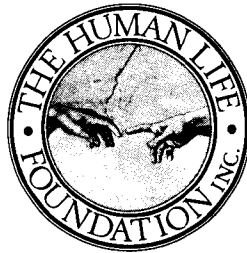


# the HUMAN LIFE REVIEW



WINTER 1981

*Featured in this issue:*

Stephen H. Galebach, Esq., on . . . . . A Human Life  
Statute

Col. Robert de Marcellus on . . . . Fertility & Power

John T. Noonan, Jr. on . . . . . Abortion Funding

Mary Meehan on . . . . . Abortion and 'Consistency'

Harold O. J. Brown on . . . . . The Hidden Roots

Peter Skerry on . . . . . The Black Family

Joseph Sobran on . . . . . Sex Education

Ellen Wilson on . . . . . The Perfect Fit

*Also in this issue:*

Frances Frech • Dr. C. Everett Koop • Robert F. Nagel

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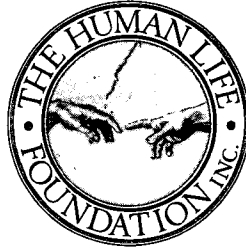
With this issue we begin our seventh year of publication. The year 1980 not only showed a marked increase both in supporters and readers, but also a gratifying increase in articles submitted on a wide range of life issues by new, young writers. These bright prospects must be credited to the loyalty of our readership, without whose generous and faithful support none of this would be possible. So we enter 1981 with a new feeling of vitality.

One article in the current issue first appeared elsewhere. Mr. Robert F. Nagel's "A Plague of Judges: The Burger Court's Secret Plan for America" (Appendix A) was featured in the November 1980 issue of *The Washington Monthly* (2712 Ontario Road, NW, Washington, D.C. 20009) and we thank them for allowing us to reprint it here. Another, "The Family with a Handicapped Child," by C. Everett Koop (Appendix B) was originally an address delivered before the American Family Institute (114 Fifth Street, SE, Washington, D. C. 20003) last November, and is also reprinted here with permission.

We remind our readers that the end of a publishing year means a new Human Life Review Bound Volume. These handsomely bound (library-style hardcover) and fully indexed volumes are not only valuable as personal reference books (which anyone in the abortion debate should have) but they also make excellent gifts to local schools, libraries, or students, etc. Full details on how to obtain them are given on the inside back cover. Finally, *The Human Life Review* is now available both on microfilm from University Microfilms International, 300 N. Zeeb Road, Ann Arbor, Michigan 48106 and microfiche from Bell & Howell, Micro Photo Division, Old Mansfield Road, Wooster, Ohio 44691.

EDWARD A. CAPANO  
*Publisher*

# THE HUMAN LIFE REVIEW



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## INTRODUCTION

“**W**HAT YOU MAY HAVE HERE,” said an editor friend, “is a solution to the abortion dilemma.” He had just read, at our request, the lead article in this issue. Funny: the same thought struck us as we read Mr. Stephen Galebach’s proposal for a *statute* — as distinguished from the many proposed constitutional amendments — to secure “personhood” for the unborn child. Why hadn’t this approach been argued long since?

As a matter of fact, Mr. Galebach, a young man of considerable legal and writing talent (as you will see), modestly informed us that he had got his idea from Professor George W. Carey of Georgetown, who has written trenchantly and often on the general subject. Indeed, one of his articles appeared in this review (Winter ’77), so we are glad to bring forth new things from the old! We think that Mr. Galebach’s proposal deserves the closest attention, and you, dear reader, will have to *give* it exactly that, for it is a tightly-reasoned article.

Of course, we strive to bring you *only* important things. And if Mr. Galebach has important things to say about *how* the abortion disaster might be solved, Col. Robert de Marcellus provides some very sobering facts as to *why* it must be, without further delay. Here again, our “reader’s” comment (we try to have at least one “expert” read every contribution) is germane: “No objections as to accuracy.” In other words, the horrifying litany of what’s been happening — and what it all means for the future of our nation — shouldn’t surprise anybody. What is surprising is that, given such “common knowledge,” so many go on talking so much about the “threat” of “overpopulation.”

Professor John T. Noonan, one of our regular contributors, next provides a timely update on the current status of the “right” of public abortion funding. Timely because, as Noonan points out, any such “right” would have seemed purely fanciful just a decade ago. However, once the Supreme Court plunged headlong into the abortion morass in 1973, it soon became not only a continuing vexed problem for the Court, but also a political issue that snarls Congress and the federal bureaucracy in a yearly show-down on what had previously been routine funding bills.

Then Miss Mary Meehan explains why she thinks so few American liberals have opposed abortion even though “it is out of character for the left to neglect the weak and the helpless.” She certainly adduces a wide

#### THE HUMAN LIFE REVIEW

range of reasons: the “left,” she thinks, was so fully committed to such other “causes” as its anti-war activities — and then exhausted by the long struggle over Vietnam — that it simply may not have had the energy to get involved in defending unborn babies. Then too, the legalization of abortion was from the first presented as a “liberalization” of harsh old laws, a formulation naturally appealing to the left’s emotional mind-set. But all this overlooks, says Miss Meehan, the most important point: that the “traditional mark of the left has been its protection of the underdog, the weak, and the poor. The unborn child is the most helpless form of humanity. She [*sic*] is even more in need of protection than the poor tenant farmer . . . or the boat people . . . The basic instinct of the left is to aid those who cannot aid themselves — and that instinct is absolutely right.” Right indeed.

The Reverend Harold O. J. Brown weighs in with yet another abortion-related article, this time from the unusual viewpoint of the “Darwinian revolution.” Again, timely stuff. When, during the recent presidential campaign, Candidate Ronald Reagan remarked that he saw no reason why “creationism” ought not to get attention equal to that long given to the theory of “evolution,” it caused quite a stir (albeit, as the results would indicate, only with a solid minority). But should it have? Dr. Brown evidently thinks not. Evolutionism, it seems, is one of those ideas that everybody “knows” without understanding — here, without understanding the kind of effects it has had on our society. Who knows? We may have here a whole new area of “modern” controversy, and once again we look forward to publishing more on the subject in future issues.

We then shift abruptly to another of this review’s continuing concerns, the family. In this case, it is the “black family,” that favorite subject of recent sociological tabulations. Mr. Peter Skerry has done considerable research himself on this subject, and he has a great many interesting things to report here. For instance, that some (too many) black leaders resist some pretty obvious ways to improve the admittedly deplorable situation simply because they oppose the *source* of such proposals. Worse, that there is also an attempt to romanticize “ghetto life” which leads to much immediate harm, e.g., the fact that “most ghetto crime is committed by blacks against *other* blacks” is downplayed, and thus solutions are avoided. The net result, Mr. Skerry argues, is that expensive efforts to help black families often end up institutionalizing the problems.

Are there any problems left? Yea, Mr. Joseph Sobran (as only he can) reminds us of another and most intimate one: the general collapse of sexual values that were once “commonly held” (as Mr. Ronald Butt put it so well in our previous issue) or at least acknowledged by most people. Here, the solution most often advocated seems to be a further and faster breakdown. Which has always amazed us: surely if flu-shots spread the

## INTRODUCTION

disease, one would expect that — at the very least — a *new* venom would be tried? Yet after decades of Planned-Parenthood-type operations with Fortune 500-size budgets, we are warned (by the very people who run the programs) that we face an “epidemic” of, for example, teenage pregnancy, for which the only answer is better “how to do it” sex instruction. Mr. Sobran pin-points the basic fallacy: sexual *mores* disintegrated when sexual practice was sold as a strictly private matter, “without clear relation to the larger social order.” But there can be no social fabric without socially-responsible individuals.

Obviously there is *no* end to the problems we deal with regularly in these pages, and we realize that we have discussed a particularly intractable lot of them in this issue. By way of compensation, we have saved Miss Ellen Wilson’s usual graceful essay for last. True, she also discusses a problem, but she does it so charmingly that it would seem a fair treat. Consider, for instance, this soothing truth: “Every value system outlines an ideal, and adherents of even the least demanding are bound to recognize discrepancies between preaching and practice. The religious parent will note his own lapses in charity, generosity, and patience.” And so on, the cool words rippling over great matters — just the restorative wanted here.

Our “back of the book” matter in this issue relates nicely to our articles. In Appendix A you will find a serious (but still amusing) journalistic portrayal that complements Mr. Galebach’s thesis, i.e., that the courts have bogged themselves down in details not suitable for “judicial determination” — abortion certainly is a prime example, for, as the author notes, the High Court might quite properly have left bad-enough alone by simply admitting “that the Constitution had nothing to say” about it! Appendix B is simply too good to miss, and while we hope and expect that it will get wide notice elsewhere, we couldn’t resist adding it to our own “publication of record.” Dr. C. Everett Koop is a remarkable man, in his accomplishments, and in person. We heard him deliver the speech reprinted here, and saw for ourselves the powerful effect it had on his audience. In an age when private, personal heroism goes unmentioned (or even despised as “unnecessary”), the cases Dr. Koop describes are exactly what they would have been called in former times: inspirational. We’d say Dr. Koop complements Miss Wilson’s point: there is a kind of perfection, attainable by accepting *imperfection*, and making the best of it. Appendix C is another serious/amusing article, by a woman (Miss Frances Frech) who is generally recognized as expert, *via* copious study and long experience, on the pregnancy “epidemic.” What she has to say meshes well with what Mr. Sobran said . . . as always, our “life issues” end up (in our minds, at least) being one endless tapestry.

J. P. MCFADDEN  
*Editor*

## A Human Life Statute

Stephen H. Galebach

*The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception.*

*Upon the basis of this finding, and in the exercise of the powers of the Congress, including its power under Section 5 of the Fourteenth Amendment to the Constitution of the United States, the Congress hereby declares that for the purpose of enforcing the obligation of the States under the Fourteenth Amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception, without regard to race, age, health, defect, or condition of dependency; and for this purpose "person" shall include all human life as defined herein.*

**D**OES CONGRESS HAVE constitutional power to enact such a statute? If Congress were to enact a statute of this sort, should the Supreme Court uphold it?

The Supreme Court's 1973 abortion decision in *Roe v. Wade* has received trenchant criticism for its defective legal reasoning as well as its consequences.<sup>1</sup> For the growing number of citizens unwilling to tolerate the consequences of *Roe v. Wade*, the answer has appeared to lie in a constitutional amendment to protect unborn life. While such an amendment may well afford the surest protection for unborn children, it will require an extraordinary consensus and a protracted ratification effort.

Until the time when an amendment could be ratified, are there any interim answers that a simple majority of Congress could provide, consistent with the Constitution and with Supreme Court precedent? In fact there are. The Constitution was not designed to leave any form of human life unprotected. Nor do Supreme Court precedents, as we shall see, prevent or discourage Congress from acting in this area.

Both the Fifth Amendment and the Fourteenth Amendment protect human life. The Fifth Amendment protects life against acts of the federal government: "No person shall be . . . deprived of life, liberty, or property, without due process of law." In similar language the Fourteenth Amendment limits the action of states: "nor

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Stephen H. Galebach (B. A. Yale '74) received his law degree from Harvard in 1979, where he was Note Editor of the *Harvard Law Review*; he clerked at the U. S. Circuit Court of Appeals in the District of Columbia, and has recently joined the Washington law firm of Covington & Burling.

shall any State deprive any person of life, liberty, or property, without due process of law.”

These provisions reflect the belief, expressed in our Declaration of Independence, that the right to life is sacred and inalienable.<sup>2</sup> Whether unborn children enjoy those rights to life already contained in the Constitution depends on how life is defined. If life begins at conception, these rights logically extend to unborn children. If life begins only at birth, unborn children enjoy no protection from the Constitution as it now stands. The beginnings of life thus pose a crucial question for those branches of the federal government that enforce the Fifth and the Fourteenth Amendment.

## I. Determining When Life Begins

### A. An Inappropriate Task for the Courts

The judicial branch confronted the issue of when life begins in *Roe v. Wade*, when the state of Texas invoked the Fourteenth Amendment’s protection of life as a justification for the state’s anti-abortion statute. In rejecting this justification, the Supreme Court did not define unborn children as non-life or non-humans. Instead it refused to decide when human life begins and whether unborn children are human life. With this issue unresolved, the Court found nothing to indicate that unborn children are persons protected by the Fourteenth Amendment. Justice Blackmun concluded for the Court that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”<sup>3</sup>

The Court’s refusal to decide when life begins was central to the outcome of *Roe v. Wade*. Without a decision on this question, there was no way to show that Fourteenth Amendment protection logically extends to unborn children. Although the state of Texas asserted its own definition of when life begins, the Supreme Court held that the state had no authority to adopt “one theory of life.”<sup>4</sup> With the Supreme Court and the state legislatures both unable to define when life begins, the state had no way to demonstrate that unborn children are human persons deserving protection. As a result, the state had no compelling interest sufficient to justify its anti-abortion statute. The Supreme Court therefore struck down the statute as an unjustified infringement of the mother’s right of privacy to decide whether to “terminate her pregnancy,” a right newly discovered in this case.<sup>5</sup>

The result of *Roe v. Wade* would have been entirely different,



however, if any branch of government had been able constitutionally to examine when life begins and to resolve the question in favor of unborn children. If in enforcing the Fourteenth Amendment, a branch of the federal government had been able to declare that the unborn are human persons, then any state could invoke that declaration as a compelling state interest for prohibiting abortions. The Supreme Court acknowledged this in *Roe v. Wade*: "If the suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."<sup>6</sup>

It may seem odd that the Supreme Court refused to address the issue of the beginnings of life, when that issue is so fundamental to the scope of the Fourteenth Amendment and to the state's power to prohibit abortions. But the Court explained its refusal, and its explanation is very important. On the beginnings of life, the Court observed, there is a "wide divergence of thinking." The question is "sensitive and difficult."<sup>7</sup> For such questions the judiciary has no suitable evidentiary standards to determine an answer. A judge could only "speculate" on this difficult question. In short, the question stands outside the scope of judicial competence: "When those trained in the 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."<sup>8</sup>

Thus the failure of the Fourteenth Amendment to afford protection for the unborn, under *Roe v. Wade*, results from the institutional limitations of the judicial branch. Without a decision that the unborn are human life, it is not clear that the Fourteenth Amendment protects unborn children. And the Supreme Court gave strong reasons for abstaining from this question. But this does not end the matter. The Constitution gives Congress, as well as the courts, a role in the enforcement of the Fourteenth Amendment. If the question of when life begins can be addressed by Congress, and if Congress has a legitimate role in enforcing the Fourteenth Amendment's protection of life, then Congress can resolve the fundamental issue from which the Supreme Court abstained in *Roe v. Wade*.

#### **B. An Appropriate Task for Congress**

The Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this

article.”<sup>9</sup> In enforcing the Amendment’s protection of life, as in many other matters, Congress does not suffer from the same institutional limitations as the judiciary. Resolving sensitive and difficult policy questions, deciding between conflicting interests, making speculative judgments where no judicial standards can offer guidance — these are functions inherent in Congress’s role and appropriate for Congress to perform.

To decide when human life begins involves the sort of considerations that are appropriate for Congress but not the courts. Any attempt to resolve the issue, as the Court observed, involves the examination of inconclusive evidence and the weighing of divergent views. By the nature of their position, congressmen are often called upon to reflect the views of divergent constituencies on matters that cannot be resolved by conclusive evidence. Congress routinely weighs divergent views on questions that admit of no “correct” answer from a court’s perspective: whether to tax one person to support another, whether to protect various species endangered by governmental or private activities, whether to require the use of safety precautions that protect people while causing them inconvenience. Legal standards provide no answers to these questions; in such matters, decisions “are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.”<sup>10</sup>

One can best appreciate the legislative nature of deciding when life begins by considering the issue as it confronts the decision-maker. He must first examine the divergent views and conflicting evidence, mentioned by the *Roe v. Wade* opinion, to see if they provide an answer. If this step leaves him uncertain whether the unborn are human life, then he faces an especially delicate and complex issue of legislative policy: Should one extend protection if human life is *probably* at stake? Or only *possibly* at stake? What degree of possibility does one require before deciding to extend constitutional protection by deeming the unborn to be human life for purposes of the Fourteenth Amendment?

The legislative nature of this issue is further confirmed by the “political question” doctrine. The Supreme Court has developed this doctrine as a means to identify those issues that are appropriately resolved not by the courts, but rather by Congress, the President, or the states. Although the Court did not invoke the political question doctrine in refusing to decide when life begins, the Court’s

reasoning could easily be explained by that doctrine. Political questions, according to Supreme Court precedent, are questions that are "delicate" and "complex," questions "of a kind for which the judiciary has neither aptitude, facilities nor responsibility."<sup>11</sup> Two of the major criteria for identifying a political question could be applied directly to the question of when life begins: "a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."<sup>12</sup> Questions of this sort, the Court has said, are "wholly confided by our Constitution to the political departments of the government, Executive and Legislative."<sup>13</sup>

The political department most appropriate to decide when life begins is Congress. The enforcement clause of the Fourteenth Amendment expressly grants power to Congress. When a term of the Fourteenth Amendment cannot be defined by the judiciary in concrete application to a category of beings — here the unborn — then the definition of that term by Congress is appropriate legislation to enforce the Amendment.

If it appears strange that Congress should be able to play such a major role in formulating a national policy on the issue of abortions, that is only because the federal courts have gone to such great lengths to take control of this issue into their own hands. But when the courts have declared themselves incapable of resolving the beginnings of human life, it should be very hard for them to insist on taking this particular part of the abortion controversy out of Congress's hands and into their own. Before the Supreme Court stepped into this arena with its *Roe* opinion, former Justice Clark had recognized the legislative nature of the controversy:

It is for the legislature to determine the proper balance, *i. e.*, that point between prevention of conception and viability of the fetus which would give the State the compelling subordinating interest so that it may regulate or prohibit abortion without violating the individual's constitutionally protected rights. <sup>14</sup>

The Supreme Court, moreover, has recently acknowledged that Congress has a proper role in protecting human life. In its 1980 decision on the public funding of abortions, the Court recognized the "legitimate congressional interest in protecting potential life."<sup>15</sup> If Congress has an interest in protecting potential human life, it certainly has a legitimate interest in protecting what it considers

likely to be *actual* human life. If Congress is to make fully-informed decisions to protect life, it must also have power to examine and answer such questions as what is actual life, what is potential life, what is likely to be actual life, and what protection should be extended to something that appears likely to be actual life.

If Congress decides that unborn children are human life for the purpose of the Fourteenth Amendment's protection of life, it follows logically that for this purpose they are "persons" as well. By common usage of language, any human being must be recognized as a person. The Supreme Court has interpreted "person" in the Fourteenth Amendment more broadly than common usage, to include corporations.<sup>16</sup>

Statements of the framers of the Fourteenth Amendment make it clear that "person" cannot include less than every human being. Congressman Bingham, author and sponsor of Section 1 of the Amendment, spoke of the right to equal protection and the right to life, liberty, and property for "every human being."<sup>17</sup> The framers had good reason to contemplate unborn children as part of the human race, since in the decade leading up to the Fourteenth Amendment, physicians responded to new evidence about conception by calling for protection of human life from that point.<sup>19</sup>

A determination that unborn children are human life, therefore, fully justifies the correlative determination that they are persons. The latter determination, however, collides with the Supreme Court's holding in *Roe v. Wade* that the unborn are not persons. But that holding makes sense only in light of the Court's inability to decide whether the unborn are human life. Informed by a congressional determination that life begins at conception, the Court might well reach a different conclusion. Still, the potential conflict raises serious constitutional questions. Does the *Roe v. Wade* holding as to "person" deprive Congress of power to pass contrary legislation? If Congress does pass legislation declaring unborn children to be human life and persons, should the Court defer to Congress's determination?

## II. Congress as Co-enforcer of the Fourteenth Amendment

Supreme Court decisions have recognized that the Court does not have the only say in applying the Fourteenth Amendment. Under its Section 5 enforcement power Congress can apply, and has applied Fourteenth Amendment terms in ways that differ from and even

contradict Supreme Court interpretations. The Court has consistently upheld such legislation in the past two decades, often giving sweeping approval to Congress's expansive role. The precise extent of Congress's power to apply the Fourteenth Amendment independent of the Court, and the degree of deference the Court gives to such congressional actions, have been central issues in a number of Supreme Court decisions.

Interplay between the Supreme Court and Congress on issues of interpretation and application of constitutional rights has arisen most prominently in the area of state tests for voter qualification. Of the leading cases on Congress's power to enforce the Fourteenth and Fifteenth Amendments, three cases have involved literacy tests for voting. Literacy tests have been challenged under the Fifteenth Amendment<sup>20</sup> as well as the Fourteenth; the enforcement power of Congress is the same under both amendments.<sup>21</sup>

Just as in the abortion area, the Supreme Court pronounced its constitutional interpretation concerning literacy tests before Congress took up the issue. In 1959 the Court held, in *Lassiter v. Northampton County Board of Elections*,<sup>22</sup> that literacy tests did not violate the Equal Protection Clause of the Fourteenth Amendment or abridge the right to vote on account of race contrary to the Fifteenth Amendment.<sup>23</sup> The *Lassiter* opinion expresses a clear judgment that literacy tests, considered in general, have no inherently discriminatory character: "Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show."<sup>24</sup> Only with evidence that a particular literacy test was actually employed to promote discrimination would the *Lassiter* Court find it to be a violation of the Fourteenth or Fifteenth Amendment.<sup>25</sup>

In the Voting Rights Act of 1965, however, Congress used its enforcement power to apply the Fourteenth and Fifteenth Amendments to state literacy tests in ways different from the Supreme Court in *Lassiter*. Section 4(a)-(d) of the Act suspended all voter qualification tests in those states or counties in which fewer than fifty percent of the voting-age residents registered or voted in the 1964 presidential election. For such states Congress found that literacy tests and similar voting qualifications abridged the right to vote on account of race.<sup>26</sup>

The Supreme Court upheld this part of the Act as an appropriate exercise of Congress's power to enforce the Fifteenth Amendment. In *South Carolina v. Katzenbach*<sup>27</sup> the Court held that Congress

had complied with the *Lassiter* holding by making extensive, detailed legislative findings that literacy tests have been used to promote discrimination in most of the areas covered by the Act.<sup>28</sup> For those areas in which Congress had not found direct evidence of discriminatory use of the tests, the Court was satisfied that Congress had inferred or could infer a “significant danger” of discrimination.<sup>29</sup> By striking down those literacy tests that had actually been employed to promote discrimination, Congress did not depart from the *Lassiter* interpretation of the Fifteenth Amendment.<sup>30</sup> The further application of Section 4(a)-(d) to the other areas, in which there was a “significant danger” that tests would be applied discriminatorily, represented a slight modification of the *Lassiter* standard; this application was appropriate as a preventive measure to combat discrimination.<sup>31</sup>

Another provision of the Act, however, represented a sharp departure from *Lassiter*’s interpretation of the Fourteenth Amendment. Section 4(e) struck down the use of English literacy tests in New York to exclude voters who had completed the sixth grade in Puerto Rican schools.<sup>32</sup> For this section Congress did not provide legislative fact-finding to show discriminatory application of New York’s literacy test.<sup>33</sup> Without such evidence the *Lassiter* holding would of course indicate that New York’s use of a literacy test was constitutionally valid. Congress could only strike down New York’s use of the test by applying a standard different from *Lassiter*.

Nevertheless, in *Katzenbach v. Morgan*<sup>34</sup> the Supreme Court upheld Section 4(e). The Court held that Congress enjoys broad authority to interpret the provisions of the Fourteenth Amendment independent of the judicial branch. As the Court framed the issue: “*Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York’s English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?*”<sup>35</sup>

The *Morgan* opinion answered this question in the affirmative. The Court gave two equal and alternative reasons for holding that Congress could prohibit enforcement of the literacy test. First, Congress could have struck down the literacy requirement in order to help the Puerto Rican community gain sufficient political power to secure non-discriminatory treatment in the provision of public services. This rationale rests on the principle that Congress enjoys the

same broad powers under Section 5 that it exercises under the Necessary and Proper Clause.<sup>36</sup> Congress may take any action that is “plainly adapted” to the objective of securing the guarantees of the Fourteenth Amendment.<sup>37</sup> Under this rationale, Congress may strike down an act of a state that does not in itself violate the Fourteenth Amendment, so long as Congress’s action tends to protect some Fourteenth Amendment right against infringement by the state.<sup>38</sup>

As a second rationale, the Court held that Congress could rationally conclude that New York’s use of a literacy test was invidious discrimination not justified by any compelling interest of the state — and was therefore a violation of equal protection.<sup>39</sup> Unlike *South Carolina v. Katzenbach*, the *Morgan* opinion did not require any legislative findings of fact to show discriminatory use of the literacy test. Instead, the Court was willing to let Congress conclude that a literacy test by its nature, with no evidence of its actual effects, violates the Fourteenth Amendment. The Court did not even require Congress to express its reasons for reaching a conclusion opposite to the *Lassiter* holding: “it is enough that we perceive a basis upon which Congress *might* predicate a judgment that the application of New York’s English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause.”<sup>40</sup> The broadly deferential attitude of the majority in *Morgan* toward Congress evoked a dissent from Justices Harlan and Stewart, which will figure prominently in our later discussion.

Both rationales of the *Morgan* opinion appeared to give Congress authority virtually to overrule the *Lassiter* holding. The Court emphasized the broad discretion of Congress to determine what legislation is appropriate to carry out the ends of the Civil War amendments.<sup>41</sup> Citing historical evidence of the framers’ intent, the Court observed that the Fourteenth Amendment primarily enlarges the power of Congress rather than the judiciary.<sup>42</sup> Commentators recognized *Morgan* as a broad endorsement of congressional power to interpret the substantive guarantees of the Fourteenth Amendment in ways that differ from or contradict prior interpretations of the Supreme Court.<sup>43</sup>

Four years after *Morgan*, Congress completed the process of undoing *Lassiter*. Title II of the Voting Rights Act Amendments of 1970 struck down all remaining state literacy tests.<sup>44</sup> The Supreme Court unanimously upheld Title II in *Oregon v. Mitchell*,<sup>45</sup> despite

the lack of specific evidence of discriminatory application of these tests by states that still used them.<sup>46</sup> The Court relied on evidence available to Congress, showing that literacy tests are likely to have racially discriminatory effects wherever in the nation they may be used.<sup>47</sup> To say that literacy tests are likely to be discriminatory anywhere in the country is essentially the same as to say they are discriminatory by nature — a direct contradiction of the *Lassiter* holding.

Although *Oregon v. Mitchell* endorsed a congressional interpretation of the Fourteenth Amendment at variance with the *Lassiter* holding, it left some uncertainty over the scope of Congress's power to apply the Amendment independent of the courts. The 1970 Voting Rights Act Amendments had also invoked Section 5 of the Amendment as a justification for Congress to lower the voting age in federal and state elections. A divided Supreme Court in *Oregon v. Mitchell* allowed Congress to lower the voting age for federal elections but not for state elections. Four justices opted for a very broad view of congressional power under Section 5 to strike down the states' 21-year-old voting age requirements; four justices espoused a narrower view; and Justice Black cast the deciding vote on grounds divorced from the Section 5 power. Justice Brennan, joined by Justices White and Marshall, endorsed a broad scope of congressional power, emphasizing "proper regard for the special function of Congress in making determinations of legislative fact."<sup>48</sup> Justice Stewart took the narrower view in an opinion which we shall discuss later.

