law at Yale. What follows is excerpted from a speech he delivered in Washington last fall to the Judicial Reform Conference sponsored by the Free Congress Research and Education Foundation, and is reprinted here with permission.]

The Role of the Court

Robert Bork

Whatever one thinks about the performance of the courts today, a subject upon which I shall have nothing to say here, it is quite clear that there have been times in our history when courts have gone well beyond their proper constitutional sphere. When that occurs, democratic government is displaced and the question is how to restore a proper allocation of powers. Absent a constitutional amendment, a general means to ensure that courts stay within the limits the Constitution provides for them can only be intellectual and moral.

That may seem a weak control. It does not seem so to me. Intellectual criticism in the short run may be quite ineffective. In the long run, ideas will be decisive. That is particularly true with respect to courts, more so perhaps than with any other branch of government.

Courts are part of a more general legal-constitutional culture and ultimately are heavily influenced by ideas that develop elsewhere in that culture. It is not too much to say, for example, that the Warren Court was, in a real sense, the culmination of a version of the legal-realist movement that dominated the Yale Law School years before. Similarly, the outcome of a present debate taking place in the law schools will surely affect the courts of today and the future.

A new struggle for intellectual dominance in constitutional theory is under way at this moment. The struggle is about the duty of judges with respect to the Constitution. It is taking place out of public sight, in a sense, because it is carried on almost entirely in the law schools and in the law reviews. But that doesn't mean it won't affect our entire polity in the years ahead. The ideas that win hegemony there will govern the profession, including judges, for at least a generation and perhaps more.

Let me sketch the nature of the debate. The contending schools of

thought are called, somewhat unhappily, "interpretivism" and "noninterpretivism." In popular usage "interpretivism" is often called strict construction. And "noninterpretivism" is what we loosely refer to as activism or imperialism.

John Hart Ely, then of Harvard Law School, described them this way: Interpretivism is the tenet "that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or are clearly implicit in the written Constitution. . . . What distinguishes interpretivism"—or, if you will, strict construction—"from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution." Noninterpretivism—or activism, if you will—advances "the contrary view, that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."

The noninterpretivists, in a word, think that in litigation which is nominally constitutional the courts may—indeed should—remake the Constitution. These theorists are usually careful to say that a judge should not simply enforce his own values. And they variously prescribe as the source of this new law, which is to control the judge, such things as natural law, conventional morality, the understanding of an ideal democracy, or what have you.

There is a curious consistency about these theories. No matter from which base they start, the professors always end up at the same place, prescribing a constitutional law which is considerably more egalitarian and socially permissive than either the written Constitution or the state of legislative opinion in the American public today. That may be the point of the exercise.

My own philosophy is interpretivist. But I must say that this puts me in a distinct minority among law professors. Just how much of a minority may be seen by the fact that a visitor to Yale who expressed interest in debating my position was told by one of my colleagues that the position was so passé that it would be intellectually stultifying to debate it.

By my count, there were in recent years perhaps five interpretivists on the faculties of the ten best-known law schools. And now the President has put four of them on courts of appeals. That is why faculty members who don't like much else about Ronald Reagan regard him as a great reformer of legal education.

If the theory of noninterpretivism—that judges can draw their constitutional rulings from outside the document—achieves entire intellectual

hegemony in the law schools, as it is on the brink of doing, the results will be disastrous for the constitutional law of this nation. Judges will feel justified in continually creating new individual rights, and those influential groups which form what might be called the Constitution-making apparatus of the nation—that is, the law professors, the courts, the press, the leaders of the bar—will support the courts in doing this. It will be very hard to rally public opinion against groups so articulate and in control of most of the means of communication. It will be particularly hard since much opposition will be disarmed by being told that this is what the Constitution commands. We are a people with a great and justified veneration for the Constitution.

The hard fact is, however, that there are no guidelines outside the Constitution that can control a judge once he abandons the lawyer's task of interpretation. There may be a natural law, but we are not agreed upon what it is, and there is no such law that gives definite answers to a judge trying to decide a case.

There may be a conventional morality in our society, but on most issues there are likely to be several moralities. They are often regionally defined, which is one reason for federalism. The judge has no way of choosing among differing moralities or competing moralities except in accordance with his own morality.

There may be immanent and unrealized ideals of democracy, but the Constitution does not prescribe a wholly democratic government. It is difficult to see what warrant a judge has for demanding more democracy than either the Constitution requires or the people want.

The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else.

Noninterpretivism, should it prevail, will have several entirely predictable results. In the first place, the area of judicial power will continually grow and the area of democratic choice will continually contract. We will have a great deal more constitutional law than the Constitution itself contains.

Rights will be created, and they will often conflict with one another, so the courts will find that they must balance them in a process which is indistinguishable from legislation.

There is a good example of this. Recently, a federal court of appeals had occasion to consider a state statute which required a wife to consult her husband before having an abortion. The husband was given no control over the decision, merely a sort of due-process right to be heard. Naturally, someone claimed that even that violated the Constitution. The

court of appeals said that it had to balance the wife's right to privacy against the husband's right to procreation.

Neither of those rights is to be found anywhere in the Constitution. The court upheld the statute, but the point is that a court, without any guidance from the Constitution, or any source other than its own views, had to make an accommodation of values and interests of a sort that used to be entirely the business of the legislature. That will become the general situation if noninterpretivism becomes dominant.

Another result of this theory, which, as I say, is the dominant theory of the law schools—at least it appears to be winning the debate at the moment—will be the nationalization of moral values as state legislative choices are steadily displaced by federal judicial choices. This is directly contrary to the theory of the Constitution, which is that certain moral choices specified in the document are national, but that unless Congress defines a new national consensus, all other moral choices are to be made democratically by the people in their states and in their cities.

Finally, there will occur what I have called the gentrification of the Constitution. The constitutional culture—those who are most intimately involved with constitutional adjudication and how it is perceived by the public at large: federal judges, law professors, members of the media—is not composed of a cross-section of America, either politically, socially, or morally. If, as I have suggested, noninterpretivism leads a judge to find constitutional values within himself, or in the values of those with whom he is most intimately associated, then the values which might loosely be described as characteristic of the university-educated upper middle class will be those that are imposed.

There is nothing wrong with that class, but there is also no reason why its values should be imposed upon everybody else. If that happens, then the Constitution will have been gentrified.

Perhaps I've said enough to show why I think this dominant philosophy in the major law schools must not be allowed to go unchallenged intellectually. But I want to make two last points about the rhetoric of its adherents.

Noninterpretivism—activism—is said to be the means by which courts add to constitutional freedom and never subtract from it. That is wrong. Among our constitutional freedoms or rights, clearly given in the text, is the power to govern ourselves democratically.

Every time a court creates a new constitutional right against government or expands, without warrant, an old one, the constitutional freedom of citizens to control their lives is diminished. Freedom cannot be

created by this method; it is merely shifted from a larger group to a smaller group.

G. K. Chesterton might have been addressing this very controversy when he wrote: "What is the good of telling a community it has every liberty except the liberty to make laws? The liberty to make laws is what constitutes a free people."

The claim of noninterpretivists, then, that they will expand rights and freedom is false. They will merely redistribute them.

What is perhaps even more troubling is the lack of candor—and I think it can only be called that—which so often characterizes the public rhetoric of constitutional scholars who subscribe to this theory.

Professor Paul Bator of Harvard put the point very well at the Federalist Society meeting at Yale. He explained that there are two different kinds of arguments that the constitutional in-group uses, depending on its purposes at the moment.

On Monday, while we are arguing for a result in court that would be hard to justify in terms of the written Constitution, we say things like: "Oh well, any sophisticated lawyer understands that the text of the Constitution is really not very clear, its history is often extremely ambiguous, and in many areas simply unknown. That being so, why shouldn't the court just do good as we define the good?"

But on Tuesday, after the decision has been made, we find ourselves talking to a different and much larger group, people who are not constitutional theorists and who may be enraged at what the court has done. These tend to be regarded by the constitutional cognescenti as the great unwashed. To them, we do not mention the ambiguities, the uncertainties that underlie the decision. We certainly don't mention the political basis for the decision. Instead we say to them, "Why, you are attacking the Constitution." That, of course, is not what the critics are doing.

If noninterpretivism is to be respectable, its scholars must stop talking this way. When they address the public, they should say, frankly, "No, that decision does not come out of the written or historical Constitution. It is based upon a moral choice the judges made, and here is why it is a good choice, and here is why the judges are entitled to make it for you."

That last is going to be a little sticky, but that is what honesty requires. Until the public understands the basis by which constitutional argument moves, there will be little chance for the public to decide what kind of courts it really wants.

