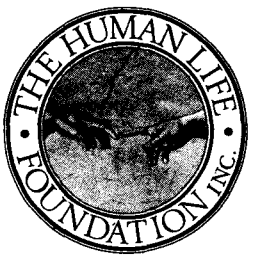
# the HUMAN LIFE REVIEW




FALL 1978

*Featured in this issue:*



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## . . . about THE HUMAN LIFE REVIEW

With this issue we complete four full years of publication and, as a kind of treat for ourselves (and our readers too, we hope) we've filled this 16th one with some unusual articles and other items, not all so closely tied to our "usual" issues, true, but all manifestly having to do with the broad concerns we have been pursuing in these pages (which, should we be lucky enough to complete *five* years, will have brought you something like a million words!).

As in the past, we have a mixture of things, some done especially for this journal, others previously printed elsewhere that particularly struck us, also two excerpts from current books — plus a transcript from a well-known TV program (we continue to believe that the words go by swiftly, never, in the normal course, to return — and while the vast majority of TV fare deserves exactly that fate, a few parts *read* well also, and are worth preserving for the closer attention the printed word makes possible).

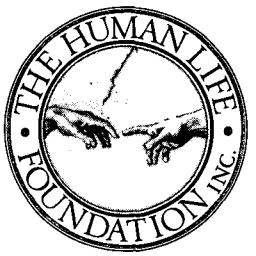
The first book excerpt is from *Christ and the Media*, by the world-famous Mr. Malcolm Muggeridge, recently published by the Wm. B. Eerdmans Co. (Grand Rapids, Mich.; price $5.95), which is based on a series of lectures given by Mr. Muggeridge at the 1976 London Lectures in Contemporary Christianity. What appears here is the major part of the second lecture.

The article by Mr. Peter Skerry first appeared in THE PUBLIC INTEREST, a quarterly journal which often carries articles that deserve a much wider audience. (Edited by the well-known writers Irving Kristol and Nathan Glazer, PI is available at $12 per year: address 10 E. 53 St., New York City 10022.) We also have columns by two of the best-known syndicated columnists, Mr. George Will and Mr. Garry Wills — both of whom, as it happens, have recently published books. Mr. Will's (*The Pursuit of Happiness, and Other Sobering Thoughts*, published earlier this year by Harper & Row, New York City) is a collection of his published pieces, and makes excellent reading. Mr. Wills' (*Inventing America: Jefferson's Declaration of Independence*, published by Doubleday & Co., Garden City, New York) was published just recently and provoked major reviews almost everywhere. Little wonder: it is both a fascinating and quite unusual attempt to "reconstruct" the mental world of the Founding Fathers, and should be, we think, of considerable interest to anyone interested in the kind of constitutional/historical questions we often discuss in our own pages.

The considerable excerpt by Profs. Germain Grisez and Joseph Boyle is taken from their new (and impressive) book, *Life and Death with Liberty and Justice: a Contribution to the Euthanasia Debate*, which will be published next year by The Notre Dame Press (and about which we hope to have exact particulars — and another excerpt — in the next issue). But be assured that the book, like Prof. Grisez's earlier and famous one (*Abortion: the Myths, the Realities, and the Arguments*), is most impressive, from title to final page, and we expect it to become a near-definitive work on euthanasia (as the earlier one was — and remains — on abortion).

Finally, we remind new readers that all previous issues remain available and, if we may say so, remain well worth reading too: given the subjects we deal with, very little of what we've published is quickly out-dated. For full information as to how to get any/all back issues (and/or bound volumes, indices, etc.) please see the inside-back cover.

# THE HUMAN LIFE REVIEW




## FALL 1978





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# INTRODUCTION

It is always a pleasure to begin with something by Mr. Malcolm Muggeridge (who surely needs no introduction to our readers). What we have here is ... well, delightful, full of the kind of thing that *only* Mr. Muggeridge seems to say nowadays (certainly no one else says it all so well). If his subject matter seems a little unusual for our (all too often) weighty journal, all the better: in this, the issue that completes four years of publishing, we think we deserve the treat of giving *you* the pleasure of reading his unblinking review of how human life as lived today may well look to others in a different time. Please remember that it was originally part of a lecture, to an English audience, so that a reference or two may mystify — but he makes his point only too clearly. (If we may take yet another liberty, we urge you to get the book in which this selection, plus a great deal more of the same, appears: the publisher's address, etc., is provided on the inside-front cover of this issue.)

While, as we admit, Muggeridge ranges wide here, he also sums up beautifully our most intimate concerns, over which we have already spilled more than half a million words, to wit: "Surveying and weighing up the whole scene, then, will not their final conclusion be that Western man decided to abolish himself, creating ... his own impotence out of his own erotomania, himself blowing the trumpet that brought the walls of his own city tumbling down, and, having convinced himself that he was too numerous, laboring with pill and scalpel and syringe to make himself fewer..." He calls this a gloomy conclusion, happily escapable. *Amen.*

We move quickly back to our here and now. Prof. Francis Canavan describes the current plight of the Equal Rights Amendment (perhaps in part inspired by Mrs. Clare Boothe Luce's article in our Spring '78 issue). But then he makes what ought to be an obvious point — although it is seldom emphasized: women are by no means just another "minority" seeking equal rights; they make up, in fact, a majority of the total population, and do *not* all agree on answers to what the media persist in labeling "women's issues." Thus, ERA or not, the focus will remain on what "particular" (i.e., only some — probably very few) women want; such goals have not been, to date, pursued through legislative action so much as through the courts (where "special interests" have long found fertile ground for victories no elected body is likely to grant). Thus Prof. Canavan's speculation is that ERA may be the first constitutional amendment designed, not for legislative enforcement, but further legal pioneering ... read on (and weep for the Constitution!).

We next welcome back Miss Ellen Wilson (not only to our pages, but to our staff), who does not disappoint: with her usual directness, she asks us to reconsider some of the most obvious of today's "negative virtues," precisely because of the undesirable results they are likely to have (especially on such of our children as may be around to "benefit") — undesirable to *us* now, she argues, if we would only stop to consider matters clearly, i.e., from the viewpoint of what we *know*, and not what we're told we believe (all the polls and studies we read with such fascination: does even a single one represent *us*?). And when you reach her final paragraph, which of

course you'll have no trouble doing, you'll find a Chesterton gem that was (as was so much else that that great man wrote) ahead of its time.

In our last issue we announced that, even more than previously, we hoped to give the growing concern for the family special attention in future issues. That is why we were struck (immediately thereafter) by Mr. Peter Skerry's impressive article in the current (Summer '78) issue of *The Public Interest*. We reprint here only the latter part; the first half, while just as interesting (and dealing largely with studies of American opinions *re* abortion and related issues — which our regular readers would certainly find of interest), we omit, both for space reasons and because Mr. Skerry makes greater use of polls than we ordinarily do. Thus we have him opening here with the proposition (strongly indicated by the polls he quotes earlier) that there is a very considerable difference of opinion between certain segments of the upper-middle class (what some would call "the new class") and the mass of ordinary Americans on abortion, and that "the emergence of the family as the focus" of such conflict is now clear. We agree with him, and hope that the interested reader will be anxious to read not only this half but the whole thing for himself.

Next we move to what is a "current issue" by any standard: test-tube babies. *The* baby (i.e., the first actual one, a few months ago) got tremendous world-wide attention, as it should have. Obviously we are late in discussing it ourselves, but at least we begin with a most sensible article by Prof. William Smith (new to these pages, but a recognized expert in the matters he discusses), which we think you will appreciate. We mean to have considerably more on the subject in due course.

Our final article is in fact a lengthy segment of a forthcoming book by Profs. Germain Grisez and Joseph Boyle (who co-authored another article for our Winter '78 issue). We say lengthy: it is but a small fraction of the book itself (to be titled *Life and Death with Liberty and Justice: a Contribution to the Euthanasia Debate*), which will surely become, at the instant of publication, the *biggest* contribution to that debate; certainly nobody thereafter can claim to *add* seriously to the euthanasia debate if he doesn't certify that he has read this one, and taken into account its definitive argumentation. Read merely what we have here, and we think you'll agree (we hope to publish another segment in the next issue).

And there is more here too. We publish four appendices. They have little in common (certainly not *size*) except that they are all interesting. All are described in short introductory remarks. We publish them because a) we found each of unusual interest, and b) we think you will too. The three shorter ones deal (Prof. Graglia albeit indirectly) with the great complex of abortion/euthanasia issues. The largest (Appendix B) is another example of our treating ourselves: Wm. F. Buckley Jr. and Malcolm Muggeridge discussing (among many other things) Solzhenitsyn — and therefore (unavoidably!) the very meaning of human life. Those who were lucky enough to view it on TV will surely admit that what was said should not simply fade from the tube (as Muggeridge points out in our lead article, "images are less durable than words, which have displayed a remarkable survival capacity."). So we have done the obvious thing, and immortalized it here.

J. P. MCFADDEN
*Editor*

# The Dead Sea Video Tapes

*Malcolm Muggeridge*

*Nothing is so beautiful, nothing is so continually fresh and surprising, so full of sweet and perpetual ecstasy, as the good; no desert is so dreary, monotonous and boring as evil. But with fantasy it's the other way round. Fictional good is boring and flat, while fictional evil is varied, intriguing, attractive and full of charm.* —SIMONE WEIL

THESE WORDS were written a decade or so before television had been developed to attract its huge audiences all over the world, becoming the greatest fabricator and conveyor of fantasy that has ever existed. Its offerings, as it seems to me, bear out the point Simone Weil makes to a quite remarkable degree. For in them, it is almost invariably *eros* rather than *agape* that provides all the excitement; celebrity and success rather than a broken and a contrite heart that are held up as being pre-eminently desirable; Jesus Christ in lights on Broadway rather than Jesus Christ on the cross who gets a folk hero's billing.

Good and evil, after all, provide the basic theme of the drama of our mortal existence, and in this sense may be compared with the positive and negative points which generate an electric current; transpose the points, and the current fails, the lights go out, darkness falls, and all is confusion. So it is with us. The transposition of good and evil in the world of fantasy created by the media leaves us with no sense of any moral order in the universe, and without this, no order whatsoever, social, political, economic or any other, is ultimately attainable. There is only chaos. To break out of the fantasy, to rediscover the reality of good and evil, and therefore the order which informs all creation — this is the freedom that the Incarnation made available, that the Saints have celebrated and that the Holy Spirit has sanctified.

No doubt my strong feelings about the media and heightened sense of the ill consequences of the eight years of a working life that a majority of our citizens dedicate to the TV screen, are products of my own telelife. Indeed, I had the idea originally of calling these lectures: "The Confessions of a Justified Communicator." There is something very terrible in becoming an image, which is what, of course, being filmed or video taped involves. You see yourself on a screen, walking,

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**Malcolm Muggeridge** is an English author and critic whose work is well-known internationally. This article is excerpted from the second in his series of 1976 London Lectures in Contemporary Christianity, published in this country under the title *Christ and the Media* by the Wm. B. Eerdmans Co. ( © 1977 by The Evangelical Literature Trust).

talking, moving about, posturing, and it is not you. Or is it you, and the you looking at you, someone else? All very confusing and disturbing, making one understand the *doppelgänger* horror stories, and think with new insight of the Second Commandment: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above or that is in the earth beneath, or that is in the water under the earth." It is the one of the Ten Commandments I have always thought of as being rather easily evaded, and therefore as the least exacting. Now I am inclined to feel differently. An image on a screen may not be graven, but it is indubitably an image, and carries with it sinister undertones of narcissism. To infringe the Second Commandment by making oneself into a graven image would seem to be to double the offence, and helps to explain why those involved in this existence in duplicate often bear upon them marks of strain and woe. I well remember the tragic state of mind of Gilbert Harding shortly before his death. And there have been others, even some suicides. In the days when I used to look at television in the evening, it quite often happened that I fell asleep. This, as I have observed, is liable to happen to whole families: the set is in full activity, and all the viewers sleeping — surely a parable picture for our time. Once, sleeping before a television screen, I woke up to find myself on it. The experience was quite terrifying — like some awful nightmare to which only someone like Edgar Allan Poe or Dostoevsky could do justice.

In the light of all this, I ask myself whether orthodox Jews, and adherents of sects like the Mennonites, are so wide of the mark in resolutely eschewing being photographed altogether. I remember once going with cameras into a district of New York largely inhabited by ultra-orthodox Jews, and how, on our appearance, everyone ran for cover. The opposite, I need scarcely say, is the usual response; the cameras draw people to them like bees round a honey pot. It seems very strange now, but I well recall how, in the early days of television, we used to have to persuade and coax people into the studios; even politicians would be hesitant in agreeing to come in front of the cameras. How different things are today! I feel quite sure that if an advertisement were to be put in *The Times* to the effect that Members of either House of Parliament who walked barefoot with a rope round their necks from John o'Groats to Shepherd's Bush would be accorded ten minutes of prime time on television, the roads would be thronging with Noble Lords and Honourable Members, attired and accoutred as required.

It is significant, I think, that Jesus, in dealing with the mentally afflicted, for whom he always showed a particular concern, restored

them to sanity by getting rid of their demonic alter ego, thereby making them one person again and delivering them from images. He, the supreme antidote to fantasy and master of reality, as it were, extricated them from the television screen and brought them back into life. I thought of this when I had occasion once to take Mother Teresa into a New York television studio for her to appear in the *Morning Show*, a programme which helps Americans from coast to coast to munch their breakfast cereal and gulp down their breakfast coffee. She was to be interviewed by a man we could see on a studio monitor in living colour, with a drooping green moustache, a purple nose and scarlet hair. It was the first time Mother Teresa had been in an American television studio, and so she was quite unprepared for the constant interruptions for commercials. As it happened, surely as a result of divine intervention, all the commercials that particular morning were to do with different varieties of packaged food, recommended as being non-fattening and non-nourishing. Mother Teresa looked at them with a kind of wonder, her own constant preoccupation being, of course, to find the wherewithall to nourish the starving and put some flesh on human skeletons. It took some little time for the irony of the situation to strike her. When it did, she remarked, in a perfectly audible voice: "I see that Christ is needed in television studios." A total silence descended on all present, and I fully expected the lights to go out and the floor manager to drop dead. Reality had momentarily intruded into one of the media's mills of fantasy — an unprecedented occurrence. Somehow it gave me an extraordinarily vivid sense of what it must have been like all those years ago in the Temple at Jerusalem, when the money-changers were chased out, and their tables overturned. In the studio normal proceedings for the *Morning Show* were soon resumed, just as I am sure the moneychangers were back in their places the following day. Indeed, they are there still. Both incidents, however, bear out the saying with which Solzhenitsyn concludes his Nobel lecture: "One word of truth outweighs the world."

This business of being an image was brought home to me in more frivolous terms quite recently when I had been abroad for some time, and therefore had not been seen at all on television. To my amazement, the people in my village greeted me with the old familiar cry, ejaculated in an admonitory tone of voice: "We saw you on the telly!" I explained that this was impossible, and then it turned out that there is a man called Mike Yarwood who does an impersonation of me. Clearly, he makes more of an impression on the screen than I can hope to achieve myself — a humbling thought! Then there was a newspaper competition; one of those very easy ones, like the recently-

introduced no-fail examinations. Readers were simply given a list of names , and asked to specify which of them were of real people and which were fictitious. Well, I was one of the names, and I am happy to be able to report that sixty-one per cent of the paper's readers thought I was a real person — quite a satisfactory result, which put me two points ahead of the Reverend Ian Paisley.

Another experience of being an image was becoming a waxwork in Madame Tussaud's Exhibition. This was a distinction which came my way some years ago, and led to my being put in a room beside no less a person than Twiggy, in the process of having a bath as a matter of fact. In the same room, presumably to ensure that everything was as it should be, there loomed up the massive figure of General de Gaulle. I used to toy with the notion that perhaps it might be possible to change places with my waxwork and spend a few days quietly in Baker Street with Twiggy and the General, leaving my waxwork to function on my behalf. However, the project proved impracticable, and now I learn from my grandchildren, who are my great informants on this subject, that I have been moved from Twiggy's side to stand by the entrance to the Exhibition, which seems to me to be a sure sign that I shall shortly be taken away and melted down. For a connoisseur of images like myself, the most interesting part of the whole experience was being taken on a tour of the Exhibition's nether regions, where there is a remarkable collection of bits and pieces of waxworks; items such as Gandhi's leg, Sophia Loren's bust, a famous Archbishop of Canterbury's rump — oddments like that casually lying about. What fascinated me most, however, was a collection of no less than six heads of Harold Wilson, who was Prime Minister at the time. I asked why six heads, and was told, believe it or not, that it was because during his period of office his head had been growing steadily bigger, so that it was necessary to re-do it from time to time. Why, you may ask, keep all the six used heads? Because, it was calculated, out of office his head might begin shrinking again, and the old heads come in handy.

This evening's chairman, Sir Brian Young, spoke about my having had my aerials removed; and that is true. I've had them removed, and I feel much better for it.Their removal, as far as I'm concerned, amounts to a kind of moral equivalent of a prostate operation. What finally decided me to give up looking at television was a series of programmes called *Family*, billed in the *Radio Times* — that compendium of ineptitude — as a "real life documentary." To suppose that life could really be lived followed about everywhere by a camera, I decided, really did represent the ultimate fantasy, not just of television, but of life itself. Furthermore, it goes without saying that the allegedly real life of the family in question, as presented on

the screen, was calculated to devalue the whole concept of family life in Christian terms.

Was this the conscious purpose of those concerned in the production and editing of the programme? Not so, I should say. From the lowest dregs of the media, like *Penthouse* or *Forum*, to the dizzy heights of Radio 3 lectures on Milton's politics or Dante's imagery, from *Steptoe and Son* and *Upstairs Downstairs* to Clark's *Civilisation* and Bronowski's *Ascent of Man*, through the whole media gamut, there runs a consensus or orthodoxy which is, within broad limits, followed, and in some degree, imposed. Certainly, any marked deviation other than in terms of eccentricity — the "Alf Garnett" syndrome, for instance — is at some point, or by some means, disallowed. At the same time, there is every reason to believe that this happens of itself. People are not hand-picked for this or that job because they fall in with the consensus. Nor are they, in any way that I know of, pressurised to fall in with it in the course of their work. All the same, they are consensus-oriented, if not -fixated. One way and another, I know a lot of people working in the media; on newspapers, magazines, in news agencies, in radio and television, and believe me, I should have the utmost difficulty in naming more than a handful whose views are not absolutely predictable on matters like abortion, the population explosion, family planning, anything whatever to do with contemporary *mores*, as well as aesthetics, politics and economics, who will not say more or less the same thing in the same words about, say, Nixon, or Solzhenitsyn, or apartheid, or Rhodesia. If, as sometimes happens, someone from the media whom I don't happen to know comes down to interview me, or consult with me, I make certain assumptions about his or her views, as falling in with the consensus, and am seldom proved mistaken.

This, in my experience, applies as much to the religious broadcasting department as any other; if not more so. Wide variations here are most unusual; Roman Catholic priests who wholeheartedly support *Humanae Vitae*, or evangelicals who believe unequivocally in the Ten Commandments, are little in evidence. Consensus-making and -promoting, I should say, is to be seen historically as an instinctive preparation for some sort of conformist-collectivist society which lies ahead whatever may happen, all that is in doubt being the precise ideology which will characterise it. What is beyond question is that consensus power has sufficed, for instance, in the United States to bring about an American defeat in the Vietnam War, to unseat a President and damage, perhaps fatally, the institution of the Presidency, besides dismantling the CIA, America's Intelligence arm, such as it is. In this country, the same force has

discredited and rendered nugatory the whole structure of Christian ethics, and succeeded in holding up to ridicule and contempt all who continue to assert that chastity is a beautiful and necessary virtue, that eroticism only has validity in the context of lasting love, which is its condition, and procreation, which is its purpose, and that making films like *Rosemary's Baby* accessible to the young and immature by showing them on television, is an outrage. In surveying the future of the media, it should be realised that the ever-expanding television schedules cannot be filled except with the help of old movies, which means that the more successful films now being shown in the cinemas will find their way almost automatically on to the television screen. As many of these belong to a category that up till quite recently would have found an outlet only in squalid Soho or Montmartre dives, it may be assumed that before very long children will be watching what has hitherto been reserved for the sick, the perverse and the depraved. Only the most naive or the most hypocritical among media bosses will be able to persuade themselves that, in the normal conditions of family viewing, children can be prevented from seeing such films by showing them late in the evening.

Thinking of this seemingly deliberate corruption of the young and innocent for money, or, in the case of the BBC, even more contemptibly, for ratings, it occurred to me that the following would be a useful exercise, though it requires a Jonathan Swift to explore its possibilities fully and with appropriate irony. Let us imagine that somehow or other, a whole lot of contemporary pabulum — video tape and film of television programmes with accompanying news footage and advertisements, copies of newspapers and magazines, tapes of pop groups and other cacophonies, best-selling novels, a selection of successful films, recordings of political speeches, exhortations, comedies and talk shows, and other recordings of the diversions, interests and entertainments of our time — gets preserved, like the Dead Sea Scrolls, in some remote salt cave. Then, centuries, or maybe millennia, later, when our civilisation will long since have joined the others that once were, and now can only be patiently reconstructed out of dusty ruins, incomprehensible hieroglyphics and other residuary relics, archaeologists discover the cave and set about sorting out its contents, trying to deduce from them the sort of people we were and how we lived.

What, we may wonder, would the archaeologists make of us? Materially so rich and so powerful, spiritually so impoverished and so fear-ridden, having made such remarkable inroads into discovering the secrets of nature and into unravelling the mechanisms of our material environment, beginning to explore, and perhaps to

colonise, the universe itself, developing the means to produce in more or less unlimited quantities everything we could possibly need or desire, to transmit swifter than light every thought, smile or word that could possibly entertain, instruct or delight us, disposing of treasure beyond calculation, opening up possibilities beyond envisaging, yet seemingly haunted by a panic fear of becoming too numerous, to the point that there would be no room on the earth for its inhabitants and an insufficiency of food to sustain them. On the one hand, a neurotic passion to increase consumption, promoted by every sort of fatuous persuasion among the technologically advanced people of the Western world; on the other, ever-increasing hunger and want among the rest of mankind. Never, the archaeologists will surely conclude, was any generation of men, ostensibly intent upon the pursuit of happiness and plenty, more advantageously placed to attain it, who yet, with apparent deliberation, took the opposite course, towards chaos, not order, towards breakdown, not stability, towards death, destruction and darkness, not life, creativity and light. An ascent that ran downhill, plenty that turned into a wasteland, a cornucopia whose abundance made hungry, a death-wish inexorably unfolded. This, as it seems to me, cannot but be the archaeologists' general conclusion from the material available to them.

All those preposterous advertisements, technically speaking the best camera work of all, beautifully produced, in the magazines, on the glossiest of glossy paper, on film or video tape, flawless, commending this or that cigarette as conducive to romantic encounters by a waterfall, some potion or cosmetic sure to endow any face, hands or limbs with irresistible loveliness, or medicament which will give sleep, cure depression, remove headaches, acidity, body odour and other ills — can it have been, the archaeologists will ask themselves, in the light of the almost inconceivable credulity required, and apparently forthcoming, some long since forgotten religious cult? A cult of consumption; the supermarkets with soft music playing, its temples; the so-persuasive voices, " Buy this! Eat this! Wear this! Drink this!" of priests and priestesses; the transformation wrought by adopting such a diet, using such gadgets, stretching out on such a bed, the miracles; with *Muzak* for plainsong, computers for oracles, cash-registers ringing in the offertory — so, they will conclude, the worship of the great god Consumption was conducted, with seemly reverence and dedication. There were even religious orders, with prodigies in the way of asceticism being performed in the interest of slimming and otherwise beautifying the male and female person.

Contrasting with this apparently flourishing cult, the archaeologists

would detect vestigial traces of an earlier faith called Christianity, which had become, it seemed, largely associated with social and political causes. Thus, the prevailing Christian ethic, in so far as one could be detected at all, was based on the concept that human beings were victims of their circumstances; in the nomenclature used by some moralists, "situational." In the folk stories, plentifully represented in the film and video footage, misbehaviour was almost invariably shown as being due to adverse living conditions, or to mental and moral states beyond the control of the individuals concerned; never to deliberate wrongdoing, so that the notion of sin seemed to have largely disappeared, and virtue, in so far as the concept still existed, to have found expression exclusively in social acts and attitudes. If any of the archaeologists were interested enough, they could trace the adjustments and distortions of the original Christian texts — always, it goes without saying, ostensibly in the interests of clarification — to conform with the concept of Jesus as a revolutionary leader and reformer, a superior Barabbas or Che Guevara, whose kingdom indubitably was of this world, finding in this textual and doctrinal adjustment an example of the infinite ingenuity of the human mind in shaping everlasting truths to conform with temporal exigencies. It might amuse one or other of the archaeologists with a Gibbonian turn of mind to note how easily hallowed sayings were turned round to signify their opposites: as, that it is absolutely essential to lay up treasure on earth, in the shape of an ever-increasing Gross National Product; that the flesh lusts with the spirit, and the spirit with the flesh, so that we can do whatever we have a mind to, and that he that loveth his life in this world will keep it unto life eternal, and so on.