The ambiguity left by the divided Court in *Oregon v. Mitchell* has been largely resolved quite recently. Last Term two Supreme Court decisions expressly followed the *Morgan* view of Congress's power to enforce the Fourteenth and Fifteenth Amendments. *Fullilove v. Klutznick* followed the *Morgan* view that Congress's enforcement power is as broad as the Necessary and Proper Clause.<sup>49</sup> *Fullilove* specifically endorsed the broad power of Congress "in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."<sup>50</sup>

The other case last Term, *City of Rome v. United States*,<sup>51</sup> approved the *Morgan* holding in the context of Congress's equivalent power to enforce the Fifteenth Amendment. *City of Rome* especially illuminates the first rationale of *Morgan*. The case arose from the application of the Voting Rights Act of 1965 to prohibit electoral changes made by the city of Rome, Georgia.<sup>52</sup> There was



evidence that Rome's voting practices had racially discriminatory effects, but no evidence of any discriminatory intent.<sup>53</sup> For purposes of deciding the case, the Supreme Court assumed that the Fifteenth Amendment prohibits only purposeful discrimination and not actions with only discriminatory effects.<sup>54</sup>

Nevertheless, *City of Rome* held that Congress could prohibit Rome's changes in electoral practices. The Court acknowledged that Congress may enforce the Fifteenth Amendment by prohibiting practices that in themselves do not violate the Fifteenth Amendment. The Court required only that the prohibition of actions discriminatory in their effect be an "appropriate" and "proper" means to prevent the "risk of purposeful discrimination."<sup>55</sup> This reasoning builds on the first rationale of the *Morgan* opinion: Congress may strike at a constitutionally proper state action, in order to protect against a risk or likelihood of state infringement of a Fourteenth or Fifteenth Amendment right.

Supreme Court precedents, then, support a prominent role for Congress to enforce the Fourteenth Amendment in ways differing from the courts. Under the first rationale of *Morgan*, Congress was able in the *City of Rome* case to strike down electoral practices that a court could not have struck down without evidence of discriminatory intent. By following the second rationale of *Morgan*, Congress can also interpret the Fourteenth Amendment in ways that a court might not adopt.

Both rationales permit Congress to include unborn children within the protections of the Fourteenth Amendment, without regard to whether the judiciary would find them to be persons. The second rationale allows Congress to liberalize the scope of the term "person" if it has reason to do so. If Congress determines that life begins at conception, or that life possibly begins at conception, this presents a good reason — indeed, a compelling reason — to deem unborn children to be persons. For Congress to examine evidence and draw conclusions on a matter unresolved and unresolvable by the Supreme Court is among the strongest bases imaginable for acting under the second rationale of *Morgan*. If the Fourteenth Amendment primarily enlarges the power of Congress and not the judiciary, then it surely gives Congress power to interpret a matter as to which Congress is competent and the courts are not.

Congress could also take action to extend the Fourteenth Amendment's protection to unborn children under the first rationale of

*Morgan*. Even if Congress leaves undisturbed the *Roe v. Wade* holding that the Fourteenth Amendment protects only post-natal “persons,” Congress can still protect the unborn under this rationale. First, Congress can examine the unanswered question of when life begins. Next, it can reasonably determine that at conception a life has come into being — a specific, individual life in terms of chromosomal structure and many consequential identifying characteristics. This individual life would probably proceed to enjoy the status of “person” with life protected by the Fourteenth Amendment *but for* the act of abortion. Therefore, in order to protect the unborn child against the risk that state action will prevent him or her from enjoying the right to post-natal life guaranteed by the Fourteenth Amendment, Congress may appropriately protect the unborn child’s life between conception and birth. State-supported deprivation of unborn life may not be (for purposes of argument) a violation of the Fourteenth Amendment; but Congress can prohibit it in order to prevent the risk that individuals may be deprived by the state of an opportunity to enjoy a right to post-natal life guaranteed by the Fourteenth Amendment.

This line of reasoning from the first rationale of *Morgan* may appear at first glance too much like a debater’s trick. But a concrete example helps to show the merit in this reasoning. Suppose that a state undertakes a program, in cooperation with expectant mothers, to eliminate a genetically identifiable group that is unwanted — for instance, children with Down’s Syndrome (mongolism), to take an example not far removed from the realm of possibility. Under the holding of *Roe v. Wade*, the Fourteenth Amendment by its own force does not protect unborn mongoloid children. Thus the state might be able to identify all unborn mongoloid children through the use of amniocentesis techniques, and eliminate them by abortion. Could not Congress, then, declare unborn mongoloid children to be human life and persons under the Fourteenth Amendment, in order to protect them against the risk that their right to a life after birth may be deprived by state action?

It is difficult to deny that Congress has power to include unborn children within the scope of the Fourteenth Amendment’s protection of life. For Congress to use this power would represent only a narrow and restrained exercise of Congress’s authority to enforce the Fourteenth Amendment. To define “life” and “person” is only the first and smallest step that must be taken if any branch of the

federal government is rationally to determine what scope of human life falls within the protection of the Fourteenth Amendment. Indeed, in *Morgan* the Court expressed dissatisfaction with the idea of limiting Congress's enforcement power to the "insignificant role" of "merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment."<sup>56</sup> It is an even narrower role for Congress to inform the judiciary of the precise meaning of less general terms such as "life" and "person" in light of contemporary evidence on these matters.

Professor William Cohen has discussed whether Congress has power in "marginal cases" to enlarge the meaning of due process and equal protection, so long as it does not adopt interpretations or applications not reasonably within the scope of the constitutional terms.<sup>57</sup> He observes that Congress has especially solid justification to act on marginal questions of constitutional interpretation when they "involve drawing difficult lines that could best be drawn by legislatures."<sup>58</sup> Congress's power to adopt "arguable" interpretations expanding Fourteenth Amendment rights should not vary, he reasons, simply because the Supreme Court has expressed an opinion on the meaning of the constitutional term at issue: "Obviously, congressional power should neither depend upon whether Congress or the Court was first in the race to cope with the issue, nor vary with the voting breakdown when the Court finishes first."<sup>59</sup> Cohen concludes that theories which limit Congress to interpreting *only* in marginal cases are "not viable" — that Congress's enforcement power, in other words, should extend well *beyond* this narrow realm.<sup>60</sup>

The definition of "life" and "person" involves this sort of interpretation on the "margin." An interpretation of "life" and "person" that includes the unborn could not be held unwarranted by the language of the Fourteenth Amendment; the Constitution does not define either term. The framers of the Fourteenth Amendment did not try to specify concrete definitions of terms that are susceptible to varying interpretations. Instead, they chose "language capable of growth."<sup>61</sup> "Life" and "person" are among the most concrete and particular terms in the Fourteenth Amendment. Yet even these terms permit some degree of interpretation on the margin. Both terms are "capable of growing" to reflect a more liberal view of the scope of human existence.

The task of adjusting the meaning of "life" and "person" to accord

with changing evidence and views of life is properly a task for Congress. Not only is the line between life and non-life a difficult one, more appropriately drawn by the legislature than by the courts; it is also a line that the *Roe v. Wade* opinion itself explicitly declared the courts unable to draw. If Congress draws the line at conception, the courts have no independent basis on which to draw a line different from that drawn by Congress. Under the approach of *Katzenbach v. Morgan*, followed as recently as last Term by the Supreme Court, the Court's prior definition of "person" in *Roe v. Wade* poses no greater barrier to congressional enforcement action than the *Lassiter* holding posed to Congress's nationwide prohibition of literacy tests.

Our review of these Supreme Court precedents has mentioned dissents to the majority view. There is indeed a consistent minority view, first expressed by Justice Harlan's dissent in *Katzenbach v. Morgan*, next developed by Justice Stewart's opinion in *Oregon v. Mitchell*, and most recently espoused last Term by Justice Rehnquist. To arrive at a balanced assessment of the wisdom of congressional action to protect unborn life, we must pay close attention to these dissents as well as to the majority opinions.

The dissenting view emphasizes the distinction between the legislative and the judicial role. Justice Harlan maintained in *Katzenbach v. Morgan* that it was ultimately for the judicial branch to determine the substantive scope of the Fourteenth Amendment.<sup>62</sup> Justice Stewart objected in his *Oregon v. Mitchell* opinion that Congress does not have power to determine the substantive scope and application of the Equal Protection Clause.<sup>63</sup> And in *City of Rome* last Term, Justice Rehnquist argued that Congress cannot "effectively amend the Constitution" by interpreting the Fifteenth Amendment independently and escaping judicial review.<sup>64</sup>

At some points these dissents might be read as saying that Congress has no role whatever in interpreting the Fourteenth Amendment, that Congress is limited to providing remedies after the courts interpret the Amendment and identify violations of it. But the dissents do not go quite that far. Justice Harlan left open a legitimate though limited role for Congress to interpret the substantive scope of the Fourteenth Amendment: "To the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect."<sup>65</sup>

Justice Harlan's view, repeated in essence by Justices Stewart and Rehnquist, is that the judiciary must make the final determination of the constitutional issue in light of the congressional findings of fact. These findings may of course influence the Court, and may change its mind. But Justice Harlan's view requires facts sufficient to justify a new constitutional interpretation, not just sufficient to afford some slight rational basis to Congress's interpretation of Fourteenth Amendment terms.

In *Oregon v. Mitchell* it is safe to say that Congress could not provide facts sufficient to convince Justice Harlan or Justice Stewart that the 21-year-old voting age requirement violated the Equal Protection Clause.<sup>66</sup> Similarly in *City of Rome*, Congress came forth with no evidence to persuade Justice Rehnquist that the city had done anything in violation of the Fifteenth Amendment.<sup>67</sup> But in *South Carolina v. Katzenbach* Congress had set forth voluminous findings of fact that persuaded Justices Harlan and Stewart — among others — that literacy tests in some areas did violate the Fifteenth Amendment.<sup>68</sup> Similar evidence convinced both justices again in *Oregon v. Mitchell* that Congress could strike down all literacy tests because they were thought to be discriminatory, despite the *Lassiter* holding.

Justice Harlan's recognition of a congressional role in this area is based on his observation that "questions of equal protection and due process are based not on abstract logic, but on empirical foundations."<sup>69</sup> How strongly Congress will influence the Court by legislative fact-finding depends on the relative competence of Congress and the courts to decide the particular empirical question. Both Justice Harlan and Justice Stewart recognized some matters on which Congress was at least as competent as the courts to express an opinion. For such matters these justices not only held that Congress has power to declare its views, but also held that the courts should give great deference to Congress.

Justice Harlan, writing for the Court in *Glidden Co. v. Zdanok*,<sup>70</sup> allowed a congressional declaration to overturn two earlier Supreme Court decisions on a matter of constitutional interpretation. The earlier decisions had held that the United States Court of Claims and the United States Court of Customs and Patent Appeals were courts created under Article I rather than Article III of the Constitution.<sup>71</sup> Subsequent to those decisions, Congress examined

the historical evidence surrounding the creation of the two courts, and declared that they were created under Article III.

Justice Harlan's opinion in the *Glidden* case acknowledged Congress's competence to declare its views on this matter, even though the issue was one of "constitutional dimension" rather than statutory construction.<sup>72</sup> Deferring to Congress's declaration, Justice Harlan refused to follow the two earlier decisions because at the time they were decided, "the Court did not have the benefit of this congressional understanding."<sup>73</sup> To allow Congress to change the Court's mind did not violate Justice Harlan's theory of the judicial and legislative roles: "To give due weight to these congressional declarations is not of course to compromise the authority or responsibility of this Court as the ultimate expositor of the Constitution."<sup>74</sup>

Justice Stewart has endorsed the power of Congress to declare its interpretation of terms in the Thirteenth Amendment. This Amendment, which prohibits slavery and involuntary servitude, confers on Congress an enforcement power parallel to that conferred by the Fourteenth and Fifteenth Amendments.<sup>75</sup> Justice Stewart's opinion for the Court in *Jones v. Alfred H. Mayer Co.*<sup>76</sup> allowed Congress to enforce the Thirteenth Amendment by broadening the scope of its prohibitions to include particular acts of racial discrimination, on grounds that they are "badges and incidents" of slavery.<sup>77</sup> So long as its determinations are rational, Congress has authority to "determine what are the badges and the incidents of slavery" and to "translate that determination into effective legislation."<sup>78</sup>

The *Jones* decision had been accepted as binding precedent by all the justices, whether they take the broad or the narrow view of Congress's power to enforce the Civil War Amendments. In *Runyon v. McCrary*,<sup>79</sup> the justices disagreed over how far to extend *Jones*, but all the opinions in that case accepted *Jones* as binding precedent.<sup>80</sup> Last Term in a concurring opinion to *Fullilove v. Klutznick*, Justice Powell relied on *Jones* to show that Congress is competent to decide what types of racial discrimination come within the scope of the prohibitions of the Civil War Amendments.<sup>81</sup>

*Jones* establishes that Congress has some role in interpreting terms of the Thirteenth, Fourteenth and Fifteenth Amendments. Terms such as "slavery," "involuntary servitude," "life," and "person," are more concrete and particular than open-ended phrases such as "due process" and "equal protection." Yet even the more

concrete terms admit of some ambiguities. In areas of ambiguity Congress may give these terms a broader scope than the Supreme Court has given them. Thus *Jones* supports Congress's authority to interpret "on the margin," as the *least* that Congress is empowered to do in enforcing the Civil War amendments.

Our discussion has already shown that the scope of "life" and "person" is an appropriate matter for Congress to interpret on the margin, in light of a determination of when life begins. For Congress to inform the courts of its determination of when life begins is appropriate under Justice Harlan's view of proper judicial and legislative roles. Indeed, a matter on which Congress is competent to decide and the courts are not is the most appropriate of all circumstances for Congress to express its judgment and for the courts to defer to Congress. Concerning such matters Justice Harlan has said: "I fully agree that judgments of the sort involved here are beyond the constitutional competence and constitutional authority of the judiciary . . . They are pre-eminently matters for legislative discretion, with judicial review, if it exists at all, reasonably limited."<sup>82</sup>

Because the question of when life begins is a matter for legislative discretion, and because the courts are not competent to resolve this matter, the courts should exercise great deference in reviewing any congressional declaration that the Fourteenth Amendment shall include unborn human persons in its protection of life against state action. Such deference would not compromise the Supreme Court's role as ultimate arbiter of the Constitution; it would simply comport with judicial limitations already recognized in *Roe v. Wade*. Thus, whether the Court follows the standard of the *Morgan* majority, or the stricter review standard of the minority, the result in this case is the same: the Supreme Court's interpretation of "person" in *Roe v. Wade* does not bar Congress from taking a different view based on its determination that human life begins or is likely to begin at conception.

When Congress has greater competence than the courts, Congress *should* take the lead in defining the content of Fourteenth Amendment rights.<sup>83</sup> Had Congress done so more frequently in the past, it could have alleviated some of the most troubling institutional problems in constitutional interpretation. For example, the Supreme Court's decision in *Brown v. Board of Education*<sup>84</sup> produced a result widely applauded today, but doubts still remain about the propriety of the Supreme Court's making the sociological judgments involved

in that decision. What if Congress had taken the lead to enforce the Fourteenth Amendment by declaring its judgment, based on legislative fact-finding, that separate schooling is inherently unequal and contrary to the Equal Protection Clause? Such action could have placed the issue in the branch of government best suited to resolve it. And would we really want to argue that the Supreme Court's endorsement of "separate but equal" in *Plessy v. Ferguson*<sup>85</sup> would have barred such action by Congress?

### III. Possible Objections to a Human Life Statute

Our examination of Supreme Court opinions, both majority and dissenting, suggests that Congress does have power to enforce the Fourteenth Amendment by enacting a statute similar to that set forth at the beginning of this article. There are additional arguments, however, that might be raised against such a statute. Several of them deserve close attention, though none is persuasive.

First, it might be argued that the same divergence of views that persuaded the Court in *Roe v. Wade* not to decide when life begins, also makes it impossible for Congress rationally to arrive at an answer. The crucial point, however, is that Congress does not need to be *certain* of an answer before it declares a national policy on when human life begins.

Throughout the cases on Congress's enforcement power, the Supreme Court has held that Congress need only predicate its action on a *danger* to Fourteenth or Fifteenth Amendment rights, on a *likelihood* that particular circumstances might constitute a violation of protected rights. *South Carolina v. Katzenbach* allowed Congress to strike down South Carolina's literacy test even though the record contained no evidence that South Carolina had applied its voter qualification tests in any discriminatory way.<sup>86</sup> Sufficient for the Court was Congress's inference from various facts that South Carolina *might* use its literacy test to discriminate.<sup>87</sup> In *Katzenbach v. Morgan* as well, there was no certainty that disenfranchisement of Puerto Ricans would deprive them of equal provision of government services; the mere likelihood of deprivation of rights was enough.<sup>88</sup> Last Term the *City of Rome* decision allowed Congress to prevent electoral changes that created only "the *risk* of purposeful discrimination."<sup>89</sup> In order to define the unborn as persons, therefore, Congress need only find a likelihood that life begins at conception.



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This standard makes perfectly good sense. If Congress discerns a likelihood or possibility that human life may be endangered by state action, it should certainly be able to take immediate action, rather than wait until the state of knowledge advances to the point that we can say for certain that it really is human life that we have been eliminating. Congress has often taken action to protect life when the uncertainties were at least as great as in the matter of abortions. Regulating the use of new, relatively untested drugs, regulating or refusing to regulate the use of tobacco, requiring passive restraint devices in cars — all such actions involve a calculation of the risk that human life will be lost without federal action, combined with a rough weighing of how much we value the possible risk of loss of human life. In all these decisions the protection of life conflicts with the convenience of many people. Sometimes, as for instance with drugs, the protection of persons from possible harmful effects conflicts directly with the grave medical needs of other persons. Decisions related to possible risks to human life are not only appropriate for Congress, they are far *more* appropriate for Congress than for the courts.

Second, it might be argued that Congress may not decide anything about the beginnings of life because the issue is inherently religious. To enact a statute for purely religious reasons, the argument goes, is to violate the Establishment Clause of the First Amendment. Professor Tribe advanced this argument in 1973 in an attempt to provide a rationale for *Roe v. Wade*.<sup>90</sup> Even if the argument were good constitutional law, it is by no means clear that it would properly apply to the issue of abortion. Certainly one does not have to hold any religious beliefs in order to be able to examine biological evidence on the development of unborn children — or to look at an aborted child — and conclude that the unborn are likely to be human life.

The argument fails even more decisively as a general rule of constitutional law. Professor Tribe himself subsequently retracted it as a rationale for the abortion cases, recognizing that it would impede the free expression of religious beliefs in the political arena.<sup>91</sup> Finally, the Supreme Court settled the issue last Term when it ruled that legislation related to abortions does not violate the Establishment Clause just because it “happens to coincide or harmonize with the tenets of some or all religions.”<sup>92</sup>

Third, one might argue that no branch of government should

decide when life begins or decide whether abortions are acceptable; these decisions should instead be left to private individuals. For a court to espouse this view, however, *would* represent a decision as to when life begins. No society that values human life could permit private individuals to have the final say on the taking of innocent life. A court that rules out any role for Congress, the executive and the judiciary in protecting the unborn cannot pretend to be taking a neutral stand. If no branch of the government decides that the unborn are worth protecting, then the government implicitly decides that they are *not* human life. Since a decision must inevitably be made, the real question is which branch of government should make the decision. The answer to this question, as we have already seen, is the Congress.

A fourth argument against congressional action on this issue might proceed from the so-called "ratchet theory." Justice Brennan's opinion for the Court in *Katzenbach v. Morgan* set up a ratchet-like standard: Congress may expand Fourteenth Amendment rights but not restrict them. The enforcement clause of each Civil War amendment, under this theory, "does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.'"<sup>93</sup> The Court did not explain why Congress is so limited, except to assert: "We emphasize that Congress's power under § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."<sup>94</sup>

Some congressional actions to enforce Fourteenth Amendment protection for unborn children might be thought to run afoul of the ratchet theory by abrogating the right to privacy.<sup>95</sup> The most simple and straightforward action Congress could take in this area, however, would not present this difficulty. Congress could simply declare that "life" is deemed to commence at conception and that "person" includes all human life, for purposes of the Fourteenth Amendment's protection of life. In effect the Fourteenth Amendment would then read: no state shall deprive any person (including unborn children) of life (which begins at conception) . . . without due process of law.

By its terms this type of legislation would bring about an *expansion* of Fourteenth Amendment rights. Such legislation would exert a collateral effect on the right to privacy, but it would not abrogate or infringe that right as the Supreme Court has interpreted it. Con-

gress's action would impose limits only on what *states* may do — it would limit the ability of states to perform abortions in institutions owned or operated by states and their subdivisions, and it would restrict funding of abortions by states. The Supreme Court has already held, however, that statutory limitations on government funding of abortion do *not* infringe the right to privacy.<sup>96</sup> The privacy right to “terminate a pregnancy” does not require the government to fund or provide any abortions.<sup>97</sup> Thus a statute such as the one proposed here, preventing states from continuing to fund abortions, does not abrogate or infringe the right to privacy. Such legislation would not prevent women from obtaining abortions, since privately performed abortions are not state action. While it can be debated whether Congress *may* reach private action as well as state action when it enforces the Fourteenth Amendment,<sup>98</sup> it is clear that both the Fourteenth Amendment and the statute suggested here, by their direct terms, apply only to state action and not to private acts of abortion.

It is true, of course, that the suggested statute would create a situation in which states have a compelling state interest in the protection of unborn life, sufficient to justify anti-abortion statutes should states choose to enact them. Once the unborn child's status as human life and as a person is established by a branch of the government exercising power to enforce the Fourteenth Amendment, the states then have a constitutional standard of “life” and “person” to which they can refer. As the Supreme Court acknowledged in *Roe v. Wade*, the state then has a valid interest in protecting unborn life, and any challenge to a state's anti-abortion statute collapses.<sup>99</sup>

To create a situation in which states have a compelling interest in protecting human life, however, would not constitute an abrogation of the right to privacy by Congress. Any state might then choose to protect the unborn child's life at the expense of the right to privacy, but no state would be compelled by Congress's action to do so. In effect, the proposed statute would make it clear that the privacy right to “terminate a pregnancy” conflicts with the life of the unborn child. This is not in itself a contraction of rights, but merely a recognition of reality. The fact is that the decision to abort an unborn child *does* conflict with the life of the unborn child. If the Supreme Court chooses to recognize a right to privacy in deciding whether to “terminate a pregnancy,” and Congress decides that

human life begins at conception, then of course the right to privacy will conflict with the right to life.

Some supporters of *Roe v. Wade* have acknowledged the underlying conflict between the two rights, and have recognized that the real constitutional issue comes down to a choice between them. Justice Douglas observed: "The interests of the mother and the fetus are opposed. On which side should the State throw its weight?"<sup>100</sup> In *Roe v. Wade*, however, the Court did not face the choice between these rights, because it refused to decide when life begins. Once Congress decides that life begins at conception, or is likely to begin at conception, the basic choice is squarely presented. The choice, whichever branch of government makes it, should not depend on the fortuity of which branch was first in the race to express its opinion.<sup>101</sup> Instead, the choice should turn on whether the life of the unborn child is more important than the right of the mother to decide whether or not to terminate her pregnancy. The proposed statute leaves this choice to the states, informed by Congress's judgment that unborn children are human life and human persons.

Whether the choice between these rights is eventually made by state legislatures, by Congress, or by courts, the fact remains that the statute suggested here does nothing more than expand the Fourteenth Amendment's protection of life to make it clear that indeed we do face a conflict of rights. A contraction of the scope of life under the Amendment — by congressional or judicial action — would of course be grounds for the utmost concern. But an *expansion* threatens only to err on the side of compassion and justice, as Senator Hatfield has well remarked: "It is difficult to bring to mind an advocate of justice whom history has condemned for a too 'liberal' view of the range of human life and personhood."<sup>102</sup>

A fifth possible objection to this statute is the argument that Congress may not delegate its power to the states. Congress does have unquestionable authority, however, to take many actions within its delegated powers, which indirectly result in giving the states powers they would not otherwise possess. Cases arising from the Commerce Clause provide an example. Such cases arise typically after the Supreme Court has declared a state unable to regulate a particular type of commerce because of the need for national uniformity. Congress then passes a statute declaring the particular subject matter to be of the type that states *may* regulate. As a result of the statute, the state can exert a power from which it otherwise

would be foreclosed. The Supreme Court interprets this not as Congress delegating its power, but rather as Congress removing an obstacle to the state's exercise of its constitutional powers.<sup>103</sup>

In the area of abortions, the state's exercise of its police power to protect health and safety is blocked by an obstacle consisting of the lack of any compelling state interest for outlawing abortions. This obstacle exists only because neither the state nor the courts in *Roe v. Wade* were competent to define when human life begins. Once Congress performs this task under its Fourteenth Amendment power, no obstacle any longer exists to prevent the state from exerting its police power. Congress has not delegated any of its power — the police power was not its to delegate in the first place — but it has removed an obstacle to state exercise of a state power, just as in the Commerce Clause cases. This result is fully consistent with precedent. Congress and the states “were not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion.”<sup>104</sup>

As a sixth objection, it might be argued that a mere declaration is not appropriate action to enforce the Fourteenth Amendment. But Congress may indeed choose to achieve its ends by declaration. It need not exert the full scope of its available power to enforce declared rights directly; it can leave implementation instead to the courts through the institution of legal action by other parties. For example, Section 10 of the Voting Rights Act of 1965 merely declared Congress's belief that poll taxes violate the Constitution. Congress did not require states to discontinue the use of poll taxes, but instead left implementation to the courts and authorized the Attorney General to file suits as appropriate.<sup>105</sup>

Congress has good reason to act by declaration without further enforcement in the matter of protecting unborn life under the Fourteenth Amendment. The only reason that many states are today depriving unborn children of life — by funding or providing abortions on demand — is that no branch of government has successfully defined when life begins. Once Congress declares that life is deemed to commence at conception, one can reasonably expect many states not only to halt state action that deprives the unborn of life, but also to invoke the compelling state interest in the protection of unborn persons, in order to prohibit private abortions.

It is appropriate, therefore, for Congress initially to trust the good

faith of the states to implement a congressional declaration that "person" and "life" include the unborn. Congress could well choose to delay any further enforcement action until it sees the extent of state compliance. Such a restrained action by Congress is well within Congress's discretion to decide "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."<sup>106</sup>

The reasonableness of such action can perhaps best be seen by leaving the issue of abortion for a moment to consider a hypothetical. Suppose a federal court were to repeat the holding of *Dred Scott* today and decide that members of the black race do not have rights enforceable in court. Would it be unreasonable for Congress simply to declare that blacks are persons under the Fourteenth Amendment? Congress would not *have* to take specific measures to insure state compliance; it could simply assume that the states will act in good faith once the judicially-created obstacle to justice is removed.

That Congress chooses not to use the full scope of its powers against a perceived constitutional violation does not in any way undermine the validity of a declaratory statute. It might be argued that the proposed statute is irrational because it defines life and person for purposes of protection of life by the Fourteenth Amendment's Due Process Clause, but not for purposes of the Equal Protection Clause or the protection of liberty and property in the Due Process Clause. Congress does have power, though, to act in piecemeal fashion. On the issue of abortion it may be especially appropriate to do so.