These concerns are not new. There is a great deal of dissatisfaction with courts today. It is important, in some sense, that those concerns,

that kind of anger is as old as our Republic. Americans have never been entirely at ease with the concept of judicial supremacy, and they have also never wanted to try democracy without any judicial safeguards.

Thomas Jefferson spoke feelingly of the dangers of judicial power: "The Constitution, on this hypothesis [of judicial supremacy], is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent is absolute also. . . . Independence can be trusted nowhere but with the people in mass."

But Alexander Hamilton spoke with equal feeling on the necessity for safeguards enforced by independent judges when he said: "there is no liberty if the power of judging be not separated from the legislative and executive powers. . . . The complete independence of the courts of justice is peculiarly essential in a limited Constitution."

Both Jefferson and Hamilton had powerful points. It seems to me that only a strictly interpretivist approach to the Constitution, only an approach which says the judge must get from the Constitution what is in that document and in its history and nothing else, can preserve for us the benefits that Hamilton saw, while avoiding the dangers that Jefferson prophesied.

APPENDIX D

[*The following document was sent us by its authors, who wrote it as a kind of public* amicus curiae *brief in opposition to an actual* amicus curiae *brief recently filed with the U.S. Supreme Court by several prominent medical associations* in re *the so-called Akron Ordinance case (which, at this writing, is under review by the Court). The authors contend that only the* officials *of the medical associations endorse the brief; the memberships were not consulted. The associations' brief in effect supports the efforts of an Akron, Ohio abortion clinic to overturn the city ordinance that putatively "restricts" the performance of abortions. The authors, who here defend the provisions in the Akron Ordinance, make clear that the medical associations did not represent members such as themselves in filing this brief. Whether or not what follows ever reaches the Court as a document in the case, we think it ought to be included in the permanent record of the abortion controversy which this journal attempts to provide.*]

Social Abortion and Medical Paternalism

by Anne Bannon, M.D. and Ann O'Donnell, R.N.

> *What occurred in Germany may have been the inexorable historic progression that the Greek historians have described as the law of the fall of civilizations and that Toynbee has convincingly confirmed—namely, that there is a logical sequence from Koros to Hybris to Ate . . .*[1]

The American Medical Association (AMA) has done it again! Once more organized medicine has a bad case of "foot in mouth" disease and this time the American Academy of Pediatrics is in for its share of the lumps.

Both authors of this "brief" are professional women, one a Board Certified Pediatrician, a member of the American Academy of Pediatrics (AAP), and the other a Registered Nurse and former Vice-President of the National Right to Life Committee. Both have been deeply involved in the anti-abortion movement for the past decade. Both of us believe we have seen organized medicine go from what Leo Alexander describes as "Koros to Hybris to Ate, which means from surfeit to disdainful arrogance to disaster, the surfeit being increased scientific and practical accomplishments, which, however, brought about an inclination to throw away the old motivations and values by disdainful arrogant pride in

practical efficiency. Moral and physical disaster is the inevitable consequence."[2]

Just what is this new low to which the AMA and the AAP have dropped? They have allowed their names to be placed on a pro-abortion legal brief against a city ordinance passed in Akron, Ohio. Why oppose a city ordinance? Because *this* ordinance is the now-famous Akron Ordinance, which is a threat to the *carte blanche* provided to abortionists by the Supreme Court of the United States in *Roe* v. *Wade* and *Doe* v. *Bolton* in 1973. And so the AMA, the AAP, and the Nurses Association of ACOG joined with the American College of Obstetricians and Gynecologists (ACOG) in an *amicus curiae* brief on behalf of an Akron abortion clinic.[3] The clinic had challenged the Akron Ordinance, which attempted to provide some guidelines for the protection of the women who were the victims of that clinic.[4]

There are always two victims of abortionists. One, the obvious one, is the unborn baby. The second victim of the medical killers is, of course, the woman. Women involved in the destruction of their own babies are not called victims because they are perceived as having made a "choice"—hence the euphemism "pro-choice" applied to the abortionists and their supporters. In addition, the woman is not supposed to be under pressure to kill her baby. Yet the pressures are there. There are pressures from society, from husband, from "boy-friend," from women friends who have undergone abortions and seem to need to justify their own act of violence by seducing others into the same act. And, finally, there is the pressure from within the medical profession itself.

Although our primary interest here is in the pressures which emanate from the paternalistic attitudes of organized medicine, it is important to consider the other sources of pressure placed, either directly or indirectly, on the pregnant woman to coerce her into willing participation in this grossly unnatural act. A consideration of the role of Society in the acceptance of abortion as a mere medical procedure with no moral ramifications was, perhaps, given its best—or worse—expression in an editorial which appeared in a California medical journal in late 1970.

> The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition or status, abortion is becoming accepted by society as moral, right and even necessary. It is worth noting that this shift in public attitude has affected the churches, the laws and the public policy rather than the reverse. Since the old ethic has not been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which

everyone really knows, that human life begins at conception and is continuous whether intra or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected.[5]

The prophetic nature of that editorial was borne out on January 22, 1973, when one of the most prestigious institutions in our Society proclaimed a new "freedom" across this Republic and made legalized killers out of physicians.[6] It is *not* a role from which all physicians have shrunk with justifiable horror. Abortionists have been on the fringe of the profession for centuries but they have never been accorded the position of "honored colleague." The Supreme Court of the United States notwithstanding, abortionists are still not considered "honored colleagues"; they are what they always have been—the scum of the profession. Legality hasn't changed what they are, but it *has* changed what organized medicine is. Let's look at the changing attitudes of organized medicine towards abortion and abortionists as reflected in changes, over the years, in official statements published by the AMA, as compiled by Dr. William Brennan in a recent book.[7]

What is Abortion?

1859 - The slaughter of countless children; no mere misdemeanor or no mere attempt upon the life of the mother, but the wanton and murderous destruction of her child; such unwarrantable destruction of human life.

1871 - The work of destruction; The wholesale destruction of unborn infants.

1967 - The interruption of an unwanted pregnancy.

1970 - A medical procedure.

Who Should Perform Abortions?

1871 - It will be unlawful and unprofessional for any physician to induce abortion or premature labor . . . and then always with a view to the safety of the child—if that be possible.

1970 - Abortion should be performed only by a duly licensed physician and surgeon in an accredited hospital.

Who Are Physician Abortionists?

1871 - Men who cling to a nobel profession only to dishonor it: False brethren; Educated assassins, These modern Herods; These men who, with corrupt hearts and blood-stained hands, destroy what they cannot reinstate, corrupt souls, and destroy the fairest fabric that God has ever created . . . under the cloak of that medical profession; Monsters of iniquity.

1967 - Conscientious practitioners performing therapeutic abortions for reasons other than those posing a threat to the life of the mother; Equally conscientious physicians who believe that all women should be masters of their own reproductive destinies and that the interruption of an unwanted pregnancy, no matter what the circumstances, should be solely an individual matter between the patient and her doctor.

What Should Be Done To Physician Abortionists?

1871 - The members of the profession should shrink with horror from all interaction with them professionally or otherwise; These men should be marked as Cain was marked: They should be made the outcasts of society. It becomes the duty of every physician in the United States to resort to every honorable and legal means in his power to crush out from among us this pest of society.

1970 - They should be allowed to perform abortions as long as they are done in an accredited hospital acting only after consultation with two other physicians.[7]

What about pressures from husbands or "boy-friends"? What happens whan a man says, "You get an abortion or I leave you."? Some women, the strong ones, say "Go!" Others have an abortion. Are they victims? Did they make a free choice, or an informed choice for that matter? Hardly. As Alan Stone, M.D., a professor of law and psychiatry at Harvard—and a pro-abortionist—wrote:

> When the Supreme Court acts as it did in these two abortion cases, it affects American society in ways that are profound and incalculable. Presumably, the court hoped to give women a right to control their lives. This is a noble cause and one that I fully endorse.
>
> However, decisions in society are made by those who have power and not by those who have rights. Husbands and boyfriends may in the end weild the power and make the abortion decision. Many women may be forced to have abortions not because it is their right, but because they are forced by egocentric men to submit to this procedure to avoid an unwanted inconvenience to men. To the extent this happens, and it has happened in other countries, neither the dignity of life nor the dignity of women will be enhanced.[8]

There is nothing life-enhancing nor dignified about the abortion procedure. Aboratoriums have been compared to car-rental agencies where women, who have been used by men, appear to be vacuumed out and certified fit for reuse. Far from being a right given by the Supreme Court to women to help them control their own lives, abortion is only another opportunity for men to exercise control over women in a way virtually impossible before January 22, 1973. If women are said to control their own bodies now, then it certainly may also be said that, for the most part, it is men—husbands, boy-friends, judges, lawyers, legislators, physicians—who control the controllers.