There being nothing in the material at their disposal to suggest to the archaeologists that Christianity had any survival possibilities, especially after coming across the announcement, as they inevitably would, that God had died, their assumption that a consumption cult had replaced it as a popular faith would be reinforced. Clearly, however, they would calculate, the cult needed some doctrine to sustain it, some mystical basis to enliven it, and some redemptive process to substitute for the traditional Christian procedure of being converted or reborn.

As far as the first of these three necessities is concerned, the archaeologists would have no difficulty in identifying the appropriate doctrine — belief in progress, clearly a basic doctrine in the society under examination. The notion that human beings as individuals must necessarily get better and better is even now considered by most people to be untenable, and will doubtless still have seemed so to our

archaeologists, however many centuries hence they may be examining the output of our media; but, they will note, the equivalent collective concept that social circumstances, values and behaviour had an intrinsic tendency to go on getting better and better, came to be regarded as axiomatic. On this basis, all change represents progress, and is therefore good; to change anything is *per se* to improve and reform it. Our archaeologists will have no difficulty in discovering innumerable instances of the deplorable consequences of the application of this fallacious proposition. For instance, wars, each more ferocious than the last, were confidently expected to establish once and for all the everlasting reign of peace in the world. Liberations that enslaved, revolutions that created worse tyrannies than those they replaced, divorce reform that undermined the institution of marriage, and abortion reform that resulted in ever more abortions being performed — surveying this picture of a society evidently destroying itself in the fond expectation that it was reforming itself, going inexorably backwards when it supposed itself to be advancing, how could the archaeologists conclude otherwise than that the doctrine of progress applied to man's social existence proved to be one of the most deleterious, not to say ludicrous, ever to have been envisaged?

As for some mystical content in the cult of consumption, there would be no difficulty in finding that. Sex is the mysticism of materialism, a proposition that would have been borne in upon the archaeologists when they found themselves confronted with a superabundance of erotica of every sort and description, in periodicals and books and newspapers, as in films, television programmes, plays and entertainments; a vast, obsessive catering for all tastes and ages, the lame, the halt and the infirm equally called upon to squeeze out of their frail flesh the requisite response; all impediments and restraints swept aside, no moral restrictions, no legal ones either. And then, with the coming of the birth pill, the crowning glory, the achievement of unprocreative procreation, of *coitus noninterruptus* that is also *nonfecundus*, sex at last sanctified with sterility.

As for conversion, the instrument here was clearly education in all its aspects, from tiny tots' play schools to post-graduate studies, whereby the old Adam of ignorance and superstition, the blind acceptance of traditional values and ways, was to be cast off and the new twentieth-century man, erudite, enlightened, cultivated, to be born. The archaeologists will surely marvel at the high hopes placed in this educative process, seemingly regarded in the society under examination as a panacea for all ills, material, mental and spiritual; at

the proliferating campuses, the ever-multiplying professors and teachers instructing more and more students in more and more subjects; at the vast sums of public money expended, and at how the pundits of the classrooms and lecture theatres were held in the highest esteem, to the point of being invited to hold forth in the television and radio studios, and even to participate in government at the highest levels. More books published, plays produced, buildings erected in a matter of decades than heretofore in the whole of recorded time; the scene set for the greatest cultural explosion of history, a Venice or a Florence on a continental scale. And the result? Instead of sages, philosopher-kings and saints, pop stars, psychiatrists and gurus. Looking for a Leonardo da Vinci or a Shakespeare, the archaeologists find only a Rolling Stone.

Surveying and weighing up the whole scene, then, will not their final conclusion be that Western man decided to abolish himself, creating his own boredom out of his own affluence, his own vulnerability out of his own strength, his own impotence out of his own erotomania, himself blowing the trumpet that brought the walls of his own city tumbling down, and, having convinced himself that he was too numerous, labouring with pill and scalpel and syringe to make himself fewer, until at last, having educated himself into imbecility, and polluted and drugged himself into stupefaction, he keeled over, a weary battered old Brontosaurus, and became extinct?

This might seem a somewhat gloomy conclusion. On the other hand, it should be remembered that archaeologists are almost invariably wrong, and it is open to anyone to draw a different conclusion from the available data in the shape of the Dead Sea Video Tapes. In any case, happily, the tapes are unlikely to survive, images being less durable than words, which have displayed a remarkable survival capacity. It was no idle boast when Jesus said, "Heaven and earth shall pass away, but my *words* shall not pass away." Witness the man in the labour camp described by Solzhenitsyn, who had the bunk above his, and used to climb up into it in the evening, and take old, much-folded pieces of paper out of his pocket, and read them with evident satisfaction. It turned out that they had passages from the Gospels scribbled on them, which were his solace and joy in that terrible place. He would not, I feel sure, have been similarly comforted and edified by re-runs of old footage of religious TV programmes.

So the debris and bric-à-brac of the past tell us little except that the past is over. Likewise, properly speaking, there is no such thing as history; only what Blake called "fearful symmetry," the working out of the true nature of things. What passes for history is merely the

propaganda of the victor transcribed by different hands and described from different angles. The reason the Bible can never become irrelevant or outmoded is that, unlike all other histories, in its case the victor is God. Thus, in the most literal sense, the Bible is the Word of God. If, however, it were recorded in images instead of words, it would be not the Word, but the image of God. In this sense, when the Children of Israel turned aside from God and made a golden calf, they may be said to have televised him. Similarly, in all the fantasies of our time, those who have eyes to see may read the anti-fantasy. What, for instance, more perfectly explodes the fantasy of money than inflation; of sex, than pornography; of knowledge, than education; of news, than *Newzak*; of power, than nuclear weaponry; of happiness, than its pursuit. I could go on and on. So, we have to thank God even for the media, which so convincingly and insistently demonstrate their own fantasy — to thank him indeed for everything, since everything that ever has been, is, or ever will be manifests his existence and is part of the totality of his love. Above all, we have to thank him for the Incarnation, when, *while all things were in quiet silence and that night was in the midst of her swift course, thine almighty Word leaped down from heaven out of thy royal throne.* That almighty Word was the medium, and the message was Christ.

# ERA: the New Legal Frontier?

*Francis Canavan*

THE ERA (Equal Rights Amendment) is in trouble. The seven-year period in which it must be ratified or die expires on March 22, 1979. After its defeat in the Illinois Legislature in June 1978, the chances are that it will not achieve ratification by the required three-fourths of the States before next March. None the less, the ERA has become so sacred a symbol of equality and justice to the feminist movement that we shall not soon see an end to controversy about it. It is still worth discussing.

I want to make one modest, but not unimportant contribution to the discussion. That is a reminder that what we are debating is not equality of rights for women as an abstract principle. We are considering a proposed amendment to the U.S. Constitution. The two subjects are clearly related; the ERA reads: "Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex." Yet, related though these subjects are, they raise distinct questions. It is one thing to ask whether women should have equal rights with men. It is quite another thing to ask whether we should turn over to the Federal courts the process of defining and enforcing equality of rights. The latter is what the ERA would do.

Even the question of equal rights for women as an abstract principle does not have a completely obvious answer. We all agree that women are fully as human as men, that they are persons quite as much as men and that in most areas of life they should enjoy the same rights as men. But does it follow that in all areas of life being equal persons means having identical rights? Or are there areas in which the difference between men and women is significant enough to justify assigning them different rights?

For example, men do not have identical rights with women in regard to military conscription and assignment to combat duty. Men can be legally subjected to both, while women up to now have been exempt from them. Is this denial of equality? Or is it simply a recognition of a meaningful difference of which the law may take account, without thereby denying the basic human equality of the sexes? Similar questions could be asked about the favor shown by the law to mothers in assigning the custody of children, or the practice of

**Francis Canavan, S.J.**, is Professor of Political Science at Fordham University, and one of our most frequent contributors.

granting maternity leaves, or of reserving certain physically hard jobs for men, or of prohibiting contact sports between boys and girls, and about a number of other topics.

I will not try to answer these questions, since I only want to point out that they are questions that must be faced in any discussion of equal rights for women. Before one jumps on the bandwagon, therefore, and agrees that of course women should have equal rights with men, it might be well to know just what that phrase means. But my immediate point is that, whatever it means, the ERA does something more than declare that women ought to have the same rights as men. In practice, the ERA will hand an almost-blank check to the U.S. Supreme Court and will transfer a large amount of power from elected legislatures to unelected courts.

As the late Justice Felix Frankfurter once remarked about another legal phrase, "equality of rights under the law" is not a self-wielding sword. The ERA intends to guarantee equality of rights. But it does not and it cannot tell us in advance what those words mean. The effective meaning — the one that will be applied and enforced in practice — will have to be worked out, case by case, over a long period of time. The Federal courts, led by the U.S. Supreme Court, will do the working out. It is true that an additional provision of the ERA gives Congress power to enforce the Amendment by "appropriate legislation." But the ordinary use to which the ERA will be put, if ratified, will be as a basis for litigation in the courts.

No doubt, if the ERA becomes part of the Constitution, women's groups will try to get Congressional legislation enacted. No doubt, too, in some instances they will succeed — but only in achieving those objectives on which most women are agreed. The chances of a feminist group hitting the jackpot and getting a radical demand translated into the law of the land will be much greater if the group resorts to the courts than if it goes to Congress or, *a fortiori*, if it goes through the slow process of presenting its demand to 50 different State legislatures.

Courts, by their nature, are more disposed than legislatures to agree that a certain demand is indeed a right guaranteed by the Constitution, and that it must be granted whether most people want it or not. The elected representatives of the people are understandably sensitive to the opinions of the people. They will grant demands if they think that most people support them or at least will not object strenuously to them. Courts are in a better position to ignore public opinion and to grant a demand simply because in their judgment the Constitution requires it or ought to be interpreted as requiring it.

This power of the courts is admittedly sometimes a good thing.

Independent judges, in office for life, as they are in the Federal courts, are able to protect the rights of individuals and minorities against a hostile public opinion. They have often done so. But the courts are also in a position to make public policy in the guise of protecting constitutional rights. A classic example is the U.S. Supreme Court's abortion decision of 1973 (*Roe v. Wade*, 410 U.S. 113). In technical legal form, the Court decided that a lady anonymously dubbed Jane Roe had a constitutional "right of privacy" that was violated by a Texas law which prohibited her from having an abortion. In reality, the Court intervened in and intended to settle a hot political controversy by laying down an abortion policy for the entire country.

Its original decision in this matter, like its decisions on school desegregation, legislative reapportionment and other subjects, has led to a stream of subsequent decisions by both the Supreme Court and the lower Federal courts. The result in all these cases is that courts have replaced legislatures in a number of important areas of American life.

The courts not only lay down a general constitutional principle such as, for example, that "the equal protection of the laws" forbids racial segregation in public schools and requires electoral districts of equal population. They end up writing detailed prescriptions for busing children around a city or county in order to implement the general principle; they draw the boundaries of the districts from which representatives are elected. Now, one may like or dislike what the courts have accomplished by such decisions. But it seems undeniable that, in their effort to enforce what they have declared to be constitutional rights, the courts have turned themselves into legislative bodies and even into administrative bodies. We must expect the same thing to happen in the enforcement of the ERA. The courts will write the laws that define the equal rights of men and women.

There is a further consequence. Because the courts frame laws and make public policy, they become the object of unending pressure from organized groups seeking political objectives. These are groups which, having failed to get what they want in the legislatures, try again in the courts. Or, probably even more often, they begin in the courts because they have a better chance of succeeding there. The National Association for the Advancement of Colored People, the American Jewish Congress, the American Civil Liberties Union, the Planned Parenthood Federation and a host of other organizations have long distinguished records of playing this kind of judicial politics.

When a case in constitutional law is decided, the name of the case

as it appears in the law reports frequently suggests that only two individuals were involved, e.g., *Roe v. Wade*. But, in reality, behind the individual plaintiff or defendant there often stands an organization which sought out the case, persuaded the individual to sue, financed the litigation and pushed the case, if necessary, as far as the U.S. Supreme Court. Such an organization is not interested merely in defending the constitutional right of the individual involved. What it wants, and sometimes gets, is a rule of constitutional law that will set public policy for the nation.

The chief effect of the ERA would be to enable organized feminist groups to play judicial politics in this manner. The goals they would seek would often be ones that most women do not particularly want or even positively reject. Women, after all, are not a minority. They are a majority of the population and, presumably, what all or most women want they can get through the ordinary legislative process. But judicial politics is made for minority pressure groups, among which we must count the feminist organizations.

It may appear that this is too cynical a view of constitutional litigation. No one can deny that people do have constitutional rights, and what are courts for if not to protect these rights? Furthermore, there is nothing wrong in an organization furnishing an individual with the necessary money and expertise to fight his case in court. This objection assumes, however, that we already know what the individual's constitutional rights are, and that it is only a matter of getting a court to enforce them.

Sometimes, of course, that is the fact. But the important cases, the ones in which new frontiers in constitutional law are set, are the cases in which existing rights are expanded or new rights are created — created, too, not merely for individuals but for whole classes of people. These are the cases in which organizations are primarily interested. They are also the cases in which we do *not* already know what the individual's constitutional rights are. We only know what some group or other hopes to be able to persuade a court to establish as his constitutional right. When such a group succeeds, it changes the law of the entire land.

Our ignorance of the scope and meaning of constitutional rights is compounded when we are dealing, not with an old and long-existing clause of the Constitution, but with a new, sweeping, broadly-phrased clause such as the ERA would be. The ERA seems clear enough: it prohibits denial or abridgment of equality of rights under the law on account of sex. It certainly would impose on the courts a thrust toward equalizing the legal rights of men and women. More than that, however, we do not know. There is no one alive today, including

the nine present members of the Supreme Court, who can say with any assurance what the Court will take the ERA to mean 25 or 50 years from now.

Proponents of the ERA have argued that the courts will not have a free hand in interpreting the Amendment: they will be controlled by what is called its legislative history. That is to say, the explanations which the framers and advocates of the ERA gave in Congress as to what it meant and what it did not mean will be a binding guide on the Courts. And, for a time, that might be so.

But constitutional clauses, amendments among them, are meant to last for generations and for ages. They take on a life of their own. As they are applied to new cases over a long period of time, courts find in them meanings that the framers certainly never foresaw, and sometimes meanings that they would have rejected if they had thought of them. No one who is at all familiar with the history of constitutional law in the United States can pretend to know what the ERA is going to mean if it becomes a part of the Constitution. All we know is that we shall have handed the Supreme Court a blanket commission to tell us what it means.

Consider the history of the Fourteenth Amendment. It was adopted in 1868, in the aftermath of the Civil War, to protect the civil rights of the recently-emancipated slaves against repressive legislation by the Southern States. In the mind of the framers, the purpose of the Amendment was to give Congress power to enact civil rights laws. The initial impulse in framing the Amendment was in part, to provide a secure constitutional foundation for the already enacted Civil Rights Act of 1866. But Congress lost interest in such laws after the end of Reconstruction in 1876. The significance of the Fourteenth Amendment turned out to be the enormously enhanced role that it gave to the Supreme Court.

The key clauses of the Amendment, in this respect, are found in Section 1 and read as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It cannot be said that the Court was quick to seize the opportunity given it by these clauses. On the contrary. The first decision it handed down under the Fourteenth Amendment was in *The Slaughter-House Cases*, 16 Wall. 36, in 1873. This was a group of cases brought by butchers in New Orleans against a slaughter-house monopoly created by an act of the Louisiana Legislature. The butchers' chief argument was that the monopoly abridged their privileges and immunities as

citizens of the United States. The Court rejected this argument by giving a narrow interpretation to the Privileges and Immunities Clause. In so doing it rendered the clause virtually a dead letter from that day to this. But to interpret the clause broadly as the plaintiffs wished, the Court said, "would constitute this Court a perpetual censor upon all legislation of the States."

The subsidiary argument that the Louisiana monopoly denied the butchers the equal protection of the laws was dismissed with this remark: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

Yet how wrong the Court was in its prediction in 1873. Beginning around the turn of the century, the Court itself interpreted first the Due Process Clause and then the Equal Protection of the Laws Clause so broadly that it has in fact made itself "a perpetual censor upon all legislation of the States." More than 40 years ago Joseph Ragland Long observed in his *Cases on Constitutional Law* (Rochester, N.Y., 1936, p. 120): "Every provision of a State constitution, every act of a State legislature, and every municipal ordinance, may be brought before the Supreme Court upon a claim that it violates one or both of these clauses." Nor has the Court restricted the protection of these clauses solely or even primarily to black people. Every natural person and every corporation in the country can and increasingly does appeal to them.

The result has been a swelling tide of litigation that has led the Court to find more and more previously unsuspected meanings in the Due Process and Equal Protection Clauses. There is not space here for even a thumbnail sketch of the history of the Court's interpretation of these clauses. (But if anyone is interested, he may find such a sketch in the U.S. government publication, *The Constitution Annotated*; it covers more than 200 pages in the 1973 edition.) A brief sample of the Court's decisions under these clauses will have to suffice here.

The Court over the years has found the following unconstitutional because they deprived some person or persons of the "liberty" guaranteed by the Due Process Clause:

—A New York law restricting work in bakeries to ten hours a day and six days a week. *Lochner v. New York*, 198 U.S. 45 (1905).

—A Kansas law forbidding employers to require the signing of a "yellow dog" contract — an agreement not to join a labor union — as a condition of employment. *Coppage v. Kansas*, 236 U.S. 1 (1915).

—An Act of Congress setting minimum wages for women and children in the District of Columbia. *Adkins v. Childrens Hospital*, 261 U.S. 525 (1923). (This case was decided under the parallel Due Process Clause of the Fifth Amendment, which binds the Federal government.)

—A "released-time" program of religious instruction in the public schools of Champaign, Illinois. *McCollum v. Board of Education*, 333 U.S. 203 (1948).

—The conviction of an accused rapist on the basis of a confession he made to police officers after two hours of interrogation without having been advised of his right to have an attorney present. *Miranda v. Arizona*, 384 U.S. 436 (1966).

—An order by school authorities forbidding children to wear black armbands in school as an expression of opposition to the Vietnam War. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

—A Missouri law requiring the consent of a woman's husband before she might have an abortion. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

The Court has also found the following unconstitutional because they denied to some person or persons the equal protection of the laws guaranteed by the Equal Protection Clause:

—An amendment adopted in a popular referendum in Colorado that allowed seats in one house of the State Legislature to be apportioned on the basis of area and other factors as well as on population. *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964).

—An Arizona law permitting only real property taxpayers to vote on the issuance of "general obligation bonds." *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970).

—A Massachusetts law prohibiting the distribution of contraceptive materials, except by registered physicians and pharmacists to married persons. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

—An Oklahoma law prohibiting the sale of 3.2% beer to males under 21 years of age and to females under age 18. *Craig v. Boren*, 429 U.S. 190 (1976).

—A New York law denying financial assistance for higher education to resident aliens unless they affirmed their intent to apply for citizenship when eligible. *Nyquist v. Mauclet*, 53 L Ed 2d 63 (1976).

Obviously I have chosen these cases out of a multitude of cases because they serve my purpose. The purpose, however, is not to persuade the reader that the Court was wrong in any of the above decisions. Rather, it is to show how disingenuous it would be to claim that the Congressmen who framed the Fourteenth Amendment and the State legislators who ratified it foresaw the range of subjects to which the Supreme Court would apply it, the variety of cases it would decide or the kinds of decisions it would hand down. It would be equally disingenuous to pretend that we know today what decisions will be derived from the ERA over the next two or three generations.

One standard answer to this kind of criticism is that we cannot confine the meaning of a constitutional clause to what was consciously in the mind of the generation that adopted it. We have, it is said, a "living Constitution" whose meaning unfolds and develops over time, as it is applied to new and unforeseen situations. But if that is so, then it follows that the ERA, if adopted, would become part of the "living Constitution," and that we should have to wait and see what the courts would make of it. One cannot simultaneously have a living Constitution and make predictions about what it is going to mean a generation or more from now.

But, generally speaking, people's attitude toward the Supreme Court is determined by whether they like or dislike what the Court has been doing recently. So, too, with the ERA. Since the Court for the past 40-odd years has on the whole moved in a "liberal" or "progressive" direction, proponents of the ERA assume that the Court will give it the "progressive" interpretation that they want. They might be well advised to remember that for 40 years prior to 1937, a "conservative" Court regularly used the Due Process Clause to strike down "progressive" economic and social legislation. The "progressive" interpretation of the ERA is therefore by no means guaranteed forever. Yet, for the immediate future, those who are pushing the ERA are probably right in banking on the Court to interpret the Amendment their way more often than not.

What would a "progressive" interpretation be? One must agree with ERA advocates that it is mere scare tactics to picture the Supreme Court finding that the ERA mandates unisex washrooms and toilets. One cannot be so sure that the Court will never find that the ERA guarantees the equal constitutional status of homosexuality and heterosexuality. The present Court is clearly reluctant to move in that direction, but the membership of the Court changes with time. We may presume that the feminist organizations will urge it to move that way, since they put themselves on record as demanding equal

rights for lesbians at the International Women's Year convention in Houston in 1977.

In general, a "progressive" interpretation of the ERA would be one that favored the independence of the individual whenever it came into conflict with the restricting obligations of the marital or family relationship. At least for a time we might expect the present Supreme Court to follow the "progressive" view, since that is the thrust of a series of decisions it has already made. As Justice Brennan put it in *Eisenstadt v. Baird* in 1972,

> the marital couple is not an independent entity with a mind and a heart of its own, but an association of individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

This cast of mind, if transferred to the interpretation of the ERA, would tend to undermine the legal status of the family in favor of the unhampered freedom of the individual.

But here, of course, we are in the realm of speculation: we do not really know what the Court will make of the ERA. It is, however, fair to say that an individualistic interpretation is what radical feminists hope to get from the Court and is the reason why they want the Court to have the ERA to interpret and apply. Those feminists who do not want this degree of individualism written into the Constitution should at least ask themselves on what grounds they can be sure that the ERA will not be interpreted in this manner.

The present writer's chief concern, however, is somewhat different. This paper is written out of a growing skepticism about the competence of courts effectually to frame the laws of the land. This is no disparagement of the personal ability of judges but a comment on the nature of judicial power. In deciding cases in constitutional law, a court can never admit that it is legislating. In principle, it can only declare what the Constitution commands or prohibits. But when this entails an unending series of decisions spelling out in detail the constitutional prohibitions and commands implicit in such phrases as "due process of law," "equal protection of the laws," or (the ERA's phrase) "equality of rights under the law," the courts are in fact legislating. But since constitutional prohibitions and commands are in principle absolute and superior to any considerations of prudence and public policy, the courts often legislate in an abstract, rigid and unrealistic way. In these circumstances judicial power is a clumsy and even dangerous instrument with which to govern a nation.

One need not have a mystical Jeffersonian faith in democracy to be

reluctant to add to judicial power by adopting the ERA. The people and their elected representatives have often made mistakes, some of them very bad ones, and will do so again. But they will probably do a better job than the courts of establishing those legal rights that most American women — as distinct from their more radical sisters — want and feel they need. The last thing that women as well as men need is one more sweeping, ill-defined clause added to the Constitution in the pious hope that the courts will translate it into rules of constitutional law that most of us would regard as making sense.

# Mother Didn't Know

*Ellen Wilson*

MY MOTHER, I sometimes think, inhabits another world — a world salvaged from an earlier time, before Robert Young became Dr. Welby, or the Andrews Sisters became nostalgia. From time to time I initiate efforts to inch her further along the time line, but whether from a sense of duty or misery wanting company I do not know. And so when I came across a study* reporting that 90% of males and 80% of females had lost their virginity before marriage (median age: 18), I carried the information out to the kitchen. My mother expressed shock as she peeled potatoes. But my younger sister was harder hit, immediately grasping the personal relevance of the data: "Who does that leave us?" she asked.

Well, it leaves us (my sister and me, and the rest of the female population) with less choice than our mothers in one way, far more choice in another. The pool of virtuous folk and hypocrites is sadly depleted. The well-worn patterns of behavior, familiar as a favorite sweater, have now been called into question. In our mothers' time, one gathers, the sexual innocence of most women before marriage was assumed; certainly it was preached and otherwise encouraged. Premarital chastity was not merely a good, but an accepted role, a social norm. As such, it passed comparatively unexamined, and one could "choose" with scarcely any awareness that a choice had been offered.