Imagine this problem from the perspective of a Congressman who believes there is a likelihood that life begins at conception, but who is not certain. He might not see any urgent need to protect property and liberty rights which the unborn child cannot yet enjoy and which do not have the same paramount importance as the right to life. Further, the Congressman might not wish to extend to unborn children a guarantee of equal protection, which has no concrete meaning and will turn out to mean whatever the courts say it means. On the other hand, his perception that unborn children are likely to be human life becomes a much more compelling and urgent guide for public policy when the issue is the protection of life itself. Any legislator might rationally decide to protect against the risk that a human being may be deprived of life, even while refusing to protect immediately against an equal risk that a human being may be

deprived of other rights. Further, he might choose to protect unborn children from state action under the Fourteenth Amendment, before addressing the issue of protection under the Fifth Amendment against federal governmental action.<sup>107</sup> In choosing this approach, the legislator would find firm support in statements by the Supreme Court that “a statute is not invalid under the Constitution because it might have gone farther than it did,”<sup>108</sup> that a legislature need not “strike at all evils at the same time,”<sup>109</sup> and that “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”<sup>110</sup>

#### IV. Conclusion

All the constitutional considerations suggest that Congress would be well within the bounds of its authority were it to pass a Fourteenth Amendment enforcement statute defining “person” and “life” to include the unborn. The relative competence of the courts and Congress to decide when life begins suggests that Congress not only *can* do this, but *should*. It is because of the courts’ limitations as fact-finders and policy-makers that they have left the nation without any answer to the question of when life begins. Since Congress does not share these limitations, it is positioned to fill this gap by serving as the proper institution to reflect and express society’s answer to this question. By taking this initiative Congress could put an end to the great anomaly of our country’s abortion policy since *Roe v. Wade*, a national policy founded on a non-answer to the most fundamental question underlying *any* abortion policy.

We should not delude ourselves, however, that the constitutional merit of such legislation assures its survival in the courts. For the past decade federal judges have not been noted for their reluctance to stretch the law in favor of abortions. Better than a statute would be an amendment to insure that our Constitution recognizes the unborn as human life.

Even an ironclad guarantee of status for the unborn as human persons, however, would not be foolproof protection against judges who are not committed to the idea that the worth of innocent human life is inviolable. One court, for instance, was willing to accept a legislative definition of unborn children as human beings, but nevertheless concluded that the state does not have a strong interest in protecting unborn human life. The court argued quite openly that “population growth must be restricted, not enhanced

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and thus the state interest in pronatalist statutes such as these is limited.”<sup>111</sup> The same judge was willing to belittle the worth of human life in “a fetus likely to be born a mental or physical cripple.”<sup>112</sup>

For a judge who employs such reasoning and refuses to acknowledge the equal worth of all human life, it is just as easy to circumvent a constitutional amendment as a statute declaring the unborn to be human. That is one good reason to insure that federal judges are men and women who either respect the limitations of the judicial role enough to refrain from imposing their views of population control or eugenics on the rest of us. At the same time we should not delay in enacting whatever legislation is within Congress’s constitutional powers, to protect the lives of the unborn. Although we cannot hope to cure at once all the mischief caused by courts in the area of abortions, we must at least take those actions that currently lie within our power.

NOTES

1. 410 U. S. 113 (1973). For a critique of the Court’s reasoning by a commentator not opposed to abortions, see Ely, “The Wages of Crying Wolf: A Comment on *Roe v. Wade*,” 82 *Yale L.J.* 920 (1973) (Reprinted in *The Human Life Review*, Vol. I, no. 1, Winter 1975). A stinging attack on the widespread taking of unborn life since *Roe v. Wade* has been delivered by the co-founder of the National Association for Repeal of Abortion Laws (now the National Abortion Rights Action League), see B. Nathanson, *Aborting America* (1979).
2. “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” The Declaration of Independence.
3. See *Roe v. Wade*, 410 U. S. at 157-58.
4. *Id.* at 162.
5. *Id.* at 152-54.
6. *Id.* at 156-57.
7. *Id.* at 160.
8. *Id.* at 159.
9. U. S. Const., amend. XIV, § 5.
10. *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948).
11. *Id.* The “dominant considerations” in the political question doctrine are “the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination.” *Coleman v. Miller*, 307 U. S. 433, 454-55 (1939).
12. *Baker v. Carr*, 369 U. S. 186, 217 (1962).
13. *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948).
14. Clark, “Religion, Morality, and Abortion: A Constitutional Appraisal,” 2 *Loyola U. of L. A. L. Rev.* 1, 9 (1969).
15. *Harris v. McRae*, 100 S. Ct. 2671, 2692 (1980).
16. See, e. g., *Gulf, C. & S. F. Ry. v. Ellis*, 165 U. S. 150, 154 (1897).
17. Cong. Globe, 39th Cong., 1st Sess. 1089 (1866) (statement of Cong. Bingham).
18. Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard). See also Cincinnati Commercial, Aug. 27, 1866, at 1, col. 3 (address of Cong. Bingham at Bowerstown, Ohio, Aug. 24, 1866).
19. See, e. g., 12 Transactions of A. M. A. 73-77 (1859). See J. Mohr, *Abortion in America: The*



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*Origins and Evolution of National Policy, 1800-1900*, at 165 (1978); J. Noonan, *A Private Choice: Abortion in America in the Seventies*, 52 (1979) (quoting minutes of A. M. A. annual meeting of 1859).

20. The Fifteenth Amendment provides:

“Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

“Section 2. The Congress shall have power to enforce this article by appropriate legislation.”

21. See *Fullilove v. Klutznick*, 100 S. Ct. 2758, 2774 (1980); *City of Rome v. United States*, 100 S. Ct. 1548, 1578 n.1 (1980) (Rehnquist, J. dissenting); *United States v. Guest*, 383 U. S. 745, 784 (1966) (opinion of Brennan, J.).

22. 360 U. S. 45 (1959).

23. See *id.* at 50-53. Appellant also raised a Seventeenth Amendment argument against the literacy test, with equal lack of success. See *id.* at 46, 50.

24. *Id.* at 51.

25. See *id.* at 50, 53.

26. See 42 U. S. C. § 1973b(a)-(d) (1976). Most of the areas covered by this formula turned out to be in the South. The *Lassiter* case also involved a southern state, North Carolina.

27. 383 U. S. 301 (1966).

28. See *id.* at 310-15, 333-34.

29. See *id.* at 329.

30. See *id.* at 333-34.

31. See *City of Rome v. United States*, 100 S. Ct. 1548, 1561 (1980). See also *id.* at 1575 (Powell, J., dissenting).

32. See 42 U. S. C. § 1973b(e) (1976). Although the section speaks generally of American flag schools teaching in languages other than English, it refers in effect to Puerto Rican schools. The state that used a literacy test to exclude graduates of such schools was New York.

33. Because Section 4(e) was introduced as an amendment to the Voting Rights Act on the floor of the Senate, it was debated only briefly and was not considered in congressional hearings. See 111 Cong. Rec. 11027-28, 11068-74 (1965).

34. 384 U. S. 641 (1966).

35. *Id.* at 649 (emphasis added).

36. U. S. Const., art. I, § 8.

37. See *Katzenbach v. Morgan*, 384 U. S. at 650-53.

38. See *id.* at 652-53.

39. See *id.* at 653-56.

40. *Id.* at 656 (emphasis added).

41. See *id.* at 650-51.

42. See *id.* at 648 & n. 7. “It is the power of Congress which has been enlarged.” *Id.* at 648 (quoting *Ex parte Virginia*, 100 U. S. 339, 345, 1880).

43. See, e. g., Cox, “The Supreme Court 1965 Term, Foreward: Constitutional Adjudication and the Promotion of Human Rights,” 80 Harv. L. Rev. 91, 106-07 (1966); Burt, “Miranda and Title II: A Morganatic Marriage,” 1969 Sup. Ct. Rev. 81, 81.

44. Pub. L. No. 91-285, 84 Stat. 314, 318 (1970).

45. 400 U. S. 112 (1970).

46. See *Oregon v. Mitchell*, 400 U. S. 112, 216 (1970) (opinion of Harlan, J.).

47. See *id.* at 131-34 (opinion of Black, J.); *id.* at 147 (opinion of Douglas, J.); *id.* at 233-36 (opinion of Brennan, White, & Marshall, J. J.); *id.* at 282-84 (opinion of Stewart & Blackmun, J. J., and Burger, C. J.). See also *Gaston County v. United States*, 395 U. S. 285 (1969).

48. *Oregon v. Mitchell*, 400 U. S. at 240 (opinion of Brennan, White, & Marshall, J. J.).

49. 100 S. Ct. 2758, 2774 (1980).

50. *Id.* (quoting *Katzenbach v. Morgan*, 384 U. S. at 651).

51. 100 S. Ct. 1548 (1980).

52. See *id.* at 1553-54.

53. See *id.* at 1559.

54. See *id.* at 1560.

55. *Id.* at 1562.

56. *Katzenbach v. Morgan*, 384 U. S. at 649.

57. Cohen, “Congressional Power to Interpret Due Process and Equal Protection,” 27 Stan. L. Rev. 603, 618-19 (1975). Another commentator describes this congressional role as “interpretive filling-out

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- of the underlying constitutional guarantee." Monaghan, "The Supreme Court 1974 Term, Foreword: Constitutional Common Law," 89 Harv. L. Rev. 1, 23 (1975).
58. *Id.* at 619.
59. *Id.*
60. See *id.* at 620.
61. See Bickel, "The Original Understanding and the Segregation Decision," 69 Harv. L. Rev. 1, 63 (1955).
62. See *Katzenbach v. Morgan*, 384 U. S. at 667-68 (Harlan, J., dissenting).
63. See *Oregon v. Mitchell*, 400 U. S. at 295-96 (opinion of Stewart, J. & Burger, C. J.).
64. See *City of Rome v. United States*, 100 S. Ct. at 1577-79, 1584-85 (Rehnquist, J., dissenting).
65. *Katzenbach v. Morgan*, 384 U. S. at 668 (Harlan, J., dissenting).
66. See *Oregon v. Mitchell*, 500 U. S. at 205-07 (opinion of Harlan, J.); *id.* at 294 (opinion of Stewart, J.).
67. See *City of Rome v. United States*, 100 S. Ct. at 1581 (Rehnquist, J., dissenting).
68. Justice Harlan discussed the relevance of this evidence to the constitutional determination in his later *Morgan* dissent. See 384 U. S. at 667-68 (Harlan, J., dissenting).
69. *Katzenbach v. Morgan*, 384 U. S. at 668 (Harlan, J., dissenting).
70. 370 U. S. 530 (1962).
71. See *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929); *Williams v. United States*, 289 U. S. 553 (1933).
72. See *Glidden Co. v. Zdanok*, 370 U. S. at 536-37, 541-43.
73. *Id.* at 542.
74. *Id.* at 542-3.
75. The Thirteenth Amendment reads as follows:  
"Section 1. Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.  
"Section 2. Congress shall have power to enforce this article by appropriate legislation."
76. 392 U. S. 409 (1968).
77. See *id.* at 440-41.
78. *Id.* at 440.
79. 427 U. S. 160 (1976).
80. See *id.* at 170 (opinion of the Court); *id.* at 186-87 (Powell, J., concurring); *id.* at 189-91 (Stevens, J., concurring); *id.* at 208 n. 13 (White, J., joined by Rehnquist, J., dissenting).
81. See *Fullilove v. Klutznick*, 100 S. Ct. at 2786 (Powell, J., concurring).
82. *Oregon v. Mitchell*, 400 U. S. at 206-07 (opinion of Harlan, J.).
83. There are, of course, areas of constitutional interpretation apart from the Civil War amendments in which Congress has taken the lead and the courts have followed. One recurring example is found when Congress differs from the Supreme Court in interpreting the extent to which the Commerce Clause prohibits certain kinds of state regulation or taxation. See, e. g., *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408, 423 (1946). Compare *Leisy v. Hardin*, 135 U. S. 100 (1890) with *In re Rahrer*, 140 U. S. 545 (1891).
84. 347 U. S. 483 (1954).
85. 163 U. S. 537 (1896).
86. See Cox, "The Role of Congress in Constitutional Determinations," 40 U. Cin. L. Rev. 199, 227 n. 100 (1971).
87. See *South Carolina v. Katzenbach* 383 U. S. at 326.
88. See 384 U. S. at 652-53.
89. 100 S. Ct. at 1562 (emphasis added).
90. See L. Tribe, "The Supreme Court, 1972 Term, Foreword: Toward a Model of Roles in the Due Process of Life and Law," 87 Harv. L. Rev., 1, 18-25 (1973).
91. See L. Tribe, *American Constitutional Law* 928 (1978).
92. *Harris v. McRae*, 100 S. Ct. 2671, 2689 (1980) (quoting *McGowan v. Maryland*, 366 U. S. 420, 442 (1961)).
93. *Katzenbach v. Morgan*, 384 U. S. at 651 n. 10.
94. *Id.*
95. For example, if Congress enacted a federal criminal statute to prohibit abortion, its action would collide with the right to privacy. On one occasion Congress has taken action arguably contrary to the ratchet theory. In the Omnibus Crime Control and Prevention Act of 1967, Congress differed from the

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Supreme Court's view that police interrogation of a person in their custody is inherently coercive. See S. Rep. No. 1097, 90th Cong. 2d Sess. 60-61 (1968). The Supreme Court has not reviewed this provision.

96. See *Harris v. McRae*, 100 S. Ct. 2671, 2685-89 (1980).

97. See *id.* at 2688-89.

98. See *United States v. Guest*, 383 U. S. 745 (1966); Frantz, "Congressional Power to Enforce the Fourteenth Amendment Against Private Acts," 73 Yale L. J. 1353 (1964).

99. See *Roe v. Wade*, 410 U. S. at 156-57.

100. *United States v. Vuitch*, 402 U. S. 62, 80 (1971) (Douglas, J., dissenting in part).

101. See Cohen, *supra* note 59 and accompanying text.

102. *Proposed Amendments to the U. S. Constitution to Protect Unborn Children: Hearings on S. J. Res. 119 & S. J. Res. 130 Before the Subcomm. on Constitutional Amendments of the Senate Judiciary Comm.*, 93d Cong., 2d Sess., pt. 1, at 6 (1974) (statement of Sen. Hatfield).

103. See *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408 (1946).

104. *Id.* at 439. See generally Koenig, "Federal and State Cooperation Under the Constitution," 36 Mich. L. Rev. 752 (1938).

105. See 42 U. S. C. § 1973h (1976).

106. *Katzenbach v. Morgan*, 384 U. S. at 651.

107. The Fifth Amendment does not confer power on Congress to enforce its terms, but Congress may well have power to influence judicial interpretations of the Fifth Amendment's protection of life by informing the judiciary of its view on the beginnings of life.

108. *Roschen v. Ward*, 279 U. S. 337, 339 (1929), quoted in *Katzenbach v. Morgan*, 384 U. S. at 657.

109. *Semler v. Oregon State Board of Dental Examiners*, 294 U. S. 608, 610 (1935), quoted in *Katzenbach v. Morgan*, 384 U. S. at 657.

110. *Williamson v. Lee Optical Co.*, 348 U. S. 483, 489 (1955), quoted in *Katzenbach v. Morgan*, 384 U. S. at 657.

111. *Abele v. Markle*, 342 F. Supp. 800, 803-04 (D. Conn. 1972) (three-judge-court).

112. *Id.* at 804.

# Fertility and National Power

Col. Robert de Marcellus

**N**ATIONAL POWER IS often defined in terms of men, money and material resources. In the past, the strength of Western nations has usually rested on all three, but today the low fertility of the West's industrialized nations foreshadows a rapid decline in manpower which will make difficult the manning of armies without the impairment of industrial potential; supporting a vastly larger number of aged citizens will deeply cut defense and Research and Development (R & D) budgets; economic growth will slow, and many areas of technological development, such as any future space programs, will be severely limited.

The implications of current demographic trends have not yet been widely recognized by either the public or government, in part because of the great publicity given to the *opposite* demographic problems of the developing world. There, the introduction of modern medicine and sanitation greatly extended life expectancy, causing the doubling-up of generations and the much-discussed "population explosion." Undoubtedly the lack of historical experience that the United States has had with stable, declining, or vanishing populations is also a reason for our seeming blindness to the danger now facing us.

Unfortunately, our official and semi-official bodies as well as the press mostly speak in terms of *world* demography, a "world population explosion," thus obscuring the fact that if current fertility trends in the West continue, Western nations will instead suffer within a few decades a population *implosion*, and a radical loss of power. Some of the misunderstanding concerning demographic trends in Western nations must also be attributed to the vested interests of groups that have for many years crusaded for lower birth rates.

Any appraisal of Western power in terms of demographic trends is indeed bleak. Every major industrial nation of the Western world is failing to reproduce its current population. To remain at a stable

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population over the long term, the so-called "Zero Population Growth" (ZPG), a nation must achieve a fertility rate of approximately 2.1 children per woman. This replaces the parents, plus a fraction to make up for children who die without progeny. In the West today, neither the United States nor any of its major allies has a fertility rate that high. Western Germany has approximately 1.4, Scandinavia 1.7, Britain, France, Japan, and the U. S. 1.8. The implications of these fertility figures are frightening. They mean, for instance, that West Germany (our principal NATO ally), with no *further* decline (but the rate dropped again this year), will not only lose 25% of its population at each twenty-year generation, but also must divert an increasing proportion of dwindling national capability to support a burgeoning number of retired elderly. If current trends continue, West Germans, numbering some 61 million today, will number only 52 million in 20 years, and only 35 million in 2030. Our other NATO allies will also suffer debilitating losses of population and a constant growth in the number of elderly, at only a slightly slower rate.

For the United States, not only is the problem facing the nation as a whole critical, but an analysis of the United States population by minority groups shows that many of the most productive and creative segments of our population are already in a demographic position as critical as West Germany's. For example, the so called "WASP" (White Anglo-Saxon Protestant) shows a fertility rate of about 1.5, while the American Jewish community's fertility is almost as low as West Germany's (and thus on the road to demographic extinction). Reflection on the immense scientific, artistic, financial and commercial contribution of this community to the U. S. during the past century underscores the critical loss involved. Other minorities in our population that have hitherto maintained a higher fertility than that of the WASP and Jew, such as American Catholics and blacks, show a rapid decline as they adopt the values of their WASP and Jewish neighbors.

The future fertility of our nation and its major allies, then, must be of paramount concern to those planning Western security for the opening decades of the next century. The men and women who, during that period, will man our armies, form our economic and industrial base, and pay for the support of today's working population must be born in the next decade. Present indications are that Western fertility will certainly not increase and may very well con-

tinue to decrease, unless public policy changes. Avowedly, projecting fertility and population size is a hazardous undertaking. Some reputable demographers still profess to see an upturn in fertility ahead. However, given the long-term historical down-trend of Western fertility and today's economic and social environment, one must assume that the future of Western fertility is not promising.

The drop in Western fertility has been hidden until now by several factors. First, even though our fertility has fallen far below the replacement level, our overall population will continue to increase for several decades due to the increase in life expectancy and the large "hump" of population with a number of years still to live. Second, the popular press has been filled with predictions of standing-room-only population because many writers and misinformed VIP's have projected *past* population growth as a straight line projection into the future, regardless of fertility trends. Manifestly, a nation whose fertility is far below the replacement level cannot replace present generations, let alone increase, in the long term. Thirdly, the difference between birth rate and "fertility" is not fully understood. Birth rate is the number of children born per unit of population in a period of time. Fertility is the number of children born to each woman in her life time. If, for example, the daughters born in the "baby boom" each had a child this year, in the long-heralded but not forthcoming "ripple effect," a great upsurge in the birth rate would result for this year. However, if these mothers never bore any more children, the long-term fertility would be 1, and the population would halve itself at the next generation.

Estimates of our population growth during the last 20 years have always erred on the side of overestimation. Past Census Bureau projections have pictured an exceedingly fast growth. This is because the Bureau's figures are what their name implies — projections, not predictions. For this reason transient factors such as the post-war baby boom were projected by the Bureau in 1963 to population forecasts of 259 million by 1980. Today, these projections have dropped to 220-225 million. Within the last decade, estimates which projected the population of the United States at over 300 million — even as high as 362 million — by the year 2000, have now been reduced, in recent Census Bureau estimates, to 262 million. Even this figure, based on an assumption of a return to replacement-level fertility of 2.1, is high. No rationale is offered for this assump-

tion. If present fertility trends continue, the figure may well be as low as 245 million.

Demographers are generally agreed that the nation has undergone dramatic change in its fertility. Differences of opinion are between those who foresee a continuation of the present fertility of 1.8 children per woman (family), with a possible further decline to a 1.7 level, and those who expect a gradual return to a fertility of 2.1, at which time the population would stabilize and be able to reproduce itself in the long term. In either case, a change of great magnitude will have taken place from the fertility of 3.5 children that the U. S. had in the 1950's.

Three "series," or population-projection ranges, have been projected by the Census Bureau for the remaining part of this century. Series I projects a population based on a total fertility (births per woman) of 2.7, Series II of 2.1 births, and Series III of 1.7 births.

Series II (2.1 births per woman, the replacement level) was selected by the Census Bureau in projecting a declining population growth culminating in a stable population (Zero Population Growth) within seventy years. The current fertility rate of 1.8 coupled with indications that social norms have changed, suggests that Series III, or a fertility of 1.7, is the most realistic. If so, it heralds economic and defense problems of extreme magnitude. It also implies major problems of critical importance which will rival and complement the fuel shortage in its consequences. The validity of using Series III as a projection is reinforced by a comparison of our fertility trends with those of other Western nations.

A long-term falling trend in the fertility of developed nations, including the U. S., is an historical fact. Muddying the picture for demographers has been the post-war baby boom. One school of thought believes in cyclical fluctuations, which can be mathematically computed. According to this school, phenomena such as the baby boom will recur. Changes in society and their effect on national fertility would indicate, however, that the falling trend in fertility of developed nations is a true trend and that a repetition of the post-war baby boom will not again take place without an unlikely repetition of the conditions which produced it.

Evidently, nations such as West Germany, where fertility is dropping to just above one child per family, will not only shrink in absolute numbers, but cannot *produce* a new baby boom if they remain in this position long. The nation's "breeding stock" of young

women becomes too small; only immigration can replenish the population. The baby-boom period was marked by early marriages and a reduction of the mean age at which women had their second babies, from 27 to 24. Earlier marriages and first babies born to younger mothers prevented women from entering non-domestic life and increased the exposure to another pregnancy.

Evidence exists in the National Fertility study of 1955 that of those women interviewed who intended not to have any more children, one third admitted to having at least one unwanted child. This figure is considered an understatement due to the psychological and emotional factors in such an admission.

In "The Family in Developed Countries," Norman B. Ryder states his opinion that the baby boom resulted from increased exposure to pregnancy (i.e., early marriage) during a time when good economic conditions implied that the family standard of living would not be affected by another birth. The dramatic fall in the birth rate today would seem explainable by an extension of the same reasoning. Economic conditions have become harder, and an increasing number of families require double incomes to maintain the standard of living they want. Furthermore, the unwanted or "unplanned" child today is not being born and the consequence is shown in the national birth rate. The validity of this conclusion seems borne out by the impact of legalized abortion as a "backup" to contraception.

The million-plus abortions in the U.S. in 1978 (unreported early abortions probably add considerably to this figure) reduced by one third the number of children who would otherwise have been born. Had these births taken place, the national birth rate would have been over 19 per thousand instead of 14.9, or a fertility rate of approximately 2.7.

June Sklar and Beth Berkov, California demographers, have asserted the belief that a new baby boom may be in the making. Their assertion is based on study of California statistics that show a 1974 leveling of the downward trend in the birth and even a 3% gain. This leveling out of the decline was considered by them to be a "bottoming out" process prior to a new rise. They theorize that the all-time low in birth rates came about because women postponed having children to a later age and that now, if they are going to have them, they must have them soon, thus starting a "catching up process" while new waves of women — the girls born in the baby boom



of the fifties — enter childbearing age behind them. The reasoning of Sklar and Berkov is based on the following points:

1. The “bottoming” indication appeared despite high abortion rates.
2. It occurred despite economic downturn.
3. It occurred without an increase in the marriage rate.

This development is possible and would be welcome news to those grappling with the problem faced by the Social Security Administration. However, in view of the long-term experience of all other developed Western nations and of the effect on birth rates when the “unplanned” child is precluded by recent developments in contraception, such an upturn in fertility appears a slim possibility.

Since the declining birth rate is due in part to the decreased proportion of children born to women over 30 years of age, it would appear optimistic to think that childless women approaching that age will decide to “catch up.” In the past it has been shown that cohorts of women who put off childbearing for an unusually long time seldom make up the child deficit later. During the low birth rates of the '30's, it became apparent that many of the children demographers thought were being “postponed” actually were never born.

Abortion is a new and fast-rising trend. Well over a million abortions were performed in 1978 (the 1979 estimates are even higher), as compared to an estimated 193,000 in 1970. It can be anticipated that abortions will take an increasing toll of the birth rate for at least several more years. The Alan Guttmacher Institute claimed in 1975 that an additional half million women would have had an abortion had it been available. The institute said that between 1.3 and 1.8 million women “needed” abortions but were unable to get them due to “inadequate services.” This figure is projected from New York and California figures. Had the higher number been performed, the United States birth rate would have sunk another 33% for a total fertility of approximately 1.26. Such a development would ultimately almost halve the United States population at each generation.

Scientific breakthroughs enabling parents to determine the sex of their child will also have a lowering effect on birth rates as parents no longer “try again” for the desired boy or girl.

Indications that our lower fertility is a result of basic changes in society appear in the results of surveys taken throughout the Western world. The number of children desired in 1970 by women mar-

ried 20 years was 3.5, but those married five years or less desired only 2.5. By 1972 a further decline to 2.2 showed in surveys. Today it is lower still — and these declines are consistent with the decline that actually has taken place in fertility. While it is possible that the actual number of children will be higher than the stated number desired due to unplanned pregnancies, it is doubtful, given new methods of birth control. More, in the U. S., for women between 30 and 44, *sterilization* has become the most favored method of birth control, and legalized abortion is increasingly eliminating such “unplanned” children as still happen.

The most persuasive explanation for fertility trends since World War II is that advanced by William P. Butz and Michael P. Ward in their RAND study conducted for HEW. They correlated the prospering economic climate which would seem to have been suitable for a high birth rate with the increasing economic opportunities for women in the work force. Their work clearly indicates that as the market value for women’s abilities has increased, fertility has fallen. Only when this value decreased (during recessions of the past two decades) has there been a marked upturn in fertility. This suggests that baby-raising is not only a consequence of the family’s overall economic well-being, but is also closely linked to how the baby affects the added material well-being that the mother’s work can bring. Women apparently opt for jobs over motherhood if the market for their talents is high, regardless of how well the family is already doing.

This study corroborates the experience of France. Enfeebled by a century of low birth rates and the blood-letting of World War I, France established a complex system of cash payments for the birth of children, child maintenance payments, paid vacations for child-bearing, and strong pro-natal policies in private industry. Initiated in the late 1930’s, these pro-natal policies brought about a radical turnabout in France’s demographics, giving it both the youngest population in Europe as well as the highest fertility, which in 1950 reached 2.6. These programs, however, did not keep pace with rapidly-increasing standards of living and national economic growth. As the financial rewards of motherhood became dwarfed by those offered the mother in the work force, French fertility began an alarming fall. Professor Pierre Channu states that family subsidy payments fell from 22% of the family income in the ’40’s to 6.4% in

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1974. As motherhood increasingly became less financially rewarding, ever-larger numbers of women opted for jobs.

Professor Charles F. Westoff of Princeton, writing in the December 1978 issue of *Scientific American*, states: “. . . nothing on the horizon suggests that fertility will not remain low. All recent evidence on trends in marriage and reproductive behavior encourages the presumption that it will remain low.”