Who are the controllers? Who are the women who choose violence

towards their own babies as a solution to socio-economic problems? One abortion victim told her story to us a few years ago. She had undergone a first-trimester abortion. She said: "I didn't feel too bad about it." Six months later she was pregnant again. She wanted very much to have this baby, but "circumstances" proved to be too much for her. She was aborted during her fifth month of pregnancy by saline infusion. Her reaction to this abortion was: "When I saw that little baby boy in the bedpan, I knew I could never have another abortion." She was soon pregnant with her third baby, which she carried to term and placed for adoption. All three pregnancies occurred when she was 21 to 22 years old, unmarried, and uninformed as to what she was doing until she saw with her own eyes the dead "little boy in the bedpan."[9]

Do licensed-physician abortionists know what they are doing to women? Neville Sender, M.D., founder of Metropolitan Medical Services, a Milwaukee abortion clinic, remarked on a television show: "We know it is killing, but the states permit killing under certain circumstances."[10] Dr. Sender and his kind know what they are doing, but do the women who undergo "the procedure"? Does Dr. Sender tell his patients that abortion "kills"? Do his patients have a "right" to know what they are deciding to do with the developing baby they carry?

A look at the statistics from the Center for Disease Control,* the government agency which collects abortion data, suggests that women do not know. During the years 1973-1978, 70% to 75% of aborting women were unmarried; approximately 65% were under the age of 24, and half of these were under the age of 19. In 1978, 56.6% of aborting women had not experienced a live birth. It is legitimate to state that a majority of the over 1 million abortions performed are done on young, unmarried, inexperienced, and vulnerable women. This is exactly the group of patients who deserve to be fully informed before consenting to a procedure that has so final and so disastrous an outcome.[11]

From Dr. Brennan's comparison of the degeneration of the position of the AMA, it seems an obvious deduction that the changed attitude *alone* provides both sanction for, and pressure on, the women considering an abortion. Sanction, because there has been no word of disapproval of what is, essentially, abortion on demand from conception to birth, the situation that now exists in the United States. Pressure, because of both a lack of information to make an informed decision, and *mis*information such as telling women that abortion is safer than childbirth, that an

*The CDC's former head, the notoriously pro-abortion Dr. Willard Cates, regularly described pregnancy as "the Number Two sexually-transmitted 'disease'"!

unwanted pregnancy is a venereal disease, and that the population is exploding all over the place.[12]

Pressure from organized medicine takes on particular significance when it takes the form of a legal paper in support of an abortion clinic, and in opposition to a practice that is accepted—even required—for all other surgical procedures, i.e., informed consent.[13] How and why did the four medical organizations involved in the pro-abortion brief become involved? To answer that question it is necessary to look at the Akron Ordinance, source of so much trouble to the pro-abortionists. It is important, too, to recognize that the participation of at least two organizations in that pro-abortion brief is only nominal. Both the AMA and the American Academy of Pediatrics were invited by ACOG to join them on the brief. The decision to place their names thereon was made not by the membership but by approximately 15 physicians, in the case of the AMA, after one teleconference, and by approximately 11 physicians of the AAP, also after a single teleconference.[14] Pro-abortion decisions are being made by pro-abortion physicians in positions of trust in these organizations.

The excuse was offered, by one high-ranking official in the AAP, that this was not a pro-abortion stand, but rather a stand against the legislating of informed consent. But that same official had to admit that the Academy of Pediatrics had never before taken a stand—or endorsed such a brief—in any of the many other cases which concerned informed consent.[15]

The Akron Ordinance is, officially, Ordinance #160-1978, which in 1978 was offered to amend and supplement " . . . the Codified Ordinances of the City of Akron, Ohio, 1975, by the amendment of chapter 1870, entitled 'Regulation of Abortions'."[16]

Several physicians, including Dr. Bannon, were invited to testify before the Akron City Council when this new ordinance was presented for discussion and passage.[17] At that time it was thought to be a model ordinance with a good chance of passage, but with an equally good chance of being challenged by the abortionists. When, on February 28, 1978, the ordinance passed, it was only by one vote (7 to 6). The ordinance was " . . . to take effect and be in force May 1, 1978." On April 19, the expected challenge from the abortionists was instituted and a preliminary injunction to prevent the enforcement of the new ordinance was issued April 27 in the District Court for northern Ohio. A trial followed very speedily (September 5 through September 21, 1978) and resulted in a not-so-speedy decision, August 22, 1979, almost a full year later, which

held parts of the ordinance to be unconstitutional.[18]

Appeals were filed, and it was not until June 12, 1981, that the Court of Appeals for the Sixth Circuit ". . . affirmed in part and reversed in part the judgement of the District Court."[19] Because of that decision there are now several important issues before the U.S. Supreme Court in the present session.

The issues concerning the City of Akron are:

1. Whether the state's interest in maternal health and well being is such that it may regulate abortion in a reasonable manner which is not unduly burdensome, even during the first trimester of pregnancy.
2. Whether a child under the age of fifteen years can be required to obtain the consent of one parent or her legal guardian or a court order authorizing the minor to consent to an abortion.
3. Whether the state can require the physician personally to inform the woman of facts relating to her pregnancy, the abortion procedure, fetal development, and agencies available to assist her.
4. Whether the state can require the physician personally to counsel the patient with respect to the risks and technique of the abortion prior to performing the abortion.
5. Whether the state can require a waiting period of twenty-four hours between the signing of an informed-consent form and the performance of an abortion.
6. Whether the term "humane" as it relates to the disposal of fetuses in Section 1870.16 is void for vagueness, and if so, whether the term is severable from the balance of the section in accordance with City Council's express intent that the provision be severable.[20]

In addition, the abortionists have been allowed to bring before the Court the issue of whether or not second trimester abortions need be performed in a hospital[21] and "Whether this Court should reconsider its holdings [in *Roe* v. *Wade* and *Doe* v. *Bolton*] that a state's interest in maternal health is 'compelling' at the end of the first trimester of pregnancy."[22]

In support of the abortionists' stand is the medical brief, initiated by ACOG, which purports to represent the position of the memberships of four organizations but which in fact represents only the prejudices of a handful of pro-abortionists in the profession who have abused their positions of power. Without benefit of vote from their membership, both the American Medical Association and the American Academy of Pediatrics have had their names appended to a legal document which only serves to highlight the paternalistic stance of many medical politicians.[23]

Those issues specifically attacked by the medical-abortionists brief are as follows:

I. Detailed specification of the information that a physician must provide each abor-

tion patient unconstitutionally burdens the patient's right, in consultation with her physician, to decide whether to terminate her pregnancy.

II. The requirement that all minors obtain parental consent or court authorization for an abortion is unconstitutional.

III. The requirement that all second trimester abortions be performed in hospitals is unconstitutionally overbroad.[24]

Let's consider some facts about these supposedly-important points of conflict between "organized medicine," as represented by the ACOG brief, and the Akron Ordinance. Point one attacks that section which merely stipulates that there are important medical facts that every woman contemplating killing her unborn child should know, such as ". . . according to the best judgment of her attending physician she is pregnant."[25] It is difficult to understand why anyone would object to an "attending physician" providing such information to a woman upon whom he is preparing to perform an abortion. It would seem logical that the woman is entitled to at least some information. And it would seem reasonable that she should be able to expect that information to come from the individual who is going to operate on her. But therein lies the crux of the problem. The "attending physician" in most abortion clinics is no more than a hired gun, a technician who comes in after the diagnosis has been made, who in many if not in most instances sees the patient for the *first time* when she is flat on her back awaiting the kindly ministrations of her baby's killer.