Even those who strayed outside the norm could draw a sense of security from its existence. Males seldom rejected the entire system of sexual ethics; they "sowed wild oats" or gave in to urges assumed to be far stronger than those of females. Women who behaved similarly were assigned the role either of victim or victimizer, seduced or seductress. In other words, neither sexual activity nor inactivity need have involved a fully aware, carefully deliberated rejection or acceptance of society's moral code.

But today of course that has changed. Here I am not focussing upon changed behavior — the diminished ranks of the continent — but the transformation of the *norm* — of society's expectations of us — and the consequent need to make a choice. If hypocrisy is the

*"The Sex Lives of Happy Men," Carol Davis, *Redbook* (Vol. 150, No. 5, March 1978), pp. 109ff.

**Ellen Wilson** is a recent graduate of Bryn Mawr College and is now an associate editor of this review.

tribute that vice pays to virtue, has modern society decided to withhold payment, or has it merely changed the definition of virtue?

The present enlargement of choice does not (yet) indicate a complete transformation in society's values — that would only substitute one orthodoxy, one accustomed model of behavior, for another. Instead, it is the result of a conflict between two norms, two vying "goods": that which the post-liberated society espouses (see T.V. situation comedies, the boom in soft porn, etc.), and that which traditional spokesmen preach (see orthodox religion, the blue-collar community, etc.). Teenagers and young adults in particular are confronted with a choice of allegiance. And this creates a deliberateness of decision, a self-consciousness of action, seldom demanded or achieved by less transitional generations. This in turn foments uncertainty, vacillation, and a sense of aloneness when the time comes to choose.

Though the similarities may not at first seem striking, young couples contemplating the decision to begin a family are in a complementary situation. Their area of choice has also been greatly magnified, both through technological breakthroughs (primarily, artificial methods of birth control) and through sociological changes. Children are not always eagerly sought by our population-haunted generation; mothering is no longer exalted as the gateway to self-fulfillment for the "minority" that makes up 51% of the population. The technological factor increases the practical possibility of choice; societal factors spawn the elements of that choice, offering contemporary competitors against the traditional "goods" of family and motherhood. But before arriving safely at a decision one must negotiate minefields full of doubts — breeding grounds for present or future guilt, no matter how one decides. Here are some samples of considerations introduced by new-minted, or newly-popular values.

The zero population argument is, I think, least compelling to an individual couple (though it is frequently mentioned) because the imagination must strain to see how it directly impinges upon their personal lives. The influence of the "Earth with elbow room" concept upon young couples probably owes much to environmental factors of a different sort: 1) the situations and opinions of those close to them; 2) their subjective impressions of crowdedness or spaciousness, which may be built upon no more scientific basis than whether they live in the country or the city, whether they have an ample amount of living space or could use a larger linen closet. But these kinds of considerations, and others related to population growth, are unlikely to tip the scales against assuming the mantle of parenthood; they are subsidiary to others offered by our culture.

One of these is the effect of family size on the child's well-being — specifically, how the number of children affects the amount of attention (and money) allotted to each. Psychologists — both amateur and professional, textbook and talk-show circuit — have been churning out books and articles for some time now on the child's need for individual attention and recognition of his unique personality. Of late there have even been reports that the only child (once thought to be a veritable seedbed of neuroses) is peculiarly favored over his peers.

Cause and effect are difficult to establish; it probably makes as much sense to attribute this "scientific" endorsement of small families to modern economic conditions (children once were a financial asset to the family, a labor source; now they are a financial drain) and popular preference, as to hand the social scientists full credit. A recent study indicates that classroom size, within a fairly wide range, bears no apparent correlation to academic performance. Even if studies comparing large and small families were to yield similar results, it is doubtful whether, at this point, they would allay the anxiety of many parents over the risks of psychological and cultural malnutrition should they generate additional offspring.

The material benefits of a small family — a larger slice of the pie for each member — are particularly influential in an age which assigns parents increasingly-heavy financial obligations to their young, especially under the heading of education. Most parents assume that they will be writing tuition checks until, one by one, each child studies his way to a college degree; some parents can even be induced to finance further degrees. And of course, education is not the only expense incurred by one's offspring: there are doctor's, dentist's and orthodontist's bills, not to mention countless luxury items which have acquired the appearance of necessities.

The financial argument against having many — or any — children is peculiarly forceful because it confounds selflessness and selfishness. Undoubtedly, parents or prospective parents are disturbed by the possibility that they may not be able to give to their children all that they need or want. Whether or not this consideration should override all others, it is an altruistic motive in the movement towards smaller families. Still, the decision to limit the number of children or to forego them entirely also absolves the couple from great self-sacrifices. This is the underlying (or perhaps not so underlying) appeal of the Family Planning Association poster that proclaims: "A Small Family Can Live Better!"

Society offers other rivals to the traditional good of the family; these also encourage couples to strictly limit, postpone, or forego

their own families. The apotheosis of (paid) work, of the Career, is one of these, since it contributes to the popularity of the two-income marriage. Size of salary is a simple and convenient scale on which to measure human worth, and in a society almost morbidly preoccupied with degrees of equality and inequality between the sexes, the career outside the home is a means of "fixing" the wife's equality.

The cult of the 9-to-5 job, the career with a capital C, has produced a number of side effects no less unfortunate because unintended. As surely as the status of the employed woman rises, in see-saw fashion, that of the "just-a-housewife" falls. Naturally enough, women who work are easy marks for the heresy that self-worth and fulfillment are measured on a salary scale. So the sacrifice of a career, or even its interruption, exacts from the mother-to-be an additional sacrifice in self-esteem, and undermines her confidence in others' good opinion of her. Thus, child-bearing may come to seem an anti-egalitarian activity, one which, paradoxically, frustrates a woman's drive toward self-fulfillment.

The reverence with which the salary is treated, a reverence both symbolic ("Equal pay for equal work," "you are what you earn") and practical (rising costs and the expansion of the definition of reasonable luxuries) clashes in several ways with the traditionally-high value accorded the family. First, relinquishing career for baby usually heralds lower living standards and unaccustomed belt-tightening. Even if the prospective mother anticipates only a few years' absence from work, she recognizes the career risk and her relegation once more to the bottom of the list for promotion. In addition, increased family expenses may seem to argue persuasively for her return to work at the very time when her children's emotional needs may argue for continued full-time mothering. For many young working mothers, especially those with "jobs" rather than "careers," the balance struck may represent the worst of both worlds, with excessive self-demands engendering guilt as well as exhaustion. Surveying the field of working mothers, many women may decide that they would rather work than "Mother."

By now we have heard of the Betty Friedan *Feminine Mystique* backlash — those "just housewives" who feel guilty and looked-down-upon because they are satisfied with their lot and hear no call to other vocations. But a much more macabre situation is arising, and one which suggests that the "double salary" may be altering the meaning of marriage itself. I know a woman who supported her husband through college and is now, at age 30, expecting her first child. Her job offers greater-than-average opportunities for fulfillment, but it is also more-than-ordinarily wearing. For years she

looked forward to exchanging it for full-time motherhood, but now that the baby's birth approaches, her husband suggests that it might be better if she returned to work afterwards, "at least for awhile."

All right, maybe he doesn't have the "right" to demand this. Maybe he is revealing his affinity to lower forms of life by doing so. But from the perspective of modern "goods" like the double-income marriage, is this any longer an *absurd* demand to make? Isn't it true that a great many women experience an almost embarrassed revulsion from associating a wedding ceremony with being "kept" or maintained by a man? A large number of married women — even those whose husbands are well-paid — may choose a job not because it is the outward sign of an inner equality, but because it is the discharging of one's obligation to pay one's own way.

If this is so, and if this is a growing trend, then it alters the traditional concept of marriage in two ways. First, to borrow a commercial vocabulary, it transforms marriage from a corporation to (at best) a loose partnership. A corporation, though made up of more than one individual, is legally treated as a single person. One sues a corporation as an entity. But partners retain a stronger hold upon their individual identities, and the nature of the bond uniting them is far less rarified, the interpenetration of identities far less complete. The couple whose marriage formerly would have meant two becoming one flesh — not just in the words of the wedding service but in countless acts of merger, symbolic and practical — now often maintain separate cars, banking accounts, incomes and even names. One doesn't have to be a Marxist to recognize the close relationship between economic conditions and social institutions. In this case, marriage as an institution deriving its distinguishing characteristics from a recognized social function faces a severe threat. In place of the *union* of two individuals, recognized by churches and states, one traces the insidious encroachment of another idea — the *association* of two individuals, forever individual if not forever associating.

And the end for which the union took place? That, too, has metamorphosed, or at least, in the opinion of many contemporary prophets, it will remain an end for only a minority of future marriages. I am speaking not of child-*bearing* (there is no obvious reason why the institution of marriage should have been established solely to bring children into the world) but of child-*rearing*. Even the most anthropologically-ignorant of us harbors hazy notions of prehistoric man going out each morning in search of food for his family, while his mate cares for the next generation of cave dwellers. That is the historical derivation we acknowledge for male economic support of the female in marriage. But if females nowadays assume

their own economic self-sufficiency as a matter of course; if couples nowadays can conveniently frustrate the procreative end of marriage without frustrating their own sexual urges; and if, because of the population boom (a reality in India, but not here), strong societal pressures to have children are diminishing, then what does marriage now *mean*, and how do couples, debating the size or desirability of a family, decide?

These are some of the factors influencing a modern couple's choice to have or forego children or to limit their number to one or two. Many prolong the decision-making period until not deciding itself becomes a decision against a family, which shows us the distance we have already travelled. In the normal course of events such a failure to decide, in the pre-contraceptive era, would have resulted in the propagation of a family. But most people at that time didn't share the often painful ambivalence of the modern couple. They had no reason to, because producing children was a perfectly natural thing to do — as natural as getting married. And so the modern man's uncertainty about the proper attitude with which to approach marriage and the family proceeds from the freedom of choice which artificial contraceptives have promised him. His ambivalent reactions to motherhood as an occupation and not just an occupational hazard, to role-playing and, most basically, to reproducing himself, also issue from this new-found "freedom." Far from offering man the opportunity to act with no responsibility for the consequences, contraception (like legalized abortion) saddles him with far greater responsibilities than he has ever known. For women who use an IUD or habitually take the Pill, even offering their bodies the potential to conceive requires a pre-meditated act.

Of course, science and society are inextricably intermeshed, and how are we to declare that science has brought this existential dilemma about, rather than society fostering the conditions in which science could augment our century's communal *Angst*? In this sense Family Planning is part and parcel of that itch for planning and prognosticating which has brought us planned economies, health plans, Five Year Plans, urban renewal plans, and almost every other imaginable plan. The 18th Century contented itself with seeing *through* chaotic externals to an underlying rational design: the world was the clock which the Divine Clockmaker had set in motion; society functioned according to the laws of a pre-historic (mythical or no, depending upon your opinion) Social Contract; the Invisible Hand of the market economy, as described by Adam Smith, disposed all things for the best. Neither the world nor society were unaffected

by man, but the total design was patented by someone else, and man's actions were accommodated into the divine blueprint.

But the modern age professes agnostic doubt about any design that lies behind the apparent messiness of creation. And it has endeavored to fill this (suspected) management vacuum, assuming responsibility for the efficient functioning of the whole. Plans are a result, the attempted remedy for social and economic untidiness. They are also evidence of the timidity engendered by such heavy responsibility, the self-doubt which confronts us when *we* confront the job of managing a universe we didn't create (a universe we "aren't responsible for").

In one sense we are right to act timidly, right to harbor such self-doubts, because we lack the power which ratifies our authority. The unfortunate thing about plans is that they are closed systems, capable of crumbling at the onset of any unforeseen circumstance, or any circumstance so uncontrollable that it cannot usefully be taken into account. Droughts or extended rainy seasons, typhoons or tornadoes, plagues of locusts or infiltration by the death watch beetle — all can wreak havoc on public or private economies. "Unforeseen circumstances" perennially upset the agricultural expectations of the Soviet Union, and England's cradle-to-the-grave welfare system will creak on only if it is true that "There'll always be an England" — one has to make an act of faith at some point.

Similarly, the attempt to control our reproductive capacities *without* controlling ourselves is based on self-deception. For there are all sorts of possibilities beyond our capacity to predict, let alone regulate. The financial drain anticipated from the birth of a child may be bypassed or surmounted by an unexpected promotion, a change in jobs, or a son's decision to become a policeman instead of a Ph.D. Or the undreamed-of, unexpected rewards of child-rearing may more than reconcile the parent to a flatter billfold. Or it may all be as bad or worse than anticipated. But how does one know beforehand? How does one ever know?

The career a woman depends upon for fulfillment may lose its appeal, or the desire for upward mobility be unaccountably frustrated. Or the satisfactions and demands of motherhood may, on balance, requite her for vexation of spirit, heroic self-sacrifice, and the interruption of the 9-to-5 life. Or maybe motherhood will not be enough — or maybe it will be too much. But what is this vaunted "control" over one's life, which leaves so many questions unanswered, so many possibilities unexplored?

Planning one's life is not that easy. Playing probabilities, though it may appear the safe course, is perhaps riskier than others. Long shots sometimes come in first, favorites can lose. The person who will only

play it safe finds loss doubly unexpected, and winning not very remunerative.

There are two ways, then, to handle uncertainties and unknown propositions. One is by boldly, creatively making use of opportunities, recognizing risks but not acknowledging subservience to them. The other, it seems to me, is the more modern path of timidity, obsessive planning and submission to plans. Discretion, which directs us to safe backwaters, is one of that class of negative or neutral virtues whose appeal is so strong today. But at best such virtues can only ward off real or imagined ills; they cannot gain us desired goods. And if we depend solely upon such cheeseparing virtues for happiness or fulfillment, our portion may be small.

Chesterton decried the modern heresy "that you can have too much of a good thing — a blasphemous belief, which wrecks at one blow all the heavens that men have hoped for." The modern world, it seems, has lost the taste for extremes, for strong, potent goods, having become accustomed to a blander diet. It protests that we already have too many children — and too many old people. It frowns upon those who undertake the rearing of a large family, just as it fails to understand those whose childlessness stems from continence, from control over one's actions rather than (attempted) control over their consequences. (The belief that one has a "right" to control these consequences leads us, of course, from failed birth control to abortion.)

And here, perhaps, is the point at which we can judge between those vying goods which I mentioned at the beginning: between the traditional, family-oriented notions of good, and the modern challengers which exalt individual self-fulfillment, the monetary evaluation of our own worth and that of our children, the usurpation of control over the consequences of our actions, and the simultaneous rejection of responsibility for the actions themselves. The earlier set of values comes with a higher price tag, but also, it seems to me, promises greater rewards. It is, in the long run, more realistic, since our boasted control is largely a self-deception. It is, finally, a more courageous, larger-souled route to take.

It was Chesterton, once again, who pointed out that those very Christians who exalted martyrs in the early Church abhorred suicides, and he explains this by spelling out the distinction between the two:

> A martyr is a man who cares so much for something outside him, that he forgets his own personal life. A suicide is a man who cares so little for anything outside him, that he wants to see the last of everything ... he has not this link with being: he is a mere destroyer; spiritually, he destroys the universe.

Surely many moderns share something of the spirit of Chesterton's "suicide," who rejects life because it is too much, who distrusts possibilities and potentialities. In this sense some of those who weigh and measure the advantages and disadvantages of reproducing themselves, and decide not to risk it, or to put it off until their own convenience, are akin to the suicide. They suffer a failure of nerve, and in rejecting new life, embrace not even death, but nonentity.

None of what I have said addresses individual cases, weighs special needs and circumstances, or evaluates personal considerations. Of course, not every couple that remains childless does so from selfishness or timidity, and not every family of 1 or 2 children would be improved by a dozen additions. Equally clearly, not all couples make good parents. But perhaps I need not worry about overstating my case, since the opposing view has so many voices. The general opinion seems to be moving toward extolling childlessness, adopting "negative" virtues, and championing all sorts of nebulous, questionable rights — such as rights to unlimited privacy and unrestricted control over one's own body (a control which even one's body can and does resist). But two can play at democracy, and at the risk of offering too much of a good thing I adopt Chesterton's Tradition, the "democracy of the dead," which "refuses to submit to the small and arrogant oligarchy of those who merely happen to be walking about." That oligarchy owes as much as we do to the traditional values of family and children: life itself. We in turn must insure the survival of those values we cherish — by passing them on to our children.

# Defending the Family

*Peter Skerry*

How shall we account for the persistent relationship between social class and opinion concerning abortion? We have already suggested one possibility: the sharply divergent attitudes among social classes toward the family.

That such differences exist is obvious. Less apparent is the emergence of the family as the focus of conflict among social classes that seems most intense between certain segments of the upper-middle class — in particular the highly educated cosmopolitans in the professions, sciences, and arts — and the working and lower-middle classes. For what underlies recent critiques of the family is the assumption that its few remaining functions should be assumed, as much as possible, by less "antiquated" institutions. This notion reflects the ideology of professionals, who tend to exaggerate the deficiencies of institutions to which they administer expert advice, or the bias of highly mobile and achievement-oriented individuals, who view the family as an obstacle to their own development and advancement. In any event, the increasing disaffection with the family among the upper-middle class contrasts sharply with developments among the working and lower-middle classes.

The work of social scientists of an earlier generation, such as Herbert Gans, Lee Rainwater, and Mirra Komarovsky, described the intense family life of the working class. Their studies showed that for the mass of Americans the family was rarely conceived of as an isolated nuclear unit, but rather as a clan — a dense network of relationships among grandparents, parents, siblings, aunts, uncles, cousins, and in-laws. Although the working class (and the lower-middle class) subscribed to the general norm that married couples established their own nuclear households, relatives tended to live near one another (often within walking distance) and continued to rely upon one another for material and emotional support. Although commonly referred to as an extended family, this structure might have been more accurately called a multi-nuclear family. The family was thus the focus of social life for most Americans.

Contrary to the claims of recent critics of the family, the situation

**Peter Skerry** is currently at work on the Mediating Structures Project of the American Enterprise Institute. This article is the second part of his article, "The Class Conflict over Abortion," which appeared in the quarterly review *The Public Interest* (Summer, 1978; ), and is reprinted here with permission.

today is not much different. In her recent study of working-class family life, *Worlds of Pain*, Lillian Rubin found that the reliance on the multi-nuclear family persists. Even in the supposedly rootless California subdivisions Rubin visited, working-class couples live near their relatives and see them more often and more regularly than anyone else. Relatives are the people whom they trust with their children and with whom they most intensely share their lives.

Less surprising perhaps, but equally significant, are the findings of William Kornblum's recent study of working-class life in the ethnic neighborhoods of South Chicago, *Blue Collar Community*. Kornblum attributes the dogged resistance to integration among the urban working class to the continuing importance of kinship ties:

> For many South Chicago adults who spend the bulk of their lives among their extended kin, the potential loss of their neighborhood threatens more than their status and class mobility, or the security of their participation in a yearly round of ethnic or neighborhood events. *Loss of the neighborhood may also mean the end of a family organization which is the prime concern of their lives* [emphasis added].

Of course, some things have changed in the past 20 years. In particular, recent research indicates important developments in the way husbands and wives relate to one another. The sex segregation and lack of communication between spouses characteristic of an earlier generation are giving way to a more nearly equal, companionate form of marriage (what Peter Willmott and Michael Young have called the "symmetrical family"). Working-class women in particular no longer seem as willing as their mothers were to put up with withdrawn, uncommunicative husbands. At the same time, working-class men, less drawn by the all-male clique outside the family, spend more time with their wives and children. In this respect the life of the working class increasingly resembles that of the lower-middle class, which also shows no signs of lessening its reliance on the family.

These developments suggest that the family is assuming *greater* importance for most Americans. In the United States during the postwar period, a steadily rising standard of living, relatively stable employment, and government policies (such as those favoring mass homeownership) have all encouraged workers to turn to family relationships for the satisfaction of their emotional needs. At the same time, the continuing inadequacy of work to meet those needs, particularly for jobholders at the base of the occupational pyramid, reinforces this tendency. As one building laborer put it to Willmott and Young: "Your family are your life, aren't they?"

The contrast with the upper-middle class could not be more vivid.

A career in the professions or management requires a commitment and offers rewards that a mere job does not. In the upper-middle class, the demands of work are more intense and pervasive; the sharp distinction made by the production worker between work and home disappears. And the tension between family and career is heightened by the ethos of achievement. When the truck driver moonlights or works overtime, he is probably doing it to provide for his family. For the ambitious lawyer, however, hard work is tied less to necessity than to some notion of individual fulfillment. Moreover, there is evidence that those who take their work seriously also take their leisure seriously — even when it means spending time away from their families. Sports and hobbies requiring diligence and application seem to attract those who also throw themselves into their careers. The achievement ethic does not confine itself to work, and here again the needs of the individual and his or her family are in tension.

**An Emotional Haven**

But much more than a turning toward the family, the emergence of the symmetrical family among the working and lower-middle classes represents a turning away from the world outside. It is frequently noted that as the family has lost many of its social and economic functions to other institutions, it has become increasingly important to the psychological well-being of individual family members — as an emotional haven from what is perceived to be an increasingly hostile environment.

This is nowhere more apparent than in the child-rearing attitudes of working-class and lower-middle-class families. Parents today invest more time and emotional energy in their children than their own parents did. Relieved of the severest economic hardships, their family life has become more child-centered. Children have become the focus of parental aspirations, however modest. Both the working class and the lower-middle class are jealously protective of their children and especially reluctant to entrust them to professionals, whom they view as likely to impose alien values. These parents avoid sending their children to day-care centers. When mothers work (which is increasingly the case), they make arrangements with trusted friends and neighbors or preferably relatives. Working-class and lower-middle-class parents even feel ambivalent about sending their children to school. One young mother told Lillian Rubin:

> I think little kids belong at home with their mothers, not in some nursery school that's run by a bunch of people who think they're experts and know all about what's good for kids and how they're supposed to act. I saw some of those kids in a nursery school once. They act like a bunch of wild Indians, and they're dressed terrible and they're filthy all the time.

The textbook controversy in West Virginia and, to some extent, the busing crises in the Northern cities are also manifestations of this suspicion regarding professionalism and its alien values.

Differing class attitudes about the family are most evident among women. The enthusiasm of affluent women for the women's movement hardly needs elaboration. As the ethic of individual achievement is taken more seriously by well-educated, upper-middle-class women, the burdens of raising a family appear more onerous, especially compared to the remunerative and often rewarding careers of men they know. At the extreme, a notion of childless marriage is emerging (also prompted by fears of overpopulation). Ellen Peck, an officer in the National Organization for Non-Parents, put it this way:

> Given the complexities of the task and the urgent need to further curb our birth rate, it would be wiser to regard parenthood as a specialized occupation — and childlessness as our cultural norm.

This attitude strikes at the heart of the lives of working and lower-middle-class women, who see such extreme comments as typical of the entire women's movement. One woman remarked to Rubin: "They put you down if you want to be married and raise kids, like there's something the matter with you." The fact is that working-class and lower-middle-class women still invest most of their energy in their roles as wives and mothers, even though more and more of them work outside the home. (Given the types of jobs they have, this is understandable.) They are not, however, untouched by the women's movement: They will no longer suffer insensitive treatment by their husbands, but they still respect their husbands' authority, and yield to it (perhaps because they suspect that in the outside world few people will). Similarly, many of these women are ambivalent about equal pay for equal work: While they accept the principle, they hesitate to think that a woman should deprive a man of the opportunity to support his family.

The unchanging reality for these women, and for their men, is that marriage and parenthood are one of the few available options. Going off to college, for example, with its relative independence and freedom from responsibility, is not a possibility for most. Those who continue their education live at home to save money and often hold a job at the same time. In most cases, young men and women strain under the rigid controls of ever-vigilant parents. For a few, the chaos and pain of an unstable family situation make the need to escape even greater. Either way, the path to independence and adulthood lies in establishing one's own family. For the men in particular, the responsibilities of raising a family are welcomed as a way to "settle

down" and to renounce the aimlessness of "hanging around" and the temptations of street-corner society.

When an unmarried working-class woman gets pregnant, she and the man responsible almost automatically assume they will marry. As one husband told Lillian Rubin, "If a girl got pregnant, you married her. There wasn't no choice. So I married her." Of the 50 couples Rubin interviewed, somewhat fewer than half were married under these circumstances. But among these 20-odd couples, not one man or woman considered abortion; not one considered not getting married. Rubin concludes that many working-class couples are participants in an unconscious drama of using pregnancy as an excuse to get married. And although the couples she talked to were married in the early 1960's, it is not clear that many would act differently if faced with the same decision today. The survey data certainly suggest that only a small percentage would resort to abortion.