Robert L. Clark of the University of North Carolina also believes fertility will remain below the replacement level. He cites such social phenomena as falling marriage rates, rising divorce rates, deferred childbearing, the upswing in single parent, two-wage-earner or individual households, higher education levels, increased work experience among young women, their greater career opportunities, the high cost of rearing and educating children, and the ever-increasing usage of birth control. Clark could have added the huge number of abortions and the rapidly-increasing number of sterilizations.

These trends are quantified by the Census Bureau as follows:

- a. Among women 20 to 24 who had ever married, the proportion who were childless in 1977 was 43%, compared to 36% in 1970.
- b. The proportion of women in their early twenties who had *never* married increased from 36% to 45% between 1970 and 1977.
- c. Unrelated couples of the opposite sex living together increased 83% to just under one million couples.
- d. The number of children under 14 fell 6.4 million since the start of the decade.

Yet reference is often made by those writing on fertility trends that “fertility will have to rise.” And this assumption is echoed in Government projections showing a return to replacement fertility and a maintenance of that level afterwards. But history shows that this does not necessarily happen; indeed, it is replete with examples of peoples who simply ceased to exist, their civilizations dying or being absorbed by more vital peoples. The Greece of antiquity is a notable example. Strabo wrote that Greece was “a land entirely deserted, the depopulation begun since long ago continues, the Roman soldiers camp in the abandoned houses, Athens is peopled by statues.” Plutarch said “One would no longer find in Greece 3000 Hoplites” (Infantrymen). Polibus (Vol. 37): “. . . one remarks nowadays over all Greece such a low birth rate and in a general manner such depopulation that the towns are deserted and the field lying fallow, although this country has not been ravaged by war or epi-

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demics . . . the cause of this harm is evident, by avarice or by cowardice the people if they marry will not bring up children that they ought to have. At most they bring up one or two . . . it is in this manner that the scourge before it is noticed has rapidly developed. The remedy is in ourselves, we have but to change our morals." His warning came too late and was not heeded. Under Christianity Greece was repopled, not with the blue-eyed, fair-haired Greek of antiquity, but with new peoples, and it took 16 centuries. Probably the major cause for the end of the Roman Empire was a similar failure to reproduce new generations. Towards the middle of the second century B.C., religious marriage was replaced by civil marriage in order that they might be more easily dissolved. It was said that "Women no longer count the years by the consuls but by their husbands." The rate at which Roman fertility fell is startling. However, it is even more startling to realize that the present drop in Western fertility is *far faster*.

Our falling fertility took its toll on the elementary school population some years ago. Today the toll has reached the men of military age. Defense department projections indicate that the military manpower pool of 18-year-olds will decline by 15% of present size by 1985 and 25% by 1990. While the military is less manpower-intensive than it was in earlier periods, this short-fall will still be most detrimental — e.g., it will be exceedingly difficult to continue present Volunteer Army policies. Not only will there be fewer volunteers, but the developing labor shortage will "bid up the market." A Volunteer Army will become increasingly expensive, with a significant decline in *quality*. A return to the draft would ease the problems of quality and cost, but would in no way ease the crises in the labor market, thus causing added resistance to a draft.

The services are today trying to replace a large proportion of their normal manpower with educationally or physically less qualified men, or turning to women to fill the ranks. The latter tactic is, of course, a stop-gap which in itself must add yet another depressant to the national fertility, and worsen the long-term outlook. Such shortsightedness is apparent in press reports, e.g., former Army General Counsel Jill Wine-Banks advocating that self-paid abortions, for women on active duty and military dependents, be allowed to be performed by military physicians — to prevent recruitment losses (it would hardly lead to increased birth rates). Worse, the defense problems stemming from a lack of men of military age, already

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severe, are far exceeded by those that will flow from drastic cuts in Western defense budgets that will occur due to our falling fertility.

A decade ago payments to the elderly and federal retirees amounted to \$46 billion or 23% of a \$201 billion federal budget. The 1979 administration budget allocated \$203 billion in an array of programs for the elderly or 40% of a \$500 billion budget. This was to be spent on the approximately 24 million elderly citizens over 65 years of age in 1979. Apparently some 38% of an estimated \$584 billion 1981 budget will be spent on the elderly, which would mean \$222 billion.

Within the next 20 years, however, the number of elderly is expected to grow by some 30%, to over 30 million. If their slice of the budget gets the same proportionate increase, it would rise by 12% from the current 40% to 52% of the budget. However, since the 23% increase in the number of elderly in the last ten years produced a 74% increase in their share of the budget (from 23% to 40%) it is likely that their actual percentage would significantly *exceed* 52%. In fact, if the elderly's share of the budget increased at the same rate as over the past ten years, it would account for 100% of the budget by the end of the century.

Even the conservative view (that the elderly's share will be "only" 52% in twenty years) suggests that the additional 12% will come mainly from the current 24% allocated to defense, since defense monies constitute the largest source of discretionary funds. We must, therefore, anticipate that defense spending could be reduced to some 12% of the budget in two decades. Only a very rapid increase in the real per-capita income and rate of economic growth could so enlarge the national wealth that the proportion of the budget devoted to defense could be maintained in the face of the mounting costs of the elderly. A crystal ball is not necessary to see what will take place; one has only to look at the national budgets of Western nations further along the demographic path of below-replacement fertility.

The manner in which the division of the British budget has changed over the years is illuminating. In 1951 defense spending in Britain accounted for 24.1% of the budget and social security for 11.8%. By 1973 these figures had almost reversed: 12.6% of the budget was devoted to defense and 17.3% to social security. This change, prophetic of the change taking place in our own country, came as a result of the increased support requirements for an ever-

larger elderly population. The drastic changes in America's future economic and military strength that will take place if fertility does not increase are evident in the following fact: *for every retired American today there are five working Americans, but fifty years from now there will be only two.*

The consequences of an aging population are finally beginning to receive close study by some economists. Even assuming a return to a fertility of 2.1 and a replacement-level birth rate, the ratio of the aged population to those economically active will show an increase of 49% by 2050. And, if trends towards early retirement should continue, or the legal retirement age be lowered, the ratio of aged to active would move higher. Boone A. Turchi, of the Carolina Population Center, computes that a rise of 50% in the ratio of retired to economically active would call for an increase in real per capita income of (at least) 1/2% annually between 1970 and 2050. But if the history of the social security system is a guide, benefits will be increased because of the policy of attenuating the drop in real income of newly-retired workers. Turchi computes that to achieve an increase in real benefits of 1% a year would require a growth rate in per capita income of 2.01%. *Actually*, real monthly social security benefits between 1950 and 1972 grew at the annual rate of 3.52% which would require a growth rate of 4.53% in personal income. It is imperative, therefore, that real income grow significantly in order that the working members of the population be able to support the retired. Such growth may be possible, but is it likely?

As of now, it seems more probable that an increasingly-inflationary economy will place ever-heavier burdens on the economically-active portion of the population, while the older, non-productive portion gains increasing political strength and presses for ever-greater benefits to meet higher living costs. Theories about the economy in a ZPG environment are outlined (by Joseph P. Spengler, William J. Serow, Alan R. Sweezy and Charles R. Weiss) in *Zero Population Growth: Implications*. Some examples: 1) Population mobility will be curtailed in a stagnant population, reducing economic mobility precisely when it is most needed to compensate for major shifts brought about by demographic change (e. g., making rocking chairs instead of baby buggies); 2) a stationary population will likely be composed of "less favorable" social and economic elements — those most able to provide for family and social requirements will be in the smallest fertility groups and will have to "be

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made up for" by those elements of the population least able to provide; 3) Profit prospects will be adversely affected by worsening expectations that reduce the incentives to invest (particularly in science, innovation, and other new ventures); 4) Decision-making will tend to pass to older people with shorter perspectives; 5) When a critical ratio of working/non-working population is reached, further benefits for the retired will be paid for by deficit financing which will intensify inflation.

As the authors point out, this will mean that taxes will absorb more potential savings, the return on capital inputs will fall, the rate of increase of production will diminish (unless the rate of technological change somehow increases), and, as the population becomes older, it will be less adaptable in bringing about optimal distribution of labor. The growth rate of aggregate savings will decline. The demand for satiable goods will stabilize. As maintenance of a high level of activity without the stimulus of population growth becomes more difficult, frictional unemployment will rise; capital formation in the private sector will decline; income distribution will become increasingly unequal if the middle and upper income families have the lowest fertility.

A marked decline in population growth which results in a decline in technological progress, investment, and employment will have multiplier effects. For instance, increasing the amount of capital per worker in order to compensate for the shortage of workers is limited by the law of diminishing returns, and as more capital is added its marginal effect or profitability decreases.

Historically our national economy has been a voracious devourer of *new* manpower. In its precedent-breaking growth from the Civil War until World War I, growth was fueled by millions of immigrants. Starting with World War I, industrial growth used up the millions of small-farm families until by 1966 only 5.9% of the United States population was still agricultural. Today 48% of American women are employed, a figure that appears close to the maximum. Unquestionably any further increase in the proportion of women in industry or the military would further diminish the national fertility.

A stagnant or shrinking population being a new experience for the developed nations, the various economic theories on its effect have yet to be proved by events. However, given the fact that the dramatic growth of Western economies developed concurrently

with population growth, it would be rash not to suspect a causative relationship to the effects of a declining population.

Particularly is this true when linked to other problems such as the developing energy crises. *Considering that economic growth has been directly linked to energy use, curtailment of economic growth by energy shortages might further impair the ability of the economically active to support the retired element.*

In addition to social security benefits, we also have greatly increased expenditures for all forms of medical care for the aged and others, and these probably will continue to expand. If today's outlay for the aged is 40% of our budget, what then of the year 2000? As a shift takes place, from dollar investment in new technology, construction and expanding industry, to transfer payments for the upkeep of the retired, our national strength, including our military capability, must be seriously affected.

Space exploration, for example — despite its obvious defense/security implications — cannot be expected to be highly prized as a national priority by retirees battling to keep their social security benefits commensurate with inflation and newly arrived immigrants from undeveloped countries fighting to gain a higher rung on the social and economic ladder.

It is highly probable that the moon explorations of the sixties will appear in retrospect as the achievements of a golden age. In fact, the know-how, technological competence and personnel teams that permitted Apollo flights may well be lost — as were so many of the Roman Empire's engineering capabilities, and for many of the same reasons. "Greypower" will become an increasingly strong political force and short-term interests will take precedence.

What the West will increasingly witness is a wholesale change in its social, genetic, and political make-up. Today, Western Europe is already host to some 13,000,000 "guest workers" who have come to take up some of the manpower slack. But with these new people come major economic and social problems. Large ghettos have sprung up in major West German cities in which the children of the newcomers run in gangs. Unaccepted as Germans, unable to speak the language of their parents, these children create major social problems as they grow. In Britain, racial prejudice has flared as the British population tries to cope with the influx of blacks and Orientals. This influx of new people represents the modern counterpart of the Germanic tribes that settled the depopulated areas of Roman



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Europe. The new peoples will come, because without them the economies of Western nations will founder, but they will bring about profound changes in thought, Western values and political realities.

The new peoples of the United States will doubtless be Latin Americans, predominantly Mexicans, as the Wetback of yesterday becomes the major source of tomorrow's manpower. These new populations will have different priorities. (The United States will need between 15 and 30 million immigrant workers by the year 2000, according to Dr. Wayne Cornelius, Director of the U.S.-Mexican studies program at the University of California at San Diego.)

NATO has served the West well. It has preserved a free Western Europe for a quarter century. Today it is being refurbished in the light of Soviet military buildups and NATO strategy is being rethought and updated. But will these efforts assure long term survival for NATO members? If current fertility trends continue unchanged, today's efforts to bolster Western defenses will prove to be a short-term effort that must inevitably fail. Unless radical change in the West German birth rate takes place, during the next twenty-five years our principal NATO ally will lose 25% of its population. More importantly, the loss will be in German youth. National efforts currently placed in the defense sector will have to be shifted to support of a far larger population of retirees; retirees who may well see political accommodation with Soviet pressure more to their benefit than defense appropriations for measures planned to take place long after their death. Britain, our other principal NATO ally, will continue to use an increasingly large portion of its budget for the support of a growing elderly population.

Consider these facts: the population of Britain has dipped below the 56 million reached in 1974; the "new towns" built to hold the overflow from the older cities are full, but huge gashes of abandoned housing, empty of all but the poorest, are now appearing in London, Liverpool and Glasgow; London, which had almost eight million people in 1960, is expected to have well under six million by 1990.

In Austria, where the population of some 7.5 million is also below the 1974 level, Finance Minister Annes Androsch recently warned that the state can no longer guarantee an automatic increase in old-age pensions when living costs go up. Austrian state spending on social services has doubled since 1970.

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France, with a fertility of 1.84, while still holding the highest fertility of any Western industrialized nation, has shown an alarming decrease which has sparked violent debate. Some predict that the population will number only 14 million in 50 years (from 53 million today). Scandinavia, like West Germany and Britain, will hardly have viable economies. As population expert Erland Hofsten of Stockholm stated “. . . a nation with a fertility of 1.57 such as Sweden, will lose 25% of its population at every generation and will cease to exist as a viable nation in 100 years.”

The Soviet Union and Eastern Europe have experienced many of the same problems. In fact, the demographic plight of Eastern Europe has become so severe that its governments have launched campaigns to try to bring about a demographic turn-around.

In East Germany cash grants are given to encourage larger families, and a \$2500 loan to couples getting married. The loan, to be paid back in five years, is reduced by \$500 for each child born. Working women are furloughed with full pay six weeks before and 20 weeks after giving birth. On the birth of the second or subsequent child, the mother can stay home from work for a year with full pay for 20 weeks and 70% after that. Her job is guaranteed. (These programs triggered a rise in births for 1977 of 223,152.)

The European peoples of the Soviet Union also have very low fertility, but this failure is balanced by the high fertility of its Mongolic peoples. By the year 2000 it is estimated by the United States Department of Commerce that European Russians will be only 44% of the Soviet population. This imbalance between European and Mongolic Soviet birth rates poses a possible cause for internal social strife, yet the prospect of a predominantly Mongolic Soviet Union cannot increase Western feelings of security or make easier any *rapprochement* with the West. Rather, it summons to mind visions of a latter-day Ghengis Khan destroying an enfeebled Europe.

The questions raised for a long-term defense planner are these: Is there any evidence to warrant confidence that the United States birth rate will regain or rise above replacement level? If United States fertility does not recoup, can we expect real economic growth to continue in the face of a stagnant or decreasing labor force and increasing outlays for the non-productive portion of the population? What factor will take the place of the apparent historical requirement in our economy for an ever larger labor force? Is it reasonable to expect defense spending to remain at the present proportion of

the national budget? Is there any valid reason to assume that the British model of cutting defense spending to finance social security would not be followed in the United States? If European economic and military strength collapses due to an inability to carry the burdens of aged populations, what new problems in Western defense strategy will face us? What new policies and strategies should be considered to harness the potential of Latin American manpower? Should defense planning envisage governmental efforts to increase the U. S. birth rate?

Whether or not we can regain a fertility above replacement level is one of the most important factors in assessing the nation's future.

It is probably prudent to predict that real economic growth, in the face of slowing population growth (aggregate demand) and energy constraints, will be very slow (and may even decline), and that if the defense budget becomes a markedly smaller percentage of national expenditures, the nation's defense posture will rapidly deteriorate.

### An Appraisal of Future Strategy

Structuring a defense force with the equivalent of half of today's defense dollars as a consequence of falling fertility would involve fateful decisions, and may require a strategy that involves the following:

- A pull-back from Europe, ideally with negotiated reductions in Warsaw Pact forces — but if not, then *unilaterally*.
- Fast-declining reliance on European allies who, for the most part, will be faced with a similar but larger problem and who may opt for a neutral position when our troops depart.
- Increased reliance on “massive retaliation” as the “cheapest” form of defense rather than on the conventional-force capability of “flexible response.”

Brazil and Mexico could emerge as our most powerful economic and military allies. In the Pacific, we may have to retreat to the island perimeter of the Western Pacific. Increasingly our security will lie in the balance of power between the USSR and Communist China. We will be unable to afford Middle East strife. Combined with a worsening energy crisis, the economic constraints of our aging population will force increasing support of Arab positions. Africa could not be considered an area for defense activities, nor could South Asia.

In short, were the United States forced by the fertility-related

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economic problems outlined to adopt within two decades a defense budget proportional to only half of today's, drastic revisions in strategic thought would be required. "Fortress America" and a completely nuclear strategy may be the only defense we can afford. And our problems will be exacerbated by the continued "technological inflation" which will drive up weapons costs over and above monetary inflation.

The U. S. armed forces two decades from now may be very similar to those of Britain's today — strategic nuclear deterrent forces backed by a very small Army. The Navy, no longer called upon to protect world-wide commitments, and in the face of drastic budget cuts, will retire its carriers in favor of its nuclear role. These would appear to be the unattractive options that defense-spending cuts will force on strategy.

Today's birth rate and the historical falling trend in fertility are a stark fact; its harmful economic consequences are conjectural but almost certain, and the implied consequences for defense grave. A partial alternative to such draconian changes in strategy exists. The volunteer military could be replaced by universal national service. When privates draw only that money needed for PX sundries, it will also make possible lower pay scales across the board. A return to compulsory service would be more palatable if all were required to serve through a program wherein youth chose the form of national service they were to perform, in the military, other governmental, or non-governmental public service institutions. Such a program would also pump new and economical labor into hospitals, police forces and other public service agencies, relieving the demand for government funds in support of programs such as law enforcement, Medicare and Medicaid. Although "unthinkable" now, such a combination of revised strategy and low-pay universal service may soon receive serious consideration.

Today's strategist and policy maker must lift his thoughts higher than the budgetary considerations of the next fiscal year. He must face the disheartening but evident fact that Western fertility is already far below the replacement level and all present indications are that — without major public programs to bring about an increase — it will either remain at this level or sink lower. United States taxpayers today annually provide at *least* 60 million dollars (some put the figure much higher) to support planned-parenthood-type activities which exert a continuous depressant on national fer-

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tility. We must realize that just as there is neither perpetual motion nor a cornucopia of plenty, a continuing rapid decline in the numbers of young, and an equally rapid increase in the number of old, unproductive citizens, must entail economic, military and social consequences of extreme magnitude. We must realize that there is nothing immortal about our nation or civilization and that if the infertility of the West continues, Western society and power *cannot*.

Unless our fertility is restored, we Americans shall, like so many nations before us, give way to younger, more vital peoples.

## The “Right” of Abortion Funding

*John T. Noonan*

AS AN ABSTRACT proposition before 1973 it would have seemed a strange contention, probably not worth five minutes' notice as a hypothetical, that there existed in the federal constitution a right assertable in a federal court to obtain money for an abortion. In 1973 *Roe v. Wade*<sup>1</sup> and *Doe v. Bolton*<sup>2</sup> established a virtually unqualified right of every woman, married or single, adult or minor, to have an abortion through the nine months of pregnancy; the Court's stipulation that a state could regulate abortion post-viability, in the last two months of pregnancy, was made impracticable by the Court's additional proviso that any abortion for the woman's health, physical, mental, or emotional, could not be denied. For the full term the liberty recognized was for all practical purposes absolute. In the wake of this decision, Richard Nixon's Department of Health, Education and Welfare began the federal funding of abortion as part of the medical services provided by the Social Security Act. Without any new legislation being passed, a substantial change in federal health care was thus effected by the federal bureaucracy responding to, and going beyond, the bold language of the Supreme Court.

A number of states such as Connecticut and Pennsylvania answered this change by legislation refusing to fund elective abortions with their contributions to Social Security, and some cities such as St. Louis made it their policy not to provide abortions in municipal hospitals unless necessary to save the mother's life or prevent grave physical harm to her. Lower federal courts invalidated these state and city actions on the ground that the constitutional liberty of abortion carried with it a right to be financed. By 1976 a remote and improbable hypothetical was being treated as the law of the land. In the same year Henry Hyde, a congressman from northern Illinois, offered an amendment to the HEW appropriations act, barring federal payment for abortions save in a very limited range of cases. The amendment passed the House and was accepted by a Senate full

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of members who openly predicted the law would be held unconstitutional. Three weeks after it came into force, its operation was enjoined by Judge John Dooling in the federal district court in Brooklyn. In this way *Harris v. McRae*<sup>3</sup> began four years ago as *McRae v. Mathews*.<sup>4</sup>

There were a number of striking aspects of Judge Dooling's preliminary injunction. Normally, an injunction is supposed to issue only if the plaintiffs show substantial and irreparable harm if the injunction is not granted. This injunction was given although the plaintiffs were New York residents, and New York State was already under an injunction from Judge Dooling's own court to fund abortions. There was a question whether New York State could get a federal refund after it paid for the plaintiffs' abortions, but no one could have suffered irreparable harm if the reimbursement issue had awaited resolution by trial. Further, Article One of the Constitution provides: "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." Judge Dooling's order drew millions of dollars from the Treasury in direct contradiction to the relevant act of Congress. The asserted ground for granting this extraordinary remedy was that as the mortality of abortion was disputed by "Godfearing people," the government would have to be neutral. Neutrality meant that the federal government would have to fund abortions!

#### The State Cases

In the summer of 1977, to the great surprise of the advocates of abortion, the Supreme Court reversed the lower federal courts that had required the states to fund abortion. Speaking through Justice Powell in *Beal v. Doe*,<sup>5</sup> *Maher v. Roe*,<sup>6</sup> and *Poelker v. Doe*,<sup>7</sup> the Court found no reason to translate the new constitutional liberty of abortion into a constitutional right to fund abortions from the public treasury. (The cases were discussed in *Hastings Center Report*, 7, 5-9, August 1977.) Quoting Justice Holmes, Justice Powell observed: "We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'" He added that states had a "strong and legitimate interest in encouraging normal childbirth" and preferring it to abortion. The Court upheld the laws of Connecticut and Pennsylvania limiting abortion funding and the St. Louis regulation restricting abortion services. Shortly after these decisions it instructed Judge Dooling to reconsider his injunction in *Harris v. McCrae*.

### **Establishment of Religion**

One would have supposed, on almost any reading of *The Abortion Funding Cases* of 1977, that the Supreme Court had rebuffed the attempt to convert a liberty of action into a right to financial support from the government, and that Congress, empowered by the Constitution itself, could choose even more freely than the state legislatures how it would provide for the welfare of the people. Judge Dooling did indeed lift his injunction requiring HEW to disregard the Hyde Amendment. He went on, however, to conduct a trial in which more than 400 documents and films were introduced and a transcript of 5,000 pages compiled.<sup>8</sup> His courtroom was dominated by an issue not specifically raised in the state cases. It was now maintained by the plaintiffs with great gravity and high moral outrage that the failure of Congress to appropriate money for most abortions constituted an establishment of religion.

From the fall of 1977 to February 1980, Judge Dooling tried *McCrae* with this claim the chief contention before him. Special liturgical celebrations of Holy Innocents' Day were testified to in his court, parish bulletins were introduced as evidence, witnesses were heard on how a candidate for the Minnesota legislature believed she had lost because of religious objection to her position on abortion. Judge Dooling was even informed about incendiary attacks on abortion clinics as though they were somehow related to a congressional appropriations act. It was not clear from any later judicial opinion in the case how the remarkable range of matter introduced by the plaintiffs served to prove their contentions about national legislation enacted by congressmen and senators whose religious beliefs were left unexamined. In Judge Dooling's typed opinion over one hundred pages were devoted to exploring this evidence and its implications before concluding that it was all irrelevant. Judge Dooling held that "the healthy working of our political order cannot safely forego the political action of the churches, or discourage it."<sup>9</sup> Later, in the Supreme Court, Justice Stewart was even more summary: "That the Judeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws that prohibit larceny."<sup>10</sup>

### **Unequal Protection?**

The plaintiffs had pursued a constitutional chimera for two years. They had, however, another contention. It was that the Equal Pro-



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tection Clause of the Fifth Amendment was violated by Medicaid being available for medical necessities but not for most abortions. According to the plaintiffs' medical witnesses, abortion might be "necessary" to treat a gravida carrying an IUD or suffering from phlebitis, varicose veins, cancer, diabetes, myoma of the uterus, infection of the urinary tract, anemia, obesity, or psychosomatic illness resulting from the pregnancy.<sup>11</sup> The witnesses were not sure whether any of these conditions would meet the "life-endangering" exception under which federal funds were available under Hyde. Judge Dooling accepted this evidence as establishing an irrational and invidious discrimination against abortion as a medical technique. The Hyde "life endangerment" test, he held, "operates to restrict the use of abortion procedure to medicaid in the narrowest classes of cases, to crisis intervention."<sup>12</sup> He held it violative of the Fifth Amendment.

On appeal, the Supreme Court noted that the Fifth Amendment was not itself "a source of substantive rights or liberties."<sup>13</sup> A statute would be upheld if it did not impinge on a right or liberty protected by the Constitution or unless the classification used by the statute was "wholly irrelevant" to the achievement of any lawful governmental objective. As to whether Hyde impinged on a protected right or liberty, the issue had already been settled by *The Abortion Funding Cases* of 1977: the Court had already decided that failure to fund was not the imposition of a penalty or the putting of any governmental barrier to exercise of the liberty of abortion. To hold otherwise, Justice Stewart now observed, would "mark a drastic change in our understanding of the Constitution."<sup>14</sup> It could not be, he wrote, that because "the government may not prohibit the use of contraceptives" or "prevent parents from sending their child to a private school," the government therefore had "an affirmative constitutional obligation" to provide everyone with contraceptives or to enable all who wished to send their children to private schools. In Justice Stewart's view, to state these consequences was to show the untenability of the plaintiffs' position.

As for relationship to a government objective, there, too, the answer had been given in *The Abortion Funding Cases* three years earlier. The state had a legitimate interest in protecting "potential life" by "encouraging childbirth."<sup>15</sup> Moreover, it was not irrational for Congress to distinguish abortion from other medical services.

“Abortion,” Justice Stewart wrote for the court, “is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.”<sup>16</sup>

**Unfree Religious Exercise?**

A third issue in the case had been taken up in Judge Dooling’s opinion. Finding no establishment of religion, he had reflected on the voluminous record before him on religious belief and reached the conclusion that the Hyde Amendment did violate the Free Exercise Clause of the First Amendment. A woman’s exercise of her abortion liberty to protect her health was “nearly-allied to her right to be” and “doubly protected” when done in conformity with a religious belief that put her welfare ahead of the unborn child’s.<sup>17</sup> According to Judge Dooling, the priority of the mother’s health was the teaching of Conservative and Reform Judaism, the American Baptist Church, and the United Methodist Church. A believer in these faiths, actuated by her religion in seeking abortion funding, would be denied, Judge Dooling appeared to say, the free exercise of her religion if the government did not give her the money to carry out her desire. Explicitly Judge Dooling held the Hyde Amendment invalid under the First Amendment.

Even more than Judge Dooling’s reasoning on Equal Protection, the underlying proposition here appeared open to the observation: “To state it is to refute it.” The underlying proposition was: If a person has a religious belief leading to an action for which money is not available, the federal government is under an affirmative constitutional obligation to supply the money. Judge Dooling’s view of Equal Protection, Justice Stewart had said, led to recognizing an affirmative constitutional obligation for the government to finance private schools. His view of the Free Exercise Clause led to an affirmative constitutional obligation of the government to finance parochial schools!