The basic fallacy of the medical brief lies in the claim that the deliberate killing of a patient, even an unborn one, represents "the best possible medical care" and "sound medical practice."[26] Neither abortionists or the Supreme Court are fit arbiters of what is sound medical practice. Abortion has never been sound medical practice, nor is it now. The deliberate removal of healthy tissue has always been recognized as bad medical practice, usually done for profit and in strict violation of medical ethics. And there is certainly no question that the "tissue" removed by abortionists in the vast majority of abortions is perfectly normal and healthy. There is also no question that the primary motive of many abortionists, if not all, is the profit motive.[27]

There is nothing new in requiring that a physician recite facts concerning a pending surgical procedure to his patient. In a series of articles on informed consent which came from the Division of Corporate Law, American Medical Association (and which were printed in the Journal of the American Medical Association, during November and December of 1980[28]) a great deal of concern is evinced for the risk of liability the

physician undergoes, and some minimal guidelines are provided. For example: "First, the physician should personally discuss the proposed treatment with the patient. Obtaining an informed consent is the physician's responsibility and should not be delegated to a nurse or other person."[29] This statement is at complete variance with what happens in abortion clinics, where pressure and paternalism are the daily *modus operandi.* Picture, if you will, a frightened young woman, on her back on the operating table with her lower body exposed, meeting her "attending physician" for the first time. This is the physician who, according to the Supreme Court of the United States, is responsible for ". . . the abortion decision and its effectuation."[30] This is the physician with whom the woman is supposed to have the much-maligned "doctor-patient relationship" which, according to the AMA's *Informed Consent: III,* is a fiduciary relationship.[31] And, according to that same article, "it is well established that, where such a relationship exists, the failure of the fiduciary to disclose all material information may constitute fraud." Even if it were possible for the abortionists to adequately recite all of the possible complications, both immediate and delayed, connected with the abortion procedure to this young woman lying partially exposed before him, how could she possibly argue with him from her literally inferior position? From a position of fear, embarrassment, and ignorance, how can any patient make an informed decision and give informed consent? The Akron Ordinance seeks to take that element of medical pressure and medical paternalism out of the area of informed consent by insisting on a 24-hour waiting period between the signing of the consent form and the procedure.[32] The woman would have to meet her "attending physician" at least once under circumstances somewhat less demeaning to her, and somewhat less *favorable* to abortion entrepreneurs who depend on "crisis consent" to increase their profit margin. It is unconscionable that any medical organization could support a legal brief which, by the nature of its objections to the Akron Ordinance, fosters the idea of crisis consent and even coerced consent.

The old, typically-paternalistic attitude in "Medicine" was that "physicians would be wise to conceal most things from their patients"[33] and feel free to "determine the amount, nature and mode of presentation of the information that should be conveyed to a particular patient. . ."[34] This includes the apparent right assumed by abortionists to determine when someone else's minor child is "mature enough fully to understand and intelligently to consent to an abortion . . ."[35]

The newer attitude, more considerate of the rights and more cognizant

of the intelligence of today's patients, is described in an article from the *Annals of Internal Medicine:*

> By contrast, a valid consent has become a moral and legal necessity in contemporary medicine. Since the writing of the Nuremberg Code (1949), it is generally acknowledged that a patient's valid consent consists of three elements: information, freedom, and competency. A consent is morally valid if it is granted by a patient who is knowledgeable concerning the proposed intervention, free from constraint or coercion in deciding, and mentally competent . . . In the legal sense, informed consent requires the physician to explain a procedure to the patient and warn of risk or hazard, enabling the patient to make an informed choice. Two standards for judging informed consent have been adopted . . . the more traditional "professional custom" standard that requires that information given the patient must conform to the "prevailing medical practice". . . and the newer "material risk" standard for disclosure. In this interpretation the standard for disclosure is what information the patient needs to make an informed choice.[36]

Medical paternalism denotes the control of a patient, or of a patient's decisions, by the physician, either overtly or by intimidation. It is a restriction of the patient's choices by whatever means. And in certain situations it is an essential characteristic of the doctor-patient relationship, that is, in medical or surgical emergencies. But in the case of an elective surgical procedure, such as a social abortion, there is no excuse for the exercise even of so called requested paternalism wherein the patient actually turns over the right to make the decision to the physician.

Paternalism is evident in the supposed concerns of the abortionists about the scientific facts the physician is required to convey to his patient under the Akron Ordinance. In a statement which demonstrates total disregard for the truth, the ACOG brief comments that *most* physicians believe "that many of the specified 'facts' are untrue, unsupported by medical or scientific evidence, contrary to sound medical practice, irrelevant to any conceivable medical purpose, or contraindicated for certain patients."[37] As examples of their totally-fallacious stand, they question even the possibility of viability at a gestational age of 22 weeks, claiming that there is *no* "medical evidence to support this statement and the experience of the profession confirms its inaccuracy."[38] In the same dishonest vein, they go on to state that the Akron Ordinance "reqires the physician to inform his patient of the 'unborn child's, sensitivity to pain, notwithstanding the medical profession's complete ignorance on that subject."[39] And, finally, in a blatant attempt to deny the reality of abortion—what it is and what it does—the abortionists brand as "irrelevant" the information concerning the well-known scientific facts dealing with the obvious humanity of the fetus.[40] Women are turned away from abortion clinics, literally at the last moment for their child, by caring men and women

outside those clinics showing pictures of fetal development at various stages. These are women who have been told by abortionists that what they are getting rid of is just a little bit of tissue. What are they afraid of? The answer to the question is simple: Truth.

Let us examine the truth in regard to the four points we have mentioned. First, the objection to informing the woman that she is pregnant: footnote #27 of the ACOG Brief states: "The section also requires the physician to inform the patient that she is pregnant and of the number of weeks that have elapsed since conception. The effect of these requirements is to prohibit the performance of menstrual extractions to terminate a pregnancy, a procedure performed soon after the first missed menstrual period, since at that time the physician cannot determine conclusively—as Section 1870.06(B) requires him to do—that the patient 'is' pregnant."[41]

On the contrary: according to Dr. Bernard N. Nathanson, Obstetrician and Gynecologist: "In practice, the method is immoral, illogical—and unsafe. Failure to tell a women that there is an accurate test for very early pregnancy when she has missed her period by a few days and fears she is pregnant is an ethical violation of her 'informed consent.' . . . It even violates the feminist canon about 'the right of a woman to control her own body,' since she cannot control it if she does not possess all the facts."[42] Dr. Nathanson goes on to explain that menstrual extraction, which he terms "nothing more than miniature suction curettage," can obscure the presence of serious disease such as ovarian tumor or endocrine problems because the woman will think that the bleeding induced by the surgical procedure is actually a menstrual period.[43] The delay in diagnosis could be disastrous for the woman. Since there are "highly accurate blood tests for early pregnancy" there is no excuse for any honest physician to subject a woman to an unnecessary procedure. Or, as Dr. Nathanson puts it, "To subject a woman to any surgical procedure without a clear medical indication for it, in particular 'menstrual extraction,' is thoroughly unsound and unprofessional."[44]

Second, at least twice in the medical pro-abortion brief there is reference to "most physicians" believing that the facts listed in the Akron Ordinance are not true.[45] Certainly, the lawyers who wrote the ACOG brief did not poll "most physicians" to ascertain if they agreed with the pro-abortionists and those who allowed the names of their organizations to be so badly misused. Obviously, the use of the term "most physicians" represents mere wishful thinking. It qualifies as a statement without basis in fact.

Equally without basis in fact is the claim that no infant born at less than 601 grams of weight has ever survived.[46] At the University of Colorado Medical Center in Denver, where Dr. Bannon took her fellowship in neonatology, there was an 8% survival rate (over an eight year period, 1974-1981) for newborns weighing between 500 and 600 grams.[47] Low, admittedly, but the Akron Ordinance does not state that *all* babies survive below 601 grams or even below 24 weeks. The ordinance simply states that women contemplating abortions after more than 22 weeks of gestation should be aware of the possibility that a live birth *may* result in a pre-term but viable infant.[48] Objection to that particular paragraph may be due to a deliberate mis-reading. Or perhaps they object to an abortionist having to attempt to save the life of the baby he, or she, has set out to kill.

Third, the claim that the medical profession is completely ignorant on the subject of the unborn child's sensitivity to pain is a clear reflection of the ignorance of those members of the medical profession who allowed the names of their organizations to be attached to so inane a brief. For many years now the literature has contained quite solid information on that very subject: for example, in 1954, Dr. Humphrey wrote:

> The development of the spinal tract of the trigeminal nerve in human embryos is reviewed . . . A few fibers of all three divisions of the spinal tract (or descending root) of V reach the spinal cord in embryos as young as 6½ weeks of menstrual age and the tract is present throughout the first cervical segment of the spinal cord by 7½ weeks when the first reflex can be elicited in response to peri-oral stimulation . . . by 9½ to 10 weeks when the first local reflexes in response to trigeminal stimulation can be demonstrated, the spinal tract of V has attained its final termination point in the spinal cord.
>
> It is concluded from observations in the literature on loss of pain perception following section of the spinal tract of V that all secondary trigeminal fibers transmitting pain to nucleus ventrails posterior of the thalamus take origin from caudal portions of the nucleus of the spinal tract of V—just cephalic to the motor decussation, at the level of this decussation, and caudal to it in the spinal cord levels in which the spinal tract of V terminates. From the results of tests of tactual sensitivity following such operations it is concluded that there is some overlap, in the nucleus of the spinal tract of V, between the origins of the fibers of the ventral secondary ascending tract of V *which carry pain* and those which mediate tactile sensitivity.[49]

Or in very plain English, not only the fetus but also the embryo is quite capable of feeling pain. They cannot tell us they are feeling pain but then neither can the newborn baby. The newborn baby can show us that he is feeling pain by moving away from a sharp instrument but then so can the fetus—as every physician who has ever performed a procedure on the fetus *in utero* knows. And as every scalpel-wielding abortionist knows.