**Dissenting Adults**

When the Supreme Court ruled in *Roe v. Wade* that "the right of personal privacy includes the abortion decision," it explicitly reserved comment on the rights of the spouse, or on the rights of the parents of an unmarried minor. Justice Blackmun, writing for the majority, did specifically reject the arguments of various *amici* "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." But the failure to address the issue of consent by spouses or parents suggested to many that the Supreme Court was sanctioning the anti-family bias of the reform movement.

When the Court did address these issues, in June 1976, such suspicions were confirmed. In *Planned Parenthood of Central Missouri v. Danforth*, the Court struck down a Missouri statute requiring the prior written consent of the spouse during the first 12 weeks of pregnancy. Justice Blackmun, again writing for the majority, agreed with the lower courts that the state "cannot delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." Thus the Court rejected the notion that the father has any rights deriving from his position in the family: He is treated exclusively as a citizen whose rights derive solely from the authority of the state. The Court thereby reduced the decision to abort to a conflict between individuals, in which their family relationship is immaterial.

In the *Danforth* case, the Court also struck down a provision requiring an unmarried woman under the age of 18 to obtain the

written consent of one parent during the first 12 weeks of pregnancy. Explicitly rejecting a lower court finding that the state had a "compelling basis" to require such consent "in safeguarding the authority of the family relationship," the Court ruled as follows:

> Just as with the requirement of consent of spouse, so here the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of a physician and his patient to terminate the patient's pregnancy, regardless of the reasons for witholding the consent.

Here and in the accompanying *Bellotti v. Baird* decision, the Court emphasized that what it objected to was an absolute parental veto. It implied that parental consent might be valid if the minor were "a girl of tender years," and that a requirement of parental consultation might be upheld.

Despite these qualifications, the Court clearly views such situations as fundamentally involving a conflict among the rights of individuals, quite apart from their rights and obligations as family members. Yet such an atomistic view of society conflicts with the way most people see the world. (Note again that in 1975 only about a third of Americans approved a woman's right to an abortion opposed by her husband.) For most people, the family is the basic social unit. Among working and lower-middle-class people in particular, individual identities are submerged in the family and its dense web of sacrifice and reward that effectively combines self-interest with altruism. The father accepts working at an unrewarding job for the sake of his family; the mother sacrifices her needs to those of her husband and children; the family gives meaning to both of their lives. This is the bargain struck, and although there are inevitable conflicts between individual needs and family demands, the principal tension felt is between *family* and *society*: Increasingly, the former is seen as a bulwark against the disorders and intrusions of the latter.

In contrast, the doctrine of individual rights elaborated by the Court is more akin to the ethos of upper-middle-class professionals, scientists, and intellectuals. The emphasis is less on family stability and integrity than on individual achievement. The principal tension felt is between *individual* and *society*, with the family increasingly seen as just one more societal institution.

### The Limitations of Expertise

Daniel Bell has written that the prototypical conflict of post-industrial society is between the professional and the populace — between the increasing power of the new knowledge class and the rights of the layman and citizen. The controversy over abortion may

be viewed in this light as a debate, largely between these groups, over the definition of abortion. Is abortion an abstruse technical-medical procedure that only doctors and medical scientists can understand and make decisions about? Or is it something that everyone can understand but that raises questions of morality, of values?

The Supreme Court has clearly chosen the former definition. One of the more interesting aspects of its various abortion decisions is the explicit deference to professional and scientific expertise. In *Roe v. Wade*, for example, the Court declined to base its ruling on the presence or absence of life in the womb, for reasons given by Justice Blackmun:

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

The Court went on to establish the criterion of fetal viability (the capability to live outside the womb) as the point at which the state may have a compelling interest in the protection of potential human life. Viability, Justice Blackmun explained, has been *medically* determined to occur approximately between 24 and 28 weeks.

What is curious here is the Court's selective use of scientific authority. It first refused to deal with the question of when life begins because scientists have been unable to agree. It then adopted the viability standard, assuming agreement among scientists and doctors when in fact there is none: The debate continues over what exactly "outside the womb" means (whether it refers to a fetus plopped in a surgical basin or carefully placed in an incubator). But even if there were such agreement, the inevitable value conflicts would not (as the Court seems to imply) be resolved. Balancing the well-being of the mother against the right of the viable fetus to be born, some medical scientists would presumably still find abortion acceptable. Others would not. Yet the Court resorted to a naive view of science as capable of not only transcending but deciding moral and ethical dilemmas.

But even if the Court had not taken this view of science, it still would have had problems. The scientific questions raised about when life begins or when the fetus "becomes human" are indeterminate, while most of the other issues raised involve clear value judgments that science can merely inform. And the intimate and personal nature of the matter leads to strong opinions that would not in any event be easily challenged by scientific findings.

A corollary to the Court's reliance on the authority of science is the

authority it grants to the professional expertise of the individual physician in the decision to abort. Justice Blackmun has written:

> The [Court's] decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the individual physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. *Up to these points, the abortion decision is inherently, and primarily, a medical decision, and the basic responsibility for it must rest with the physician* [emphasis added].

Yet abortion is seldom just a technical-medical procedure; it is rarely indicated for medical reasons alone. Indeed, the present controversy concerns precisely the expansion of legal abortion to allow for *non*medical justifications. In the *Doe v. Bolton* decision, the Court itself concedes this by defining the health of the mother as a matter of "professional judgment" that "may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient."

The Court relies on professional and medical expertise, yet offers a definition of health that goes beyond the bounds of scientific knowledge. The point is well made by Dr. Bernard Nathanson, a physician and prominent reform activist who has nevertheless expressed doubts about the ultimate wisdom of abortion on demand:

> The phrase "between a woman and her physician" is an empty one since the physician is only the instrument of her decision, and has no special knowledge of the moral dilemma or the ethical agony involved in the decision. Furthermore, there are seldom any purely medical indications for abortion. The decision is the most serious responsibility a woman can experience in her lifetime, and at present it is hers alone.

If we accept for the sake of argument that abortion *is* a moral issue, then the nature of the class conflict over abortion is more apparent. Scientific knowledge and analytic skills are simply not as capable of informing this issue as they are certain others, such as pollution or nuclear power. The members of the knowledge class (and the rest of the upper-middle class to which they belong) are thereby really not any better equipped to deal with the matter of abortion than are the members of any other group. Indeed, when they argue for abortion, what they are doing is no different from what those opposed to abortion are doing. They are defending a set of values grown out of their common life experiences, opportunities, and beliefs — defending, in short, a moral decision about the symbolic meaning that abortion has for their particular culture.

# Procreation Is Not for the Laboratory

*William B. Smith*

A BABY GIRL, conceived in a test tube, is born and now lives in England. God bless her! May she have a good, long, full and happy life. May her parents be especially wise.

She is, so far, one-of-a-kind, but the world and the press do not always treat one-of-a-kind very kindly. The Dionne quintuplets were so much in the public spotlight that they were actually separated from their own family. May this new family be wise enough and strong enough to avoid that excess.

While I sincerely wish this child the best, I just as surely oppose artificial conception.

Some, no doubt, expect Vatican-inspired opposition to anything new, and so they cast local representatives as expected foot-draggers to progress. But that is a prime question: Is this progress?

Conventional Christian teaching favors parenthood and is certainly not opposed to birth. And one of the things at stake here is the nature of human parentage — a very basic form of humanity.

What, then, is the objection? The objection is to the separation of procreation from natural human intercourse.

If the end result is the same, why quibble over means?

This is no mere quibble. This is a separation with consequences.

In test-tube conception, that union of "two-in-one-flesh" of which Scripture speaks and sanctions (Gen. 2:24; Mk. 10:8; Eph. 5:31) is torn asunder. Indeed, marital union, in the Judeo-Christian view, is not just the chemical fusing of two sex gametes — linking 23 chromosomes from jar "His" with 23 from jar "Hers."

No, the transmission of love and life go together in a marital, personal, untransferable, exclusive and integrally human action. This is a simultaneous and cooperative union, a mutual gift of a husband and a wife — "two-in-one-flesh."

Surely it can't be true that, in the closing quarter of the 20th Century, the only consistent defenders of natural intercourse in marriage are thoughtful celibates who pray and plead from the Vatican: Don't sacrifice sexuality on the altar of sex, nor on the altar

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**William B. Smith** is a professor of moral theology and Dean of St. Joseph's Seminary in Yonkers, New York. This article was first published in the August 2, 1978 issue of *Newsday* (the major daily newspaper on New York's Long Island) and is reprinted here with permission.

of technology; such splits are not wise, nor truly human, nor are they upright.

*In vitro* fertilization is a separating short-cut. In fact, several *in vivo* — in and within a living mother — methods have not been fully examined or exhausted. Many look for progress here, whether through improved microsurgery, bypasses, perhaps even in-place transplants not yet perfected but welcome.

The *in vitro* method is not just a tiny adjustment in technique — as in improved hearing aids, glasses or artificial limbs. This involves the very origins of human life, the parameters of which should be honored, not manipulated.

We have all seen the headlines, but we have not seen the obituaries because none are published. Drs. Steptoe and Edwards have admitted to 30 previous tries that failed. What is the ethics of that? Initiating human life at such high risk and hazard?

Someone put it crudely that all mistakes and mishaps are "washed down the sink."

However small, these are human lives — lives at great risk and hazard. And the foundational canon of medical ethics remains: "First, Do No Harm! *Primum non nocere*!" With human subjects, it is not enough not to know harm and hazard; rather we must know there is *no* harm and hazard.

*In vitro* fertilization not only separates procreation from intercourse, it unveils some currently reigning social fictions.

In one room of one hospital, nascent life is destroyed for 150 Medicaid dollars plus; in another room, human life is manufactured for a few thousand dollars plus. In 1973, the Supreme Court ruled that no one really knows when human life begins, suggesting that such knowledge is a kind of religious scruple. Abortion views aside, it's clear that scientists and geneticists, on all sides, know when life begins and are now determining how, where, why and under what circumstances.

Given the element of chance in natural procreation, *in vitro* conception is a first and necessary step in genetic engineering. "Negative" genetic engineering aims at straining out some defect, curing some disease or pathology, as in removing a diabetic gene. All progress in that is welcome progress. But "positive" genetic engineering is the construction/manufacture of human life, often in the language and atmosphere of eugenics. That is a different ball of wax entirely.

A number of Nobel Laureates in genetics and biology are exceedingly gloomy about the present state of our gene pool. They

look for planned control over reproduction — not just quantity, but quality too.

Given the narrow pelvic area of women, children must now be delivered at about nine gestational months. Some advocate artificial wombs so that babies with bigger heads and presumably bigger brains can be born. One has even suggested that our genetic endowment be tatooed, attractively, on foreheads, so that those who don't match up well will not date nor mate. I don't take these ideas from comic books but from printed papers and theses presented in very serious circles. All of them require that reproduction be separated and "protected" from natural intercourse.

Many colleagues in ethics see no objection so long as *in vitro* involves a husband and wife. But, it is a medical truism that, once a procedure is in place for one effort, it is, of course, in place for other opportunities. Will this be limited to the married? On what basis? What of the "liberated" who want a child but not a pregnancy? If there is no objection to method, all rests on the couple's consent. What of the husband who consents to the use of the spermatazoa of another; the wife who consents to the ova of another? If all that counts is consent — with no objection to method — then where is the real objection?

Critics of conventional morality have been vocal in their charges of insensitivity to personalism and personalist insights. In conception, when you distance the human father from the human mother, you have strained out the human factor, which is a dehumanizing move in a depersonalizing direction.

Prof. Leon Kass reminds us that increasing control over the "product" is purchased by increasing depersonalization of the "process." Some seem to forget that human procreation not only issues human beings, but is, itself, a human process. Conventional ethics holds for the word "procreation" instead of "reproduction" because reproduction is not a manufacturing term.

Do we really have the wisdom to be our own creators? Is limitless self-modification even wisdom at all? Consider the rape of the earth and the state of our natural environment. Is our track record so splendid that we should now zero in on internal human evolution? Recall: Nature is the home team, and the home team always bats last. God always forgives; man sometimes forgives; nature never forgives.

There are profound questions here. After all, who is the patient? The mother? Father? Baby? It is human life they seek, and each is a human subject. The canons and rules of ethics apply to human subjects; indeed, our country once put doctors of another country on trial for unconsenting experiments on human subjects.

Some talk of "disposing" of mistakes and mishaps. What is a mistake? The wrong size? Wrong genes? Wrong sex? "Dispose" here, of course, means "destroy."

The alleged technological imperative reads: "What we can do, we must do!" This is no human imperative; rather, it is indicative of knowledge without an ethic. Knowledge without the corrective of charity can take on the nature of venom.

"What we can do, we must do!" Must we, really? I much prefer the humane imperative of Prof. Paul Ramsey of Princeton, who writes, instead: "The good things that men do can be made complete only by the things they refuse to do."

# Life, Death and Liberty

*Germain Grisez and Joseph M. Boyle, Jr.*

WHAT ABOUT the requirement that human individuals be born alive before being accepted as legal persons? This dividing line excludes from legal personhood a subclass of members of the species, the unborn, which are in reality whole organisms and distinct individuals. At present, the law in the English-speaking countries does not consider the unborn to be legal persons and the law of homicide does not forbid killing unborn individuals. This is true even where laws forbidding abortion provide some protection for such individuals; anti-abortion laws are not based upon the assumption of the full legal personhood of the unborn, for if that assumption were accepted, the ordinary homicide laws would apply to them.

Two points may be made by way of jurisprudential defense of the present exclusion of the unborn from protection by the law of homicide.

First, this exclusion is based upon a status which is not a matter of degree. To this extent, using birth as a necessary condition for legal personhood is not legally unworkable in the way that using quality-of-life criteria is. Or, to put the point another way, the repeal of the laws forbidding abortion does not open the door to the killing of an indeterminately large class of individuals other than the unborn from whom this repeal withdraws legal protection.

Second, the exclusion of the unborn from protection by the law of homicide is not *in itself* a novel discrimination introduced as a practical application of one particular world view. As we have pointed out already, anti-abortion laws were necessary to protect the unborn precisely because the commonly received legal view was that the unborn are not protected by the law of homicide which protects those who are already born. To permit nonvoluntary euthanasia would be a more radical step than to legalize abortion, for the legalization of nonvoluntary euthanasia would mean the withdrawal

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**Germain Grisez** is the author of *Abortion: the Myths, the Realities, and the Arguments* which, although published three years before the U.S. Supreme Court's 1973 *Abortion Cases*, remains a definitive study of the abortion issue. **Joseph M. Boyle, Jr.** is an assistant professor of philosophy at the College of St. Thomas in Minnesota. This article is excerpted from the forthcoming book *Life and Death with Liberty and Justice: a Contribution to the Euthanasia Debate*, which will be published next year by the University of Notre Dame Press (reprinted with permission, © The University of Notre Dame Press).

of protection from individuals until now protected by the same law of homicide which protects everyone. Those killed in a program of nonvoluntary euthanasia, whether declared nonpersons or not, would be individuals whose personhood before the law has been universally accepted in Anglo-American jurisdictions until now.

Nevertheless, we think that unborn human individuals ought to be considered legal persons and that the restriction of the law of homicide by which it protects only those who have been born alive ought to be abandoned. The case for this position has been stated at length elsewhere and need not be repeated in full here.[1] However, a few comments are in order.

First, until modern times, no one knew when human life begins. It was commonly thought that it began from nonliving materials sometime during pregnancy. But by 1800, it was known that while new human individuals begin, human life as such does not begin but is transmitted continuously. Further, law generally stays close to common sense. From a common sense point of view there is something lacking for the full reality and personhood of an individual until birth occurs and one can begin to interact with the separate and distinct body of the infant. Between the time when spontaneous movement of the fetus is felt (animation) and live birth, a common sense view is that the unborn is alive and growing — the baby *is coming*. Hence, there is a tendency to count the unborn as being in an intermediate state between nonbeing and being, between lifeless material and the fully real, liveborn infant. Law also has very important problems with evidence. No one can be held guilty of killing until it is certain that life is present, until it is clear that the act was the cause of death, and so on.

Under these conditions, Anglo-American law would have found it extremely difficult to attempt to consider unborn individuals as legal persons whose lives would be protected by the laws forbidding homicide. Some clear dividing line was essential, and birth was quite naturally chosen. At the same time, unborn individuals were protected by special laws, already to some extent at common law and later by statutes which were enacted beginning early in the nineteenth century when the real status of the unborn began to be understood more accurately.[2]

In its decision repealing laws forbidding abortion, the United States Supreme Court accepted false historical claims by proponents of abortion which called into question the fact that abortion was a crime at common law and which denied that anti-abortion statutes were intended to protect the lives of the unborn.[3] A more responsible effort by the Court to discover the relevant history of the law would

have revealed the situation summarized in the preceding two paragraphs.[4]

Second, Anglo-American law never has taken a consistent position either that the unborn are not legal persons or that they are legal persons. In different areas of the law, different solutions were reached at different times and places, always recognizing the impossibility of completely excluding the unborn from the human community but never simply affirming their unqualified membership and rights. Nevertheless, if any recognition was to be given at all, it was very difficult not to give increasing legal status to the unborn. The reason for this is simple and obvious enough: If there is a claim of justice, less than full and unqualified recognition of the claimant is injustice. And so until the pro-abortion movement reversed a long-term trend, Anglo-American law tended for more and more purposes to regard the unborn as already existing legal persons in possession of rights before the law, some of which were actually enforced prior to birth.[5]

In its abortion decision, the Supreme Court distorted this state of affairs in two ways. It suggested that there existed disagreement concerning when life begins and it proposed to avoid settling this disputed issue. It then noted that the law did not consistently regard the unborn as legal persons, minimized the respects in which personhood was in fact accorded the unborn by the law, ignored the trend toward fuller recognition, and summed up the situation by saying: "In short the unborn have never been recognized in the law as persons in the whole sense."[6]

Third, inconsistency in the law with respect to the status of individuals as persons is intolerable. Law can deal with most things in different ways for different purposes. But persons are not simply something within the subject matter of legal concern. Persons are those for whom the law exists. If one is a person, one deserves the whole service of the law; if not, none of its service. The case of the unborn is not the only historical instance of legal inconsistency on this matter. Slaves and Indians also were treated inconsistently, being recognized as persons for certain purposes and denied personal status for other purposes.[7]

The controversy over legalization of abortion forced a decision which would settle the status of the unborn, for if they were persons then the demand for abortion could not be admitted, while if they were not it could not be resisted. The issue was not a matter of policy on which consensus or lack of it could be decisive, because the putative right of persons to live was at stake. Nor was it a matter on which a decision could be avoided.

The Supreme Court held that if the unborn were persons, then the

case would have to be decided in their favor. But instead of facing the responsibility of settling this crucial issue, the Court maintained that the case for personhood was not proved, and thus that the unborn should not be considered persons. The question was what consistent policy ought the law to adopt; the Court begged this question by assuming that if the unborn were not already fully recognized as persons, then such recognition could not be given them.[8]

Fourth, the dividing line of birth is not particularly significant either with respect to the status of human individuals as members of the species or with respect to their status as individuals involved in human society. There is very little difference between an infant about to be born and a neonate. And the developments in the law made clear that in many respects the unborn are involved in society — for example, by owning property which must be managed, by needing the support of their fathers, by suffering negligent damage and death, by requiring medical care which a mother might reject for herself on religious grounds, and so on. Also, the quickly developing movement to allow nonvoluntary euthanasia of defective newborns clearly extends the acceptance of abortion to the class least distinct from the unborn.[9] Moreover, the unborn could be recognized as legal persons without any legal impracticality.

To insist upon birth in addition to membership in the human species under these circumstances — taking into account what has been known for more than a century — is discriminatory. Hence, all living human individuals should be considered legal persons; the same law of homicide should protect the lives of all equally.[10]

However, the Supreme Court claimed that killing the unborn must be permitted because they are only *alive* on one debatable theory — a patent absurdity. Still, the Court admitted that there is some sort of life which is other than life "as we know it": a potentiality of life, or potential life, or fetal life. At the point of viability, a State can give some protection to this so-called potential life "because the fetus then presumably has the capability of meaningful life outside the mother's womb."[11]

In taking this position, the Court implied that the life of all those who survive either spontaneous or induced abortions but who are too young to survive the neonatal period is not meaningful, although such individuals certainly are legal persons and are citizens of the United States according to the Fourteenth Amendment. Thus in its decision on abortion, the Court itself began the trend toward belittling the significance of the life of infants already born which is now unfolding in the movement to legalize killing some such persons, whether on the theory that such life is not meaningful and that such

persons are better off dead, or on the theory that such individuals should be excluded from personhood, or on the crass view that whether such individuals are persons or not they simply should be disposed of if they cost more than they are worth.

Our conclusion is that legalized abortion, except to save the life of the mother, is a violation of justice. Equal protection of the laws demands that the unborn be considered legal persons, and their lives protected by the same law forbidding homicide which protects other persons.

**The Nazi Experience with Euthanasia**

In his article on euthanasia, Yale Kamisar* argued ... that voluntary euthanasia would lead to nonvoluntary euthanasia. In this connection he suggested that the Nazi action was an example of the "parade of horrors." We omitted this aspect of Kamisar's argument from consideration [earlier] because the Nazi program did not begin with voluntary euthanasia. However, the Nazis did proceed from more to less restricted nonvoluntary euthanasia, and they proceeded from nonvoluntary euthanasia to genocide. Hence, the analogy of the Nazi action deserves consideration here, where the subject is nonvoluntary euthanasia and where the problems of drawing and maintaining firm lines have been discussed.

In discussing the Nazi action, we do not intend to rest our case upon this historical analogy. However, Germany is the only nation in modern times which has undertaken a program of nonvoluntary euthanasia about which we have any real information. (Perhaps nonvoluntary euthanasia is practiced in the Soviet Union or elsewhere, but we have been unable to find any significant evidence on the matter.) Hence, the Nazi action deserves some consideration.

At the same time, the differences between Nazi Germany and the Anglo-American nations of the 1970's require caution lest one press the evidence of this past experience too far. Certainly, if there were no objection to nonvoluntary euthanasia *except* that based upon the Nazi action, the argument would not be strong. But the preceding arguments have shown that nonvoluntary euthanasia would involve a very serious injustice right from the beginning. Since the Nazi action and the nonvoluntary euthanasia proposed today would share the common characteristic of injustice from the outset, consideration of this analogous instance is instructive.

Proponents of euthanasia have attempted to neutralize the force of the Nazi experience with euthanasia by four main lines of argument.

First, it is sometimes maintained that the Nazis were racists and

*Yale Kamisar's article was reprinted in the Spring and Summer 1976 issues of *The Human Life Review*.

that their euthanasia programs were a means to purification of the Aryan race. Since the end rationally required the means of genocide, this means was used. But since no advocate of the legalization of nonvoluntary euthanasia in an English-speaking nation espouses racism, there is no reason to suppose that this type of killing will get out of hand and lead to the excesses that it did in Nazi Germany.[12]

Second, it is sometimes maintained that the Nazis did not engage in mercy killing at all. What they did was really cruel, strictly merciless murder. Kohl protests vehemently that beneficent euthanasia is intended to be kind, that it does not rest upon a principle of utility, and that its sole point would be to minimize misery and maximize loving treatment. Thus because present society so loathes Nazi atrocities, it must avoid cruelty and indifference, and so accept beneficent euthanasia.[13]

Third, it is argued that Anglo-American tradition and law are so different from the totalitarianism of Nazi Germany that there is no reason to fear a repetition of Nazi horrors if nonvoluntary euthanasia were legalized in these democratic and liberty-loving nations. Glanville Williams, for example, points out that American laws permitting sterilization were little used and that men trained to kill in World War II did not return home after the war and continue killing.[14]

Fourth, it is sometimes argued that the Nazi action is not a historical precedent because of the ideological character of Nazi objectives. Their racism was not simply discriminatory, it was totally impractical, a mere abstract ideal. Euthanasia in Anglo-American society would be pragmatic, a matter of rational, cost-benefit calculation. The benefit to society would be a real one, measurable in tax dollars and cents.[15]

As to the first point, the authorities whom Kamisar quotes make clear that euthanasia began in Germany quite apart from the anti-Jewish policies of the Nazis. German Jews were at first excluded because it was believed that the blessing of euthanasia should only be granted to "real" Germans. The roots of the program antedated the coming to power of the Nazis, in a propaganda barrage which established the proposition that there is such a thing as valueless life.