Justice Stewart, however, did not draw this startling conclusion from the lower court’s opinion. He merely pointed out that Judge Dooling had no one before him in a position to raise this claim, no one who was asserting to have actually been denied the free exercise of her religion. It was elementary law that the federal courts did not decide imaginary controversies or pass on claims by imaginary persons. The Supreme Court did not reach “the merits” of the Free Exercise claim because no one with standing had presented it.<sup>18</sup>

**Principles or Ideology?**

The decision in the Supreme Court was 5-4, with the majority consisting of Chief Justice Burger and Justices Powell, Rehnquist, Stewart, and White. Justice Stevens, who had been with the majority in the *Abortion Funding Cases* of 1977, swung into dissent with Justices Brennan, Blackmun, and Marshall. Justice Brennan treated the denial of federal funding for abortion as coercive and a circumvention of *Roe v. Wade*.<sup>19</sup> Justices Blackmun and Marshall joined this opinion, and Justice Marshall added that the decision was “a cruel blow to the most powerless members of our society.”<sup>20</sup> Justice Blackmun referred to his earlier dissents in *The Abortion Funding Cases* and repeated: “The cancer of poverty will continue to grow.”<sup>21</sup> Justice Stevens found a difference from *Maher* in that there the abortions were nontherapeutic (he did not mention *Poelker*). Where the abortions were medically necessary it was “tantamount to severe punishment” to deny the money.<sup>22</sup> As the quotations suggest, the tone of all four dissents was impassioned.

The prime distinction between the majority and the minority in the Supreme Court was that the majority was willing to treat the case as one where ordinary rules of constitutional adjudication operated. Some of the Justices in the majority, Stewart observed, did not believe the denial of funds was “wise social policy.”<sup>23</sup> No doubt Stewart himself fell in this category. But the majority did not consider it their mission to impose their views on the country as the voice of the Constitution. The majority had no ideological commitment to the statute it upheld. As Justice Stewart remarked of Judge Dooling’s conduct, he had made “an independent appraisal of the competing interests involved here.” In so doing he had gone “beyond the judicial function. Such decisions are entrusted under the Constitution to Congress, not the courts.”<sup>24</sup> Fidelity to democratic theory and the constitutional framework required the result.

The minority did not show interest in meeting the majority’s attempt to use constitutional principles which could operate beyond the question at hand; nor did the minority show much sensitivity to the view that the question was for the legislature, not the courts. For the minority the issue was abortion, and with great zeal and marked bitterness the minority attacked the result which permitted the restriction of funds. The tone struck in the dissents was scarcely distinguishable from that of the editorial and news columns of the *New York Times* and *Washington Post* which, in the week following

the decision, lambasted it as heartless, shortsighted, and unresponsive to the needs of the country. That great principles of constitutional government were at stake was not noticed by these leaders in the media, intent as they were on giving succour to a cause to which they were committed.

### Three Remaining Issues

The abortion issue itself remains. The majority opinion restated its devotion to *Roe v. Wade* and proved it by continuing to refer to the unborn as “potential life.” As long as this obnoxious oxymoron is employed, the issue of abortion is not squarely faced. If the unborn child is potential, he or she is not “life” — a conclusion drawn by Judge Clement Haynsworth in *Floyd v. Anders*.<sup>25</sup> If the unborn child, as biologists and pediatricians and mothers would have us believe, is alive, he or she is not merely potential. Judicial thinking would be clarified if potential and actual judges focused on the existence of unborn children.

The appropriations issue is not resolved. The author of this article, whose perspective is evident, was counsel for two hundred and thirty-eight members of the House (a majority of the House) and Senate, who filed an *amicus curiae* brief in *McRae v. Harris* asserting that Judge Dooling had trespassed on a power which the Constitution had entrusted Congress, the power to appropriate. In the view of these congressmen, as in the view of many theorists of democratic government, the “power of the purse” is fundamental. The historic battles of representative government were fought to secure it for those elected by the people. Wrested from kings and preserved from encroachments by presidents, the power is not one to be lightly surrendered to an appointed judiciary with lifetime tenure. The power to appropriate, exercised by Judge Dooling, is the power to govern. Wisely or unwisely, the Supreme Court did not take up this basic constitutional issue.

The issue of limits on constitutional interpretation is not resolved. The question of how far the Supreme Court should go in reading into the Constitution its members’ vision of good social policy is not decided by a single 5-4 vote. For almost eighty years “substantive due process” — another obnoxious oxymoron; process is not substantive — was derided by Justices Holmes, Brandeis, and Frankfurter, and their critique became constitutional orthodoxy. With *Roe v. Wade* substantive due process revived, and it has now

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become fashionable when applied to the area of family law.<sup>26</sup> Invoking this notion, judges are free to mold the law affecting family structures as they think appropriate. We have in nine members of the Supreme Court, or merely in the five necessary for a majority, a “bevy of Platonic guardians,” whose views, stated as the meaning of the Constitution, become the law of the land. As long as the view prevails that there is some magic in the office which endows with uniquely superior wisdom nine persons randomly selected by a political process, substantive due process will have its day; it is likely that those who applaud the result will overlook the means; and close squeaks for democratic government like *McRae v. Harris* will recur or even turn into triumphs for the imperial judges.

### NOTES

1. *Roe v. Wade*, 410 U.S. 113.
2. *Doe v. Bolton*, 410 U.S. 179.
3. *Harris v. McRae*, 48 LW 4941 (June 30, 1980).
4. *McRae v. Mathews*, 421 F. Supp. 533.
5. *Beal v. Doe*, 432 U.S. 438.
6. *Maher v. Roe*, 432 U.S. 464.
7. *Poelker v. Doe*, 432 U.S. 519.
8. *McRae* at 4947.
11. Typed opinion, pp. 104-113.
12. Typed opinion, p. 322.
13. *McRae* at 4948.
14. *McRae* at 4947.
15. *McRae* at 4948.
16. *McRae* at 4949.
17. Typed opinion at 328.
18. *McRae* at 4947-4948.
19. *McRae* at 4951.
20. *McRae* at 4952.
21. *McRae* at 4955.
22. *McRae* at 4956.
23. *McRae* at 4949.
24. *McRae* at 4949.
25. *Floyd v. Anders*, 440 F. Supp. 535, 539 (1977).
26. See Note, “Development in the Law — The Constitution and the Family,” *Harvard Law Review* 93, 1157, 1166-1186 (1980).

## Abortion and the “Consistency Thing”

*Mary Meehan*

**T**HE ABORTION ISSUE, more than most, illustrates the occasional tendency of the left to become so enthusiastic over what is called a “reform” that it forgets to think the issue through. It is ironic that so many on the left have done on the abortion issue what the conservatives and cold-war liberals did on Vietnam: they marched off in the wrong direction, to fight the wrong war, against the wrong people.

Some of us who went through the anti-war struggles of the 1960’s and early 1970’s are now active in the right-to-life movement. We do not enjoy opposing our old friends on the abortion issue, but we feel that we have no choice. We are moved by what pro-life feminists call the “consistency thing,” that is, the belief that respect for human life demands opposition to abortion, capital punishment, euthanasia, and war. We don’t think we have either the luxury or the right to choose some types of killing and say that they are all right, while others are not. A human life is a human life, and if equality means anything, it means that society may not value some human lives over others.

Until the last decade, people on the left and right generally agreed on one rule. We all protected the young. This was not merely agreement on an ethical question. It was also an expression of instinct, so deep and ancient that it scarcely required explanation. And protection of the young included protection of the unborn, for abortion was forbidden by state laws throughout the United States. Those laws reflected an ethical consensus, not based solely on religious tradition, but also on scientific evidence that human life begins at conception. And the pro-life position was common throughout most of what we call the civilized world, particularly in the medical profession. The prohibition of abortion in the ancient Hippocratic Oath is well known. Less familiar to many is the Oath of Geneva, formulated by the World Medical Association in 1948, which included these words: “I will maintain the utmost respect for human

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life from the time of its conception.”<sup>1</sup> A Declaration of the Rights of the Child, adopted by the United Nations General Assembly in 1959, declared that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”<sup>2</sup>

It is not my purpose to explain why courts and parliaments in many nations rejected this tradition over the past few decades. (I suggest in passing that their action was largely a surrender to technical achievement, if such inventions as suction aspirators can be called technical achievements.) But it is important to ask why the left in the United States generally accepted legalized abortion.

Perhaps an accident of timing was largely responsible. The push for “liberalized” state abortion laws reached its height while most activists on the left were desperately trying to end the war in Vietnam. The Supreme Court abortion decisions of 1973, which led to abortion on demand, were handed down two days after Richard Nixon’s second inauguration and one day before the “peace accords” on Vietnam were initialed by Henry Kissinger and Le Duc Tho. The agreements were supposed to end the war, but in fact did not. Certainly most anti-war activists were aware of the Court decisions, but it seems fair to say that the war was a major distraction, nearly an obsession. The left did not give the abortion issue the sustained and careful attention it might have received in a time of peace.

It was not just a matter of distraction; it was also a matter of exhaustion. Ten years of seemingly fruitless opposition to the war did not leave many activists with the physical and moral energy that another life-and-death issue required. People just could not face another protest of conscience; it was all they could do to continue working against the war.

Then, too, a strong minority on or near the left favored abortion. This was especially true of many feminists and environmentalists. Individually, they exerted peer pressure on others on the left. Collectively they had political power, or at least the potential of power, which seemed important to the peace movement. Anti-war leaders were always eager to broaden their coalition. But instead of trying to cut through class symbols and cultural stereotypes to reach anyone who agreed with them on the war issue, they tended to reach out to people like themselves in background and lifestyle. The feminists and environmentalists were much closer than the farmers and

the elderly. Why alienate people who might help you on the war issue by challenging them on something seemingly so abstract as the abortion issue? Ten years later, when the abortion body count is over one million a year and has far outdistanced the Vietnam body count, the abortion issue is no longer abstract. But at the time, few people realized the long-term implications.

Those who did think about the issue often accepted a civil-libertarian rationale for freedom of choice in abortion. Many feminists presented it as a right of women to control their own bodies. When it was objected that abortion ruins another person's body, they responded that a) it is not a body, just a "blob of protoplasm" (thereby displaying ignorance of biology); or b) it is not really a "person" until it is born. When it was suggested that this is a wholly arbitrary decision, unsupported by any biological evidence, they said, "Well, that's your point of view. This is a matter of individual conscience, and in a pluralistic society people must be free to follow their consciences."

Unfortunately, many liberals and radicals accepted this view without further question. Perhaps many did not know that an eight-week-old fetus has a fully human form, including tiny fingers and toes and a heart that has been beating since she was four weeks old. They did not say, "Well, you may think that the world is flat, too. But when the facts say otherwise, the state cannot base public policy on your eccentric point of view." Nor did they ask whether American slaveholders before the Civil War were right in viewing blacks as less than human and as private property; or whether the Nazis were correct in viewing mental patients, Jews, and Gypsies as less than human and therefore subject to the final solution.

In the late 1960's, liberals were troubled by evidence that rich women could obtain abortions regardless of the law, by going to careful society doctors or to countries where abortion was legal. Why, they asked, should poor women be barred from something the wealthy could have? One might turn this argument on its head by asking why rich children should be denied protection that poor children have. But pro-life activists did not want abortion to be a class issue one way or the other; they wanted to end abortion everywhere, for all classes.

Many people who had experienced poverty did not think that providing legal abortion was any favor to poor women. Thus in 1972, when a presidential commission on population growth recom-



mended legalized abortion, partly to remove discrimination against poor women, several commission members dissented. One was Graciela Olivarez, a Chicano who was active in civil-rights and anti-poverty work. Olivarez, who later directed the federal government's Community Services Administration, had known poverty in her youth in the Southwest. With a touch of bitterness, she said in her dissent: "The poor cry out for justice and equality and we respond with legalized abortion." Olivarez noted that blacks and Chicanos had often been unwanted by white society. She added: "I believe that, in a society that permits the life of even one individual (born or unborn) to be dependent on whether that life is 'wanted' or not, all its citizens stand in danger."<sup>3</sup> Later she told the press: "We do not have equal opportunities. Abortion is a cruel way out."<sup>4</sup>

Many liberals were also persuaded by a church/state argument that went roughly like this: "Opposition to abortion is a religious viewpoint, particularly a Catholic viewpoint. The Catholics have no business imposing their religious views on the rest of us." It is true that opposition to abortion is a religious position of many people. (Catholics receive the most attention, partly because they are the largest denomination in the United States. Orthodox Jews, Mormons, and many of the fundamentalist Protestant groups also oppose abortion. So did the mainstream Protestant churches until recent years.) But many people are against abortion for reasons that are independent of religious authority or belief. Many would still be against abortion if they lost their faith; others are opposed to it after they *have* lost their faith, or if they never had any faith to start with. Only if their non-religious grounds for opposition can be proven baseless could legal prohibition of abortion fairly be called an establishment of religion. The pro-abortion forces concentrate heavily on religious arguments against abortion and generally ignore the secular arguments. Possibly because they cannot answer them.

There are two other reasons why many people on the left have accepted the pro-choice position, and both are emotional rather than intellectual. First, many people just do not like to think about the issue. It is not a pleasant subject. Abortion is a bloody, brutal affair. Suction abortion, the most common method, tears apart the tiny embryo or fetus with the sheer power of a vacuum machine. Dilation and curettage (D & C) involves dismemberment of the fetus, piece by piece. Saline abortions kill the fetus with salt poisoning, usually in the womb, although occasionally the fetus is born

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alive and badly-burned, and dies shortly after birth. This is what happens in those clean, modern, bright, cheerfully-decorated, safe, legal, abortion clinics and hospitals. It is not pretty to see or even to think about. Most people prefer not to. It is much easier to say that one personally has reservations about abortion, but that it must be a matter of individual conscience, and then just forget about it.

The second emotional reason is that so many conservatives oppose abortion. Many liberals have difficulty in accepting the idea that Jesse Helms can be right about *anything*. I do not quite understand this attitude. Just by the law of averages, he had to be right about something, sometime. Standing at the March for Life rally at the U. S. Capitol in 1979, and hearing Senator Helms say that "we reject the philosophy that life should be only for the planned or the privileged,"<sup>5</sup> I thought he was making a good civil-rights statement.

If much of the leadership of the pro-life movement is right-wing, that is due largely to the default of the left. We "little people" who marched against the war and now march against abortion would like to see leaders of the left speaking out on behalf of the unborn. But we see only a few, such as Dick Gregory, Mark Hatfield, Jesse Jackson, Richard Neuhaus, Mary Rose Oakar.<sup>6</sup> Most of the others either avoid the issue or support abortion. We are dismayed by their inconsistency. And we are not impressed by arguments that we should work and vote for them because they are good on issues like food stamps and medical care. To us, this is like saying, "Don't worry about the unborn; we can't or won't do anything to help them. Some of them will be born alive, and others will be torn apart in the womb; that is entirely up to their mothers. But we will take very good care of the survivors."

Although many liberals and radicals accept legalized abortion, there are signs of uneasiness about it. Tell someone who supports it that you have many problems with the issue, and she is likely to say, quickly, "Oh, I don't think I could ever have one myself, but . . ." or "I'm not really pro-abortion; I'm pro-choice" or "I'm personally opposed to it, but . . ." Why are they personally opposed to it if there is nothing wrong with it?

Another sign of uneasiness is the use of euphemisms. Abortion is "the operation" or "the procedure" or "termination of pregnancy" or "interruption of pregnancy." The fetus is "it" or "products of conception" or "contents of the uterus," never "she" or "he." Abortion clinics have such innocuous names as Women's Community

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Health Center, Ob-Gyn Associates, Parents' Aid Society, and Women's Pavilion. "Human kind," said T. S. Eliot, "cannot bear very much reality."<sup>7</sup>

Perhaps the uneasiness is a sign that many on the left are ready to take another look at the abortion issue. With the hope of contributing toward a new perspective, I offer the following thoughts.

First, it is out of character for the left to neglect the weak and the helpless. The traditional mark of the left has been its protection of the underdog, the weak, and the poor. The unborn child is the most helpless form of humanity. She is even more in need of protection than the poor tenant farmer or the mental patient or the boat people on the high seas. The basic instinct of the left is to aid those who cannot aid themselves — and that instinct is absolutely right. It is what keeps the human proposition going.

Second, the right to life underlies and sustains every other right we have. It is, as Thomas Jefferson and his friends said, self-evident. Logically, as well as in our Declaration of Independence, it comes before the right to liberty and the right to property. The right to exist, to be free from assault by others, is the basis of equality. Without it, the other rights are meaningless, and life becomes a sort of warfare in which force decides everything. There is no equality, because one person's convenience takes precedence over another's life, provided only that the first person has more power. If we do not protect this right for everyone, it is not guaranteed for anyone; because anyone can become weak and vulnerable to assault.

Third, abortion is a civil-rights issue. Dick Gregory and many other blacks view abortion as a type of genocide. Confirmation of this comes in the experience of pro-life activists who find open bigotry when they speak with white voters about public funding of abortion. Many white voters think that abortion is a good solution for the welfare problem and a good way to slow the growth of the black population. In 1978 I worked for a liberal, pro-life candidate who was appalled by the number of anti-black comments he found when discussing the issue. And Rep. Robert Dornan (R., Cal.), a conservative pro-life leader, once told his colleagues in the House: "I have heard many rock-ribbed Republicans brag about how fiscally conservative they are and then tell me that I was an idiot on the abortion issue." When he asked why, said Dornan, they whispered: "Because we have to hold them down, we have to stop the population growth." Dornan elaborated: "To them, population growth

means blacks, Puerto Ricans, or other Latins” or anyone who “should not be having more than a polite one or two ‘burdens on society.’”<sup>8</sup>

Fourth, abortion exploits women. Many women are pressured by spouses, lovers, or parents into having abortions they do not want. Sometimes the coercion is subtle, as when a husband complains of financial problems. Sometimes it is open and crude, as when a boyfriend threatens to end the affair unless the woman has an abortion, or when parents order a minor child to have an abortion.<sup>9</sup> Pro-life activists who do “clinic counseling” (standing outside abortion clinics, trying to speak to each woman who enters, urging her to have the child) report that many women who enter clinics alone are willing to talk and listen. Some change their minds and decide against abortion. But a woman who is accompanied by someone else often does not have the chance to talk, because the husband or boyfriend or parent is so hostile to the pro-life worker.

Juli Loesch, a feminist/pacifist writer, notes that feminists want to have men participate more in the care of children. But she says that abortion allows a man to shift total responsibility to the woman: “He can *buy* his way out of accountability by making ‘The Offer’ for ‘The Procedure.’” She adds that the man’s sexual role “then implies — exactly nothing: no relationship. How quickly ‘woman’s right to choose’ comes to serve ‘man’s right to use.’”<sup>10</sup> And Daphne de Jong, a New Zealand feminist, says that “if women must submit to abortion to preserve their lifestyle or career, their economic or social status, they are pandering to a system devised and run by men for male convenience.” She believes that: “Of all the things which are done to women to fit them into a society dominated by men, abortion is the most violent invasion of their physical and psychic integrity. It is a deeper and more destructive assault than rape . . .”<sup>11</sup>

Loesch, de Jong, Olivarez, and other pro-life feminists believe that men should bear a much greater share of the burdens of child-rearing than they do at present. And de Jong makes a radical point when she says: “Accepting short-term solutions like abortion only delays the implementation of real reforms like decent maternity and paternity leaves, job protection, high quality child-care, community responsibility for dependent people of all ages, and recognition of the economic contribution of child-minders.”<sup>12</sup> Olivarez and others have also called for the development of safer and more effective

contraceptives for both men and women. In her 1972 dissent, Olivarez noted with irony that “medical science has developed four different ways for killing a fetus, but has not yet developed a safe-for-all-to-use contraceptive.”<sup>13</sup>

Finally, one might note what should be obvious to everyone: at least one-half of the fetuses destroyed by abortion are female. They, and their little brothers, are not allowed the right to control their own bodies.

Fifth, abortion is an escape from an obligation that is owed to another. Doris Gordon, coordinator of Libertarians for Life, puts it this way: “Unborn children don’t cause women to become pregnant but parents cause their children to be in the womb, and as a result, they need parental care. As a general principle, if we are the cause of another’s need for care, as when we cause an accident, we acquire an obligation to that person as a result . . . We have no right to kill in order to terminate any obligation.” Gordon meets the privacy argument head-on: “Unborn children are not the ones accused of, nor are they guilty of, violating their mothers’ privacy anyway. Even if they were, killing them would be an excessive use of force. The state wouldn’t sanction killing in any other case of a violation of privacy and there is no justification for doing so here.”<sup>14</sup>

Sixth, abortion brutalizes those who perform it, undergo it, pay for it, profit from it, and allow it to happen. Those who look the other way because they do not want to think about abortion are like those who refused to think about Vietnam. A part of reality is blocked out because one does not want to see broken bodies coming home, or going to an incinerator, in those awful plastic bags. People deny their own humanity when they refuse to identify with, or even acknowledge, the pain of others.

With some it is worse. They are making money from the misery of others, from exploited women and dead children. Doctors, business men, and clinic directors are making a great deal of money from abortion. Jobs and high incomes depend on abortion; it’s part of the gross national product.<sup>15</sup> The parallels of this with the military-industrial complex should be obvious to anyone who was involved in the anti-war movement.

And the “slippery slope” argument is right. People really do go from accepting abortion to accepting euthanasia and accepting “triage” for the world hunger problem and accepting “lifeboat

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ethics” as a general guide to human behavior. We slip down the slope, back to the jungle.

Seventh, the agnostic/atheistic position against abortion may be even stronger than the religious arguments. Existence in this world is more precious, not less, if it is the only one we have, if there is no immortality. If things do not come out all right in the end; if there is no final balancing of accounts and no making-up for injustice, then the taking of human life is the ultimate wrong, the absolute wrong which cannot be remedied in any way.

To save the smallest children, and to save its own conscience, the left should speak out against abortion.

Notes

1. Jay Katz, ed., *Experimentation With Human Beings* (New York: Russell Sage Foundation, 1972), p. 312.
2. Dusan J. Djonovich, *United Nations Resolutions, Series I, Resolutions Adopted by the General Assembly* (Dobbs Ferry, NY: Oceana Publications, Inc., 1974), vol. VII, p. 195.
3. U. S. Commission on Population Growth and the American Future, *Population and the American Future* (Washington: U.S. Government Printing Office, 1972), pp. 162 & 163.
4. Graciela Olivarez, quoted in Betty Liddick, “Abortion Foe Wants Equal Time,” *Los Angeles Times*, June 2, 1972, Part IV, p. 5.
5. Senator Jesse A. Helms, Speech at March for Life rally, Washington, DC, January 22, 1979.
6. Other radicals or liberals who have spoken out against abortion include Rev. Daniel Berrigan, S.J., Governor Ella Grasso (D-CT), Rep. Lindy Boggs (D-LA), Dr. Bernard Nathanson, Senator Thomas Eagleton (D-MO), Senator William Proxmire (D-WI). Although the extent of left involvement in the pro-life movement is greater than the media have recognized, it is less than might be expected on the basis of ideology. Groups working for more pro-life involvement on the left include Feminists for Life (1503 North 47th Street, Milwaukee, WI 53208) and Prolifers for Survival (345 East 9th St., Erie, PA 16503).
7. T. S. Eliot, “Murder in the Cathedral,” Part II; and “Four Quartets, Burnt Norton,” Part I.
8. *Congressional Record*, June 17, 1977 (daily ed.), p. H 6087.
9. See Magda Denes, *In Necessity and Sorrow* (New York: Basic Books, Inc., 1976) and Linda Bird Francke, *The Ambivalence of Abortion* (New York: Random House, 1978) on pressures on women to have abortions. The Francke book also describes in detail the sheer human misery endured by many couples who experience abortion — a factor overlooked in many discussions of the issue.
10. Juli Loesch, “Perspective: Our Right to Choose,” n.p., n.d., p. 2. For an interesting dialogue among pro-life and pro-choice feminists, see Juli Loesch *et al.*, “Abortion: A Question of Survival?” *WIN*, August 1, 1980, pp. 15-28.
11. Daphne de Jong, “The Feminist Sell-out,” *NZ Listener*, January 14, 1978, p. 18.
12. *Ibid.*
13. U.S. Commission on Population Growth, *op. cit.*, p. 163.
14. Doris Gordon, Letter to the Editor, *Life Report* (published by Maryland Right to Life, Inc.), April, 1979, p. 7.
15. See Gwynn McDougal, *Women's Medical Clinic of Providence* (Providence, RI: Scorpio Press, 1979), p. 12, where she describes a Philadelphia clinic in which a doctor “can earn upwards of \$1,000.00 each day for performing abortions from ten in the morning until two or so in the afternoon.” See, also, Kaye Archiprete *et al.*, *The Abortion Business* (Cambridge, MA: Women's Research Action Project, 1975); Rochelle Lefkowitz, “Preterm Clinic Management's Approach to Union Busting,” *Seven Days*, April 25, 1977, p. 13; and “Abortion Clinics Rush to Diversify,” *Business Week*, December 10, 1979, pp. 68 & 73.

## Hidden Roots: Cultural Presuppositions of the Abortion Revolution

Harold O. J. Brown

**A**S RECENTLY AS THE mid-1960's, the Planned Parenthood Foundation regularly conceded that abortion, unlike contraception, destroys a real baby in the process of development. Into the 1970's, the official position of most representative medical organizations in America admitted abortion as a medical procedure only as a last resort, when there was a severe threat to the life of the pregnant woman. By the early 1970's, Planned Parenthood and its affiliates have become million-fold advocates, advertisers, and providers of abortion-on-demand; the medical profession, with laudable but rare exceptions, has quietly added it to the "full range of medical services," allowing a few unscrupulous abortionists to reap immense profits and even raising an occasional celebrated abortion practitioner to its highest professional and academic dignities. A revolution in moral sentiment as well as in medical practice has taken place. Lawrence Lader, one of the outstanding early pro-abortion activists, has not incorrectly entitled his celebration of the abortionists' success *Abortion II: Making the Revolution*.<sup>1</sup>

Where did this revolution originate? One of the earliest scientific papers on the subject, by Raffaello Balestrini in 1888, calls abortion "the apparent manifestation of the state of decadence of a people, which has very deep roots . . ." <sup>2</sup> This is only a description, but no answer: what brought about this "state of decadence"? It is my purpose to argue that our present "abortion revolution" is possible only on the basis of the widespread replacement of our perception of ourselves as rational creatures made in the image of God, with the perception of ourselves as mere accidental by-products of what Jacques Monod calls "chance and necessity," — in other words, with the general triumph of social Darwinism. In an important study, *Darwin and the Darwinian Revolution*, Gertrude Himmelfarb concludes: "But if it is important for later generations not to deny the fact of revolution because they cannot concede its truth or

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justice, it is no less important not to concede truth or justice merely because they cannot deny the fact of revolution.”<sup>3</sup> We cannot deny that there has been an abortion revolution, but we do not concede its truth or justice. In the same way, we cannot dispute that there has been a Darwinian revolution, but it is not necessary to concede, by reason of its facticity alone, that it represents the whole truth or is productive of justice. As Himmelfarb writes, “Even those who are entirely convinced of the validity of Darwin’s scientific doctrines may be wary of their extension to political or social theory”<sup>4</sup>: one such extension lies in the creation of what we may call the abortion mentality.