Fourth, to object to telling a pregnant woman that she is carrying a human life from the moment of conception because the biologically-illiterate lawyers who wrote the ACOG brief think that's only a "theory of life"[50] is genuinely stupid and not really deserving of comment. There is a wealth of scientific literature proving beyond any doubt that from the moment of conception there is a new human life. That fact is not debatable. Nor is it debatable that a woman cannot make an informed decision about any procedure, including abortion, without knowing all of the facts she should know. And knowing the anatomical and physiological facts about her own embryo or fetus most certainly will contribute to the patient's understanding of the "nature" of the proposed procedure. If she does not know that the abortionist is going to destroy a completely helpless but fully formed and functioning human being, and not a little mass of cells, there is no way she can even remotely understand "the nature of the proposed procedure."

It is at this point that paternalism rears its ugly head most often. The abortionist, and even the physician who "wouldn't do that myself" but does refer his patients to abortionists, prefers that the "girls" should not have to bother their little heads over minor details like what their baby looks like and can do at the stage of development when he will be killed. Those things are only emotionally traumatic and may cause a loss of income to the abortionist—and a loss of control over both of his victims.

But perhaps the height of paternalism is seen in the extension of control, through minor children, over the entire family by abortionists. It should not come as a surprise to anyone that an abortionist, who objects to telling a woman that she is pregnant and that what she is pregnant with is a human life and not a kitty or puppy, does not want to tell the parents that their child is pregnant and that he is going to perform what may be major surgery on her even though he doesn't enter the abdominal cavity. A D&E, especially in the second trimester with an enlarged softer uterus, may well result in perforation and death from hemorrhage. A daughter is lost and parents have no place to turn and no recourse against this intrusion into their family. For as an adjunct to medical paternalism, the paternalism of the courts protects the abortionist and denigrates the basic unit of our society.

In its headlong flight toward the total destruction of honor and decency in the medical profession, ACOG has managed to produce a monument to medical paternalism in its brief for the Akron abortionists. The arrogance of the pro-abortionists in the profession has never been more evident than in their application of words like "sound medical prac-

tice" to the literal tearing-to-pieces of a living human.[51] But the arrogance of ACOG is minimal compared to the arrogance and irrationality of the Board of Trustees of the American Medical Association and the Board of Directors of the American Academy of Pediatrics. If there is a method for impeaching them, it should be initiated. Organized medicine has reached a new, record low with this attempt to white-wash the multi-million dollar baby-killing business by calling it "sound medical practice."[52]

It is a short step from reading "sound medical practice" for killing the unborn child to reading "sound medical practice" for starving a newborn baby to death or "helping" a useless senior citizen (the Nazis used to call them "useless eaters") to die with just a little nudge from a syringe and needle. Be warned. The medical killers are loose. The Supreme Court of the United States has unchained them. And, until they are driven back into their cages, beware the vacuum cleaner, the scalpel and the syringe. Tools of a new trade. Rather, tools of an old trade revived. For we have gone back in time over 2000 years to an era when the physician could be hired either to save or to kill.[53] Make sure you know which your own physician is, a healer or a killer.

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20. City of Akron Brief, pages 2,3.
21. ACOG Brief, pages 17 ff.
22. City of Akron Brief, page 3.
23. Personal communications to Anne Bannon, M.D. from AMA and AAP.
24. ACOG Brief.
25. Akron Ordinance, Chapter 1870.06, Informed Consent (B) (1), page 4.
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APPENDIX E

[*For much of the 97th Congress, which convened in January, 1982, abortion was the much-debated issue that was never put to a vote. Even when Senator Jesse Helms finally brought his amendment to protect the unborn to the Senate floor, the debate was on* whether *to debate; in the event, it failed to get consideration by a single vote (47-46). However, the Helms amendment remains the principal text around which the abortion question revolved, and we believe that it ought to take its place in the permanent record of this journal. Therefore we reproduce below the full text of the proposal, as well as the address Mr. Helms gave in support of it, just as it was extracted from the* Congressional Record.]

United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 97th CONGRESS, SECOND SESSION

Vol. 128 WASHINGTON, WEDNESDAY, AUGUST 18, 1982 *No. 114*

Senate

UP AMENDMENT NO. 1251

(Purpose: To protect unborn human beings.)

Mr. HELMS. Mr. President, I send to the desk an amendment in the second degree and ask for it to be stated.

The PRESIDENT pro tempore. The clerk will report.

The bill clerk read as follows:

The Senator from North Carolina proposes an unprinted amendment numbered 1251.

Mr. HELMS. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

Mr. CANNON. I object.

The PRESIDENT pro tempore. The clerk will read the amendment.

The bill clerk read as follows:

At the end of the modified Helms amendment strike out the last two words in the last line, to wit: "United States" and insert in lieu thereof the following:

"United States of America".

TITLE II

SEC. 201. The Congress finds that—

(a) the American Convention on Human Rights of the Organization of American States in 1969 affirmed that every person has the right to have his life protected by law from the moment of conception and that no one shall be arbitrarily deprived of life;

(b) the Declaration of the Rights of the Child of the United Nations in 1959 affirmed that every child needs appropriate legal protection before as well as after birth;

(c) at the Nuremburg International Military tribunal for the trial of war criminals the promotion of abortion among minority populations, especially the denial of the protection of the law to the unborn children of Russian and Polish women, was considered a crime against humanity.

(d) the Federal Constitutional Court of the Federal Republic of Germany in 1975 ruled that the life which is developing itself in the womb of the mother is an independent legal value which enjoys the protection of the constitution and the state's duty to protect human life before birth forbids not only direct state attacks, but also requires the state to protect this life from other persons;

(e) the Declaration of Independence affirmed that all human beings are endowed by their Creator with certain unalienable rights among which is the right to life;

(f) as early as 1859 the American medical profession affirmed the independent and actual existence of the child before birth as a living being and condemned the practice of abortion at every period of gestation as the destruction of human life;

(g) before 1973, each of the serveral States had enacted laws to restrict the performance of abortion;

(h) agencies of the United States continue

to protect human life before birth from workingplace hazards, the effects of dangerous pharmaceuticals, and other hazardous substances;

(i) it is a fundamental principle of American law to recognize and affirm the intrinsic value of all human life;

(j) scientific evidence demonstrates the life of each human being begins at conception;

(k) the Supreme Court of the United States in the case of *Roe* v. *Wade* erred in not recognizing the humanity of the unborn child and the compelling interest of the several States in protecting the life of each person before birth; and

(l) the Supreme Court of the United States in the case of *Roe* v. *Wade* erred in excluding unborn children from the safeguards afforded by the equal protection and due process provisions of the Constitution of the United States.

SEC. 202. No agency of the United States shall perform abortions, except when the life of the mother would be endangered if the child were carried to term.

SEC. 203. No funds appropriated by Congress shall be used directly or indirectly to perform abortions, to reimburse or pay for abortions, or to refer for abortions, except when the life of the mother would be endangered if the child were carried to term.

SEC. 204. No funds appropriated by Congress shall be used to give training in the techniques for performing abortions, to finance research related to abortion, or to finance experimentation on aborted children.

SEC. 205. The United States shall not enter into any contract for insurance that provides, directly or indirectly, for payment or reimbursement for abortions other than when the life of the mother would be endangered if the child were carried to term.

SEC. 206. No institution that receives Federal financial assistance shall discriminate against any employee, applicant for employment, student, or applicant for admission as a student, on the basis of that person's opposition to abortion or refusal to counsel or assist in the performance of abortions.

SEC. 207. Any party may appeal to the Supreme Court of the United States from an interlocutory or final judgment, decree, or order of any court of the United States regarding the enforcement of this Title, or of any State law or municipal ordinance based on this Title, or any judgment, decree, or order which adjudicates the constitutionality of this Title, or of any such law or ordinance. Any party to such case shall have a right of direct appeal to the Supreme Court of the United States on the same terms as govern appeals pursuant to section 1252 of title 28, United States Code, notwithstanding the absence of the United States as a party to such case. Notwithstanding any other provision of Federal law, attorneys' fees shall not be allowable in any civil action involving, directly or indirectly, the provisions of this Title.

SEC. 208. If any provision of this Title or the application thereof to any person or circumstance is judicially determined to be invalid, the validity of the reminder of this Title and the application of such provision to other persons and circumstances shall not be affected by such determination.".

Mr. HELMS. Mr. President, the purpose of the amendment I have sent to the desk is to bring some of the Federal Government's legislative power to bear on the abortion problem. We, in Congress, have extensive constitutional authority to provide legal protection for unborn human beings, and this bill takes advantage of part of that authority.