Early in the program, a protesting official of the Domestic Welfare Council of the German Protestant Church asked: "Where is the borderline? Who is abnormal, antisocial, hopelessly sick?" But persons in institutions were killed, and their relatives were sent a form letter saying, for example: "Because of her grave mental illness, life was a torment for the deceased. You must therefore look on her death as a release." Precisely because the killing of the sick had become

somewhat acceptable, the Nazis, using psychiatric certificates as a basis, carried out political killings under the guise of euthanasia.[16]

Frederic Wertham describes at length the unfolding of the euthanasia program in which mental patients and others in institutions were killed. Thousands of German, non-Jewish children were killed by starvation and by drugs. In the early stages, only infants suffering serious defects were killed. But the project did not end until allied troops overran Germany, and as time passed the children became older and the indications slighter — for example, "badly modeled ears," bed wetters, and "difficult to educate."[17] In all, an estimated 275,000 persons who had been in nursing homes, hospitals, and asylums were killed; this number included some indeterminate proportion of foreign workers.[18]

In 1920, two respected professors, Karl Binding and Alfred Hoche, published a booklet defending euthanasia.

Binding, a Doctor of Jurisprudence and Philosophy, began his section of the work by emphasizing that there was no question of recognizing any right to kill; what was at issue were merely the conditions under which, in addition to emergencies, the destruction of human life might be permitted. He went on to argue for *death with dignity* for those desiring it. But he did not stop with voluntary euthanasia. Incurable idiots, whether congenital or not, may be regarded as mere caricatures of real persons. Parents or heads of institutions should be allowed to apply on their behalf for euthanasia; if the latter, a mother might wish to object, and in that case the child could be returned to her care. Ideally, a committee should consider each case in advance, but this might not always be desirable. Errors undoubtedly would occur, but only a life of little quality would usually be lost by mistake.

Hoche, a medical doctor and psychiatrist, argued that an individual could lose so many human characteristics that life would be devoid of value. Incurable idiots can be regarded as mentally dead, but they may be able to live for many more years with considerable costs for care. Such persons cannot respond to love and do not participate effectively in human relationships. The purpose for destruction of such valueless lives is not primarily pity, since they do not suffer to any great extent, but rather a rational consideration of social interests, for example, in making the best use of scarce health-care facilities.[19]

The preceding evidence clearly indicates that the Nazis began by endorsing existing proposals for euthanasia. The project was not in the first instance racist. But neither was it based on voluntariness. Rather, the emphasis was on the good of society. The principle seems

to have been that when there are individuals who are better off dead or for whom life and death make no difference, then the burden of institutional care for such persons can hardly be justified.

As to the second point — Kohl's argument that beneficent euthanasia has nothing to do with the Nazi action — two things need to be noticed.

First, Kohl's conviction that insistence upon voluntariness is fanatical when the killing would be kind according to Kohl's own view is not reassuring. Many people would hold that killing of a nonwilling person never can be kind. The basic arrogance of judging some human lives not worth living, as if that judgment were an objective fact when it is only an expression of subjective opinion, is common to Kohl and to Hoche and Binding.

Second, as we have seen, the arguments for euthanasia on grounds of social utility are too common to ignore. Kohl talks as if economic considerations are insignificant in the movement of nonvoluntary euthanasia. But, as we showed [earlier], considerations of costs of care are not a small part of the argument for euthanasia just as they were not a small part of the argument for legalizing abortion. The weak and helpless who are dependent are equally unwanted persons — and likely to be declared nonpersons — whether they happen to be unborn or not. Kohl himself cannot forbear to mention economic considerations. But the most important point is that Kohl is quite ready to impose his conception of kindness upon nonconsenting individuals to justify killing them, just as Fletcher is quite ready to impose his conception of personhood upon some until now considered persons to negate their right to life.

As to the third point — that Anglo-American traditions are very different from Nazi totalitarianism — the distinction no doubt is real and important *up to now*. The question is whether it will continue to be so. To assume that it will is precisely to beg the question which is at issue when it is suggested that the legalization of euthanasia in Germany paved the way to genocide. The German people also had a tradition which rendered the Nazi atrocities incredible. Yet German physicians, even leading members of the medical profession, cooperated quite willingly and enthusiastically in the euthanasia program and in human experimentation. They were not terrorized into what they did. Rather, Nazism gave them an opportunity which they seem to have been waiting for.[20]

Kamisar points out that no one would have expected the United States to mistreat Americans of Japanese ancestry as it did during World War II. A number of other examples are relevant. During World War II, Great Britain and the United States carried out

terroristic bombing raids. These culminated in the atomic bombing by the United States of Hiroshima and Nagasaki. The terroristic strategy of nuclear deterrence emerged from this experience. The existence of the deterrent overarches American military strategy.

In 1960, many Americans believed that the United States would never carry out anti-guerrilla warfare with terror, torture, and reprisals, and with the obliteration of the distinction between combatants and noncombatants, as the French had done in Algeria. It was widely believed that French officers were corrupted by their colonialism and that they were so inept as to be unable to carry out a surgical strike against the enemy's military power. But then there was Vietnam, endless escalation, pacification and cruelty, the "mere-gook rule," and My Lai. Any nation which considers itself incorruptible is already corrupt.

Moreover, the United States and nations like it could be even more vulnerable than a totalitarian society to an orgy of murder. At least in a totalitarian society there is some central control, some tendency to limit murder when the national interest is at stake. But a democratic society in which liberty becomes license and the rights of the weak are overridden by claims of privacy by the strong can slip into anarchy. Even when the security of the nation is threatened, even when the majority wish to call a halt to killing, it may not be possible to do so. Near the surface of contemporary democratic societies there is a tremendous reservoir of aggression, which rioting and civil strife of recent years has only begun to uncover.[21] To remove any of the present inhibitions with respect to killing would be foolhardy indeed.

As to the fourth point — that Nazi euthanasia was ideological while Anglo-American euthanasia would be pragmatic — it is not clear that this distinction, even if it is assumed to hold, makes a great difference. When the way is opened to killing, ideological fanaticism and individual greed can be equally effective motives. But the distinction is not even clear.

As we have explained already, Nazi euthanasia was not at the outset racist. C. P. Blacker quotes with credit a statement by a prominent Nazi, Hermann Brack:

> Hitler's ultimate reason for the establishment of the euthanasia programme in Germany was to eliminate those people confined to insane asylums and similar institutions who could no longer be of any use to the Reich. They were considered as useless objects and Hitler felt that, by exterminating these so-called useless eaters, it would be possible to relieve more doctors, male and female, nurses and other personnel, hospital beds and other facilities, for the Armed Forces.[22]

This concern seems no less pragmatic, rational, utilitarian, and well-

grounded in cost-benefit analysis than do the arguments of Walter Sackett, Robert Williams, and others, or the memorandum, which we quoted [earlier], of Robert Derzon to the United States Secretary of Health, Education, and Welfare. The last, of course, was not advocating active, much less nonvoluntary, euthanasia — not yet.

Furthermore, Anglo-American arguments for euthanasia, especially the killing of defective infants, are continuous with arguments for abortion, and the latter simply unfolded the ideology of the birth control movement. This movement always has involved an ideological commitment. The first American Birth Control Conference passed a eugenics resolution stating that "we advocate a larger racial contribution from those who are of unusual racial value."[23] Margaret Sanger herself strongly supported this view in urging that the procreation of the diseased, the feeble-minded, and the poor should be stopped.[24]

This eugenicist coloring persisted in the birth-control movement from its beginning in the 1920s into the mid-1930s.[25] But by the late 1930s, the eugenics movement came under a cloud, and the argument was shifted into more democratic terms: It was important to avoid having a disproportionate part of the population come from segments with the least economic opportunity in which healthy development and acculturation of children is impossible.[26]

Population growth, pollution, and poverty — cited by the United States Supreme Court as complicating factors in its abortion decision — can mark out matters of legitimate public concern. But in much debate of the past two decades these factors have been used to project an ideology of the common welfare which especially conforms to the conceptions of the upper classes as to what is necessary both for their own pursuit of happiness and for the kindest possible treatment of the multitudes of poor people crowding into public parks and drawing sustenance from Aid to Families with Dependent Children and other relief programs.

In sum, there remain important disanalogies between the Nazi situation and the situation which shall come into being in any Anglo-American jurisdiction which legalizes nonvoluntary euthanasia. But the disanalogies are not as great as proponents of euthanasia claim. And it is entirely possible that the legalization of killing within any of the ideological frameworks used by proponents of euthanasia would unfold into a reign of terror even more severe than that of Nazi dictatorship, because it would lack totalitarian restraint and be characterized by the degradation of democratic liberty into anarchic license.

Nevertheless, it also is possible that at least in self-interest the

citizens of any Anglo-American jurisdiction would not go beyond killing the weak and unprotected, so that some semblance of law and order would remain. In this case, the extremes of cruelty in the awful horror of Nazi genocide might never follow even if nonvoluntary euthanasia is legalized and extended far beyond what anyone would expect at the outset.

Much would depend upon the speed with which killing began and spread. From this point of view the legalization of nonvoluntary euthanasia by a decision of the United States Supreme Court comparable to the abortion decision would be especially dangerous, for this would preempt the normal operation of the political processes in each State and would make it extremely difficult to withdraw or limit the legalization of killing when restraint began to deteriorate seriously.

As we [have] pointed out ... the Congress of the United States has enforcement power under the Fourteenth Amendment whereby it can act to protect basic rights of persons by appropriate legislation. We believe it would be desirable if Congress would enact legislation guaranteeing the protection of the laws of homicide in all jurisdictions under the Constitution to all persons, except in the cases of capital punishment and self-defense, thus to exclude by preemption the legalization of nonvoluntary euthanasia by the various States. An attempt to enact such legislation would, at the very least, be a positive step which would force the euthanasia debate to unfold somewhat faster than proponents of euthanasia might prefer.

Proponents of euthanasia very likely would resist such an effort by claiming that it amounted to an attempt to impose one view upon the whole society, in which there is no longer any consensus regarding the absolute inviolability of human life. After all, democratic government and law is based upon consensus. In this respect, there remains an important difference, proponents will insist, between legalizing nonvoluntary euthanasia in a democratic society and in a totalitarian state, since the majority rules in the former while a few vicious men determine what will be done and enforce their will by terror in the latter.

But this argument would be fallacious. Consensus does extend and limit the purposes to which government can properly direct the common resources and activities of political society. Thus, if there is no consensus that the protection and promotion of human life in itself should be an object of state action, then one must concede that the concept of the sanctity of life cannot be assumed in jurisprudence as a principle.

However, whether all persons shall equally be protected by the law

of homicide and whether all human individuals should be considered persons are not questions about purposes. These are not issues about ideals and interests which can be settled by a consensus which would either include protection of rights and recognition of personhood within the sphere of common concern or leave these matters in the domain of liberty outside the field of appropriate state action. Whether society extends the protection of the law of homicide equally to all and whether it recognizes all human individuals as persons are matters on which one position or the other inevitably must be taken, with decisive results for the individuals concerned.[27]

It remains possible, of course, that a majority of citizens with the color of legality will choose to set aside the standard of equal protection of the laws or will choose to declare some until now recognized as persons to be nonpersons, thus to attain the same result. But if this happens, consensus with regard to justice itself will be gone. The acts of government then will be a reflection merely of power, resolving competing interests in a mutually acceptable way. Minority rights will no longer exist, because "rights" will mean no more than what is conceded to members of the group by the dominant part of it.

Such a condition would be, in reality, no more a political society cooperating under law than was the German state under the Nazi regime. For what is lawless about dictatorship is not the fewness of those in power but the arbitrariness with which they exercise power, unrestrained by the requirements of equal liberty and justice for all — that is, for the weak as well as the strong, for the deficient as well as the normal, for the burdensome as well as the productive. What is obnoxious about racist discrimination is not that the principle is race but that the discrimination is unjust. Careful exclusion of racial principles for discrimination of lives too meaningless to live, of human individuals too unintelligent to be persons, of persons too burdensome to protect from being killed will not make the discrimination just.

In an article arguing for the standard of membership in the human species as sufficient for legal personhood, Joseph L. Lewis has pointed out:

> In a country where racial, social and ideologic tensions between various groups and the state become greater daily and more profound every decade, that neither membership in the human race nor the right to life is to be determined by arbitrary socio-political standards is a good point to have clear, both for the safety of the persons comprising dissident and minority elements and for the safety of those persons comprising both the state, as society, and the governmental state. Not only is it a good point to have clear in

> general, but it is a good point to have constitutionally clear, in the form of unequivocal written law.
>
> If one group of Homo sapiens can, in the course of history, be singled out and as a class have their right to life and liberty suspended, then in a historic context appropriate to the action, another group of Homo sapiens may be singled out and as a class have their right to life and liberty suspended. Because of the neatness with which society continues to function through its rational systems and established procedure, it is hard to perceive that the Supreme Court's abortion decision has declared a rationalized state of nature among the groups, classes, and individuals of American society. The Supreme Court decision represents a social Darwinistic doctrine of survival of the fittest, and the Supreme Court has arrogated to itself the rationalizing power to say who is the fittest.[28]

Because we agree with Lewis that the unborn surely ought to be recognized as legal persons and their right to life protected, we also agree with him that the Court's decision was a radical injustice to this minority. And the tendency of the present legal situation with respect to the unborn does follow logically: to terminate the rule of law and to substitute the rule of brute force.

However, we think Lewis is mistaken in supposing that the corruption of legality in the United States Supreme Court decision on abortion — and in the more or less extensive legalization of abortion in other jurisdictions within the common law world — totally corrupts legality and substitutes throughout society the struggle for survival for fair cooperation toward common purposes with respect for liberty beyond the field of common action.

The power of the United States Supreme Court, even the power of the British Parliament, is not so great that a single act on its part can utterly destroy lawful authority in an entire political society. Moreover, the claim of justice in the case of abortion, while clear enough for those prepared to see it, is not so patently clear that those responsible for recognizing it can not have overlooked it, thus perhaps engaging in an exercise of self-deception but not necessarily in an exercise of dissimulation and solemn mockery.

Further, a large part of the society does recognize the injustice and is working for its rectification by lawful means, for example, by seeking an appropriate amendment to the United States Constitution. Many other citizens, we believe, would support this cause if they understood more clearly what is at stake.

Of course, if nonvoluntary euthanasia is legalized and especially if it becomes widely accepted, then the corruption of legality which Lewis is talking about will not be so restricted, especially because in this case it would be very difficult to make a mistake about what is just even with the help of self-deception. And, as we have said, if the legal order as a whole becomes corrupt, formerly democratic societies

would no more remain communities under law than was the German state under the Nazi regime.

In such a circumstance, even those persons comprising the state as a society and high government officials would no longer be safe, as Lewis points out. For if isolated terroristic acts by a very small number of extremists already create great difficulty in democratic societies, acts intended to defend innocent lives from destruction under the color of legalized nonvoluntary euthanasia might cause even greater difficulty, as judges and lawmakers who decreed the practice and physicians and others who administered it might come to be viewed — whether rightly or wrongly — by those most dedicated to the defense of the right to life as unlawful attackers who might be killed without immorality in a situation in which law had resigned by its abandonment of justice.

This was the attitude of those who plotted to kill Hitler, and we doubt that anyone in the democratic nations believes they were incorrect. As the United States Declaration of Independence makes clear, governments are instituted to protect fundamental rights, including the right to life, and they deserve to be altered or abolished by force when they become destructive of their purpose. Those who killed the legalizers and ministers of nonvoluntary euthanasia might consider their acts justifiable as an attempt to alter and reform government which had become perverted. Whether or not one would consider such acts justifiable, one must recognize that nonvoluntary euthanasia would be dangerous to all.

Of course, those who have great wealth and power often find effective ways of protecting themselves even in the most anarchic situations. Hence, even if the rule of law gives way entirely to the law of the jungle, the wealthy and the powerful perhaps will be able to keep themselves safe and to kill the poor and the weak with immunity. But this would not change the fact that such killing would violate justice — the justice which the American people always have hoped to establish in their common life. All of those killed without their consent will be denied equal protection of the law, whether they are killed by the arbitrary judgments of others that they would be better off dead, by the arbitrary imposition on them of criteria which would make them nonpersons, or by the brutal decision to solve finally the problem of dependency by killing the dependent.

Advocates of euthanasia often point out that in certain primitive tribes which lived in very hard environments, there was a practice of abandoning the elderly and others who could not keep pace with the group. Even in such a practice, imposed by cruel necessity, there was respect for the dignity of persons who were left behind. The

dependent who were killed in a program of nonvoluntary euthanasia would enjoy no such respect for their dignity. They would be deprived at once of life, of liberty, and of justice with the approval of the law of a land which has made its proud boast: liberty and justice for all. And they would be disposed of like refuse by a nation unwilling to care for them, although it is the richest and most powerful nation the world has ever known.

# II.

### Liberty and Justice in Jeopardy

Many of the most important public debates involving jurisprudential issues in the United States since World War II can be viewed as conflicts between parties who prefer as much liberty as possible and parties who prefer as much equality as possible, especially in matters involving important components of justice. Libertarian arguments have been offered against the growth of the welfare state, equalitarian arguments for it; libertarian arguments against going beyond the ending of legally enforced segregation to begin legally enforced integration of the races, equalitarian arguments for it; libertarian arguments against criminal laws protecting the lives of the unborn, equalitarian arguments for such laws.

As a comparison of the individuals and groups on either side of these and similar issues quickly makes clear, no one is consistently a libertarian or an equalitarian. Simultaneously respecting both of these basic jurisprudential principles is never easy. Moreover, as exemplified in the preceding chapters, there are considerations of either liberty or equality or both on opposite sides of many, if not of all, important jurisprudential issues.

In the course of our study we have noted many important respects in which — assuming our conclusions correct — liberty and justice are presently being violated or are threatened with violation in the immediate future.

The liberty of competent persons to consent and to refuse consent to medical treatment has been violated, and the law has failed to provide effective means by which persons can exercise this liberty with respect to a future time of noncompetence. The recently passed natural-death or right-to-die legislation is objectionable for many reasons, not least that it arbitrarily restricts the very liberty it is intended to implement. The liberty of persons who wish to commit suicide sometimes is infringed by excessive measures of restraint and

custody; such measures often infringe upon the privacy of persons who live in institutions. The liberty of members of society who oppose the death penalty to stand aloof from this form of official homicide seems to us to be violated by every jurisdiction which uses this method of punishment.

The liberty of members of society who consider abortion murder of the unborn to stand aloof from public programs which involve the state in this form of killing has been violated by every jurisdiction which has put public facilities and public funds at the disposal of those who engage in abortion. Similarly, if voluntary euthanasia is legalized and carefully regulated to the extent that it must be if it is to be safe, the liberty to stand aloof of all who regard as abhorrent such killing with the consent of the victim will be violated by the *institutionalization* of the practice. Everyone, nevertheless, will admit institutionalization to be necessary to protect the lives of those who do not consent to be killed.

The liberty of physicians to provide noncompetent patients with appropriate but not excessive medical treatment is violated to the extent that the present legal situation compels the physician to work in a context of uncertain liability, instead of facilitating a clear determination of the patient's constructive consent in cases in which there is doubt about it.

Not every limitation on liberty is a violation of it. Liberty is justly limited whenever all who are reasonable agree to its limitation for the sake of the common life they share, the social order which liberty itself creates. But every restriction of liberty without social necessity and every limitation of liberty which unfairly weighs on some for the good of others does involve injustice. The preservation of the blessings of liberty is itself a very important aspect of political society's constituting purpose.

Some proposed definitions of death would deprive living persons of their legal status as persons; such deprivation is a fundamental injustice which opens the way to a whole series of other injustices. At the same time, to insist upon outdated standards for determining death is to compel the living to treat the dead as if they were alive, when the contrary can be established beyond reasonable doubt. This is unjust, especially when the dead person has made an anatomical gift which is interfered with. Competent persons are unjustly required to undergo and someone is required to pay the cost of unwanted treatment when the liberty to refuse treatment is insufficiently recognized and implemented. The noncompetent who are deprived of appropriate treatment or who have imposed upon them excessive treatment likewise suffer an injustice.

But most important is the unjust deprivation of life which is involved in the failure of the law to provide equal protection to this basic good. Those who are aborted before birth, those who are killed by omission after birth, and those for whom early death is sought as a management option are unjustly deprived of their lives. At the bottom of the present and growing tendency to deprive some persons of life is the ascendancy of one particular world view: secular humanism with its consequentialist ethics. According to this world view, one person can decide on behalf of another that he or she has a life or prospect of life not worth living, a life which does not merit preserving and protecting.

Secular humanists, of course, are entitled to affirm this world view and to seek to live their personal lives according to it, so long as they respect the interests of society and the rights of others. This is what liberty means. But in America today — for that matter throughout the Western world — secular humanists are seeking to have their world view established as the exclusive legitimate framework for public policy.

Thus Western societies are moving very rapidly from a jurisprudence based upon the traditional religious morality of sanctity of life to the new morality of quality of life judged from a secular humanistic perspective. From the position of protecting every individual's life as inherently inviolable, Western societies are moving directly to the opposite position of withdrawing legal protection from some individuals' lives considered as useless to themselves and others — as lives which ought not to have been conceived or which ought to be quickly terminated. The kindest possible treatment for such persons is to kill them, it is argued, for they will be better off dead.

The injustice of imposing upon a noncompetent person someone else's concept and standard of quality of life is patent. So is the injustice of imposing secular humanism as the established framework of public policy upon a whole society, many of whose members do not share the secular humanist faith. Indeed, as a matter of constitutional law, the use of the secular humanist perspective as a privileged basis for public policy — which was what happened in the legalization of abortion and is proposed in the argument for legalizing euthanasia — constitutes an establishment of religion in violation of the First Amendment of the United States Constitution.

Proponents of euthanasia no doubt will vehemently deny that they are attempting to establish a religion. Their own literature is filled with attacks upon the principle of the absolute inviolability or sanctity of human life precisely on the basis that this principle is rooted in a religious view which not everyone holds in contemporary

pluralistic society. In effect, those seeking to justify nonvoluntary euthanasia are urging that instead of earlier religious principles, purely rational and humanistic principles ought to be accepted as a basis for public policy. According to these principles, whatever policy will have the best social consequences, judged according to utilitarian ideas of what is best, ought to be adopted.

But in taking this position, the proponent of euthanasia is saying in effect: "You may not legislate your morality, because I am going to legislate mine. And I have a right to do so, because mine is areligious while yours is religious." It has seriously been suggested that any legislation which enforces a religiously rooted morality, even in purely secular terms, amounts to an unconstitutional "establishment of religion"; on this view, only legislation which serves as obviously rational, "independent, secular, utilitarian, social function" is acceptable.[29]

But can utilitarianism, with its consequentialist criteria for good policy, be made the final standard of the constitutionality of legislation without establishing secular humanism as the official religion of the United States? More generally, can any of the principles embodied in the arguments of proponents of euthanasia be admitted as a basis for excluding some human individuals from the equal protection of the law forbidding homicide with the establishment of the world view which would justify this exclusion and the imposition of this world view upon those to be excluded as well as upon other citizens who still hold to a different world view — for example, one which embraces some conception of the sanctity of life?

It may seem fanciful to suggest that the preference for areligious to religious world views in the determination of public policy issues constitutes an establishment of religion. After all, secular humanism, for example, is by definition *not a religion.* However, this point is not well taken.

The United States Supreme Court already is committed to the position that "secular humanism" is a religion despite its areligious character. In *Torcaso v. Watkins* the Court ruled that the State of Maryland had denied secular humanists the free exercise of their religion by demanding of them profession of belief in a Supreme Being as a condition of eligibilty to hold the office of Notary Public.[30] In *United States v. Seeger* the Court held that a conscientious objector to military service should be considered as having an adequate religious basis for objection if his objection was based upon a belief which occupied in his life the same place as belief in God holds in the life of one clearly qualified for exemptions.[31]

Still, in *Seeger* there remain suggestions that reference to something more than personal moral convictions is necessary for religion. But in a subsequent case, *Welsh v. United States*, the Court held:

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by ... God" in traditionally religious persons.[32]

In taking this view, the Court had to contend with the fact that the statute excluded from exemption persons whose objection was based upon "essentially political, sociological, or philosophical views or a merely personal moral code." The Court held that this language does exclude those whose beliefs are not deeply held and those whose judgment is not a matter of moral principle but rests only "upon considerations of policy, pragmatism, or expediency." But a deeply held conscientious conviction, regardless of its source or any reference to a ground beyond human relationships, qualified as religious.[33]

Presumably, proponents of euthanasia will maintain that their views are deeply and sincerely held, at least by themselves, and that these views somehow have a basis which transcends mere policy, pragmatism, and expediency — a basis for evaluation which is more than a mere personal preference. They must maintain as much to try to evade the charge of arbitrariness which we have leveled against them. But in holding their beliefs to be deeply and sincerely held, proponents of euthanasia will fulfill the requirements for their beliefs to be considered religious.