As will be evident from what follows, this writer is not “altogether convinced,” and will seek to show that it is not necessarily wise so to be. But even if one *is* convinced — as most of the modern world appears to be — it is well to be wary of the extensions. As the magisterial Scottish theologian John Baillie wrote:

I believe that the illicit extension of the categories of natural science to the inner life of the spirit presages the final betrayal of our human birthright . . . I can imagine nothing more convenient to my sloth, my selfishness, and my concupiscence than a philosophy which persuaded me, in the name of scientific outlook, to regard myself only as part of nature and as subject to none but nature’s laws; nor can I imagine anything that would be more destructive of the very foundations of my humanity — and therefore, in the end, of my very science itself.<sup>5</sup>

In the fact that the abortion revolution has led to a widespread destruction of human life, we can see the fulfillment of the first part of Baillie’s prediction; in the fact that medical and juridical science now so frequently denies or ignores evident scientific reality, namely, the humanity of the unborn human beings destroyed in million-fold abortions, we see fulfilled his second prediction: destruction of the foundations of science itself. All this, we might add, is — just as he wrote — very convenient to our sloth, our selfishness, and our concupiscence. If the Darwinian revolution is accepted in its full form, then each of us is only “part of nature,” with no higher destiny, and — as Oswald Spengler noted over half a century ago — there is perfect justification for the political and social ends of whoever happens to be in power.<sup>6</sup> That this is virtually an inevitable consequence of Darwinism in its materialistic, non-theistic form has been attested and demonstrated again and again. George Bernard Shaw referred in *Heartbreak House* (1919) to Darwinism as the



religion that caused World War I and caused England and Prussia to damage each other in a degree hardly likely to be repaired in his time.<sup>7</sup> Shaw refers to the success of nineteenth-century naturalism as necessarily justifying “the ruthless destruction or subjection of . . . competitors for the supply . . . of subsistence available.”<sup>8</sup> Is this so different from the economic, utilitarian argument of the more cynical pro-abortionists that abortion is cheaper than welfare?<sup>9</sup> There is ample evidence that Darwinism, if it did not cause World War I, at least provided the rationale that enabled large numbers of intellectuals on both sides to view it as a necessary if rather bloody stage on the road to progress.<sup>10</sup> It seems not unreasonable to think that the same type of Darwinian naturalism helps create the abortion mentality that looks with complacency, even satisfaction, on an annual abortion rate in the United States that far exceeds, each *year*, the total American casualty figures for World War I and World War II combined. It is often alleged that abortion is justifiable on the basis of the theory or conviction that the developing fetus is not yet human life, but it is becoming increasingly evident that the more fundamental justification for abortion lies in the conviction that the mere fact of the humanity of the fetus — now widely conceded — does not in itself confer the right to life. This is consistent with the naturalistic reductionism of non-theistic evolution, which sees human beings as nothing more than products of their environment. It may be argued that evolutionary naturalism need not inevitably produce the kind of utilitarian relativism that characterizes the abortion mentality, but the connection is so strong, and the sequence of events so marked, that those of us who reject abortion and other life-destroying policies can profit by taking a closer look at the scientific-metaphysical foundation on which they so comfortably rest.

#### **Evolution and Theology**

The idea that human beings have certain rights as humans not only results from biblical teaching but also is clearly expressed in the natural law views of deists such as Thomas Jefferson, for whom it was “self-evident” that all human beings are “endowed by their Creator with certain inalienable rights . . .” The concept of inalienable rights does not necessarily depend on revealed religion — Jefferson himself was rather indifferent to revelation — but it does depend on the conviction that the world demonstrates a natural order, on the basis of which it is possible for reasonable minds to discern

the appropriate *telos*, or goal, of each being. For human beings, extermination, either outside the womb or in it, does not appear as an appropriate *telos*. If we deny that human beings have an innate *telos* to which they should conform and which should be respected by others, then it is only reasonable to speak of the survival of the fittest and to encourage those who are fit to assert themselves at the expense of the weak, the infirm, and the helpless. It is very difficult to see how scientific naturalism, which rejects the idea of a Creator and of an order of creation, and hence of any teleology, can coexist with any structure of universally-binding ethical principles.<sup>11</sup>

If Darwinism is the dominant social theory, and if Darwinism necessarily excludes teleology, the idea of God, and divinely-endowed human rights, and if the abortion struggle is precisely the attempt to assert that humans do have a *telos* that is violated in abortion, it will be impossible, other than by a pure *coup de force*, to restrict abortion without simultaneously attacking the naturalistic evolutionism that justifies it. Inasmuch as most anti-abortionists feel that they have a debilitating struggle on their hands in the legal-political arena already, it is not surprising that few are eager to reopen the scientific-metaphysical-religious quarrel relating to Darwinism and its ethical implications. Darwinism, one might argue, is too thoroughly entrenched to challenge: therefore we shall confine our efforts to the political and legal arena. However, if Darwinism is necessarily naturalistic and will inevitably reign, it is difficult to see how political and legal efforts to undermine one of its consequences can be successful in any other way than by a forcible *coup*. On the other hand, if Darwinism need not reign (an unpopular suggestion today), or even if it need not be naturalistic and a-teleological — in other words, if it does not dominate, or at least does not dominate in such a way that it destroys the idea that human beings have purpose and innate, endowed rights — then the struggle against abortion may eventually be won.

#### **Darwin and Naturalistic Evolution**

During the early stages of Darwin's activity, most of his opponents assumed that his views were necessarily anti-theistic. They made the fundamental mistake of confusing an explanation of process, or Secondary Cause, with that of purpose, or First Cause. Darwin himself did not make this mistake; although he abandoned the mild Christian orthodoxy of his early years, he remained con-

vinced to the end of his life that evolution had both a purpose and an architect, i.e. that all had been begun by God. About God, Darwin professed to know very little, but the mere fact that he acknowledged Him was enough to save Darwin himself from becoming a complete naturalist, as so many of his followers did. In other words, if we can accept the claim of Darwin to be a good evolutionist, we can easily concede that belief in evolution need not necessarily exclude faith in God, nor the ideas of human dignity and purpose. Indeed, quite a number of Christian theologians now welcome the evolutionary theory and hold it to be true — assuming, of course, that God the Creator set it all in motion. Thus Eric L. Mascall, an Anglican theologian with considerable attainments in mathematics and the natural sciences, can write: “That evolutionary theory as such is not inconsistent with the Christian Faith would be admitted today by all but the most obstinate fundamentalists.”<sup>12</sup>

There *are* problems with evolutionary theory, as non-religious scientists occasionally point out,<sup>13</sup> but on the whole its general outline commands all but universal acceptance in the modern world, and energetic opposition to it is confined to a few of the “most obstinate,” in Mascall’s terms. Against this background, from a practical perspective it would be foolhardy for anti-abortionists to attempt first to demolish the evolutionary framework. There are simply not enough “obstinate fundamentalists” around to do the job, and they would be dooming themselves to frustration in a very unequal struggle. On the other hand, we shall maintain this: while it is not necessary to struggle against evolution *per se*, it *is* necessary to break the logically-necessary but practically all-but-absolute link between the general theory of evolution as a scientific explanation of biological reality and the metaphysical schema of evolutionary naturalism as a substitute for Creation and God. Evolution in a theistic framework is not without problems, and this writer for one would like to reserve the right to point some of them out, but at least it is compatible both with Christianity and with a teleological view of man as having an innate purpose and certain divinely-endowed rights. Evolution in an atheistic, naturalistic framework is logically and practically incompatible both with belief in God and with the idea of human purpose and innate rights. Fortunately, the atheistic, naturalistic framework is by no means a necessary conclusion from the evidence on which the theory of evolution is based, but involves the imposition of metaphysical, not scientific, presuppositions —

such as the axiom that there is no God and the supposition that by explaining the mechanism of a process, one can dispense with the question of First Cause.

Unfortunately, while naturalistic evolution remains a presupposition rather than a result, and while the accumulating scientific evidence increasingly points to an intelligent First Cause, i.e. to God,<sup>14</sup> in the general public and especially among the educational establishment the reigning Darwinism is generally interpreted as making naturalism an assured result of science and thereby excluding all idea of God and of divine purpose, or at least banishing it to the realm of private religious opinion.

### Conclusion

The anti-abortion argument is essentially an argument from what we may call creation order, or at least from natural order. It contends that the developing child, irrespective of Constitutional provisions and Supreme Court decisions, possesses rights in himself, that this is, in the words of Jean Jacques Burlamaqui, a law "that God imposes on all men, and which they are able to discover by the sole light of reason."<sup>15</sup> It looks away from arbitrary, relativistic, sociological law, so well illustrated by *Roe v. Wade*, to the higher principle that "all men are created equal, and endowed by their Creator with certain inalienable rights . . ." To the extent that a Creator is radically denied, divine purpose and endowment are also denied, and with them, innate human rights. Then law need do no more than "correspond with the actual feelings and demands of the community, whether right or wrong," as Oliver Wendell Holmes put it.<sup>16</sup> As Grant Gilmore interprets Holmes' view, it means that "If the dominant majority desires to persecute blacks or Jews or communists or atheists, the law, if it is to be 'sound,' must arrange for the persecution to be carried out with, as we might say, due process."<sup>17</sup> We need only supply the familiar catchwords, "safely and legally," and we have a perfect rationalization of *Roe v. Wade* and the license it granted to abortion-on-demand.

In the legal and political sphere the anti-abortion cause can make headway only by appealing to a higher law, to a "law of eternal validity," above the relativistic, man-made sociological "justice" currently established by the United States Supreme Court. I have already argued this point in an earlier essay in this review.<sup>18</sup> But the very possibility of such a law — although the Bible and Christian

theology teach it and most members of the general public take it for granted — is negated by the implications of a thoroughly-naturalistic evolution. In order to defend the right to life against its abolition in man-made law, it is necessary to defend the proposition that there is an order to nature, that man has a purpose and a dignity that are his *by nature*, not conferred by constitutional conventions or federal courts. In order to defend the concept of such a natural, innate right, it is necessary to defend the concept of purposeful, divine Creation against the implications of naturalistic evolution.

This defense can be accomplished by a critique of the entire theory of evolution — whether or not, to some, such a critique may seem Quixotic and relatively unpromising in the present day. This necessary defense can also be accomplished equally effectively by attacking the traditional but weak link between evolution as a scientific theory explaining the mechanisms of life and evolutionary naturalism as an all-embracing world-and-life view explaining, or rather denying, the Ultimate Meaning of Everything. Perhaps this too seems Quixotic. Nevertheless, it is by no means hopeless. Accumulating scientific evidence favors, as we have stated, the theological conviction that the world is the purposeful Creation of God. At the very least it is adequate to disqualify any claim that naturalistic evolution is an assured fact on which to base principles of political, legal, and individual policy.

The abortion issue, as Malcolm Muggeridge pointed out some years ago, “raises the question of the very destiny and purpose of life itself.”<sup>19</sup> It will not be possible to resolve this issue without answering that fundamental question, and affirming that each individual human being has a purpose and a destiny of his own because, regardless of evolutionary mechanism or special creation, he is not “the product of his environment,” but someone whom God has made in His own image. In order to make this affirmation, and thus to smash the basis for the abortion mentality, we must be willing to part company with every atheistic, naturalistic, reductionistic view of man. This does not mean abandoning evolution as a mechanism, but it does mean repudiating it as a religion. Fortunately, the mechanism is scientifically compatible with a Christian view of God; indeed, we may properly contend that it is *more* compatible with a Christian view of God than with any concept of an impersonal, godless universe. Unfortunately, this distinction has been so obscured, carelessly by some, craftily by others, that evolution is often taken

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to prove naturalism and thereby to cast us inevitably into the morass of a relativistic world-view in which there are no such things as innate rights or absolute moral standards. It is not necessary to be a conservative Christian or Jewish believer to oppose abortion; as a practical matter, it is not even necessary to be a theist. Every anti-abortion group knows individuals who support it without a theological basis for their militancy. Often — fortunately for the human race — an individual's moral intuition is healthier than his explicit or implicit metaphysical theories might justify. Nevertheless, there is a significant logical link between the factual evil of abortion and the theoretical view that there is an order to nature, that human beings have a *telos*, and that it is very wrong to destroy them without grave and sufficient cause. It is this link that naturalistic evolution destroys. For this reason, it is practically wise, as well as intellectually responsible, to re-examine the unsound presuppositions of naturalistic evolution and to expose them for what they are: scientifically unfounded, logically unconvincing, and socially dangerous.

NOTES

1. Boston: Beacon Press, 1973.
2. Raffaello Balestrini, *Aborto, infanticidio, ed esposizione d'infante* (Torino: Bocca, 1888), p. 141.
3. Gertrude Himmelfarb, *Darwin and the Darwinian Revolution* (New York: Norton, 1962), p. 452.
4. *Ibid.*, p. 412.
5. John Baillie, *Natural Science and the Spiritual Life* (London: Oxford University Press, 1951), pp. 42f.
6. Oswald Spengler, *The Decline of the West*, Vol. I (New York: Knopf, 1926), p. 369. Miss Himmelfarb makes the same point in her *Darwin*, p. 421.
7. George Bernard Shaw, *Heartbreak House, Great Catherine, and Playlets of the War* (London: Constable, 1925), p. xiii.
8. *Ibid.*, p. xiv.
9. For one example among many, see the transcript of remarks by A.C.L.U. attorney Harriet Pilpel, cited in *The Human Life Review*, Vol. VI, no. 3, Summer, 1980, p. 85.
10. Gertrude Himmelfarb, *Darwin*, pp. 416f.
11. This point has been ably argued by Stanley L. Jaki in his Gifford Lectures, *The Road of Science and the Ways to God* (Chicago: University of Chicago, 1978), pp. 279-313.
12. Eric L. Mascall, *Christian Theology and Natural Science* (London: Longmans, 1956), p. 254. On this reasoning Dr. Mascall might number this writer among "the most obstinate fundamentalists," but he is cordial enough in personal contact. Although I agree that *theistic* evolution is not absolutely irreconcilable with orthodox Christian faith, I would like to be on record as asserting that there are serious problems of both a theological and a scientific nature with the so-called general theory of evolution (the view that all living organisms are derived, by a more or less regular development, from a single original life-form). "Special" theories, which hold that evolution does take place but that it is not enough to explain the present complexity of life forms, and hence does not exclude all divine creative interventions during or alongside the evolutionary process, are compatible. The Bible would appear, on a simple reading of Genesis 1, to permit "mediate" or evolutionary creation of the animals, although it is less flexible with respect to the special creation of a first human pair. Even that special creation of man and woman can be interpreted, within a more or less orthodox Christian framework, as a figurative expression of God's directing activity, exercised through an evolutionary process. This is done today by most Roman Catholic and a number of relatively orthodox Protestant thinkers. Among the great figures of contemporary Protestant thought, Karl Heim was an evolutionist, but the neo-orthodox leader Karl Barth was not. The leading evangelical anti-abortion writer, Francis A.

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Schaeffer, opposes the evolutionary view, while Paul Ramsey does not. But all of the above, indeed all Christians, acknowledge that man was made according to God's deliberate will and counsel, and in His image and likeness (Genesis 1:26-27). Purely naturalistic evolution, in which everything takes place, in Jacques Monod's terms, on the basis of nothing but "chance and necessity," is certainly incompatible with the Christian doctrine of Creation.

13. E.g., G. A. Kerkut, in *Implications of Evolution* (Oxford: Pergamon, 1960).

14. In addition to the works of Mascall and Jaki mentioned above, one may consult with profit Karl Heim, *The Transformation of the Scientific World View* (New York: Harper, 1953), and Robert Jastrow, *God and the Astronomers* (New York: Norton, 1978).

15. Jean Jacques Burlamaqui, *The Principles of Natural and Political Law* (Philadelphia, n.n., 1859), p. 87.

16. Grant Gilmore, *The Ages of American Law* (New Haven: Yale, 1974), p. 49.

17. Gilmore, *Ages*, pp. 49f.

18. "What Makes the Law the Law?" *The Human Life Review*, Vol. V, no. 1, Winter, 1979, pp. 68-72.

19. Malcolm Muggeridge, "What the Abortion Argument is About," *The Human Life Review* Vol. I, no. 3, Summer, 1975, p. 4.

## The Black Family Revisited

*Peter Skerry*

**I**N 1965 WHEN DANIEL PATRICK MOYNIHAN wrote his now-famous report on the black family, he pointed with alarm to statistics revealing that more than one out of five black births were illegitimate and that a growing proportion of black families — more than 22 percent — were headed by females.<sup>1</sup> Today, these figures are even more disturbing. By 1975 the illegitimacy ratio had more than doubled in a decade; just about half of all black children born were illegitimate — almost seven times the ratio among whites.<sup>2</sup> By 1978 nearly 40 percent of all black families were headed by women.<sup>3</sup> And this increase is even more dramatic when we note that since 1950 the proportion of black families headed by women whose husbands died has dropped from over half to about one-fourth, while those headed by women never married have increased from 9 percent to about 22 percent.<sup>4</sup> In any event, current estimates indicate that about three-quarters of all black children born in the early 1970's will spend some time in a female-headed family — compared to about one-third of white children. Today, as many as one-half of all black children will spend most of their childhood in a household without their father.<sup>5</sup>

Those who point to poverty as a prime factor in this continuing deterioration of the black family would be wrong, for the amelioration of poverty is one of the few bright spots in an otherwise discouraging picture. In 1959 over 48 percent of all black families were living below the federal government's poverty line. By 1977 this had been reduced to slightly more than 28 percent.<sup>6</sup> And these figures take into account only money income and therefore do not include in-kind transfer payments such as food stamps and Medicaid.

On the other hand, it is evident that black employment, which Moynihan identified as a real threat to the integrity of the black family, has been dismal. The overall unemployment rate among blacks relative to whites has not changed much since 1960: it has remained about twice the rate for whites, fluctuating up and down

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somewhat with the economy.<sup>7</sup> Of course, if we focus on black teenagers, the situation has deteriorated dramatically, climbing from 24 percent unemployment in 1960 to over 41 percent in 1977.<sup>8</sup> Indeed, the real crisis in black employment is not among adult workers already in the labor market, who may or may not be unemployed, but among teenagers who have not yet gained entry into the workforce, and those adults who have stopped looking for work and dropped out of the market entirely. For example, from 1964 to 1976 the non-labor-force-participation rate for black males over 16 jumped from 11 percent to 15 percent, while the unemployment rate for this group actually declined slightly over the same period.<sup>9</sup>

What these data suggest is that our efforts to alleviate poverty, though fairly successful, have had devastating social consequences, undermining the already-weakened black family. As the federal government's income-maintenance experiments have demonstrated, a guaranteed income — which our welfare system now in effect provides — tends to increase the rate of separation and divorce — undoubtedly because it bolsters the financial situation of wives who might otherwise be reluctant to rid themselves of a bread-winning husband.<sup>10</sup> Even more insidiously, welfare has undermined the position of the black male within the family by providing a steadier and, in many instances, higher income than what he could earn at the minimum wage. Under these circumstances it is no wonder that more and more black men are abandoning their family responsibilities and that more and more black women are prepared to raise a family without a male provider.

But just as when Moynihan warned of the problems besetting black families, it is today not popular to point to these signs of continuing deterioration. Those who do are dismissed as moralistic prigs insensitive to the cultural standards of the black community. But the understandable outrage of respectable middle-class families aside, the real issue here is the persistent disadvantage facing black children raised in these families. As economist Richard Freeman has pointed out, the declining importance of discrimination against blacks in the labor market means that family-background characteristics are more important than ever to the progress of blacks. In order to take advantage of expanding opportunities, black children need the resources and motivation provided by stable families. But as Freeman also shows, in the 1970's the economic progress of black

families relative to white families came to a standstill — primarily because of the continuing increase of female-headed families.<sup>11</sup>

In 1965 his critics overlooked the fact that, as Assistant Secretary of Labor under Lyndon Johnson, Moynihan was trying to mobilize an administration in danger of falling into complacency in the period after the passage of the Civil Rights Act of 1964 and before the Watts riots of August 1965. Moynihan was denounced for focusing exclusively on the negative aspects of black culture and ignoring the positive. Soon a number of articles and books began to appear emphasizing the strengths of the black family. Today we have a small but very influential — and largely unscrutinized — body of social science that one way or another manages to completely ignore the continually-deteriorating social fabric of black communities across the nation.

#### **The First Response: Mom, Dad, and the Flag**

One of the earliest responses to Moynihan came from Andrew Billingsley, a professor of social welfare and a long-time consultant to the National Urban League. Billingsley's argument in *Black Families in White America*, published in 1968, was evident from the cover of the paperback edition, which featured a black mother holding a baby girl, her husband, and their young son holding an American flag.<sup>12</sup> The author countered Moynihan by pointing out that over three-quarters of all black families had two parents. But Billingsley shared Moynihan's emphasis on stable families as crucial to individual and group advancement, and he devoted considerable attention to the strong and sustaining families in which prominent black leaders had been raised. And like Moynihan, Billingsley expressed concern about what he identified as pathologies within the black community — pointing out, contrary to the conventional wisdom, that many of the rioters of the 1960's were actually employed and that the failures of job-training programs were frequently traceable to the low level of commitment and poor work habits of ghetto youths.

Black conformity to middle-class values is also emphasized in historian Herbert Gutman's *The Black Family in Slavery and Freedom, 1750-1925*.<sup>13</sup> Published in 1976, this mammoth piece of research is actually the author's response to Moynihan a decade after the fact. Arguing against the long-dominant view that slavery destroyed the black family, Gutman spent years researching family

histories in plantation registers and Freedmen's Bureau records. And for over six hundred pages he documents the myriad ways in which ordinary blacks maintained strong family ties in the face of adversity during and after slavery. Like Billingsley, Gutman acknowledges problems of illegitimacy and female-headed families that have long been evident among some blacks, but he also emphasized that most black families have had two parents.

Gutman's real argument, of course, is less with Moynihan than with the scholarship on which Moynihan and others have relied. Gutman takes exception to the work of historian Stanley Elkins, who in the 1950's drew a parallel between the experience of slaves on plantations and prisoners in concentration camps who identified with their Nazi captors.<sup>14</sup> Of fundamental concern to Gutman is the work of black sociologist E. Franklin Frazier. For Frazier the family is the key agency of social control in which blacks are to learn discipline and responsibility. Indeed, because that institution was seriously weakened by slavery and then by urban migration, blacks in America — at least in Frazier's view — have been reduced to a state of dependency and *anomie*.<sup>15</sup>

The problem with such interpretations of the black experience is, as Gutman rightly points out, that they reduce blacks to putty readily molded by the will of masters or the forces of history, which are assumed to be totally beyond their influence or control. Frazier in particular — perhaps because he is so sensitive to the fundamental importance of stable families to economic and social advancement — tends to exaggerate the debilitating influence of slavery and urbanization on the black family. In any event, there is evident in these interpretations a deterministic impulse that offends our notion of human beings as something more than the focus of myriad social forces. Perhaps more importantly, there is a tendency here toward paternalism that would relieve blacks of any responsibility for changing their present or future condition — though this is quite contrary to Frazier's intent.

#### **The Second Response: Different Strokes**

As we have already noted, Gutman's book and its emphasis on the conventional family life of most blacks is rooted in the early controversy over the Moynihan Report. By the 1970's a new response had begun to emerge with an emphasis on the strengths of black families that were not so conventional. Perhaps the most

frequently-cited example of this tendency is *All Our Kin*, anthropologist Carol Stack's account of daily life in the black ghetto of a midwestern city.<sup>16</sup> Interestingly enough, Stack documents details of ghetto life entirely consistent with what in 1965 Moynihan called "a tangle of pathology." We read of families headed by mothers, grandmothers, aunts, and female friends. Unmarried teenage girls routinely get pregnant, and then turn their children over to their mothers and grandmothers to be raised. Men — fathers, boyfriends, and brothers — drift in and out of the lives of these women and their children. Many children don't know who their father is, and many who do see him infrequently.

There is then no dispute over these facts, but there is considerable disagreement over their interpretation. In contrast to the view of ghetto blacks as demoralized and passive victims, Stack emphasizes their adaptive capacity to cope with financial and emotional stress. She points to the mutual-aid networks and extended family ties that ghetto residents rely on to survive. Families crowd into apartments — up to three generations in each apartment — to save on the necessities of life. Friends and neighbors routinely care for one another's children. Relatives informally adopt nieces and nephews whose parents are either unable or unwilling to care for them.

An obvious problem with this perspective is that it romanticizes ghetto life. Focusing exclusively on the fellowship that is undoubtedly there, Stack completely ignores the mutual distrust and alienation that other observers have found in the ghetto. Reading Stack, one would never realize that most ghetto crime is committed by blacks against *other* blacks. As for friends and family, Stack presents a bowdlerized version that ignores the hurt as well as the help that individuals offer one another. As some ghetto residents put it to one sociologist:

My husband and I had a savings and told relatives about it, a couple of weeks later they borrowed the money and never paid it back.

A friend is the only one that gets close enough to you to do you some harm. A lady I met, we went drinking together and she borrowed money from me. She was a friend so she knew I needed the money, but she never paid it back.<sup>17</sup>

Ghetto life appears to be based much less on cooperation and mutual aid than Stack suggests. What seems to dominate there is an ethic of "going for yourself" or "looking out for number one." As

Harvard sociologist Lee Rainwater, who spent several years studying an all-black housing project in St. Louis, observes:

Pruitt-Igoeans [residents of the project he studied — it was later demolished] draw a number of conclusions as guides for survival in their milieu. In addition to being on guard when one communicates with others, no matter how close, he tries not to count on others for much, not to expect others to live up to their putative responsibilities as relatives or friends. Instead he expects to manipulate others to get what he wants — and this manipulation, of course, reinforces the generalized mistrust each has of the other . . . In short, Pruitt-Igoe people learn that relationships are brittle; therefore, the reasonable person takes care not to place too much strain on them lest they shatter.<sup>18</sup>

A less obvious but nevertheless serious problem with Stack's view of the strengths of black ghetto families is her failure to distinguish between mere survival and success. Stack and her colleagues explore in detail the skills ghetto residents call upon just to squeeze by from day to day, but they neglect to deal with the relative lack of organizational and business skills in black communities across the nation — skills with which in other ethnic groups many successful careers have been launched.<sup>19</sup> What Carol Stack seems to ignore is that to join the mainstream of American life ghetto families need to do more than get by, they need to get *ahead*.

Implicit here is an even more fundamental issue. The real question with regard to kin and mutual-aid networks is how they affect social mobility. In an earlier era European immigrant families frequently discouraged their children from continuing their education so that they could contribute to the immediate needs of the family as a whole. Those who now praise the strengths of the black family must consider that it too may hinder the advancement of individuals. Indeed, observers note that members of black extended families are often expected to contribute to and share in a common pool of resources, which probably discourages individual achievement. On one hand, this may act as a dis-incentive to those who have the opportunity to advance but would then be expected to share the rewards. But perhaps more to the point, this arrangement might well discourage effort on the part of those many family members who face menial work but who also know they can fall back on their relatives for support. Of course, families can exert social pressures to discourage such free-riding (no doubt more effective than the means available to the state against those who take advantage), but the problem would seem to be a persistent one.<sup>19</sup>

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Perhaps a more distressing example is that of a fourteen-year-old girl who gets pregnant and gives birth to a child. In most ghetto families today this girl knows she can turn her baby over to her mother or grandmother, who will raise it with all the love and affection they gave her. This solution to the problem is clearly better than turning the child over to the foster care system and understandably more acceptable than placing it for adoption. This is indeed an example of one of the many "strengths" of the black family. Yet we must ask: if a girl knows she can rely on her family for such support — frequently despite their warnings about getting into just such a situation — then what sanctions are there to discourage such behavior? With half of all black children currently born illegitimately, there appear to be very few. From this perspective, then, what Carol Stack sees as a strength of the ghetto family is more accurately a tragic weakness that contributes to the cycle of poverty in which so many find themselves.