The first section contains findings involving treaties, international bodies, foreign tribunals, American history, Senate hearings, and Supreme Court decisions relating to unborn human beings and the right to life. These findings will put Congress on record as clearly recognizing and affirming the right to life and rejecting the tragedy of abortion on demand.

The next four sections restrict the use of Federal funds for abortion. The traditional Hyde amendment formulation is employed, which last passed the Senate on May 21, 1981, by a vote of 52 to 43. Further funding limitations are included with the objective of getting the Federal Government totally out of the business of supporting abortion with tax money.

The sixth section is a freedom-of-conscience provision for medical personnel who work in institutions receiving Federal financial assistance and who object to taking part in providing abortions. Discrimination against such medical personnel on account of their prolife convictions is prohibited.

The seventh section provides for expedited Supreme Court review of cases arising out of State antiabortion statutes. This provision will insure that the Supreme Court gets an early opportunity to review its decision in Roe versus Wade. In addition, award of attorneys' fees is specifically prohibited in cases involving this bill in order to carry out the purpose of the bill in ending Federal financial support for abortion. The last section is a severability clause.

TRADITION AGAINST ABORTION

Mr. President, there has been a longstanding tradition in Anglo-American jurisprudence and in Western civiliza-

tion generally that the protection of innocent human life is a preeminent value. On January 22, 1973, the Supreme Court made a radical break with that tradition. It decided the case of *Roe* v. *Wade*, 410 U.S. 113 (1973), and in the process, announced a newly discovered rule that the Constitution sanctions abortion on demand. The effects of Roe converted abortion from a felony into a constitutional right—overnight.

Swift was the change in centuries of law, and swift were the results in American culture. Since January 22, 1973, there have been more than 10 million abortions. A handful of babies survived the procedures and are alive today. The rest perished. Whatever the fate of the dead in the economy of God's merciful providence, we, on Earth, are without 10 million American children. Let us pause for a moment and think about that fact.

TRUE NATURE OF ABORTION

Mr. President, the United States has been given many great gifts. We have land rich in beauty and natural resources. We have a climate conducive to the most productive agriculture in the world. We have a heritage which includes the best of European and other cultures. We have a tradition of political freedom and economic opportunity which draws immigrants year after year. We have religious liberty and strong families. We have all this and much more.

But beyond these many things, I believe that we all would admit that our most precious gift in America is something else. We see it all around us, especially in the Capitol at this time of year. This gift carries us away from the daily grind into a world of hope and wonder. It is the gift—and mystery—of children. Can we ever overestimate the immense value of American children?

I say no, Mr. President, and everything in our heritage and culture says no, as well. The English poet, John Masefield, has stated the great truth about children in these lines:

And he who gives a child a treat
Makes joy-bells ring in Heaven's street.
And he who gives a child a home
Builds palaces in Kingdom come.
And she who gives a baby brith
Brings Saviour Christ again to Earth.
—The Everlasting Mercy.

Abortion is, tragically, not really about freedom of choice or reproductive rights. I wish it were. It is, instead, about children. It is about which children will live and which will not.

TRAGEDY OF LEGALIZED ABORTION

Mr. President, the fact of 10 million abortions since 1973 has created an unmistakable void in our land. We are missing our own children. Where there would have been laughter, there is silence. Where there would have been tears, there are no eyes to cry. Where there would have been love for the now living, there is nothing.

The plague of legalized abortion has inflicted, I am afraid, a mortal wound to the American ceremony of innocence. The most common surgical operation in the United States used to be tonsilectomy. A sort of all-American rite of youth, it ended with the patient's enjoying mounds of ice cream as therapy. Today, the most common operation is abortion. It ends with a dead baby, a childless mother, and a legacy of guilt.

Abortion, whether we, in Congress, like it or not, has become a national nightmare. Nearly one out of every three pregnancies is now deliberately ended through abortion. In some of our leading cities, there are more abortions than births. A huge amount of medical resources is devoted, not to preserving human life, but to destroying it at its earliest stages. No one can persuasively argue to me that these facts are evidence of health in a society enjoying "freedom of choice." On the contrary, they reflect a society whose very foundation is being torn up.

The destructiveness of legalized abortion is evident in the serious damage which it has inflicted on the American family. Fathers are now rendered powerless to protect the lives of their own offspring. Mothers are lured into abortion by a seductive doublespeak that ignores the reality of the unborn child and proclaims a false liberation. Siblings are denied the advantage of brothers and sisters. Teenagers are counseled, often by Government proxies, to have abortions without the knowledge of their parents. As a result of these and other factors, the family has been atomized, and the bulwark of a well-ordered society has thus been undermined.

NATURAL REVULSION TO ABORTION

Those who advance the cause of legalized abortion often say, "I am personally opposed to abortion, and I would never have one myself." Then they go on to make certain arguments in favor of abortion. I think it is profitable to consider the first part of their argument in which they say they have a personal feeling against abortion. If abortion is some sort of legitimate "reproductive right," why should there be, even among proponents, a repugnance toward the act of abortion itself? Why do the proponents abhor it "personally" and yet encourage others to have abortions?

The answer to this contradiction lies, I think, in the human heart. None of us—not even the proabortionists—can understand the facts of prenatal development, understand motherhood and the value of children, understand abortion techniques, and understand our own humanity and say, at the same time, that abortion is a good thing. Abortion makes us all a little weak-kneed. Even when it is called "termination of pregnancy," we naturally recoil from the thought of a mother and an abortionist destroying an unborn child.

In her book, "In Necessity and Sorrow" (Basic Books 1976), Magna Denes described the staff at an abortion hospital as "dedicated and full of doubt, committed but uneasy." (p. 17.) Where does this doubt come from? What makes health professionals uneasy about their work? It is, I am convinced, the inescapable truth engraved on every heart that human life is a special gift deserving our utmost respect. Beyond all the arguments on both sides of the abortion issue, it is ultimately true, as Pascal put it, that "the heart has its reasons which reason does not know." The human heart simply cannot conform to abortion.

BELIEVERS AND NONBELIEVERS IN AGREEMENT

Believers know this rule of the heart as God's law. They have it confirmed by revealed truth, reason, and tradition and articulated by the ancient command, "Thou shalt not kill." Nonbelievers reach the same conclusion by studying closely the facts of prenatal development and conceding that abortion is simply wrong.

Dr. Bernard N. Nathanson is a former abortionist who now argues against legalized abortion. He is a self-professed nonbeliever. In his book, "Aborting America," Dr. Nathanson discusses the Golden Rule in connection with abortion. He asserts that even apart from religion, the Golden Rule is "simply a statement of innate human wisdom." He says,

> Unless this principle is cherished by a society and widely honored by its individual members, the end result is anarchy and the violent dissolution of the society. This is why life is always an overriding value in the great ethical systems of world history. If we do not protect innocent, nonaggressive elements in the human community, the alternative is too horrible to contemplate. Looked at this way, the sanctity of life is not a theological but a secular concept, which should be perfectly acceptable to my fellow atheists." (p. 227.)

As a Christian, I have a different approach from Dr. Nathanson, although on the abortion issue, we reach a similar result. To my mind, every single abortion is an incalculable blow to the moral order ordained by Almighty God. It is God who creates individual human beings in His image and likeness, and we humans take part only as procreators. For this reason, human life, in the deepest sense, belongs to God.

GOD'S AUTHORITY AS BASIS FOR LAW VERSUS LEGAL POSITIVISM

Although many in public life may shrink from mentioning God, I do not fear to invoke His name and His authority as the ultimate basis for human law. As a body, we, in the Senate, invoke God's authority before beginning each session. This practice of an opening prayer goes back to the early days of the Republic and has its genesis in the traditional notion that man's law is subject to God's. We thus daily affirm in our institutional practice here in the Senate that our work as lawmakers is under the authority of a higher law.

The traditional invocation of God as a substantive basis for legislation does not, however, go down easily with most contemporary legal scholars. They have become caught up in the spirit of an intellectual age whose first article of faith is that man, not God, is the measure of all things. The wisdom of the "Laws of Nature and of Nature's God," as Thomas Jefferson put it, is lost on these legal scholars and their disciples in government. In the world of jurisprudence, this modern

theory of law is generally known as legal positivism. Much to the detriment of our country, it has become ascendant in Congress, the executive departments, and most clearly in the Supreme Court. Legal positivism holds that the validity of a law derives from its being promulgated through regular procedures and rules, irrespective of its substantive content. In other words, no matter what the law says, it is valid as long as it complies with ordinary lawmaking procedures. Legal positivism admits of no higher law or check on manmade law. Hence, the concept of justice has no place in the positivist legal system.