Principles which would justify the limitation of the law of homicide on the basis of quality-of-life considerations, restrictions of personhood, or evaluations of the worth of contributions by various members of society thus are just as much religious beliefs as are principles which would preclude on the basis of the absolute sanctity of life the arbitrary refusal of care for themselves by competent persons who think they would be better off dead and so wish to die. Thus, while proponents of euthanasia are at liberty to hold and to live their personal lives in accord with their own world views, they are not entitled to have some sort of common denominator of their world views accepted and established as the basis for settling which human individuals until now protected by the law forbidding homicide shall be allowed in the future to be killed. Such acceptance and establishment would amount to the establishment of secular humanism, and its imposition upon all members of the society,

especially upon those whose right to life would be annulled in accord with it.

Commenting upon the Supreme Court decisions we have summarized, Paul Ramsey concludes:

> A well-founded conclusion from this is that any of the positions taken on controversial public questions having profound moral and human or value implications have for us the functional sanctity of religious opinions. The question concerning non-religious positions is whether they any longer exist; and whether proponents of one or another public policy are not, whether they like it or not, to be regarded as religious in the same sense in which traditional religious outlooks continue to affirm their bearing on the resolution of these same questions.[34]

We agree with Ramsey in recognizing as religious in the constitutional sense views which are on their face purely secular and humanistic.

However, we differ from his view to the extent that it implies that there can be no nonreligious or neutral basis for resolving controversial public questions. There is such a basis in the commonly recognized principles of liberty and justice which we have appealed to throughout this book. These principles required us to forgo any appeal to the traditional principle of the sanctity of life; the same principles equally require proponents of euthanasia to forgo any appeal to contemporary conceptions of the quality of life, the requirements for personhood, or the value of various sorts of contributions to society.

It is clear that in certain contexts the United States Supreme Court has been ready and willing to recognize secular humanism and other nontheistic deeply held foundations of personal morality as religious. This recognition cannot fairly be extended to adherents of such religions when it is to their benefit and then conveniently forgotten when the same Court undertakes to adjudicate on abortion and other matters.

As we pointed out [earlier], advocates of legalized abortion and nonvoluntary euthanasia such as Glanville Williams argue that the alternative to retaining a traditional morality of the sanctity of human life as the basis for public policy is adopting a utilitarian conception of quality of life which would justify legalizing some forms of murder or near-murder forbidden in the past by Anglo-American law.

Against Williams, and without invoking a moral principle of sanctity of life, we argued that utilitarian, consequentialist conceptions of the social function of homicide laws ought not to determine to whose lives these laws will extend protection. The

distinct and neutral principle of justice — equal protection of the laws — should settle the issue. Even legitimate public policy concerns about problems such as poverty, pollution, and population ought not to be allowed to be weighed in a consequentialist scale against the value of the lives of members of society.

Of course, in the *Abortion Cases*, the United States Supreme Court pretended to maintain judicial neutrality and reserve, especially in regard to the question when human life begins. But the Court's professed uncertainty about this well-known matter of biological fact was exposed as a pretense when it legalized the killing of the unborn — by attributing to them only *potential* life, which at most is *possibly* meaningful if live birth occurs, and by refusing even to consider their interest in life — while it balanced women's interests against various state interests which it held become compelling as pregnancy progresses.

In *Roe v. Wade* the Supreme Court of the United States did not maintain judicial neutrality. Rather, it adopted one religious perspective, established it, judged in accord with it, withdrew from one group of living human individuals the legal protections hitherto afforded their lives, and imposed a new constitutional provision on American society in violation of the liberty of all who do not share the secular humanist perspective.

Someone will object that the Court had to decide the case one way or another, to please one side or the other. Strictly speaking, this is not true. The Court could have declared itself and other courts incompetent to decide the issue on constitutional grounds and unable to decide it on other grounds. Such a decision would have left all parties to the debate free to promote their positions by political means in the legislatures, including Congress, and also free to seek the amendment of the Constitution to bring it into harmony with their own understandings of the conflicting claims of liberty and justice.

Instead, the Court chose to exercise raw judicial power to amend the Constitution in a manner other than those ways provided for in the Constitution itself. The amendment consisted in giving the right of privacy of pregnant women an absolute constitutional status, so that the states would no longer be permitted to protect as they had done — in some cases for more than a century and one-half — the lives of the unborn.

John Hart Ely remarked that *Roe v. Wade* was not constitutional law and showed almost no sense of an obligation even to try to be.[35] The reason is that in this case the Court exercised the only legally recognized policy function which is superior to constitutional law: the deliberation and consent which creates and amends the

Constitution. The American conception of free government demands that this deliberation and consent be the supreme exercise of the liberty of the people: "We the People of the United States...do ordain and establish this Constitution." In usurping this function, the Supreme Court most grievously violated the liberty of the people. The legitimacy of American government is severely wounded; powers which are not *just powers* are exercised with specious authority.

Thus, although the United States today remains in many ways unlike Nazi Germany, in many ways which are very important it has become like that lawless regime of might claiming to make right. Moreover, discrimination which rationalizes killing is equally vicious whether it is rooted in an ideology of racial perfection or in an ideology of individualistic perfection, which asserts that no unwanted child should ever be born and no life below a certain standard of quality should any longer be protected.

What is more important is that — as we argued [earlier] — the Supreme Court could have decided the legality of abortion without assuming as established either the traditional morality based upon the sanctity of life or the new morality based upon the quality of life. The question should have been one of whether the law, which had never been consistent in regarding the unborn either as persons or as nonpersons, would better accord with the basic, common principles of justice and liberty if it were rendered consistent in one or the other way. Since the only thing common to all already recognized by law as natural persons is membership in the human species, and since the unborn of human genesis are members of the species, no nondiscriminatory basis exists for excluding the unborn from legal personhood. Once the unborn be admitted to be persons, equal protection of the law demands that a society which cannot exist without a law of homicide protecting its strong members and those defended by strong protectors should also protect its weak and unwanted members by the same law of homicide.

[There are] many ways in which laws might be reformed without alteration in the Constitution to conform better to the requirements of liberty and justice. Death can be defined, thus to protect those at this margin from being unjustly considered dead when they are not and to protect the living from being required to treat dead bodies as legal persons. Once the significance and breadth of the problem is recognized, we think this definition would best be made by an act of Congress under its enforcement power of the Fourteenth Amendment.

The impositions on liberty in relation to those who have attempted suicide can be eliminated easily. The liberty of competent persons to

refuse treatment and the rights of the noncompetent to appropriate but not excessive care can be facilitated and protected by appropriate statutes [which are outlined elsewhere in the book — *Ed.*]. Capital punishment can be abolished by statute, for if the practice is not unconstitutional, neither is its abolition.

However, in the United States, at least, not all of the existing violations of liberty and justice can be remedied so easily.

The rectification of the injustice to the unborn of denying their lives protection will require either a reversal by the Supreme Court of its decisions in *Roe v. Wade* and *Doe v. Bolton*, or a constitutional amendment to make clear the requirements of justice which the Constitution formerly respected and implemented but now — in the state of the law as it is after the Court's action amending the Constitution — ignores and blocks.

Moreover, the rectification of the violation of the liberty of the people involved in the establishment of the secular humanistic world view as the sole legitimate framework for the determination of questions of public policy will require either a reversal by the Supreme Court not only of the abortion decisions but also of certain others, which we shall discuss later, or a constitutional amendment to make clear the requirements of liberty in a pluralistic society with respect to every theistic and nontheistic religion, every world view which provides an ultimate foundation for any set of deeply held conscientious convictions by which citizens can live their personal lives within the common society.

## NOTES

1. Joseph M. Boyle, Jr., "That the Fetus Should Be Considered a Legal Person," *American Journal of Jurisprudence*, 24 (1979), forthcoming. See also Grisez, *Abortion: the Myths, the Realities, and the Arguments* (New York: Corpus Books, 1970), pp. 361-442; Dennis J. Horan *et al.*, "The Legal Case for the Unborn Child," in Thomas W. Hilgers and Dennis J. Horan, eds., *Abortion and Social Justice* (New York: Sheed & Ward, 1972), pp.105-141 and 301-328; Robert A. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," *California Law Review*, 63 (1975), pp. 1250-1292 and 1331-1341 [also reprinted in *The Human Life Review*, Vol. II, No. 4, Fall 1976]; Joseph W. Dellapenna, "Nor Piety Nor Wit: The Supreme Court on Abortion," *Columbia Human Rights Law Review*, 6 (1974), pp. 389-409; Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion," *Fordham Law Review*, 41 (1973), pp. 807-862.

2. Grisez, *Abortion*, pp. 186-193 and 374-397.

3. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973) at 133-137 and 148-153, 718-721 and 724-726.

4. In addition to the work cited in note 2, see Destro, *op. cit.*, pp.1267-1292; Byrn, *op.cit.*, pp. 815-839. Nowhere other than in its careless acceptance of poor pro-abortion propaganda as historically determinative is the Court's bias and irresponsibility more evident.

5. Grisez, *Abortion*, pp. 361-402; Horan *et al.*, *op. cit.*, pp. 109-127.

6. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973) at 160-163, 730-731.

7. U.S. Constitution, Art. 1, § 2; see James Madison, No. 54 of Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, Clinton Rossiter, ed. (New York and Scarborough, Ont.: New American Library, 1961), pp. 336-340, in which Madison avoids arguing for this provision by putting its

defense into the mouth of a fictional southerner. Cf. Destro, *op. cit.*, pp. 1284-1289; Joseph Parker Witherspoon, "Impact of the Abortion Decisions upon the Father's Role," *Jurist*, 35 (Winter 1975), pp. 41-47. Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of the American West* (New York: Holt, Rinehart & Winston, 1970), pp. 351-366 and *passim*, shows how the rights of American native people continued to be violated even after the ratification of the post-Civil War amendments, and how they continued to be treated as semi-persons.

8. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973) at 160-163, 730-731. See comments by Byrn, *op.cit.*, pp. 809-814 and 840-852; Destro, *op. cit.*, pp. 1263-1267; Baruch Brody, *Abortion and the Sanctity of Human Life: A Philosophical View* (Cambridge: MIT Press, 1976), pp. 127-129.

9. See Richard Trubo, *An Act of Mercy* (Los Angeles: Nash Publishing Co., 1973), pp. 141-158. Norman Podhoretz, "Beyond ZPG," *Commentary*, 53 (May 1972), pp. 6 and 8, already argued that if abortion entailed infanticide, as some argued, this should weigh against abortion. F. Raymond Marks, "The Defective Newborn: An Analytic Framework for a Policy Dialog," in *Ethics of Newborn Intensive Care*, Albert R. Jonsen and Michael J. Garland, eds. (San Francisco and Berkeley: University of California, 1976), p. 102, notes that the Court's decision in *Roe v. Wade* embodies a fiction that the unborn is not a person and thus conceals the adoption of quality-of-life criteria for preferring other lives to its, but Marks argues (pp. 106-125) on the assumption that abortion is now accepted and so infanticide also must be accepted. It is frightening to notice that *at every stage* of its unfolding the control of life movement has insisted very strongly upon the utter difference between its immediate objective and the next step, and at every stage it has used its achievement as a step toward that next step — notably in using the acceptance of contraception to promote abortion and using liberalization of restrictions upon private activities to promote public programs of contraception and abortion.

10. See Grisez, *Abortion*, pp. 403-431; and other works cited in note 1, above. See also Joseph L. Lewis, "Homo Sapienism: Critique of *Roe v. Wade* and Abortion," *Albany Law Review*, 39 (1975), pp. 856-893.

11. *Roe v. Wade*, at 162-163 and 731-732.

12. Arval A. Morris, "Voluntary Euthanasia," *Washington Law Review*, 45 (1970), pp. 264-265; Lucy Dawidowicz, in "Biomedical Ethics and the Shadow of Nazism," *Hastings Center Report*, 6, Special Supplement (1976), p. 3.

13. Marvin Kohl, *The Morality of Killing: Sanctity of Life, Abortion and Euthanasia* (Atlantic Highlands, N.J.: Humanities Press, 1974), pp. 98-100.

14. Glanville Williams, "'Mercy-Killing' Legislation — A Rejoinder," *Minnesota Law Review*, 43 (1958), pp. 10-11; "Euthanasia and Abortion," *University of Colorado Law Review*, 38(1966), p. 181. If it were not impossible to provide hard evidence, it would be interesting to consider whether training to kill in World War II did not in fact — as some returning soldiers claimed it did — lead to a good deal of unauthorized killing which did not contribute to the attainment of military objectives, including killing of prisoners, of enemy civilians in the war zone but off the field of battle, and even of fellow soldiers or officers who became too unpopular. Apart from such killings, many serious crimes such as forcible rapes do occur in any war.

15. Dawidowicz, *op. cit.*, p. 17.

16. Yale Kamisar, "Some Non-Religious Views against Proposed 'Mercy-Killing' Legislation," *Minnesota Law Review*, 42 (1958), pp. 1031-1034.

17. See Frederic Wertham, *A Sign for Cain: An Exploration of Human Violence* (New York: Macmillan Co., 1966), pp. 153-191, especially 161-163, 167-169, 175 and 178-180.

18. Maximilian Koessler, "Euthanasia in the Hadamar Sanatorium and International Law," *Journal of Criminal Law*, 43 (1953), pp. 736-737.

19. Karl Binding and Alfred Hoche, *Die Freigabe der Vernichtung Lebensunwerten Lebens* (Leipzig: Felix Meiner, 1920), tr. with commentary by Robert L. Sassone, *The Release of the Destruction of Life Devoid of Value: Its Measure and Its Form* (Santa Ana, Cal.: Life Quality Paperback, 1975). Note page 4 reference to this work in war crimes trials.

20. This point is stressed by Wertham, *op. cit.*, pp. 153-191.

21. See James Hitchcock, "The Roots of American Violence," *The Human Life Review*, Vol. III, No. 3, Summer 1977; pp. 17-28.

22. C. P. Blacker, "'Eugenic' Experiments Conducted by the Nazis on Human Subjects," *Eugenics Review*, 44 (April 1952), p. 12.

23. "Resolutions Passed at First American Birth Control Conference," *Birth Control Review*, 6 (January 1922), p. 18.

24. Margaret Sanger, "The Morality of Birth Control: Address of November 18, 1921 at the Park

Theater," *Birth Control Review*, 6 (February 1922), p. 25.

25. See Grisez, *Abortion*, pp. 60-65. Also see references to Raymond Pearl, *ibid.*, pp. 55-56. William G. Lennox, "Should They Live? Certain Economic Aspects of Medicine," *American Scholar*, 7 (1938), pp. 457-458, cites with approval Pearl's remarks in favor of disposing of idiots and monsters. Lennox's own statements are full of eugenicist ideas; he remarks with respect to birth control: "This principle of limiting certain races through limitation of offspring might be applied *intra*nationally as well as *inter*nationally. Germany in time might have solved her Jewish problems in this way" (p. 461). One wonders whether Lennox would have approved the solution adopted.

26. Frank W. Notestein, "The Importance of Population Trends to the Birth Control Movement," *Birth Control Review*, 22 (April 1938), p. 76.

27. See Joseph M. Boyle, Jr., *loc. cit.*

28. Lewis, *op. cit.*, p. 892. It is worth noticing that even if one did not hold that the Supreme Court's decision violates arbitrarily the right to life of the unborn, one might still hold that the decision by the Court was lawless because it was legislative rather than interpretative; thus John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *Yale Law Journal*, 82 (1973), p. 947 [also reprinted in *The Human Life Review*, Vol. I, No. 1, Winter 1975]: The decision "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." If the Court should legislate euthanasia, this act would be doubly unjust, both as a substantive violation of rights and as a procedural abuse of its own power.

29. Louis Henkin, "Morals and the Constitution: The Sin of Obscenity," *Columbia Law Review*, 63 (1963), p. 408. Henkin makes clear (pp. 407-411) that he considers utilitarian reasons to have an exclusive claim on rationality.

30. *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680 (1961); note the holding at 495-496, 1683-1684, and the dictum in footnote 11.

31. *U.S. v. Seeger*, 380 U.S. 163, 85 S.Ct. 850 (1965) at 184, 863. The fact that the Court interprets a statute in this case does not make it less significant for constitutional law, since the alternative clearly would have been to find the statute unconstitutional; cf. Robert L. Rabin, "When Is a Religious Belief Religious: *United States v. Seeger* and the Scope of Free Exercise," *Cornell Law Quarterly*, 51 (1966), pp. 240-244.

32. *Welsh v. U.S.*, 398 U.S. 333, 90 S.Ct. 1792 (1970), at 340, 1796.

33. *Ibid.*, at 342-344, 1798. The prevailing opinion was held by only four members of the Court. The majority was formed by the concurrence of Justice Harlan, whose separate opinion rejected the opinion's construction of the statute. Yet Harlan held with the others that an unconstitutional establishment of religion could be avoided and religious neutrality nevertheless maintained by the government only if theistic and nontheistic religious beliefs and comparable secular views were treated alike (at 357, 1805).

34. Paul Ramsey, "Some Terms of Reference for the Abortion Debate," manuscript of a paper delivered at the Harvard-Kennedy Conference on Abortion (Washington, D.C.: September 6-8, 1967), p. 7.

35. Ely, *op. cit.*, p. 947.

# APPENDIX A

*[In recent years, many nationally-known columnists have commented on the issues of primary concern to this journal and, from time to time, we have reprinted what we believe to be examples of particular relevance. We herewith reprint three more such. The first is by Garry Wills (first issued by the* Universal Press Syndicate, *July 7, 1978, ©1978 Universal Press Syndicate, reprinted with permission and with author's permission) on the abortion debate; the other two are by Mr. George Will (who, in addition to his newspaper columns, also writes a regular column for* Newsweek*), one also on abortion (first published in the Washington* Post, *June 26) and the second on the "Test Tube Baby" (*Post, *July 30; both columns © 1978 The Washington Post Co., reprinted with permission, and with author's permission).]*

## Abortion and Morality

*Garry Wills*

Many liberals believe in a "right to life" for snail darters and louse worts, for redwoods and whales, among other things. They would suspend or cancel large projects beneficial to the human community in order to show their concern for life even in its subhuman manifestations. Then why are they so sure that life in the human fetus is not worth preserving?

Admittedly, abortion is a difficult topic. Those on both sides, even with the best will, presume bad will while making bad arguments. And even good arguments, on both sides, seem inadequate to budge this moral and political obstacle in our path.

In the current issue of *The New York Review of Books*, novelist Mary Gordon tries to isolate the elements that make the problem of abortion so intractable. She finds four main ones: 1) The fetus is not directly visible (unlike, say, a redwood tree); 2) Its development is remote in time from its cause; 3) The causality is oblique in any case; 4) The definition of life is hard to pin down.

Now these four things do make it harder to argue the morality of abortion. But Miss Gordon goes too far when she implies that abortion is therefore unique as a moral problem. After all, war involves all four of the points Miss Gordon raises; yet liberals were able to reach the verdict that the Vietnam war was immoral.

Take it point by point: 1) In war, especially modern war, the enemy is often invisible — certainly to the war planners, the rocket releasers, the high level bombers. It is sometimes said that tv brought the victims of the war in Vietnam into the living room. It may have been more important that it brought those victims into the planning rooms in the Air Force recreation centers.

2) There is a time lag between the decision to make war and most specific acts of war, one that separates the moral judgment of a napalm thrower from the acts on which napalm throwing followed.

3) The causality is not only oblique but, often, involuntary — that is, acts

meant to shorten a war in fact prolong it, things meant to prevent escalation promote it.

4) War's rationale is self-preservation, the saving of the national life — and this involves at least as many problems of definition as does abortion. How does one trade in lives — killing others for our security, for our leadership credibility, for our quality of life, for our cause, etc.?

I use one of the many possible parallels to show that the moral difficulty of abortion is not special to itself. After all, people who are capable of discovering that smoking has long-term, indirect, unintended harmful effects on life should not be completely at a loss with the factors Miss Gordon raises.

Miss Gordon, while trying to be fair to everyone, argues in effect that no one can have any certitude in this area. She says that abortion is more like murder than any other act, but it is not murder. I agree more with the second part of her proposition than the first. But her arguments for the second part are astonishingly feeble. She says, for instance, that abortion "has been practiced and continues to be practiced by women who are in no other aspect of their lives criminal." Quite true — and just as true of that abomination practiced by great gentlemen and ladies, indeed by the founders of our country, the holding of human slaves. The fact that Washington and Jefferson were slave-masters does not make slavery moral or admirable.

How, Miss Gordon asks, can abortion be murder when the nation is shocked by a mere 17,000 murders a year and, by comparison, only mildly perturbed by over a million abortions in the same year? Well, in slave days, there were many more lives blighted by slavery than were wiped out by murder. So (from a moral point of view) what?

That kind of numerical argument usually arises from and fosters moral obtuseness. It resembles the argument that the Vietnam war could not have been immoral, since it killed fewer Americans per year than did automobiles on the highway.

Miss Gordon is ingenious in trying to put abortion outside moral criteria. She says, for instance: "It is hard to believe that one created a murder victim in one's own body when one thought one was doing something different. And it is probably never true that the victim of a murder could not survive unless he were fed by blood and protected by the body of the murderer."

This is literally true in details, which merely define the act. But the moral principle involved has many parallels. The gentle slave owner protected and nourished and cared for his slaves, and did not think he was destroying human life. The general who sends his men out in foolish and illegal combat tries to save and support them, but may — from a longer moral view of things — be the cause of their death.

Miss Gordon goes on to explain the history of abortion in America — its acceptance, and rejection, and partial reacceptance — as determined by sociology and accident. Again, one can "explain" slavery in terms of economic exigency, or Vietnam in terms of cold-war concepts. But what has

that to do with the question of morality? One can explain forever "why" a murderer killed. That does not make murder less than murder. Miss Gordon's attempt to show understanding in the area of abortion just shows how far we are from understanding this matter morally.

## Abortions as Commodity, Not Medicine

*George F. Will*

A few years ago a woman had a healthy breast removed surgically because it interfered with her golf swing. The interesting question is not whether what she did was censurable, but whether what the surgeon did was medicine. The distinction between true and false ends of medicine is germane to the annual debate about public funding (primarily through Medicaid) of abortions.

Opponents of funding for most abortions have a decisive argument that is logically independent of views about the general morality of abortion. The argument is that few abortions are, properly speaking, medical procedures, and so should not be subsidized by funds appropriated for medical programs.

Dr. Leon Kass of the University of Chicago argues for what he calls "the old-fashioned view" that health is the true goal of the physician's art. If his argument is correct (and it is not easily assailed), most abortions are not acts of medicine, properly understood. The vast majority of abortions are non-therapeutic, in that they are not performed to ensure the health of the woman (who surely should not be called a "patient"). Although they are performed by persons licensed to practice medicine, they serve not the pursuit of health, but rather the woman's desire for convenience, absence of distress — in a word, happiness.

Kass gives other examples less bizarre than that of the woman golfer, of physicians' skills put to non-medical purposes. Amniocentesis, a diagnostic technique that reveals many fetal disorders, also reveals the sex of the fetus, and abortions have been performed because the fetus was not of the desired sex. Some doctors specialize in pharmacologically induced "peace of mind," and dispense amphetamines to physically healthy but discontented people seeking mood "elevations."

Such doctors are not practicing medicine — the pursuit of health — any more than are narcotics peddlers. Doctors who perform artificial insemination may be doing good; they are not doing medicine, any more than are practitioners of the "cosmetic surgery" that corrects other than inborn or acquired abnormalities.

Such practices, says Kass, "the worthy and the unworthy alike, aim *not* at the patient's health but rather at satisfying his, albeit in some cases reasonable, wishes." They are acts not of medicine but of gratification: for consumers, not patients.

Another false goal of medicine is "behavior modification," using physicians' skills to produce "social adjustment." Kass warns that biological

manipulation (such as psychosurgery or sophisticated drugging for violent people) is apt to increase as more is learned about the biological contribution to behavior. But even if such manipulation by "bio-behavioral conditioners" has "socially useful" outcomes, it is not medicine.

Kass notes that when medicine's powers were fewer, its goal — health — was clearer. And the World Health Organization has muddied things by defining "health" as "a state of complete [sic] physical, mental and social [sic] well-being." That means that happiness is a medical commodity; happiness is the doctor's business. That, in turn, means almost everything is the doctor's business, so "medicine" becomes a classification that excludes nothing, and hence does not classify.