#### **The Third Response: Black Is More Beautiful**

The emphasis on the strengths of poor black families is carried one step further by sociologist Joyce Ladner, whose book *Tomorrow's Tomorrow* deals with the coming-of-age of teenage girls in a St. Louis ghetto.<sup>20</sup> Here again we find what would seem to confirm all the most depressing stereotypes of ghetto life: young girls subject not to the discipline of their husband-less mothers, who cannot control them, but to the demands of the peer group; the dominance of a street culture where stealing and sex are routine; a world in which children grow up very quickly and learn the hard realities of life before they can defend themselves from being caught in the same trap as their parents were; a world where men "get tired and just walk away" from their families and where ten-year-old girls agree with their mothers that "men are no good."

Like Carol Stack, Joyce Ladner is undaunted by the picture she paints. For what she sees here is not misery or tragedy — much less pathology — but the workings of an "autonomous" and superior black culture that is an amalgam of vestigial African tribalisms and resourceful responses to oppression in America. In Ladner's terms, black culture is a functional adaptation to a hostile environment. Describing the casual acceptance of shop-lifting among the girls she interviewed, Ladner explains:

The point I am trying to make is that stealing items and pawning them have a high functional value for these girls because of their poverty circumstan-

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ces. They are able to rationalize their activities because they serve a highly utilitarian purpose. A girl will have money to buy food; will have adequate clothes to wear; will be able to share some of life's necessities which would otherwise be unavailable to her . . . The concern with providing the essentials for oneself by whatever available means are forthright expressions of their feelings. It is important to understand that they are operating within two value contexts — one which condones stealing because it is functional and another which condemns it for ethical reasons. The moralistic attitude that is traditionally taken toward stealing does not apply within this context because it is dysfunctional.<sup>21</sup>

With regard to the many girls she met who began sexual activity at thirteen or younger and shortly thereafter gave birth to their first child, Ladner has this to say:

Often in the absence of material resources (such as money to purchase gifts for a boyfriend's birthday, etc.) sex becomes the resource that is exchanged. Sex becomes the medium of exchange for a boyfriend who shows that he cares by providing small gifts, taking the girls out on dates, etc. While these small considerations of gifts, dates and the like might strike one as trivial, they are sometimes extremely important sources of gratification for these young women, who might need the emotional security the boyfriend provides. Her involvement in sexual behavior is only an attempt to respond to this concern for her by attempting to fulfill his needs in the only way she can. It is here that sexual involvement transcends any conventional analysis because the standards that the individuals apply to their actions are created out of their particular situations.<sup>22</sup>

Not content with this level of social-scientific detachment, Ladner goes on to assert:

There are no "illegitimate" children in the low-income Black community as such because there is an inherent value that children cannot be "illegally" born. There are, however, "unauthorized births" because these children are not born within the limitations and socio-legal context defined by legislators and other people in the majority who create and assign labels to the minority group.<sup>23</sup>

But let there be no mistake. Ladner is no relativist. She goes on to assert the superiority of these distinctly black values. When she encounters a family that refuses to accept the dominance of the peer group and the street culture, Ladner finds it at best quaint and more frequently "over-protective." At various points she taunts the reader with the notion that whites are increasingly adopting black values — particularly in matters of sex. And with regard to the precocity of the girls she talked with, Ladner comes to this curious conclusion:

When one views closely the responses the girls gave on the effects of unemployment, the role of the police, their rationalizations for stealing, etc., it is

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apparent that they have a clear understanding of what the sources of oppression are. They do not turn their disparagement inward because they have been cut off from the dominant society's resources, but rather, they usually place the burden of blame upon the root causes. Their stark understanding of the "whys" and "hows" of their conditions is phenomenal. Thus, their ability to cope with them and to try to find some means of eradicating these conditions is a decided advantage they have over white middle-class kids whose adaptability to poverty and racism would be more difficult to manage were they suddenly confronted with it.<sup>24</sup>

### **Back Full Circle**

With this Joyce Ladner brings the discussion of race differences back full circle to where it began. By explaining away illegitimacy and stealing as "functional" aspects of an autonomous black culture, Ladner reduces these girls to ciphers in a sociological calculus that relieves them of all responsibility for their actions. In a real sense Ladner is saying that these girls are incapable of abiding by conventional norms. But in so doing she reduces them to the passive and demeaning status that critics so justifiably denounced in the work of Frazier. But whereas Frazier sees blacks as buffeted about by the forces of slavery and urbanization, Ladner traps them in a superior culture of their own.

Ladner's analysis of the strengths of black culture is a regression in still another way. Throughout the 19th and well into the 20th century the prevailing view of the black race was that — whether for cultural or biological reasons — it somehow operated by its own distinctive rules. And because blacks were seen to be not only different but inferior, it was argued that they needed the support of paternalistic institutions without which they would revert to barbarism. Indeed, it was argued that the family was one of the civilizing institutions that blacks owed to the influence of their white superiors.

By the 1960's a very different view had emerged. Anthropologist Oscar Lewis advanced the notion of the culture of poverty as a set of values and attitudes that set the poor, regardless of race, apart from the rest of society. For those living in the culture of poverty, daily life is extremely disorganized and unpredictable. Crime, drugs, and prostitution are accepted as part of life without any sense that they violate society's norms. There is little or no community life. Participation in politics, unions, and even churches is virtually non-existent. And as Lewis made clear, the implication of all this is that those in the culture of poverty don't need economic resources as much as they need psychotherapy to bring them into the mainstream.<sup>25</sup>



Though Lewis estimated that only ten percent of ghetto residents actually live in the culture of poverty, his work provoked a spirited response from liberals, who were offended by his gloomy view of even this small segment of the ghetto. They argued that the poor do in fact share the dominant middle-class values of American society, but due to limited resources and political power, they are unable to realize these values in their day-to-day lives. Social scientists wrote of a lower-class subculture that was different from the dominant culture but that nevertheless shared its fundamental values. Others talked of “value stretch” to describe the process by which those in the lower class adjust and adapt dominant values to the circumstances of ghetto life — and in the process coined a piece of sociological jargon that for once filled a real need.

And the evidence offered by social scientists who have taken the trouble to go into the ghetto confirms these more theoretical musings. For example, in *Tally's Corner* Elliot Liebow, in the classic tradition of William Whyte's *Street Corner Society*, reports on the lives of a group of black men who spend their days hanging out on a Washington, D.C. street corner. Liebow observes that though they frequently give up in anger and succumb to self-destructive and anti-social temptations, lower-class black males share society's view that they should work to support their families. Indeed, Liebow shows that these men typically internalize their failures to find steady work and blame themselves.<sup>26</sup>

In spite of themselves, Ladner and Stack reveal the persistence of conventional values among lower class blacks. Their work repeatedly presents scenes of distraught mothers and grandmothers deploring the sexual activities of their daughters and expressing fears of pregnancy. Or take the example of what one mother did, as told by her daughter to Carol Stack:

I really was wild in those days, out on the town all hours of the night, and every night and weekend I layed my girl on my mother. I wasn't living home at the time, but Mama kept Christine most of the time. One day Mama up and said I was making a fool of her, and she was going to take my child and raise her right. She said I was immature and that I had no business being a mother the way I was acting. All my mama's people agreed, and there was nothing I could do. So Mama took my child. Christine is six years old now. About a year ago I got married to Gus and we wanted to take Christine back. My baby, Earl, was living with us anyway. Mama blew up and told everyone how I was doing her. She dragged my name in the mud and people talked so much it really hurt.<sup>27</sup>

Of course, most mothers are perhaps not as determined as this one. While they may protest and disapprove of their children's behavior, ghetto mothers often find they are unable to change it. Among lower-class families there seems to be a certain pragmatic, if not fatalistic, acceptance of the ghetto's traps by parents who find it almost impossible to protect their children from them. Ghetto life appears, then, to be a continually-negotiated compromise between the ideal of conventional, middle-class values and the temptations of the street.

#### **A Cruel Hoax**

There is today every indication that our welfare system has begun to feed upon the worst aspects of the black-subculture — and to reinforce these at the expense of the conventional values without which blacks will be unable to take advantage of the opportunities available to them. In this context to talk of the strengths of the black family in the manner of Stack and Ladner is a cruel hoax on those in the ghetto and on the society that has a responsibility to aid them. Here is a naive pluralism that will only further hinder the progress of black Americans.

It would be easy to dismiss the work of Stack and Ladner except that it is repeatedly cited as a definitive response to the so-called pathology perspective advanced in the Moynihan Report. But far from focusing on the pathologies of ghetto life, Moynihan argues for government programs — job programs in particular — to reinforce the embattled conventional values. In contrast to this hopeful approach, Joyce Ladner tells us that blacks do not share society's dominant values but instead have their own distinct culture. It is a view whose implications remain largely unexamined by Ladner, though at times she points to the possibility of some sort of upheaval by means of which superior black values will become dominant. But of course the real implication of her interpretation of black America is utterly defeatist: if blacks aren't like the rest of us and if they live by their own rules, then it makes little sense to come to their aid with compensatory education, job training, and employment programs, for they will take our money and our good intentions and subvert them to their own ends. Despite her rhetoric, then, the practical, political outcome of Ladner's approach is not that different from what a 19th-century racist would propose doing for blacks — nothing.

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## Sex Education

*Joseph Sobran*

**W**HILE BROODING ON THE depressing topic of sex education, I recently happened on a movie review containing the following sentence: “The film has an amusing premise: the two heroines race to see who can lose her virginity first.” The two heroines are girls at summer camp.

Amusing? The writer might at least have left open to us the reaction that the film’s premise is more truly described as coarse. Coarse, because it affects a sniggering disregard for a genuine human value: chastity. But I have said the very thing one isn’t supposed to say.

Irving Kristol has remarked that secular humanism is the established religion of our day. And although this, the faith of the enlightened, professes to scorn taboos, it has erected quite a few taboos of its own. The author of the review I have quoted clearly means to invoke one of them. We are to avoid any suggestion that sexual behavior is in any way involved with the dignity, the sacredness of the human person. To hold that sex should be reserved for specially consecrated relations is to be guilty of, among other sins, priggishness.

But this is assumed rather than discussed. Such is the nature of a taboo. Victorian ladies and gentlemen didn’t need constant explicit reminders that certain topics were to pass unmentioned in polite society; cultural pressures are almost always subtler than that. Things may have to be spelled out for dull children, but not for most of us.

In today’s popular Western culture the desacralization of sex is taken for granted. No, let me be more precise: it is supposed to be taken for granted. There is an airy hypocrisy, even now, in talking as if everyone were agreed on the matter. Quite a few people still think chastity is a virtue; enough that even the more debauched among educated people are unlikely to make open sexual propositions to strangers in polite company. The movie-reviewer’s observation smacks of something of an attempt to increase the pressure of con-

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formity against the cultural holdout. He dares us to contradict him. That is why it is necessary to do so.

But without question, the party of chastity is very much on the defensive these days. They are up against an opposite presumption. Given the terms in which pleasure is discussed in the mass media, it is very awkward to hold that there are values that transcend pleasure, satisfactions that are superior to the more immediate and intense. The battle would be easier to fight if it were conducted more openly, if the enemy would declare frankly that he doesn't believe it means anything to speak of sexual "virtue." Then should we throw away our Dante and Shakespeare, or debate him on the proposition he has advanced?

Unfortunately, some doctrines are most effectively spread by insinuation rather than by direct propositions. In his profound and beautiful little book *The Abolition of Man*, C. S. Lewis speculates on the results of this technique as put to work in a rather typical textbook:

The very power of Gaius and Titius depends on the fact that they are dealing with a boy: a boy who thinks he is "doing" his "English prep" and has no notion that ethics, theology, and politics are all at stake. It is not a theory they put into his mind, but an assumption, which ten years hence, its origin forgotten and its presence unconscious, will condition him to take one side in a controversy which he has never recognized as a controversy at all. The authors themselves, I suspect, hardly know what they are doing to the boy, and he cannot know what is being done to him.

The innocent (or simply inattentive) reader can hardly know what is being done to him either, when thousands of little signals accustom him to the idea that nothing very serious is at issue when a young girl's eagerness to lose her virginity is presented as "amusing." Eventually a certain attitude comes to prevail by sheer attrition. One gathers not so much that it is true as that there is nothing to be gained (and maybe much to be lost) by contradicting it. And today a good many perverse views have seized command of public discussion by claiming to monopolize sophisticated opinion. The devil's favorite phrase must be "of course."

We see, on every side, a strange phenomenon. George Orwell tagged it Newspeak in its extreme form: a style of talking so wholly artificial as to be actually at odds with the reality of our experience. But that is the language of the totalitarian nightmare. In secular humanist society, it takes the milder form of enlightened public

opinion, which I like to define as what people think other people think.

The values upheld by Enlightened Public Opinion may not be false, or altogether false; but they receive, at least, a rhetorical stress in public opinion that is seldom matched by the place they hold in our lives. To take a fairly recent example, it has been common to hear enlightened folk speak of the imperative of racial equality and racial integration. Yet few even among such folk actually altered their own mating and migrating patterns to increase social contact with black people. White liberals marry white liberals, and it is hard to avoid the conclusion that most of them would just as soon live in white neighborhoods — next door, if need be, to a white bigot, rather than to the objects of their explicit concern.

I don't mean merely that they are insincere. I mean something of perhaps graver import: that sincerity may be an irrelevant category when it comes to Enlightened Public Opinion. Professing the orthodox credo may suffice; there may be no real obligation to square it with one's personal behavior. For every thousand who say they favor abortion, there is hardly one woman who will confess to having had one, hardly one man who will confess to having put pressure on his wife or girlfriend to get one; common though such things must be. And Raymond Aron remarks that it is as necessary for the Soviet ruling elite to profess Marxism as it would be disastrous for them to base public policy on it. The actual function of public creeds is complex.

Nevertheless, such creeds would be almost useless unless at least *some* people swallowed them. And in fact many people do — including some of those whose interest it is to propagate them. Surely a higher proportion of secular humanists in America than of Communists in the Soviet Union actually mean what they say. The special hypocrisy of the secular humanist lies in their pretense that their peculiar beliefs are the common ground of all rational beings — the of-courseness of their attitude.

The tension and open conflict over sex education isn't hard to explain. Traditional-minded people rightly sense that this is one more area in which they are being "had" by organized, and somewhat disingenuous, enemies. Many local battles over sex education have been extremely bitter. Yet those who favor it — the humanist forces — downplay the depth of their own commitment. They have been willing to defy angry majorities of parents; they have urged the

necessity of sex education as a public health matter. But they seem unwilling to admit that the significance of their hard-won victories goes beyond the spreading of a little information.

If they were being honest about it, I for one would have expected them to back down, as they so often have done, in the face of community displeasure. But I suspect that deep down they know full well how much is at stake. If parents feel they have a lot to lose, the educators must feel, for their part, that they have just as much to win. And make no mistake, they are winning it.

On the surface the issue appears to be cognitive: sex-education is treated as something like inoculation against disease, and not as any sort of usurpation of parental authority. Yes, the humanists concede, the facts of life should “ideally” be taught in the home and church. But since these agencies are clearly failing to do the job — as witness the soaring rates of teenage pregnancy and venereal disease — the public schools simply must step in and lend a hand.

But as the controversy proceeds, it begins to sound as if the public schools themselves, far from being a provisional emergency substitute for worthier institutions, are actually the ideal setting for sex instruction. For it is promised that the classroom discussion will have all the virtues of free inquiry and open discussion. True, they will be studiously “value-free,” shunning any temptation to “impose” special points of view. But the longer we listen (if we can do so without being hypnotized by jargon) the more we discover that the value-free approach is quietly committed to certain identifiable values — even if neither the educators nor their subjects can readily identify them.

More than one study of the materials used in sex education courses from England to California has shown that the value commitments may be thinly disguised indeed. Here is an English text quoted in the London *Times* by Mr. Ronald Butt:

Although there are some laws which do try to protect us from being harmed by sexual experience, the basic idea behind many of them seems to be that all sexual activity is bad unless it is between a married couple in order to have a baby. Even if the law doesn't spell this out, it is the way it often seems to work in practice. Such an old fashioned view of sex needn't matter to most people. But for some people it does. The law does occasionally interfere in people's sex lives, discouraging them from enjoying sex in the way they want to enjoy it and making them feel guilty, even when no one is going to be harmed.

Comments Mr. Butt: "How is that for malign weasel words?" Examples could be multiplied.

What is the problem sex education is meant to solve? If we face orgiastic levels of misbehavior, it seems odd to blame that on a shortage of information. During the years in which the epidemic is alleged to have descended on us we have had, if anything, a surfeit of "openness" in books, articles, movies, and television. Dear Abby and Ann Landers talk about sex much more readily, as do nearly all the popular media counsellors one can think of. Everyone speaks more casually in private. Assuming that awareness leads naturally to rational behavior, all this should have remedied, not aggravated, the ills which sex education now steps forward to address.

But the assumption is clearly false. Even doctors smoke, despite not only the existence of known correlations between smoking and various maladies, but also the intensive campaign to discourage and stigmatize smoking. Having the facts is a very different thing from using them virtuously — or even from using them in the prudently selfish spirit which the sex education lobby takes for granted will actuate their charges. Besides, the young are more often impetuously romantic than calculatingly hedonistic, and they usually ignore the wise counsels of the classroom anyway.

Supposing the educators could manage and bear to keep their sex instruction free of their biases, a certain bias is probably inherent in the very idea of sex education as they conceive it. There is something insensitive in the demand for unmediated explicitness in all things. Parents are probably right to feel that the public discussion of intimate things constitutes a kind of transgression against intimacy. What the enlightened call sex education, far from solving the problem, may be a symptom of it; may even worsen it.

Liberal-minded people have insistently reminded us — at least for certain purposes — that sex is a "private" matter, but they themselves have helped undermine its privacy. If they were less blithely tolerant of pornography, for example, which insults the sensibilities of every passer-by, the public might more willingly trust them to teach the young. But they have resigned themselves to the pornography boom, not so much as an unfortunate fact of reality but as a legitimate moral option, a feature of progress. In some guarded way they even approve of it, though they acknowledge that many of its forms are personally distasteful to them.

But an indispensable layer of privacy is public reticence. Contem-



porary philosophy has long since abandoned the naively absolute division between words and deeds, between thought and behavior. In most situations words are a prelude to action, or even a preliminary part of it. The simplest example is bribery, where a mere suggestion — made, say, to an arresting officer — can be a criminal act. In fact it might be hard to transact a bribe without framing it verbally. The meaning of acts depends on the words and symbols that surround them.

It is true that there are some subjects about which we can be, in a limited sense, value-free. At least we are not directly discussing moral choices when we talk about the properties of falling apples and flowing electrons. For that matter, the embryologist is not talking about morals when he discusses the processes of life in its earliest stages. But the sciences themselves, like all forms of knowledge, are ordered to some end, some good. Bodies of knowledge, like individual facts, can be put to uses, like war, about which very emphatic value-judgments can be made. Our age should hardly need reminding what happens when the moral premises of science are neglected.

But the whole purpose of instructing the young in matters sexual is, by the allegations of sex education's proponents, to affect their behavior. The acknowledged purpose may be a value about which there can be no serious disagreement, like preventing unwanted pregnancies. Still, the choice of means to that end inevitably implies deeper views about ultimate ends.

How should we discourage teenage pregnancies? By upholding chastity, or by introducing the young to contraceptive techniques? I doubt that many sex educators would think the former a useful approach; they probably think it has already failed; and one may even entertain the suspicion that they would not be very enthusiastic about it even if they thought it did work. Furthermore, they are concerned with precisely those young people who care nothing for things like chastity. In fact, as one gathers from all the public discussion to date, they conceive of today's young people as a uniquely "sexually active" generation such as would laugh at any adult who presumed to lecture them on sexual virtue. And enlightened people, people who believe in the possibility of a radically improved future, don't like to be laughed at by those they conceive of as denizens of that future. They assume the young must be more futuristic than themselves.

No doubt the young often do — to use a non-liberal locution —

misbehave; always have, always will. In that sense the sex education advocates are right to say that sex is a “natural” activity. But to leave it at that is to take too narrow a view. “Nature” is a complex thing. Sexual reticence and modesty are as natural as sexual ardor; it is a wonder that people who argue that homosexuality is natural because it sometimes occurs among baboons don’t notice a fact so obvious. We must be concerned with which acts are preferable and with the degree to which we can affect their relative frequency.

To discuss erotica publicly, on the presumption that most young people engage in casual sex, would be to make the chaste and modest members of the younger generation appear — and feel — exceptional, abnormal, perhaps socially retarded. Whatever the intentions of their elders, they will be put somewhat on the defensive among their peers; more specifically, the girl who can’t fall back on the solid support of a conventional No will be put in an awkward position *vis-à-vis* her sexually aggressive male companions. The media have already done enough harm. The harm must be immeasurably compounded if an area of life which we naturally feel to have ties to self-respect, privacy, and even holiness were to be discussed, by teachers of personal authority, in a purely profane manner, as if these considerations had nothing to do with sexuality.

In some school districts where sex education is established, the student has the option of being excused at his parents’ request. On the face of it, any such exemption defeats the goal of enabling the schools to supply the deficiencies of the home. More important, it isolates the student who opts out: he becomes a kind of recusant and a candidate for ridicule. In any case, his departure must be so exceptional as to help reinforce the sense that the sex education courses teach a set of attitudes that constitute a public orthodoxy. The United States Supreme Court has held, after all, that excusing individual students from classroom prayer doesn’t sufficiently protect their religious liberty. Letting an individual student out of a course his parents find objectionable doesn’t alter the fact that those parents are still forced to accept — and subsidize — a course they find objectionable.

We are not, remember, considering anything so simple as a mix of “good” and “bad” young people. We are considering a community, with a wide range of moral shades, some unsettled, all of whom might be uplifted by the maintenance of firm standards. The young are not primarily interested in biological facts and techniques; no

matter what is said about sex, they will want to know things like what it feels like, how successful they would be at it, and (not least) what they ought to do. They are at least as anxious as they are curious. And they will bring their own questions — questions they may be too shy to ask — to the classroom, gathering many answers obliquely when the teacher is not even conscious of what they want to know.

Teachers always teach more than they intend. When a teacher thinks he is merely explaining how to avoid pregnancy, he may also be implicitly telling the student something about the respect due (or not due) to chastity, privacy, and dignity. Such values are compromised even by being discussed in mixed company. What actually happens, where liberal sex education occurs, is that a certain set of values is more or less covertly superordinated over traditional ones. In fact the liberal values are seldom identified on the same plane as their rivals; they are treated instead as the bedrock, while anything expressly labelled a “value,” in the alleged interests of pluralism, is actually being relegated to the status of a more or less optional taste or preference. In this way chastity and homosexuality are both reduced to likings. That sort of thing, it is understood, is up to the individual, though we should all be tolerant of each other: which is to say, there are no standards by which we can evaluate preferences. It is seldom pointed out that this sort of tolerance is itself a value, whose status among competing values may and must be rationally determined.

But the content of “sex education” is only half the story. The very *fact* of it is, if anything, even more important. I need hardly say that it has always been a myth that the schools confine themselves to the three R’s. They have fairly consistently labored to shape the moral attitudes of the young. Sometimes they did this harmlessly enough, when the attitudes they sought to propagate were the basis of the community and stirred no dissension. At other times, more sinisterly, they sought to assimilate the children of foreigners and minorities to the views of the natives or majority, thereby making the schools a weapon against *certain* parents. What is new in public education in our day is the growing boldness of educators who see the role of the schools as taking over the traditional prerogatives of the parents; *all* parents.

It is probably true that most children can be plausibly said to receive an “inadequate” sex education at home. But it is also as

likely that they receive inadequate religious education. And it is obvious enough that religion and the family are so closely intertwined that few of us would presume to interfere in our neighbors' business by undertaking to catechize their children without consulting them. If the state were to commit so gross an act of interference, there would be so quick and overwhelming a protest that the very attempt would probably ruin whoever was foolish enough to launch it.

Who would try to give his neighbor's child a good sex education? Would the plea that the parent had been "inadequate" cut any ice in a dispute? Obviously not; there are some things we simply leave it to parents to do, resigning ourselves to the fact that if the parents neglect them they may not get done at all. Failure to perform them doesn't justify outside intervention. In matters so personal society has hitherto kept its distance.

And hitherto sex has been thought part of the knot of personal things that include the family and religion. The claim of the teaching elite, an arm of the state, to authority in sex instruction is something novel and, I believe, portentous. Formally, the claim has been limited to factual aspects of sex in which the authority that is claimed can be plausibly based on scientific expertise. Of course not every teacher will be an expert, but he can be said, in a sense, to be drawing on an expert body of knowledge and to teach by a kind of apostolic delegation from science. Still, all this should not distract us from the simple fact that the state is now expanding its authority into an unprecedented region.

I think we already have enough experience to caution us against any expectation that sex education, as conceived by today's professional educators, is unlikely to settle for the humble role of merely reinforcing traditional values. It is much more likely to reinforce the attitudes purveyed in the mass media, attitudes which are worse than hedonistic.

In the view that now prevails among many educated people, casual sex is not only permissible, it is virtually imperative. There is a discernible compulsion to treat sex not in an unprincipled way, nor even in a purely hedonistic one, but as a kind of necessary initiation into a new social order. The shape of that order is often left vague, and where specified its forms vary from anarchic libertarian to communist. But what seems common to all visions of it is hostility to the family as the basic unit and ordering form of society.

Nearly all modern ideologies conceive the family as oppressive or

at least arbitrary; most of them want either to dispense with it or to accord to the state the power to modify its form and subordinate it to political goals. The implications of this fact should be carefully noted. It means that the state is a more basic social form than the family; or, to put it the other way around, from the point of view of the individual, subjection to the state is prior to membership in the family; or, to put it brutally, your relation to your ruler is more important than your relation to your mother and father. For all practical purposes, then, it is the state, not the family, that is sacred.

It seems to me that we are now in the throes of what can fairly be called a global revolution, and that all societies are being drawn toward more or less socialist models. The names vary: communist, socialist, social democratic, liberal; historian John Lukacs prefers the term “national socialist,” discredited since Hitler used it, but no less accurate (or apt) for that. In every state, almost, there is a drive to expand the power of the state itself (or to replace a traditional government with a totalitarian socialist state) and to break down or weaken buffer institutions and social knots whose independence rivals the authority of the state. Obviously the Soviet communist model is harsher than the American liberal one; but an important key to their ideological consanguinity is the reluctance of American liberal socialists (to use a name they themselves would probably resist) to criticize any variant of socialism, and especially their almost total blindness to the Soviets’ assaults on religion and the family — notably through the agency of the school itself. Indeed, President Carter’s former top education official, Mary Berry, returned from China exulting about all they had to teach us.

The American public education establishment would never dare mount a direct assault on religion. But that establishment already enjoys the status of a religious establishment, in that it has a financial base in tax monies that gives it an enormous advantage over all its competitors. It also rigorously excludes religion, and, *via* assertions of educational “standards” (improbable in the light of its own inferiority to those rivals), harasses independent, largely religious schools. It resists the efforts of parents to assert some authority over what children are taught. In short, it assumes a sovereign power to initiate the young into the ideology of the teaching elite. Since it is the arm of the state, its function is increasingly parallel to that of the propagandizing “schools” of the more fully socialist countries: to enfeeble family loyalties, and any other sense that some ties are

more personal and permanent than the tie between citizen and state.