According to Hans Kelsen, a leading positivist of the 20th century, law cannot be criticized as unjust. For Kelsen, justice "is not ascertainable of rational knowledge at all." He says, "Rather, from the standpoint of rational knowledge there are only interests and conflicts of interests . . . Justice is an irrational ideal." Hans Kelsen, "The Pure Theory of Law," 50 Law Quart. Rev. 474 (1934). At bottom, legal positivism denies outright traditional notions of a higher law given by God. The ideal of justice based on immutable principles of right and wrong is dispensed with.

Consistant with legal positivism, the idea has become accepted in certain circles in the United States that God has nothing to do with law and public policy. In debating issues in Congress, we, in 1982, are not, supposedly, to mention God or have recourse to religious authority. God is something exclusively for private life and is irrelevant to human law.

Mr. President, I stand here today to reject legal positivism root and branch. Justice is the legitimate object of all law, and God's guidance in attaining that end is indispensable. In failing to recognize these ancient understandings, human societies subject themselves to the destructive ways of men unimpeded by God's law. Men thus cut off from God have only themselves for authority, a fearful prospect which has always produced fearful consequences.

A CROSSROAD FOR AMERICA AND THE WEST

Legal positivism and its rejection of God's authority are alien to traditional Anglo-American jurisprudence, and they are destructive of American society. I say that it is time to return to our heritage and return to God and His law as the basis for our own.

According to Malcolm Muggeridge, the well-known British journalist, Western civilization is at a critical point, and the abortion controversy, he asserts, is syptomatic of the decision that confronts us. He says:

> Our Western way of life has come to a parting of the ways; time's takeover bid for eternity has reached the point at which irrevocable decisions have to be taken. Either we go on with the process of shaping our own destiny without reference to any higher being than Man, deciding ourselves how many children shall be born, when and in what varieties, which lives are worth continuing and which should be put out, from whom spare-parts—kidneys, hearts, genitals, brainboxes even—shall be taken and to whom allotted.
>
> Or we draw back, seeking to understand and fall within our Creator's purpose for us rather than to pursue our own; in true humility praying, as the founder of our religion and our civilization taught us: Thy will be done.—Muggeridge, "What the Abortion Argument is About," 1 Human Life Review 4, 5 (1975).

NATURAL LAW BASIS OF THE CONSTITUTION

Let me hasten to add at this point, Mr. President, before the positivists denounce me as destroying the Constitution, that what I am advocating today, although rarely heard in recent times, is solidly based in American tradition and does no violence whatsoever to the Constitution. In fact, the establishment of the United States grew out of the colonists' rejection of a British parliamentary positivism which claimed absolute prerogatives over colonial life. Let us not forget those powerful words of the Declaration of Independence, "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." The founding document of our country acknowledges God as the source of legal rights and as the authority for human law.

Some critics undoubtedly will argue that resort to God's authority as a guide to legislation violates the establishment clause of the first amendment. The purpose of the establishment clause was not, however, to outlaw religious principles as a basis for law, but it was to prohibit congressional establishment of a national church. It is no violation of the first amendment to base our laws on reli-

gious principles. To do otherwise—to ignore God's revelation in human history—would be to reject the only sure foundation we have on Earth.

Writing in the March 19, 1982 issue of Christianity Today, Richard John Neuhaus, editor of Lutheran Forum, said, quite accurately,

> Today, talk of a "Christian America" is portrayed as rightwing extremism. But that America was as Christian as it was a republic was self-evident throughout most of our history. If we wonder why some people react so aggressively to the course of American society, we need to be reminded that some of the fundamental changes in our national life are very recent. . . [T]alk about our being a secular society and state began to gain currency only in the 1940's. From the Mayflower Compact in the 17th century through the social-gospel movement that ended in this century, it was assumed that in some significant sense this is a Christian nation. Opponents of that notion have failed in recent decades to eradicate that belief from American life.

American history is full of examples substantiating what Mr. Neuhaus says. In the context of the debate over court-imposed abortion on demand, it will suffice to note two assertions by the Supreme Court itself. In 1892, the Court agreed, "[W]e are a Christian people, and the morality of the country is deeply ingrafted upon Christianity . . . "*Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 471 (1892). In 1931, the Court said, "We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God." *United States* v. *MacIntosh*, 283 U.S. 605, 625 (1931).

To protect innocent human life is the first purpose of any government which claims to be just. In this regard, we, in the United States, have failed over the past 9 years. The travesty of 10 million deaths from abortion is abundant evidence that Congress needs to act for the protection of unborn human beings.

THE CANCER OF ROE VERSUS WADE

In *Roe* v. *Wade*, 410 U.S. 113 (1973), the Supreme Court purported to interpret the Constitution to strip the States of virtually any power to protect unborn human beings. Beyond the fact that such a construction of the Constitution was clearly erroneous, having support in neither text nor history, the Supreme Court rendered its decision in a moral vacuum. In keeping with the theory and practice of legal positivism, the Court tried to develop the Constitution as something sui generis. The Court was without vision—the moral vision—that the Constitution can only be properly construed as informed by the subtle but unmistakable light of natural law.

Such natural law has as a fundamental tenet that human beings are created by God and that accordingly they all have the right to life. They have the right to be free from the aggression of others. To the extent that any manmade rule violates this principle, it cannot properly be called law but is instead a corruption of law. Although clothed with the power of law by virtue of the position of seven of the nine men on the Supreme Court in January 1973, Roe against Wade is nonetheless not law in an ultimate sense. It is a corruption of law, a corruption of the Constitution, and a corruption of American society.

Let us turn away from the corruption of Roe against Wade, but let us do so in a spirit of forgiveness and reconciliation. The abortion matter in the United States has caused much acrimony and hard feelings over these last 9 years. It is indeed an emotional subject. Many fine people with the best of intentions have been deceived by the rhetoric of "freedom of choice." But let us all, both as individuals and as Americans, make a resolute commitment to forgive each other for the errors which have been made. "To err is human, to forgive divine," according to the familiar counsel of Alexander Pope. The Divine in this case will lead us out of the abortion tragedy, and He will surely provide the means for national healing as well.

A CONGRESSIONAL REMEDY

Mr. President, Congress has the moral duty and the constitutional authority to ameliorate the continuing effects of Roe. The bill I am sponsoring today goes part of the way toward providing the appropriate legislative remedy. In essence, it does three things:

First, employing the unquestioned congressional power of the purse, the bill seeks to stop all Federal financial support for abortion. Even the Supreme Court did not venture so far from American tradition and the Constitution as to deny Congress its appropriation power. Although a deter-

mined positivist minority dissented, the majority of the Court held that the Hyde amendment, cutting off abortion funding, was constitutional in *Harris* v. *McRae*, 448 U.S. 297 (1980). The current bill seeks a permanent defunding of abortion insofar as that can be done by any one Congress.

Second, the bill contains a freedom-of-conscience provision for medical personnel who object to participation in performing abortion. This provision prohibits discrimination against pro-life medical personnel in any institution receiving Federal financial assistance.

Third, the bill establishes an expedited Supreme Court review for cases arising from enforcement of traditional State antiabortion laws which may occur in light of the bill's findings on the beginning of human life and the errors of Roe against Wade. These findings constitute, at a minimum, a congressional repudiation of the construction of the Constitution put forth by the majority in Roe against Wade. After the loss of 10 million unborn American children through legalized abortion, the time is overdue for such a repudiation.

SEPARATION OF POWERS

Some have engaged in the sophistry that Congress may not overturn a Supreme Court decision by enactment of a statute. In a strict sense, this statement is true: Congress may not reverse the binding decision between litigants of the highest Federal appellate court. But Congress may indeed interpret the Constitution differently from the Supreme Court and exercise its powers consistent with such interpretation. In so doing, Congress does not overturn a case. The order entered by the Court affecting the litigants in Roe stands. The litigants are bound. What does not stand—what cannot stand under the moral law and the Constitution itself—is a general political rule that the American Constitution renders unborn human beings mere things to be disposed of at will and that Congress is powerless to act.

In this connection, it should be recalled that the primary function of courts in our system of government is to decide cases at law and suits in equity. For appellate courts, including the Supreme Court, their job is to correct errors of law made in the courts below. In doing this, they must sometimes interpret the Constitution and declare a statute invalid. Their interpretation of the Constitution, however, is for the purpose of deciding the particular case before them. It is not for the purpose, nor have the courts been given the power, of acting as the exclusive arbiter of the meaning of the Constitution. Within Congress jurisdiction—that is, legislative power granted under the Constitution—Congress itself must interpret the Constitution pursuant to the oath of office of its Members.