What Kass calls "creeping medical imperialism" is encouraged by a definition of medicine that is not properly related to health or, more precisely, is related to an overbroad definition of health that includes "happiness" and "contentment" and "good citizenship."

From the fact that physicians have a monopoly on the right to perform surgery, it does not follow that surgery is always medicine. Non-therapeutic abortion is the second most common surgical procedure, after circumcision. Most abortions are "birth control of last resort" or, more accurately, of first resort.

Most women seeking abortions are unmarried and neither they nor the man attempted contraception. According to one study, 1.7 million of the "sexually active" teen-age women do not use any contraceptives. Most abortions are measures of relief from the consequences of pleasure pursued irresponsibly.

Supporters of subsidized abortions argue that such relief is not only a social good, but also is an individual right that must, as a matter of equity, be subsidized for those who cannot afford it. But no such argument can establish the propriety of using funds appropriated for medical services to promote such a goal, which, whether defensible or indefensible, is not a true goal of medicine. Most abortions have no more to do with medicine than did the golfer's mastectomy.

## Irreverent Test Tubes

*George F. Will*

Biology is taking mankind into wild country that is full of threats to the increasingly tentative belief that all human life is of value and should be treated reverently.

In Britain, a remarkable obstetrical event has occurred. A woman has delivered a child conceived in a laboratory dish and later implanted in the mother's womb. The technique of "embryo transfer" has been developed to assist women who have blockages in the tubes that normally carry fertilized eggs to the womb.

The technique is humanely intended to prevent frustration of one of life's profoundest and most worthy desires. But it is also another step into terra incognita.

Embryo transfer is unlike artificial insemination because it involves unknown risks to the baby who is being made, and thus must be rigorously considered in terms of compatibility with the minimal principle of medical ethics, "Do no harm." The development of embryo-transfer techniques depends upon, indeed constitutes, experimentation upon the unborn, some of whom will, in all probability, be damaged and born as physical or mental "mistakes."

Some damage to embryos may be deliberate. Scientists may use "surplus" embryos as laboratory specimens in tests to determine, for example, what drugs and X-ray dosages damage embryos. If that would be ethical, would it be similarly ethical for a woman who has decided to have an abortion to take a new drug — perhaps something like thalidomide — in order to allow scientists to study its effect on the fetus that is, in any case, doomed?

In New York, a couple has sued a doctor and a hospital where a laboratory-conceived embryo was destroyed, as a matter of policy, before another doctor could implant it. The hospital argued, among other things, that the procedure was undertaken without due regard for guidelines pertaining to experiments on human beings. Freedom, Hobbes said, is the silence of the law, and the law is soon going to be compelled to speak on many such matters. For example:

To allow laboratories a margin for error in preparing embryo transfers, several eggs are apt to be taken from a prospective mother and fertilized. When one is implanted, who decides what is to be done with the surplus? Does anyone have any responsibility regarding such life, once it is begun?

Two developments will eventually make this an urgent question. Embryo-transfer techniques will not always unite a husband's sperm with his wife's egg. And technology may be able to bring embryos to viability in laboratories. The social definition of such babies (Can a laboratory be a parent?) will require interesting laws.

Here is a melancholy situation. Dangerous and ethically dubious baby-making technologies are being developed, in large part, for the compassionate purpose of helping couples with problems to enjoy the incomparable satisfactions of parenthood. And that is not just because a couple can only find satisfaction from its own biological child.

Adoption makes possible the primary satisfaction of parenthood and some special satisfaction. But although there is a severe scarcity of children deemed adoptable, this nation records more than a million abortions a year. If there were fewer abortions there would be more adoptions, and less pressure pushing baby-making technologies beyond the range of ethical understanding.

Perhaps none of the problems posed by new techniques will trouble (rather than merely fascinate) a society that considers fetuscide a matter of moral indifference. But biology is conferring techniques that are, strictly speaking, awful: They awe — solemn wonder tinged with fear.

What we may be losing is the precious sense expressed by Sir Thomas Browne, a 17th-century physician and author of some of the most moving

meditative prose in the language: "There is something in us that can be without us, and will be after us, though indeed it hath no history of what it was before us, and cannot tell how it entered into us."

A couple seeking an embryo transfer is apt to be expressing reverence for life. But a noble purpose does not mean that the necessary technology will be benign. Some manipulations of life must, over time, subvert our sense of mystery, and so our reverence for life.

# APPENDIX B

*[The following is reprinted (with permission) from the original transcript of Wm. F. Buckley, Jr.'s "Firing Line" TV program, which was taped in London on June 27, 1978 and telecast in the U.S. on the Public Broadcasting System. "Firing Line" is a production of the Southern Educational Communications Association of Columbia, So. Carolina, and is produced and directed by Mr. Warren Steibel.]*

## Muggeridge Revisited

MR. BUCKLEY: 1977 was cursed by the absence from this program of Mr. Malcolm Muggeridge, who has been hectically engaged in evangelizing in other, perhaps, media markets, always confounding the listeners by his bizarre reiterations of the few Galilean truths. Mr. Muggeridge is the single living person about whom I feel there is nothing more for me to say of him by way of introduction and that I am incompetent to say it. By coincidence, the last time we appeared together, it was for the purpose of analyzing an interview that had recently been conducted with Alexander Solzhenitsyn — an interview that shook up Great Britain as nothing had done since one of those wartime orations by Churchill. It happens that we meet here again, just after another speech by Solzhenitsyn, delivered at commencement at Harvard University, which has left a great wake. Solzhenitsyn appeared to be doing nothing less than challenging the matrix of Western civilization, or more exactly, Western culture.

I propose during the hour to discuss with Mr. Muggeridge some of the observations of Solzhenitsyn and toward the end we shall submit to the questions of the examiner, the editor of *The Economist,* Mr. Andrew Knight.

Solzhenitsyn detaches only the state of Israel from the West he is condemning. This he does because, I quote him, "Its state system is fundamentally linked to religion." Is that singularization reasonable?

MR. MUGGERIDGE: I think it's absolutely reasonable. Yes. Whether the existing state of Israel, as it is now, is a true expression of that principle is not a matter, but the whole tradition of the Jewish people is — that in fact it is what makes them unique; what makes them, as Christians say, God's chosen people because they have consistently, through their history— that's been the basis on which they've existed.

MR. BUCKLEY: Well, might as much be said about Spain?

MR. MUGGERIDGE: I wouldn't have said so. I wouldn't have said that, that is, as it were, built into the whole way of life of Spain, into its very existence as a people, as it is with the Jewish people.

MR. BUCKLEY: In other words, you would understand Solzhenitsyn to mean by this that the Jewish people understand themselves, even those of them who are bound up with secular concerns, as in some way fulfilling a destiny?

MR. MUGGERIDGE: They can't escape it, Bill, because, after all, their king

is God. I mean that's the whole point. And if you actually make God the king, however widely you may diverge from that in your behavior, ultimately you go back to that. I mean, there's no Caesar. There's only God, and the Caesars that have existed, intermittently in Jewish history, the Israeli state is one of them now, have withered on the branch, always they go back to that. Which is why of course, even now, the very Orthodox rabbis disapprove of the Israeli state.

MR. BUCKLEY: Disapprove of the Israeli state as what — a distraction?

MR. MUGGERIDGE: As an exercise in power, as something which is separated from this destiny of accepting God not only as the deity, but as the nation; as everything. The history of the Israeli people is the history of their relations to God, which is what makes the Bible such an extraordinary book, because that is their history. And it's the only national history which could become a universal scripture.

MR. BUCKLEY: And is this, do you think, the fountain of its spiritual energy?

MR. MUGGERIDGE: I think it has made them a people who, scattered all over the world, identifying themselves with every kind of culture; yet, infallibly, indomitably retain their own national being, simply for this reason. Can you imagine — supposing any other race had been scattered for centuries about the world and not only scattered but had played a very active part in the cultural life of those societies in which they were involved, and *yet* retained their identity. I was talking, the other day, to the chief rabbi who'd been out to Austria to meet some of these Jews coming from the Soviet Union. And he expected to find them completely alien; that it would be very difficult for him to talk to them because for 60 years they'd been cut off from their scriptures — from everything. He spoke to them and it was as though there'd been no break at all. He spoke to them in the full assumption of this incredible tradition out of which, of course, has come our Christian religion also.

MR. BUCKLEY: Yes. The defense by Israel of its frontiers by violence brings me to the next striking observation of Solzhenitsyn who wrote, "Neither one," meaning neither the West nor the Soviet Union, "can be transformed into the other without the use of violence." He is there challenging the so-called Convergence Theory. Is this convincing to you?

MR. MUGGERIDGE: It's a view I've always taken. I've always considered that any idea that there could be a solution to the conflict between the Soviet Bloc and the Western Bloc is nonsensical. There can be, of course, a *détente* in purely military terms. This is quite possible. But ultimately, the division is there. In that last letter that Solzhenitsyn wrote to the Soviet government before leaving the U.S.S.R., which was the most extraordinary letter I think that has ever been addressed to a government, he said that what is wrong with this country that I love so dearly is not the *fact* that it's a dictatorship or the *fact* that it's an authoritarian system or the *fact* that it's a socialist system, what's wrong with it is — Marxism, is materialism, and that no country can base itself on a materialist view of life and live spiritually.

MR. BUCKLEY: Yes, but I — I remember that clearly, but you'll remember also that in the interview conducted here with Mr. Charlton he said that the Soviet Union will never need to use its massive nuclear arsenal because when the moment comes to exert itself it will succeed in doing so by a mere exertion of will against a will-less West. Now, is this a departure, in a sense, when he tells us that violence will be required by the Soviet Union to proceed with its imperialist designs? He is at least crediting us with the courage to resist, is he not?

MR. MUGGERIDGE: I wouldn't have said so. I would have said that he was assuming that in the last resort we shall give way and I think there's great evidence that that won't be so, that it won't be necessary for them to use the apparatus of power.

MR. BUCKLEY: But he didn't say that. He said "neither one can be transformed into the other *without* the use of violence."

MR. MUGGERIDGE: Well, the use of violence or the threat of violence. I mean, if the West collapses in front of the violence —

MR. BUCKLEY: There'd be nothing to be violent about.

MR. MUGGERIDGE: Nothing to be violent about. I mean the violence has succeeded without being violent, and this I should have thought was on the whole the most likely outcome.

MR. BUCKLEY: There'd be a lot of gibbets around.

MR. MUGGERIDGE: Oh yes, a lot of killing. After all, if you take it in its simplest terms, supposing that the Soviet Union has a huge army, a huge air force, a huge submarine fleet; supposing tomorrow the Red Army starts moving westwards, there's absolutely no way that could be stopped except by the use of the nuclear deterrent from the United States. Do you imagine for a moment either that the people of Western Europe would accept the use of the American deterrent, or that the United States government would have the resolution—not just to threaten to use it, but to use it? Otherwise, they could just move right across Western Europe without the slightest difficulty.

MR. BUCKLEY: Yes, I think that you are correct. I think that the lingering question is what's left of the deterrent? There are some people prudent enough in the Soviet Union to wonder whether it might not happen—that we might use a nuclear deterrent, and it is *precisely* that lingering doubt that is the effective deterrent. There's nothing left.

MR. MUGGERIDGE: Maybe so. I wouldn't deny that, but I am very skeptical about it because I think everything that's happening since the Vietnam War, what's happening in Africa, everything that's happening suggests very strongly the contrary.

MR. BUCKLEY: Yes, that we will be supine.

MR. MUGGERIDGE: And I think the temptation to call their bluff — it was almost called in the Khrushchev affair, the Cuban affair —

MR. BUCKLEY: And Berlin.

MR. MUGGERIDGE: — and Berlin, it was almost called. I think the tempta-

tion now when the West is in such a pitiable state, not just because of that — I mean, it's got the weaponry, but not just because of that, but because of its utter incapacity to formulate even a policy about Africa; to have any views whatever, any purpose whatever, except the ravings of Andrew Young and the sniveling of Dr. Erwin. They represent the only policy there is.

MR. BUCKLEY: Well, this leads us, as it led Solzhenitsyn, to a discussion of courage. He said that a decline of courage may be the most striking feature which an outside observer notices in the West in our days, and decline in courage is ironically emphasized by occasional explosions of anger and inflexibility on the part of the same bureaucrats when dealing with weak governments and weak countries.

MR. MUGGERIDGE: Notably, South Africa.

MR. BUCKLEY: Yes, we can crank up all kinds of indignation against Rhodesia and South Africa, but not very much. . .

MR. MUGGERIDGE: Yes, that's the one way of flexing muscles, really. You can always sort of have a go for South Africa. You know, when the Pickwick group were traveling they got into a fracas with the crowd and I'm afraid they didn't behave with great courage, but Mr. Winkle was seen to take off his coat and begin belaboring a small boy. That's South Africa — every courageous man in the West who believes in freedom and equality have a go at them. Because that's very easy.

MR. BUCKLEY: Or Chile.

MR. MUGGERIDGE: Chile, not quite so easy because there aren't any black people there much and it's not within the orbit much of the West, but South Africa is the absolutely favorite thing. In order to not to have to do anything or say anything about the Gulag and so on, it's perfect —

MR. BUCKLEY: Or Cambodia.

MR. MUGGERIDGE: Or Cambodia, any of these things. So that, I think he's probably right. Of course, he makes another point which appeals to me very much and that is that he points out that for no particularly edifying reason, the Communist countries have held apart from the fearful decadence of the West, I mean the moral decadence of it, the pornography and the self-indulgence which is of course enormously weakening its resolution and its sense of reality. They have avoided this and it does make a big difference. I've been reading Spengler in these dark days. Have you ever read it?

MR. BUCKLEY: I've managed to avoid it.

MR. MUGGERIDGE: You won't avoid it for long. I've almost made it inevitable that you'll read it now. The point is that he finishes up, you see, with the statement that the end of the West will be a conflict between money and blood, and in that conflict blood must win. In other words, this whole decadent structure, which he saw very clearly, even then, will collapse through its own inherent moral weakness; which of course, is brought on to a considerable degree by this quest for bogus freedom which involves the

complete moral debilitation of the collectivity and of the individuals who compose it. The people in the East have cut themselves off from that. To me, it's awfully strange — whenever you go to a Communist country anything about it is horrible except one thing — you walk about with a kind of happiness and you think to yourself, "What is this? How does this happen?" And then you suddenly realize it's because all the sort of erotic persuasion, with which we're endlessly surrounded, is absent — there are no posters suggesting to you that the one thing that's desirable in life is to satisfy your carnal desires — all absent. And I think this will be, as Solzhenitsyn said, a source of strength.

MR. BUCKLEY: Well, I'm slightly puzzled by what you say inasmuch as there were periods, for instance, in British history during which one could say that the country was strong and yet pornography flourished. It was at least subterranean. It was decorous in that sense.

MR. MUGGERIDGE: It was subterranean — it was in some degree limited to a small elite. I mean, the thing that's happened in these — and always happens in the ultimate decadence, is that the decadence of the few becomes spread to the many, so that you don't have one Emperor Nero, you have 50 million Emperor Neros.

MR. BUCKLEY: Yes. It is unhappy to reflect that in the Soviet Union, pornography is not available because the state does not permit it. The probability is that if the state did permit it, the people would quickly import it and doesn't that challenge the thesis of Solzhenitsyn which seems to be—that the crucible of Soviet experience has given us a race of men and women annealed by suffering to a higher life and to a consideration of higher things.

MR. MUGGERIDGE: That is undoubtedly true, but I agree with you that it's been helped by this purely artificial circumstance that for reasons.... And one would be very interested in knowing exactly why, I mean, what exact motive there is in the Soviet authorities in taking this attitude to self-indulgence.

MR. BUCKLEY: Well, there has been of course, a historical prudishness in the whole Bolshevik tradition. The sources of it, I suppose, are philosophically isolatable in that it distracts from the revolutionary ideal or whatever. The trouble is all that stuff is so synthetic that it's hard to find it appealing. I certainly would prefer Western decadence to Bolshevik rectitude as I'm sure you would.

MR. MUGGERIDGE: Rectitude is not the word I'm using, but I'm saying that in a battle of will the fact that you have a population which has not been corrupted in this way— it's exactly like the conflicts that Gibbon describes between the barbarians and the Romans. I've been reading that too, and I mean it's incredible how clearly that expresses itself. Of course, don't forget that when the revolution started, it accepted all this crackpot business about freedom—sexual freedom, no marriage and no restraints of any kind and every sort of facility for decadence in every way, and actually it was really when Stalin took over, when you had a Russian in the chair that all that was stopped. Homosexuality. You see, that was when Gide changed

his view of the U.S.S.R. — not when he heard about the camps or anything like that, but when they brought in penal legislation against homosexuality. I'm not for a moment saying that it's truly virtuous or edifying in any way, but that in terms of power it will be seen to have been something that enhances their side.

MR. BUCKLEY: Well, I'm interested in this. We both remember that during the 30's, it was widely supposed that an army raised by the ascetic standards of Hitlerism, would triumph over the flatulent English and Americans, and of course, it proved not to be so.

MR. MUGGERIDGE: It didn't do badly, did it actually?

MR. BUCKLEY: No, it did extremely well, but ultimately it collapsed. At the same time you find Solzhenitsyn, I think perhaps a little bit incautiously, referring to intolerable music. In the course of distinguishing between the East and the West, well this intolerable music is a hot black-market item. It would be nice to think that in the black market of the Soviet Union only books by Solzhenitsyn sold, but also records by Mickey Jagger sell.

MR. MUGGERIDGE: Unquestionably, but I don't think there's any virtue in this. I think it's something that the state has deliberately done. And, of course, it is true that the minute you have, for instance, the Czechoslovak Spring, the first sign of that, I've been told from Prague, was the appearance of pornographic magazines and so on. In other words, I mean freedom comes with —

MR. BUCKLEY: In licentious ways.

MR. MUGGERIDGE: — in licentious ways. I agree with you entirely that if the lid was taken off in the U.S.S.R., no automatic restraint would arise at all. I just mean that if you're weighing up the strength of power potential of the two sides, I think this plays a part in it.

MR. BUCKLEY: Solzhenitsyn says: "Through intense suffering our country has now achieved a spiritual development of such intensity that the Western system in its present state of spiritual exhaustion does not look attractive." I find that very hard to understand.

MR. MUGGERIDGE: Well, I think I understand it, and he's thinking of himself in his labor camp when his only enlightenment — Solzhenitsyn's enlightenment, which is one of the most wonderful of our time, came to him in the Gulag, not before.

MR. BUCKLEY: Yes.

MR. MUGGERIDGE: People forget the Solzhenitsyn, if he'd wished, could have had the life of a sort of corrupt Gorky. He could have been the great writer.

MR. BUCKLEY: An Ehrenburg.

MR. MUGGERIDGE: Well, yes, almost hard to say Ehrenburg. Remember Ehrenburg was a simple little —

MR. BUCKLEY: Hack.

MR. MUGGERIDGE: — hack. But Gorky is the best example, who was prepared to be a sort of performing seal, ultimately, for the regime. And then

Solzhenitsyn could have had all that. He could have had his Nobel Prize, he could've travelled about the world, he could have addressed audiences and everything; and it was only because of what he learnt in the labor camp that that was intolerable to him, that he felt he must speak to the world about what was going on there. Since in himself, his view of life owed so much to suffering.

MR. BUCKLEY: Is he making the mistake now, Mr. Muggeridge, of anthropomorphizing through himself an experience which is not in fact a universal? We know that Ivan Denisovich achieved a certain grandeur and we certainly know that Solzhenitsyn has. He is, I'm quoting you, "Probably the world's greatest living human being." But is he correct in assuming that the whole of the Soviet Union, that his people, have reached that state of spiritual intensity alongside which the Western system has ceased to be attractive? I'm not sure that's true.

MR. MUGGERIDGE: I don't think it's true, but I think it's an understandable assumption, and I would say this however. I think that this suffering has given the Russians something, some quality which the self-indulgence, the opposite proposition, in the Western world is lacking — a sort of resignation, a sort of inward strength. But, I agree with you that if the restraints were removed and the frontiers were opened, in a very short time this would all change and they would fall into the same sort of way of life.

MR. BUCKLEY: So that the experience of which Solzhenitsyn speaks is not in fact something that has given us a new man, but it has, if you are correct, given to religion a kind of intensity and meaning for those who have found it.

MR. MUGGERIDGE: Which is unique.

MR. BUCKLEY: Yes, which is to be compared with the catacombs.

MR. MUGGERIDGE: Absolutely, and I feel that myself when I've met Russian Christians, especially, occasionally you meet some young ones, and this is quite remarkable. How their whole awareness of these truths, which have so disappeared from Western life, that if you speak about them you're speaking to people who don't really even understand what you're talking about. The whole idea, basically, of what we're discussing at this moment, that suffering itself is a means of sharpening people's spiritual perceptiveness and enhancing their lives, whereas the doctrine of the West is entirely that it's something which is abhorrent, and that is degrading and that the hope of the future is that you eliminate it and that even people who are acutely suffering or handicapped, that it's kind to them to kill them; which is, of course, the point that we have now reached.

MR. BUCKLEY: The critics of Solzhenitsyn, as you are aware because their vibrations are now palpable, are really saying that here's a man as to whom there is no question on the matter of personal heroism, but that he really is a theocrat and that he will criticize any society whose institutions are not explicitly oriented to the promulgation of Christianity. Do you read Solzhenitsyn in that way?

MR. MUGGERIDGE: I think it's perfectly true that whereas on the one hand

the essential quality of the position he's taken is his Christian faith. Separate that; take away that Christian faith and he simply becomes one more exile —

MR. BUCKLEY: Dissident.

MR. MUGGERIDGE: — dissident, but that what makes him such an extraordinary man, makes him able in the West to see so clearly what is lacking, what is weak and what is morally destructive in the West, is because of that Christian faith. And that that Christian faith has governed his conduct and his view of life and it is obviously, to people in the West, an extremely alien position.

MR. BUCKLEY: How do you account for the dissent from that position by someone like Bernard Levin, who here in this room two years ago, classified his own enthusiasm for Solzhenitsyn as being as total as yours and as mine, but insisted that it had no religious roots whatever? A position reiterated by Professor Sidney Hook in California a week or so ago commenting on this last speech. Are you saying that they are missing something in Solzhenitsyn which gives them that ultimate dimension, but that they simply feel the secular impact of Solzhenitsyn without understanding the spiritual impact?

MR. MUGGERIDGE: They are humanists and that's what being a humanist means — that you believe in the possibility of the achievement of virtue in human terms. And they admire Solzhenitsyn for his courage, for his championship of his fellow victims of the Gulag, but the actual basis of his position is something that they neither understand nor, if they did, admire — and it's a difficulty that in an infinitely inferior way I meet myself endlessly. I do not believe that there's any possibility of understanding what this conflict is about, except in Christian terms. But, for the Christian faith, there really is not conflict. I got into terrible trouble in California when I was there, by giving an address on human rights and arguing that there were no human rights whatever, apart from our relationship to God. Take that away and we have no rights and that the two categories of human beings in the world whose human rights are most clearly and absolutely defined, are the Russian people and the American people—defined specifically in their constitution. The Russians have no rights because their constitution has never been put in any way into effect. The Americans have no rights because their rights, as defined, have opened the way to total self-indulgence. And therefore, they are enslaved to their appetites, to their carnality, to their egos, and ceaselessly tormented by this.

MR. BUCKLEY: I think people would find what you're saying a little bit paradoxical. If you have a human right, secularly defined, it includes the right to self-abuse.

MR. MUGGERIDGE: Yes, certainly.

MR. BUCKLEY: You have the right, for instance, to patronize the saloon.

MR. MUGGERIDGE: You have the right to destroy yourself in a sense, but you have no absolute right in the sense that Solzhenitsyn sees human rights.

MR. BUCKLEY: Are you trying, as per the exercise, to restrict yourself to a

humanist vocabulary now, or are you going back to an extra-humanist vocabulary?

MR. MUGGERIDGE: I'm saying that between the humanist, at his or her very highest and best, and the Christian, at his or her lowest, the Christian at his lowest is immeasurably further advanced than the humanist at his greatest in this particular matter of good and evil, which is of course, what human rights are about.

MR. BUCKLEY: How can you without great discomfort read Gibbon? He can have very little to say in the light of —

MR. MUGGERIDGE: I read it in utter delight, but I read it as I might listen to some comedian performing —

MR. BUCKLEY: Because he keeps pressing the point.