This analysis of constitutional separation of powers is not new. It is supported by many precedents in American history. See, for example, Thomas Jefferson, Letter to Abigail Adams, September 11, 1804 (VIII The Writings of Thomas Jefferson 310 (Ford ed. 1897)); Thomas Jefferson, Letter to William C. Jarvis, September 28, 1820 (X The Writings of Thomas Jefferson 160 (Ford ed. 1899)); Andrew Jackson, Veto Message on Bill to Recharter the Bank of the United States, July 10, 1832 (II Messages and Papers of the President 576, 581-83 (Richardson ed. 1896)); and Abraham Lincoln, Speeches during the Lincoln-Douglas Senatorial Campaign, July, October 1858 (II The Collected Works of Abraham Lincoln 494, 516 (Basler ed. 1953); III id, 255). What would be new is to accept the argument that the Supreme Court is not only the supreme judicial organ but occupies a position of political supremacy over the whole Federal Government.

Let us briefly review statements of three Presidents on this point. First, Thomas Jefferson wrote:

> [T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, *but for the Legislature and Executive also, in their spheres, would make the judiciary a despotic branch.*" Letter to Abagail Adams, supra (emphasis added).

Second, President Andrew Jackson said, in his message of 1832 vetoing the act to recharter the Bank of the United States:

> The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve." II Messages and Papers of the Presidents, supra.

A third notable antecedent in Ameri-

can history, relevant to separation of powers in abortion and Roe against Wade, involves slavery and the Dred Scott decision. President Lincoln, in his first inaugural address, March 4, 1861, articulated the proper role of the Supreme court:

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to a very high respect and consideration in all parallel cases by all other departments of the government. And, while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal. *The Writings of Abraham Lincoln* 262 (A. Lapsley ed. 1906).

President Lincoln's statement is as appropriate today as it was in 1861 and should be recalled whenever the argument is made that the Supreme Court is somehow the supreme branch of the entire Federal Government.

The doctrine of separation of powers under our Constitution is not always simple in its application, and I do not intend to lay down today a single rule of thumb that applies under all circumstances. In the abortion matter, however, it is clear that the Supreme Court misconstrued the Constitution and that Congress has certain power to ameliorate the continuing effects of that error. Let us proceed with dispatch to recognize the right to life under American law.

APPENDIX F

[*The following article appeared as an editorial feature in the Boston* Globe *of July 29, 1982, and is reprinted here with permission. Rabbi Seymour Siegel is professor of ethics and theology at the Jewish Theological Seminary in New York, and a member of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research.*]

To Life! And Even 'The Edges of Life'

Rabbi Seymour Seigel

I represent a faith community which is the oldest in the Western world, and which has, from its very beginnings, been adamantly and enthusiastically pro-life. It is a community upon which death has been imposed by enemies and persecutors in horrible and unprecedented ways. In spite of—perhaps because of—the tragic encounters that the Jewish people have had with death, we have more reason than most to be pro-life.

The God of Israel, who is, of course, the God of Christendom and of the whole world as well, is called in Hebrew literature the God of Life. The Torah—the collective name for the religious and spiritual teachings of Judaism—is called a Torah of Life, "Torah Chayim," and in the most sacred days of the Jewish calendar, the most fervent prayers are recited to be inscribed in the Book of Life. If I were to categorize the Jewish view of things (though not the Jewish view exclusively, since we share this with all high religions) I would say we teach a *bias for life.*

Now the questions that most agitate us are not the applications of this principle to healthy, attractive, young, vibrant individuals. Rather, the questions which agitate us as a society have to do with what the great Protestant ethicist Paul Ramsey of Princeton University calls "the edges of life"—that is to say, not at the highpoints of life, but where life is weak, protectionless, cannot speak for itself, usually at its very beginning and very end.

The Talmudic literature, which is for Jews the authentic interpretation of scripture and the source of doctrine and law, sees the fetus as possessing a human dimension. It speaks of "ubar bemeah imo," the fetus in the womb of its mother, even participating in praising God. The Zohar, the classic book of Jewish mysticism, in praising the Israelites in Egypt for preserving their moral integrity, comments that one of the great attrib-

utes of the people of Israel at that time was that they did not, in spite of provocation, destroy fetuses which are, in the words of the Zohar, "the handiwork of the Living God."

The abortion dilemma which faces us personally and communally is seen in Talmudic literature not as a question of pro-life or pro-choice, but as a dilemma in which there is a pursuer—a "rodef" to use the Hebrew term—and someone or something which is pursued. There are occasions, fortunately rare, in which the fetus is a threat to the mother who is carrying it. In such a rare situation, the doctrine of self-defense can be invoked, and the aggressor can be eliminated in defense of the victim of that aggression.

Otherwise, killing a fetus is forbidden by Jewish morality, law, faith and teaching. According to Genesis 9:6: "Whoever sheds the blood of man, by man shall his blood be shed . . ." The Talmud interprets this to mean: "He who sheds the blood of a person or a being within a being shall be punished." The killing of the unborn is therefore a heinous crime.

Thus Jewish law did not permit abortion except to save the life of the mother. Traditional Judaism takes the view that the fetus possesses a human dimension; it is human life on the way.

From the Jewish point of view, as well as from Christian and other points of view, being pro-life involves being pro-all. We do not fulfill our responsibilities on behalf of the children who are growing and waiting to be born unless we also assume responsibility for what happens to them after they are born. This means as Mother Teresa has been insisting, a program of adoption for children who are "unwanted" by their parents, making it possible to provide them with homes where adoptive parents will offer love, care and affection.

In the Talmud there is a parable, paralleled in other ancient literature, about three men who are sitting in a boat. One man starts drilling a hole under his own seat. The others say to him, "What are you doing?" He says, "What do you care what I'm doing? This is my place and what I'm doing is my business, not yours." The fallacy of this reasoning is obvious. We cannot, we must not accept the notion that we can exist comfortably in a community in which life is cheapened and death is institutionalized with the consent—or even with the indifference—of the government.

Thus, I cannot help but deplore the many millions of abortions that have taken place legally in the United States since the Supreme Court decisions of 1973. And I cannot help but applaud the most realistic legislative remedy yet proposed to reverse those decisions—the Human Life

Federalism Amendment proposed by Sen. Orrin Hatch, which the U. S. Senate will soon be debating.

The tradition for which I speak shares with Christianity, Islam, and other religious traditions, too, a bias for life—a bias which must be invoked where life is threatened most. When there is any doubt, we should always choose the side of life.

APPENDIX G

[Professor R. V. Young sent us the following appendix to his article in this issue, which we reproduce here without alteration.]

A Sample of College Freshman Writing

The following essay was written in class in the space of about one hour. The student was told the topic the preceding day and allowed to prepare an outline in advance. The subject of the paper is a chapter from Rachel Carson's Silent Spring, *in which she sets forth—with obvious approval—an alternative method of insect control, which does not involve the use of pesticides: the release of numerous sterilized males among the insect population as a whole. It becomes immediately obvious that the student has missed the point of Carson's chapter altogether, despite the fact that the context and significance of* The Silent Spring *were discussed in class the previous day. In any case, Carson's style, whatever one may think of her work on other grounds, is not especially formidable. It is equally obvious that the student has never heard of Rachel Carson, or at least has no idea who she was or what her book was about. The incoherence of the following essay is a result, then, of simple ignorance even of important public affairs, and of the incapacity to follow or produce a written argument. Spelling, punctuation, etc. are reproduced from the original text.*

In the essay "the Other Road," Rachel Carson takes a serious look at the use of poisonous chemicals. Carson imposes that the use of these chemicals are a frightening rish. The insecticides we use to kill various types of insects, can also affect man in a dangerous way. The use of chemicals is a greater menace to man than to insects. This creates a conflict between man and nature.

Carson's essay reveals a conflict between man and nature. This conflict is evident in the use of insecticides to destroy insects. Man makes the insecticide to destroy troublesome insects but in the process enables poisonous chemicals to enter one's own body. Indirectly we are preparing these chemicals to poison ourselves. Another example of this conflict between man and nature is the screw-worm. The screw-worm's natural reproductive cycle, is the laying of larvae in an animal's open wound and eventually new adults are formed. In the essay Dr. Knipling proposes a method to sterilize insects. This method would eventually have insects producing infertile eggs. For this reason the population of insects would

end. These insects are a natural part of the earth, put here for a reason, but because of the conflict between man and nature, they are destroyed.

The subject of controlling insects is complicated. It is a subject which holds a great deal of research. With extensive research, the use of insecticide can be a safe and effective way of controlling insects. The conflict between man and nature will always exist as long as insects remain a nuisance to man

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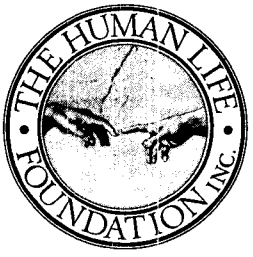
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