MR. MUGGERIDGE: I mean this is delightful, and his droll picture of this little man, a typical 18th century man, describing all these goings-on in the collapse of the Roman Empire. There is something infinitely remote from any possibility of happening, and then, when there is a little bit of a fracas in Lausanne where he was writing this, a tiny little remote . . . vaguely connected with the French Revolution, he simply ran, in utter despair, back to England because — faced with this turbulence in contemporary terms, because of his skepticism he was totally unequipped either to deal with it or understand it.

MR. BUCKLEY: And is it your judgment, that for that reason his great book is insufficient?

MR. MUGGERIDGE: No, utterly inadequate. It's a charming book to read. It contains a lot of very interesting material.

MR. BUCKLEY: Narrative.

MR. MUGGERIDGE: Narrative. But of course, in its analysis of what happened it's completely worthless.

MR. BUCKLEY: Why do you say that human rights cannot be enunciated in a natural vocabulary?

MR. MUGGERIDGE: They can be enunciated, but they have no force except in relation to a Christian view for us — where I'm talking of Western people, or a religious view if you like, but for us, a Christian view, of human life and human beings that we are creatures made in the image of our creator and that each particular individual man made in the image of his creator, whoever he may be, is infinitely precious in the eyes of his creator who's counted the hairs of his head, etc.

MR. BUCKLEY: Well, this is certainly an additional sanction, but for some humanists it would be considered supererogatory. That is to say they would take a position, that, let us say the right of habeus corpus is not a right that is dissipated by the secularization of authority.

MR. MUGGERIDGE: It is a right that in the last resort — and I suspect during the years ahead this is going to be demonstrated quite dramatically — it's a right which really put to the test will prove quite worthless as it does, for instance, in the Soviet system. They've all got habeus corpus rights, they've

got every kind of right written into their constitution, but — because of Marxism and because this constitution is based on a completely materialist view of life and of history, this right in practice has no reality.

MR. BUCKLEY: Yes, but you have slipped into the Orwellian mode, and it was the genius of Orwell that he showed the extent to which travesty was something that could be done to the language, and there is there a comprehensive enunciation of rights which turn out to be meaningless, and that require a repeal of the principle of contradiction so that war is peace and so on and so forth. Now, if Bernard Levin or Sidney Hook were here right now, surely they would say to you in the last analysis you need temporal sanctions, divine sanctions being unavailable, to govern the magistrate and the courts and to enforce your rights, but this temporal authority is one that can exist apart from divine sanction, can it not?

MR. MUGGERIDGE: Well, it can exist, obviously, but it is not in the — my point is — that in the last resort it is in no way effective because it is not based on anything except the idea that some nice rational men drafted some laws and these laws should be enforced. It's not based on any ultimate sense of the reality of our existence. In other words, unless it is—

MR. BUCKLEY: In other words, they can be repealed by man.

MR. MUGGERIDGE: Repealed and ignored and distorted and cheated over, which we have seen on every hand. Every single government in Africa has been set up — it's all the ex-British colonies I'm talking about, particularly now—on the basis that there must be a constitution, habeus corpus, parliament, elections, etc. None of this has happened. Absolutely nothing. They're just mere words because it wasn't related to anything real, only to a notion, an idea, a general proposition and this is of course, what will be the essential criticism by posterity of our time. What I was trying to illustrate in this way—taking the American citizen and the Russian citizen, both with these highly enlightened and developed constitutions claiming their rights, the Russians claiming them in vain; the Americans claiming them in order to destroy themselves. . .

MR. BUCKLEY: Is Solzhenitsyn talking about self-destruction when he says, "Society," talking about Western society, "appears to have little defense against the abyss of human decadence, such as for example, misuse of liberty for moral violence against young people, motion pictures full of pornography, crime and horror; life organized legalistically has thus shown its inability to defend itself against the corrosion of evil."

MR. MUGGERIDGE: I agree with every word of it. Every word.

MR. BUCKLEY: Yes, but agreeing, as you do, how do you handle that as a challenge in positive law?

MR. MUGGERIDGE: I don't —

MR. BUCKLEY: What documents arise out of that wisdom which you would feel with some sense of assurance you could recommend to the House of Parliament?

MR. MUGGERIDGE: There's no document. There's only faith. And the faith is exactly what Solzhenitsyn is saying is lacking. No document. I mean,

documents can establish a libertarian society and up to a point it can work, but of course, as the stress comes and the walls begin to fall down, it doesn't work at all. That's what I meant when I said that there *are* no human rights. They're only paper agreements except in our relationship to our creator.

MR. BUCKLEY: Well, you are talking about taboos then really. That is to say, a society that does not enumerate in documents that which is impermissible acquiesces in the matter of taboos. There are certain unwritten laws in England and in America that are observed, correct?

MR. MUGGERIDGE: They're very rapidly disappearing.

MR. BUCKLEY: They're rapidly disappearing, but for instance, a certain kind of social precedence that is given to a woman is unspecified, and nevertheless by and large observed.

MR. MUGGERIDGE: I think that that worked because they — originally it arose out of the religious faith and it had a kind of momentum which carried it on for a time, but as the momentum is spent you're left with, as it were, the documentary proposition.

MR. BUCKLEY: Nothing to nourish it.

MR. MUGGERIDGE: Nothing whatever, and that's exactly what's happening, possibly more here than in America, I'm not sufficiently familiar, but here to a fantastic degree —

MR. BUCKLEY: Although Mr. Robert Conquest reports in the paper this morning that scientists have all of a sudden discovered that there are differences between men and women.

MR. MUGGERIDGE: Amazing. (laughter) It's always interesting when they discover something.

MR. BUCKLEY: But, do you see what I'm trying to get at? Solzhenitsyn mystifies a great many Americans who seek to understand him because they can agree, for instance, on the matter of the decadence of much of that erotomania you speak about so frequently, but they don't quite know how it is that you codify an inclination of this sort and he's not very helpful at this level, is he?

MR. MUGGERIDGE: No, because he's a man of faith, you see, and I think it's terribly difficult to explain to people to whom the word "faith" means nothing. They say, well, codify this, give us some laws, give us some regulations, work it out —

MR. BUCKLEY: Well, the second book of the Bible is just full of laws.

MR. MUGGERIDGE: Yes, it is and the Old Testament is full of laws, but then ours is largely based on the New Testament, and there you have no laws — you have only faith —

MR. BUCKLEY: Beatitudes.

MR. MUGGERIDGE: Yes, but they're not laws, they're expressions of a sense of human virtue, but they're not laws.

MR. BUCKLEY: Well, they're an expression of relationships, aren't they?

MR. MUGGERIDGE: Yes.

MR. BUCKLEY: Now, can an expression of relationships guide a virtuous

society in distinguishing between what is permissible and what is not in the matter of say horror, or crime, or violence, or the corruption of children?

MR. MUGGERIDGE: I don't think it can. I think a sense, an awareness of good and evil — and this was Solzhenitsyn's first point about Western society—was that this distinction between good and evil had gone and this is of course, true. There lies the heart of the whole thing because it is only this awareness of good and evil, of God and the devil, darkness and light, all the various ways in which this has been presented, that enabled people to have a sense of how they should behave, what their relationships with one another should be. This, translated into terms of humanistic propositions — for instance, the proposition of equality — that's a humanistic proposition — all men are equal. Plainly and patently ridiculous, but it is true —

MR. BUCKLEY: Said in that way it's a humanistic proposition. Said slightly differently it's a highly spiritual proposition.

MR. MUGGERIDGE: Yes, well, if you make it brothers —

MR. BUCKLEY: Yes.

MR. MUGGERIDGE: And this is the difference and I personally think that you could understand the ethical muddle, of the Western world today, perhaps better than anything else —

MR. BUCKLEY: By making that distinction.

MR. MUGGERIDGE: — by making that distinction. By understanding what is the difference between men being equal and men being brothers. Equality is a fantasy. They're not equal, but in the light of the Christian revelation and all that's come of that, the awareness of men being brothers is a reality. And only through their awareness of being brothers can their relations with one another be all the things we want them to be — loving and not hating, etc.

MR. BUCKLEY: Yes, it is a venture in metaphysics, isn't it?

MR. MUGGERIDGE: Well, it is a — I have to go back to the word faith.

MR. BUCKLEY: Yes, which is metaphysical.

MR. MUGGERIDGE: Yes, it is, but that's only a little bit of it.

MR. BUCKLEY: Well, equality, as currently used, is a physical assertion, isn't it? That is to say it is a mechanical assertion.

MR. MUGGERIDGE: It's a false assertion too.

MR. BUCKLEY: It is clearly false. The kind of equality that the humanists of the 18th century referred to was really an equality before the law, was it not?

MR. MUGGERIDGE: Yes, and that is a very fragile — largely meaningless. It also — put it another way — of course this sense of brotherliness between men — it derives from seeing the society we live in as a family. This was of course, the Christian concept of it, whose father is God. If you see it as a community and you attempt to establish the relations that must exist, for instance, as we're doing in this country with say our race-relations law which is incessantly and dramatically increasing racial hatred.

MR. BUCKLEY: Why?

MR. MUGGERIDGE: Because, if you say in law you must regard yourself as the equal of that man, you're saying a thing which is quite false. There's no way you can be made to regard yourself as his equal. If you say that man belongs to the same family as you belong to, he's your brother, and as your brother he might be clever or stupid, whole or maimed, anything you like, but he's your brother and if you love him on that basis men can have a relationship between one another which unifies their life together and enriches their life together — but that's gone. It's gone with the whole idea of God and of a family and of good and evil. And what's left is this notion of a community in which you say you *must* and if you don't you'll go to prison. But you can't do it that way and it only exacerbates the rivalry and hostility between man and man.

MR. BUCKLEY: Yes, in the sense that the assertiveness of a palpable untruth is aggravating.

MR. MUGGERIDGE: Of course.

MR. BUCKLEY: But the progressive disillusionment of Solzhenitsyn — you remember two years ago he said that when he arrived, that he used to dream of the West because the West had stood firm in this situation and the other. Is that progressive disillusionment, in your judgment, a disillusionment that arises primarily from public policy, from the obvious pusillanimity of Western policy or is it his experience with Western culture that has disillusioned. . .

MR. MUGGERIDGE: I think the latter. Essentially —

MR. BUCKLEY: How can someone who doesn't speak the language and cannot really mingle, experience the culture of another country?

MR. MUGGERIDGE: I'd think that anybody who is as wonderful a writer —

MR. BUCKLEY: As sensitive as he is.

MR. MUGGERIDGE: — as sensitive a person as Solzhenitsyn, is aware of this particular aspect of the thing. In hundreds of ways it's borne in upon him.

MR. BUCKLEY: Well, he says, for instance, "What is not fashionable will hardly find its way ever into periodicals or books, or be heard in colleges. Legally, your researchers are free, but they're conditioned by the fashion of the day." Now, I know the extent to which that is correct. There is a clear bias —

MR. MUGGERIDGE: Enormous.

MR. BUCKLEY: — and I wrote a book about it when I was 23 years old. However, it is simply not true that you have any difficulty, for instance, in access to the reading public or the viewing public —

MR. MUGGERIDGE: Well —

MR. BUCKLEY: — or the journals.

MR. MUGGERIDGE: No, but it is true that there exists something called the consensus in our society; you and I know exactly what that is; we know exactly what view it holds about everything, and we know that it is dominant. It's perfectly true that one still can challenge the consensus and

criticize the consensus and that generally, theoretically one has a fair deal in doing that, though of course, it's not a fair deal really because these enormously powerful media are loaded in favor of the consensus.

MR. BUCKLEY: Yes, and there are some narrow escapes. *Animal Farm* almost didn't make it.

MR. MUGGERIDGE: Yes, 14 publishers turned it down. Absolutely. And as things go on here with closed shops and such arrangements I can see that it will become increasingly difficult—in fact, the English, without knowing it, are creating the apparatus of a collectivist state.

MR. BUCKLEY: How?

MR. MUGGERIDGE: By things like introducing the closed shop, so that unless you belong to a particular union, you can't get work in that field, such as a journalist.

MR. BUCKLEY: As a matter of fact, didn't your student association here attempt three or four years ago to bar any speakers whose views were not congenial to the students and the campuses?

MR. MUGGERIDGE: They still do. Joseph is the man in the Tory party who they consider to be some kind of a racist. The other day he was invited to go to speak to the students —

MR. BUCKLEY: Sir Keith Joseph?

MR. MUGGERIDGE: Sir Keith Joseph — to speak to the students of the London School of Economics. He presented himself; he wasn't allowed to speak to them and nobody was punished for this. Most people wouldn't accept an invitation to go for that reason. I see all around me — and it may be just the sick fancy of an old man — but I see all around me the structure of a collectivist society.

MR. BUCKLEY: Which is crystallizing?

MR. MUGGERIDGE: Yes, being got ready. So, that at a certain moment there will be nothing to be done. It's there. All the machinery is there. The inoperativeness of the law, which after all is the only ultimate defense that anybody has who doesn't —

MR. BUCKLEY: Temporal defense.

MR. MUGGERIDGE: Right, temporal defense. Temporal defense. Quite right. — is becoming increasing — in fact, the other day a man wrote a book about how he'd murdered his wife because she asked him to — appeared on television with great éclat. As far as I know, no legal action whatever has been taken against him. Twelve level-crossing keepers, the other day, stopped all railway passing between London and Birmingham for 24 hours. Multiply these things endlessly. The law has no effect against them. The idea that you can do anything through the law is regarded as completely laughable. In law, it cannot be held against a consultant physician that he will not do abortions. By the abortion law, this was included as one of the safeguards — completely disregarded. Unless a man would do abortions he cannot be a consultant gynecologist in this country. I can go on much further. And all around me I see it and watch it like a sort of nightmare. It's all being set up and apparently nobody noticing, or if they notice, dismissing

it from their minds.

MR. BUCKLEY: Mr. Andrew Knight, the distinguished editor of the *Economist,* will serve as the examiner.

MR. KNIGHT: I find myself agreeing with many of the things that have been said, particularly in the last few minutes, but the lecture in despair that we have from Mr. Solzhenitsyn, not present, and Mr. Muggeridge and Mr. Buckley, I am deeply troubled, even outraged by — it seems such a static view of society, if I can address myself to both of you. Mr. Muggeridge said at one point that Americans claim their rights in order to destroy themselves. Do you really think that you can eat your cake in the form of a free society and have it in the form of the power that only totalitarian power can provide?

MR. MUGGERIDGE: I think that is of course, exactly the trouble, but the point that I am making about that was that that is the inevitable result of attempting to formulate and establish human rights without any sort of transcendental implication. That's exactly what I meant and those human rights on that basis are proving and will increasingly prove completely worthless.

MR. KNIGHT: But you talk of moral weakness. Is asking questions even about sexual problems, even a certain amount of sexual exhibitionism at this particular stage in our society, is that really moral weakness? I mean, was the Edwardian family, let's say the Forsytes or the teeming populace below them, were they so uncorrupt or incorruptible?

MR. MUGGERIDGE: Not at all. I mean, of course corruption always exists and always has existed in all societies, but the point that I was making was — that this corruption has reached a stage at which it is, as it did in Rome, going back to Gibbon for a moment; at which the society itself becomes morally and ultimately physically incapacitated.

MR. KNIGHT: You don't see this just as a stage?

MR. MUGGERIDGE: No, I don't. I see it as a —

MR. KNIGHT: After all, we've elevated millions from grinding poverty really in the past forty or fifty years. It's likely that they are going to be disturbed for a while, isn't it?

MR. MUGGERIDGE: Well, it's a matter of opinion and if you think that the path we're on now is going to lead to a morally coherent and stable society, you, of course, may be right. But to me, it's quite inconceivable. The deliverance of people from material poverty is obviously in itself a good thing, but it has to be said that the countries in which it has been most effectively done, like for instance, the Scandinavian countries, are in this moral, spiritual sense in the most deplorable plight and will themselves admit it and their literature reflects it.

MR. KNIGHT: There's the beginning of a reaction, isn't there?

MR. MUGGERIDGE: This is a word — you know I'm an old man; you're a young man — I've heard this — for the last forty years people have been saying to me, "There is the sign of a reaction." I don't believe in that re-

action, really. I think it's much more a sort of gadarene slide onto which people get and I don't think that this reaction operates.

MR. KNIGHT: Do you prefer to live in a city where Soho exists, but where you can appear on this television program than let's say in a city where Red Square exists, but where you couldn't?

MR. MUGGERIDGE: Well, I'm not prepared to choose between those two.

MR. KNIGHT: But you were —

MR. MUGGERIDGE: I was not. I was saying two things. I was saying that the intolerance of the Soviet Union and the complete tolerance leading to some moral indulgence to a point of disillusion, that those two things equally abolish human rights and that in terms purely of power — something that is not in itself either admirable or important — but in terms of power it is calculated to generate power in the one case and to not generate it in the other case. That's all I was saying. I wasn't saying I would rather be in the Red Square than in Soho. I'm not particularly keen on either.

MR. KNIGHT: Can I take up one particular point —

MR. MUGGERIDGE: Please.

MR. KNIGHT: — that you made on double standards on which our host, Bill Buckley, joined you in? You cited Mr. Winkle belaboring the poor little boy of South Africa, whereas nothing much had been said about the Gulag and at that point Bill added the word Cambodia. Can I contest that? First of all, South Africa is not exactly the Afrikaner regime and South Africa is not exactly a little boy. And secondly, as I frequently have to write to angry readers when they write in every time we write about South Africa, we, on my newspaper — and we don't have a monopoly of virtue in this matter — write far more about the Gulag and far more about Cambodia than we do about South Africa. South Africa gets noticed and the other things don't.

MR. BUCKLEY: Unhappily, we have run out of time. Thank you, Mr. Knight and thank you very much, Mr. Malcolm Muggeridge; ladies and gentlemen.

# APPENDIX C

[*This review has frequently published articles and commentaries on or about the United States Supreme Court and its decisions, especially the* Abortion Cases. *The July 21, 1978 issue of* National Review *carried an article on the Court, titled "Judicial Imperialism: The Supreme Court's Abuse of Power," by Prof. Lino A. Graglia (a professor of constitutional law at the Univ. of Texas Law School). In the main, the lengthy article concerned school busing decisions, but it included several passages of more general interest, which we reprint here, with the author's permission (* © *1978 by* National Review Inc.*).* — Ed.]

## What Limits the Court's Power?

*Lino A. Graglia*

If, as should be clear, the Constitution does not in fact significantly determine or limit the Supreme Court's power, what, if anything, does? Another basic justification often offered for the Court's apparently unlimited power in our supposedly democratic system of government is, surprisingly, that the Court has no "real" power at all. Even if it is not significantly limited by the Constitution, this argument goes, the Court controls neither the sword nor the purse, and the effectiveness of its decisions therefore depends "ultimately" on its "moral authority."

The Court is thus often likened to a very respected and influential teacher or spiritual leader. However, as Clinton McCleskey has pointed out in *Judicial Review in a Democracy: A Dissenting Opinion*, the views of teachers and preachers are not ordinarily enforced by the power of the state. Little Rock can attest that the enforceability of Supreme Court decisions does not depend upon the Court's ability to persuade its opponents, and that the Court has an effective call, if need be, upon the bayonet. It seems easy for many to forget that a Supreme Court decision is not less enforceable or effective because the Court's opinion is demonstrably incoherent, its reasoning illogical, and its factual statements inaccurate. Few people read Supreme Court opinions, and fewer still study them critically and compare the facts as stated by the Court with the facts shown in the record of the case. In any event, what it means to be supreme is that your views prevail even when you are clearly wrong. As Justice Jackson said, in a concurring opinion in *Brown v. Allen*, the Supreme Court is not final because it is infallible, but it is infallible for all practical purposes because it is final.

The claim that the Supreme Court's power derives from and is limited by moral principles, or by a supposed need on the justices' part to maintain unusually high standards of integrity, is no less fictional than the claim that it derives from or is limited by the provisions of the Constitution. The Court's freedom from authoritative determinations that it has erred has the effect on Supreme Court justices that is predicted by Lord Acton's dictum concerning the tendency of power to corrupt.

As Thomas Jefferson never tired of reminding us, judges are not, more than other rulers, immune from the effects of the possession of power.

> Our judges [he wrote to William C. Jarvis in 1820] are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is "*boni judicis est ampliare jurisdictionem*," and their power the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control.

Indeed, because in our legal theory judges are not authorized simply to announce their policy views, but are required to claim a constitutional basis for their decisions invalidating the acts of other officials — a basis that typically does not in fact exist — the practice of judicial review is inherently inconsistent with candor. In effect, judges finding unconstitutionality must demonstrate what cannot be demonstrated, and wide departures from usual standards of accuracy and rationality are the inevitable result. How wide these departures are at any given time depends on how much the judges are willing to attempt, and for more than two decades now our judges, as already noted, have been willing to attempt a very great deal. As a result, they have been forced to explain and justify their actions with opinions that can make no claim to intellectual coherence or respectability, and they have engaged in practices — perversions of legislation, misstatements of fact, and patently fallacious reasoning — that would, if they were engaged in by any other government officials, be considered scandalous and lead to demands for impeachment.

* * * * *

The best evidence, perhaps, of the invulnerable position and enormous power the Supreme Court has now achieved in our system of government — of the existence, that is, of an imperial judiciary — is the fact that the Court apparently remains free from such censure and such demands.

# APPENDIX D

[*The following text was supplied anonymously by a reader who describes it as being part of a document prepared by the Department of Health, Education and Welfare in mid-1977 for use by Secretary Joseph Califano in a "budget meeting with President Carter." A "covering letter" describes the "suggested initiatives" as being designed to "produce both Federal and system-wide savings in health expenditures" and goes on to note that "Most of the suggested initiatives involve major policy shifts or legislative changes which warrant considerable discussion and exploration. Although these initiatives will undoubtedly generate controversy among health care institutions, physicians, insurers, and consumers, many can have a substantial impact on controlling rising health care costs..." We reprint here the portion supplied in the hope of furthering the desired "considerable discussion and exploration."* -- Ed.]

## Change Social Values Regarding Cost-Inducing Activities

### *A. Encourage Adoption of "Living Wills"*

The "Living Will" concept allows patients to legally require the cessation of the employment of extraordinary means to prolong life when there is irrefutable evidence that biological death is imminent. The first such law was enacted in California in September 1966, and legislators in 16 other States sought to delineate rights for the terminally ill during that year. The statutes make provision for a person to declare in advance what he would wish done if he should reach a moribund condition and be incapable of expressing his wishes. It relieves the physician and/or health facility of any liability. Prior to passage in California, 87 percent of persons polled there thought that an incurably ill patient should have the right to refuse life-prolonging medication. Encouraging States to pass such a law or, more strongly, withholding Federal funds without passage would serve to heighten public awareness of the use of such resources and would also lower health spending when such wills are executed.

The strong response to the Karen Ann Quinlan case demonstrates that such encouragement would result in some negative public reaction. Although the Catholic Church ruled that extraordinary measures need not be employed, there is still religious resistance to this concept.

The cost-savings from a nationwide push toward "Living Wills" is likely to be enormous. Over one-fifth of Medicare expenditures are for persons in their last year of life. Thus, in FY 1978, $4.9 billion will be spent for such persons and if just one-quarter of these expenditures were avoided through adoption of "Living Wills," the savings under Medicare alone would amount to $1.2 billion. Additional Federal savings would accrue to Medicaid and the VA and Defense Department health programs.

## *B. Reduce Unwanted Births*

In 1973, about 3.6 percent of all women aged 15-44 eligible for Medicaid received abortions in States covering abortions. Add to this the proportion of unwanted pregnancies where abortion was rejected, and it is possible that close to half the welfare recipients of child-bearing age have unwanted pregnancies in a single year. In 1975, there were 3.5 million AFDC families, nearly all of whom have women of child-bearing age. The costs of caring for these potentially unwanted births, under both Medicaid and welfare, is staggering. To reduce unwanted births, the Administration can reverse its decision not to cover abortions under Medicaid and/or intensively counsel and provide birth control assistance.

The second alternative, intensifying Federal birth control efforts, is consistent with President Carter's preferences. It would require additional funds to implement an effective program, reaching teenagers as well as adults. Nevertheless, the resulting savings would far outweigh the costs and the political ramifications would not be substantial. Covering abortions under Medicaid would be more effective in preventing unwanted births and would have far greater savings, but also far greater ramifications. In addition to being contrary to the President's current stand, it would incur the anger of the Catholic Church, the "Right to Life Groups," etc.

The cost-savings under either alternative are difficult to estimate, but every unwanted birth prevented saves about $1,000 annually in welfare payments and another $100 in Medicaid funds.

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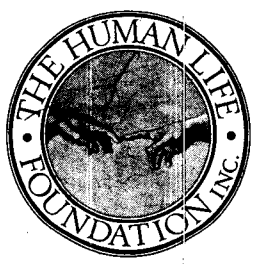
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