The Russian dissident writer Igor Shafarevich points out that every socialist movement seems to stress free love (especially group sex) as part of its program, and particularly as a form of conditioning for its own members. Random intercourse is a way of submerging personal identity in the unstratified, undifferentiated commune which socialism identifies as the society of the future. This is not to suggest that our sex education advocates have any such vision before them. And yet there is a clear affinity between their notion of people as sexually interchangeable and the more general socialist notion of state-subject relations as prior to family-member relations. The real function of sex education in the public schools may be to encourage the young to *imagine* themselves in a radically different way from that self-image which is fostered by normal familial and religious influences. Enlightened Public Opinion, in the sense I have discussed, already seeks to do this; public sex education would merely align the ideology of the schools with that of the popular arts rather than that of the home.

What is needed at the moment is a civil liberties organization for families. As things now stand, the major so-called civil liberties organizations stand foursquare against parental authority. They proclaim the "rights" of children to contraception and abortion (without consulting or informing parents), to sue their own parents, to freedom from moral regulation at colleges (even if the parents who pay for the college education wish to delegate their authority to the school), and so forth. They take few positions in support of religious education. They seldom treat the sheer growth of the state as a potential menace; in fact they welcome it. The inconsistencies in their positions almost always show their bias against family, property, and religion — bases of any effective resistance to the totalitarian state.

Sex, then, is by no means a discrete area of "private" behavior, without clear relation to the larger social order. Where socialists of all stripes seem to favor greater personal freedom in sexual behavior, it is simply because they wish to vitiate the ordinary human loves that create the social fabric and make people recalcitrant to collectivist herding. Santayana quipped that the only thing the modern liberal wants to liberate man from is the marriage contract. But it might be more true to say that what the liberal wants to liberate from that contract is not the man, but the state.

## The Perfect Fit

*Ellen Wilson*

“**Y**OU’RE A PERFECT SIZE 6½,” a shoe salesman told me recently, and I felt absurdly pleased, as though I could take credit for the size of my foot. When I considered what I had been taking credit for, I decided that it was the “perfect” compatibility of my size 6½ foot and its size 6½ shoe. It was the flawless conformity between foot and environment. In fact, my foot had achieved what the rest of me — what the rest of mankind — so ardently desires: an easy relationship between man and environment, one that will allow untrammelled room for development and authorize the expression of his thoughts and emotions. All very far removed from shoe sizes.

But consider the intellectual concerns of mankind in the past century or so — from the time of Darwin, at least, when man’s efforts to adapt and subdue his environment were translated into evolutionary vocabulary, and extended by analogy to cover his social relationships as well. Consider the rise of sociology and its investigation of man’s social relations: the forms they may take, the influences societies exert upon their members, and the like. Consider anthropology, which, while sharing territory with sociology, extends the study of man across great stretches of space and time — drawing analogies, comparing and systematizing the ways in which human societies have served their members, the behavior they encourage, the rewards and punishments they mete out. Consider psychology and its exploration of human needs, of the power of human influences for good and evil. These sciences, which sprouted only in the last century and are already flourishing in our own, are extensions of man’s desire to control his environment and engineer a “perfect fit” between himself and it. Of course, man has striven to conquer nature from earliest times: the taming of fire and the invention of the wheel were precocious efforts in this direction. He has striven to provide a secure and abundant food supply, protection from the elements, and remedies for disease. But without abandoning the quest for “perfect” living conditions, modern man has also taken on the task of retooling the social environment so as to accommodate everyone most comfortably, most happily.

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Those social theorists who have pushed the ideal of the perfect fit furthest — and who therefore most clearly exemplify the impulse — are the promoters of the behavioral modification theories of B. F. Skinner. (The ebb and flow of their influence within the Academy is, for our present purposes, insignificant, since their theories have found their way into the public imagination, influencing our language and even our literature.) These men have taken the common human insight that environment affects the development of organisms — including human organisms — and extended it to the extreme position that environment is wholly responsible. Of course, it has always been clear that poverty, neglect, and lack of opportunities for what the Victorians would call “betterment” frustrate the potential of many people for happy and productive lives. And even before the birth of psychology, people understood the crippling effects of neglect and emotional abuse on the personality. But the 20th century, eager to systematize this knowledge through the social sciences, and confident of improving social environments thereby, has moved almost unconsciously toward belief in human perfectability, and a corresponding disbelief in inherent evil. The religious expression of such belief would be something like Teilhard de Chardin’s Omega Man. Original sin, redefined as those limitations imposed by one’s evolutionary stage, may be considered a temporary phenomenon, diminishing as man’s potential for good develops.

But most people nowadays do not express the theory of perfectability in religious terms, and so they can afford to sidestep the difficult problems of sin, free will, and the existence of evil. Far from projecting long millenia of evolutionary improvement, the secular perfectionists tend to believe that, if one could only construct society so as to do away with poverty, guilt, and discrimination, people could achieve happiness in harmony with one another. A carefully-controlled and meticulously-designed social environment would yield “perfectly” adapted people.

Such an environment is yet to be achieved on any large scale, though there are pockets of people whose enlightened upbringings should have made them paradigms for the rest of society. But here is where we run into difficulties, since there would seem to be no compelling reason why we have not yet achieved the well-balanced society. Granted the relative youth of the social sciences — in their popular forms they are only a generation or two old — still, the torrent of self-help books, assertiveness training manuals, guides to



child-rearing and physical fitness should have had some wider beneficial effect than the enrichment of their authors.

For the theory of human perfectability suggests that mankind is responsible for his own happiness, that he is capable of engineering the conditions for happiness. Happiness, you will note, is here defined as successful adaptation — a perfect “fit” — between oneself and one’s environment. It thus becomes a duty for mankind, becomes one’s purpose in a life limited to man’s allotted four score and ten. For in a society dominated by scientific values, happiness tends to be defined in material terms, partly because of the analogy made by early social scientists between natural and social environments, partly because science as a system cannot accommodate transcendence or evaluate the wisdom of postponing pleasures to a future existence. In scientific — which must be secular — terms, pleasures postponed beyond this life are pleasures foregone. Restricted to this world and this existence, and lacking the inspiration of the transcendent, man labors to acquire the temporal ingredients of happiness. And assuming — as the perfectionist must — that happiness is a realistic goal, man will be faced with the duty of achieving it.

It is this sense of duty, I cannot help believing, which has fostered the extraordinary popularity of each successive cult of self-realization, with their promises of a freer, less inhibited life-style, of more fulfilling relationships and more gratifying sex lives. For narcissism becomes a duty, since good health and good looks are crucial to one’s physical and social adjustment, toward the achievement of high levels of self-esteem and self-gratification.

Thus, though the goal is to achieve happiness, there is, mixed up with a normal attraction to pleasure and repulsion from pain, a vague sense that mankind as a whole profits from each “successful” life, each successful pursuit of happiness. Each person’s *unhappiness* lowers the success ratio for the human race. Further, from the belief that man’s natural end in this world is satisfaction of his wants, and the assumption that these wants are even primarily material, one comes around to the view that impediments to happiness are senseless and even unjust. Not far down the road from this is the belief that contentment and well-being are the very least one can expect — are the birthright of the rational, well-balanced man. Sanitary conditions and religious tyrannies may have denied him his birthright in

primitive times, but science has now set matters straight in the former area, and psychology in the latter.

The belief in man's right to temporal happiness may not be formulated so explicitly or championed so uncompromisingly by every modern adherent, but it is nonetheless strong, because it represents the only value system which can compete on more or less equal terms with a transcendental one. The religious person regards man's end, his goal and purpose, as union with God. All other activities should be subordinated to the primary task of growing in knowledge and performance of God's will. The perfectionist, being temporal-minded, places his earthly happiness at the center of his value system. Other values are subsidiary, or are "explained" in egoistic terms. For instance, there are some human potential theorists who incorporate acts of charity into the system, justifying them on the grounds that they make the doer feel good, or that they count as emotional "loans" which may be called in at future need. But in the main the contrary emphases of the two systems are clear. And as the religiously-minded person is taught that he bears a special responsibility for the fate of his own soul, so the perfectionist considers each man specially responsible for his own happiness, since he should best know how it is to be attained.

What does all this theory mean practically, in the realm of personal relations? It means the cultivation of open relationships, so that counterproductive ones — ones that produce unhappiness or make excessive demands — may be easily escaped. That is a crude way of putting it, but remember that for the perfectionist self-gratification is supreme over loyalty or the keeping of faiths. Usually, when a breakup occurs, the initiator rationalizes it so as to produce beneficent consequences for both parties. "I would never have made him happy," the perfectionist says. "This way he can start fresh, and find the person he was meant for." Or, "I would never have made a good mother/father. I would only have left him with psychological scars." In such words do people try to make others concede the morality of what they are doing. Far from "shirking responsibility," they are discharging a duty — for they "owe it to themselves." Duty to oneself demands abandoning ship when the advantages of a relationship seem no longer to outweigh the disadvantages. Thus, it is only since divorce became commonplace that people have seriously begun to advance the argument that unhappy unions often harm the children more than divorce. The

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perfectionist's primary responsibility may be to himself, but it helps to think that he is thereby contributing to others' happiness as well.

But what of the impulse which draws two people together in the first place? Did the couple misdiagnose their adaptability? Were they ill-advised to cultivate the acquaintance? Was the entire relationship unfortunate? The perfectionist, applying the standard of happiness, would conclude that *if* they were happy, *while* they were happy, they were right to remain together. But when one partner begins to feel exploited by the other, tied down or frustrated from developing his full potential, or when a likelier prospect for happiness comes along, then it is time to part company. The breakup is its own justification. Thus, while someone with a less self-indulgent set of values might apply a discriminating standard to past relationships, condemning some and condoning others, the perfectionist can accept all but those which were prolonged beyond their "normal" course because of well-meaning scruples or outside interference.

The perfectionist is the sort of person who boasts on T.V. talk shows of his excellent relations with former spouses. He defends the utility of all his experiences, denies regretting anything that has happened to him. He is the sort of person who refuses to assign blame for "failed" relationships — refuses even to accept some share of blame himself. "It was no one's fault, we just weren't meant for each other"; "we were just kids"; "we didn't know what we wanted"; "we just grew apart." The precise words do not greatly matter: it is understood that both parties simply found themselves pursuing separate and conflicting routes to happiness.

Since parent-child relations probably send more people to psychiatrists' couches than any other kind, we might expect special problems when the pursuer of happiness considers starting a family. To begin with, what reasons will he offer? Few people in this era of choice submit themselves to parenthood simply as a patriotic duty to mankind. No, pursuers of happiness, at bottom, form families for much the same reasons everyone else does. They are attracted to the warmth and stability which family life seems to offer: they respond to that compound of inheritance and upbringing that we commonly call maternal (or paternal) instinct.

But though perfectionists are motivated in ways similar to other people, fewer of them eventually submit to biology and beget children. I draw this conclusion from contemporary fertility statistics which indicate a sizable drop in the per cent of women of child-

bearing age who in fact bear children. And the fertility rate tends to be lowest among women of what we might call the perfectionist class — educated, career-minded, comfortably situated. Perhaps fewer perfectionists become parents, or parents of several children, because both their value system and their desire to keep options open contend against instinct and the evocative images of hearth and home. Marriage is a potential trap which may be sprung with relative ease nowadays. Parenthood, it is hard not to believe, is forever. More, parenthood is for many years a participation in a relationship between unequals — strength bears the responsibility for protecting weakness; knowledge for instructing ignorance. Lacking so much that is necessary for their well-being and even survival, children demand much. A relationship which, to a great extent, charges one partner with responsibility for the well-being of both, seems to offer the supplier little material benefit.

Many pursuers of happiness are held back by such considerations, along with the additional fear that years of egoism may have rendered them incapable of sustained altruistic behavior. They may fret for years over the decision, eyeing other people's children wistfully while they talk of career satisfactions and European holidays. Some, driven finally to "desperate" decision by biological realities, "try" having a child as one would try an exotic *hors d'oeuvre*. Others waver earlier and more often. But in all cases, problems remain even after the fateful decision has been made.

Every value system outlines an ideal, and adherents of even the least demanding are bound to recognize discrepancies between preaching and practice. The religious parent will note his own lapses in charity, generosity, and patience. The parent whose overarching ethic is self-fulfillment will experience conflicts of a different sort. He is likely to become confused about his own goals, about what happiness and self-fulfillment require, and what he really wants. Most parents do love their children, and "naturally" try to do their best by them — love sparks the impulse, though it is often imperfectly acted on. But the pursuer of happiness will not only experience the post-lapsarian tendency to resent his child's demands, he will be consulting a value system which discourages heroic self-sacrifice. "I have my rights too"; "I need privacy too sometimes" — these complaints, whether vocalized or expressed silently in the privacy of one's own psyche, are common to all parents. But in the mouth of the perfectionist, they are not only an excusable expres-

sion of frustration and exhaustion but an appeal to a moral tribunal for that fair play and equal treatment which must seem, in his value system, the very least one can ask. Taught to seek life's meaning in self-fulfillment, he will frequently be at a loss to explain or defend a life which, by its nature, exacts great amounts of self-abnegation. What happens to developing potential, to personal growth or professional advancements? What about favorite amusements which must be curtailed for the sake of budgets or minding baby? What becomes of one's philosophy if life demands a series of sacrifices on behalf of children who will in turn be expected to sacrifice on behalf of their children? Or would the perfectionist prefer his children to behave differently as parents, to follow the same self-seeking course he abandoned when *he* became a parent? But as C. S. Lewis reminds us in *The Four Loves*, love desires the good of its object, and scorns that the beloved be happy "in base or contemptible modes." Even the most indulgent parent — even the parent who, like the perfectionist, is "indulgent" on principle, encouraging his children to singlemindedly pursue their own material happiness — is, I think, irrationally disappointed if his child ends up seeking no more than this. Such confusions of values are inevitable, since perfectionism does not "fit in" well with the demands and even the satisfactions of family life, and so the conflict is likely to continue unless one or the other set of values surrenders.

In the meantime, the poor man or woman who in the dawn of adulthood sallied forth with *carte blanche* to enjoy life will find himself a failed hedonist — frustrated, torn between impulses to give and to receive, with no roadmap but a self-defined "happiness" to direct him. The titles of the self-help books will taunt him with his failure to achieve that wholesome guilt- and anxiety-free psyche which he once considered his birthright. He will probably confuse his children as much as himself, admonishing them on the one hand to secure comfortable jobs, travel and enjoy life, while on the other hand reminding them of their parents' many sacrifices on their behalf, the duties of family members to one another, and even the desirability of providing grandchildren for their parents' old age.

There is no reason why such value-conflicts need ever be resolved in one person's lifetime. Logic alone impels relatively few people to accept or reject propositions. The pursuer of happiness, as unfortunate as this may seem, may go down fighting for his right to gratifi-

cation (even at others' expense) while increasingly muddled as to the nature and source of that happiness.

On the other hand, a certain number of people may move toward a more self-effacing set of values, if for no better reason than to ease the strain between theory and practice. Without breaking explicitly from the past, or publicly announcing a conversion, this refugee from happiness will gradually emend his goals and chisel away at his expectations. "Happiness" and "self-gratification" will begin to merge into something we might more accurately categorize as "the Good," and the former hedonist will defend this change by explaining that he draws happiness from the well-being of those he loves. (It was during that other 20th century experiment in hedonism, the Roaring Twenties, that a Broadway show song carried the lines "I want to be happy/But I won't be happy/'Til I make you happy, too.")

Those who travel this route out of perfectionism will, in a sense, be witnesses to the *unadaptability* of perfectionism to life in the Real World. After all, given circumstances of material comfort and psychological adjustment, happiness was supposed to flow like the milk and honey of the Promised Land — it could not have been considered a duty if it were not possible of attainment. But the experience of many pursuers of happiness seems to invalidate the theory. Doubtless there have been many happy rogues throughout history, but I do not think their number can be multiplied on a large scale in society. On the contrary, it is chiefly *unhappy* rogues one sees today, or people valiantly trying to qualify as rogues in the belief that roguery will bring them happiness. But however comfortable his material situation, however protected from neuroses and shielded from guilt complexes, the pursuer of happiness still finds his object elusive. Placing self-gratification at the head of one's value system does not seem to make it more attainable, and the weary continuation of the quest for duty's sake would surely be a contradiction in terms. In fact, it looks as though the feverish search itself frustrates the attainment, as though perhaps Jesus were on to something when he counseled that he who would gain his life must lose it.

What, then, is the alternative set of values, the alternative program of action? How do we escape from the search for the perfect fit? The first step is the realization that, in the social sphere, a perfect fit does not seem to be one of the options. One person's wants and needs conflict with another's, psyche scrapes against psyche, and

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even within the best-regulated minds there are struggles between “better” and “worse” impulses, and periodic confusion as to which are which. Given the degree of discomfort even a reasonable person seeking a modest portion of personal happiness can bring upon himself, maybe a reordering of priorities is wise.

The order that the self-help books and the psychology texts and the Skinner utopias reflect is an artificial one, like the political utopias of the statist, or the economic models of the financial wizards, or the controlled experiments of the scientists. Even those who continue to place mankind’s hopes for happiness in further tinkering with the human mechanism and its environment, further attempts to manufacture the perfect fit, must, if they are realists, concede that neither this generation nor the next will learn how to design a balanced happiness out of the jumble of conflicting impulses, attractions and repulsions crowding the human psyche. The best method of coping, it seems to me, is to withdraw the spotlight, from time to time, from our shockingly *ill*-regulated minds; to interrupt the endless questioning as to whether this or that will make us happier, what price we can afford to pay for our pleasures, and the like. And the only way man has ever been able to do this is by training the spotlight on someone else, by thinking of others and interesting ourselves in their happiness (or, C. S. Lewis would tell us, their “good”). “The proper study of mankind is man,” said Alexander Pope. It matters how you interpret the line, but we might rephrase it: the proper study of man is other men.

## APPENDIX A

[*The following article first appeared in the November, 1980, issue of The Washington Monthly, and is reprinted here with permission (©1980, The Washington Monthly). Robert F. Nagel is on the law school faculty of the University of Colorado at Boulder. He is currently a visiting professor at Cornell Law School.*]

### **A Plague of Judges**

#### **The Burger Court's Secret Plan for America**

*by Robert F. Nagel*

It's been a decade since Richard Nixon began filling seats on the Supreme Court, having announced his intention to provide an antidote to "some of our judges who have gone too far in assuming unto themselves a mandate . . . to put their social and economic ideas into their decisions." The intervening years have seen the completion of the Republican-appointed majority, whose members have, as expected, issued urgent calls for "judicial restraint" — prompting equally predictable rounds of condemnation from liberals accusing the Court of abandoning the bold legacy of Earl Warren.

What we haven't seen, strangely enough, is any letup in the lawsuits. Like sleepwalkers following some internal vision, reformers continue to emphasize judicial action in spite of the Burger Court's conservative image. And now, more than ever, they are succeeding, as the courts routinely lead the way on reform of (among other things) police practices, adoption laws, mental institutions, prisons, and schools. If Nixon were dead he'd be turning over in his grave.

It would be hard to blame him. In their own peculiar way, his appointees have not only failed to stop the march of judicial power, they have spurred it on. The Burger Court speaks in resolute tones about limiting our dependence on courts, much as Latin American juntas are fond of discussing an early return to free elections. But so far, in the constitutional battles between liberal lawyers and conservative lawyers, the only clear winner has been legalism.

During the Warren Court's heyday, legal scholars liked to argue that judicial activism was based on a respect for the Court. But if this were so, a dramatic shift away from reliance on litigation would surely be in progress. The reputation of the Burger Court within the legal profession is miserable. Lawyers, professors, judges, even law students point sarcastically to the bewildering proliferation of concurring and dissenting opinions, the inexplicable reversals of tone and reasoning.

The Court's shifts of legal doctrine, while occult to the layman, repre-



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sent a simple fact: basic uncertainty as to what the Constitution means. For example, in 1968 the Supreme Court ruled that discrimination against illegitimate children would be subject to “careful judicial scrutiny” — legal code words for a constitutional “test” that requires discriminatory state laws to be struck down unless they are justified by (more code words) a “compelling state interest.” In 1971, the Court switched to another test, the so-called “rational basis” test, which approves a discriminatory statute unless it can be shown to be unrelated to *any* “legitimate state interest” — a virtually impossible feat. In 1972 the Burger Court moved back to “strict scrutiny.” Finally, in 1977 the justices settled on a “middle level” of review, the nature of which was somewhat mysterious, except that it was described as “not toothless.”

In the famous *Bakke* case, the Court’s majority seemed to say that strict racial quotas were unconstitutional. But the justices couldn’t come close to agreeing on the legal principle that explained this result. Two years later the Court *approved* a federal program establishing racial quotas for government contractors. This time the Court’s opinion refused to even discuss legal principles, choosing to reveal only that it did “not rely on any of the formulas of analysis” in *Bakke*.

On the death penalty front, the Court initially struck down state laws that gave too much discretion in sentencing to judges and juries. When the states obediently rewrote their statutes to mandate the death penalty for certain crimes, the Court reversed its field, voiding the new laws because they didn’t allow juries to consider “mitigating circumstances.”

The justices’ confusion encourages further litigation, if only in the desperate attempt to find out what they might mean. More important, lower-court judges, aware that even emphatic language in one Supreme Court ruling might be brushed aside in the next, are encouraged to ignore whatever suggestions of restraint might emerge from the Court. And the zig-zagging views of the justices tempt litigants of all types to try their hand at constitutional argument. On any given Monday, if you catch the brethren in the right frame of mind, you might win.

As a result, even when the Burger Court has set itself against expansive judicial remedies, reformers calmly return to the courts and often prevail. Last year, for example, the justices used the strongest possible language to emphasize that the administration of jails was for jailers, not judges. Even major invasion of prisoners’ privacy like “body cavity searches” were held to be a matter for the discretion of the wardens. Almost immediately after the Court issued this decision, a federal district judge struck down restrictions on visits to jail inmates by their children. The lower-court judge did nod in passing to the High Court (“The ambit of the administrator’s discretion . . . may be wide . . .”) but then walked insistently on into the

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unknown (“but it is not unbounded . . . the final judgment as to what is reasonable or not lies here”).

Confusion on matters of constitutional principle is embarrassing to the Court. So the justices are tempted to avoid the appearance of confusion by avoiding principles — by substituting, in place of broad disagreements about moral standards, narrow agreements based on highly-detailed judgments about particular situations. For example, the justices could not agree on the principle that sex discrimination, like race discrimination, is almost never justifiable. But they could agree, in a particular case, that the current statistical data on patterns of drunk driving was insufficient to justify a state law that allowed women, but not men, to drink beer at age 18. As for the next discriminatory law, who knows?

For the Burger Court, facts seem to have taken the place of rules. When does the Constitution permit patronage firings of public employees? When does the Court, in a case-by-case inquiry, is convinced that “party affiliation is an appropriate requirement for public office.” [See “Zbig for Life,” *The Washington Monthly*, June 1980.] When is the death penalty “cruel and unusual punishment”? When, as Chief Justice Burger himself recently wrote, “on a case-by-case basis [the Court decides] a defendant’s conduct is egregious enough to warrant a death sentence.”

In taking this approach, the Burger Court invokes the traditions of legal conservatism with its veneration of the cautious, fact-sifting exercise of judicial statesmanship. The theory is that by avoiding sweeping Warrenesque pronouncements, judges avoid unnecessary interference in everyone’s affairs. It doesn’t work out that way.

After all, when a court announces a clear principle — even when that principle, like the Warren Court’s rule of “one man-one vote,” allows the exercise of great judicial power — at least *some* claims are discouraged, because it is clear to everyone that they don’t fall within the principle. But when each case seems to turn on what the justices think is “appropriate” in that particular factual situation, little that is said by the Court in one decision binds in the next — the facts in the next case are always different in some ways, the same in other ways. And because there are no rules to act as dividing lines, virtually *no* claims are “ruled” out. A vast range of subjects become the subjects of judicial regulation, and within each area everything must be “reviewed” by the courts — each discriminatory law, each patronage position, each application of a death penalty statute. Judicial intervention is left to the discretion of individual judges, restrained only by their own judgment about the facts in each case, rather than by principles. All groups and interests are encouraged by the unconfined possibilities of court action to commit their resources toward a judicial resolution of their problems.

A good example of this phenomenon is the Burger Court’s treatment of

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“procedural due process” (which is what the Constitution requires before a person can be “deprived of life, liberty, or property” by the government). The meaning of “due process” was once relatively certain: the phrase referred to an adversary model of decision-making, and required traditional legal protections for the citizen like adequate notice of charges, the opportunity to confront witnesses, a decision based on the evidence presented, etc. The specifics might vary — counsel might not always be required, for example — but the basic contours of an adversary hearing stayed intact.

So “due process,” to the delight of Warren-era civil libertarians and legal reformers, involved an ambitious package of court-imposed rights. But, for that very reason, judges thought carefully before deciding *when* it was that the government had to grant this “due process.” In general, the doctrine was applied only to those official decisions where an individual was threatened with a harm great enough to justify the elaborate safeguards — when he was threatened with jail for a crime, for example, or revocation of his parole, or having his welfare payments cut off.

In recent years, however, the Burger Court has said that the meaning of “due process” varies depending upon “the private interest that will be affected. . . the risk of an erroneous deprivation. . . the probable value, if any, of additional procedural safeguards; and . . . the [nature of the state’s] interest.” If that seems like much to you, you’re not alone. “Due process” in effect, now means whatever the Court thinks is necessary — or, as the justices put it, “such procedural protection as the situation demands.” In the context of a prison disciplinary hearing, it does not include the right to cross-examine witnesses. In a school, it might amount merely to an “informal give-and-take” between student and principal. If a public utility wants to shut off gas or electricity, “due process” is satisfied by a notice that tells customers where they can complain.

But since “due process” has now lost all fixed meaning, the courts are free to apply it to a far broader range of government actions. It might apply, for example, to decisions on whether or not to grant a prisoner time-off for good behavior, to expulsions from medical school on academic grounds, to the termination of a government arts grant or consulting contract. Litigants are standing by ready to press each of these claims, and there will be more, because *any* official decision-making process can be evaluated to determine what “the situation demands.” And a court, of course, will do the evaluating.

A Supreme Court that is openly aggressive in its use of power provokes responses from the public or the other branches of government — just as the Warren Court elicited rumblings about impeachment and proposals in Congress to limit the federal courts’ jurisdiction. The Burger Court, by

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donning the robes of judicial restraint, has largely disarmed this potential opposition.

But although the Congress might be beguiled, lower courts and litigants will not be. They realize that, when the mood strikes it, the Court is now free to proceed ambitiously. They also correctly perceive that the justices — even when they can agree on nothing else — exhibit a growing consensus on the importance of judicial power. The signs are unmistakable. In the prison rights cases, for example, the Burger Court has given short shrift to inmates' pleas for greater freedom of speech — but it has gone out of its way to manufacture a new right: a right of “access” to the courts. What is important, it seems, is not so much the prisoners' rights as the supervisory rights of judges. More dramatic was the Burger Court's recent

### **Drumming Up Business**

The Burger Court's tendency toward numbing detail is illustrated on the abortion issue, where the Court has engaged in a display of constitutional ad-libbing unlike anything ever seen in the Warren era. Three clear-cut avenues were available to the Court: it could have decided that abortion was a mother's constitutional right, that *not* being aborted was a fetus's right, or that the Constitution had nothing to say on this messy moral issue.

Instead, of course, the Court constructed a *variable* right for the mother, in which the ability of state laws to protect the fetus depended on the specific trimester of pregnancy. The vague nature of this “right” meant that it might be outweighed by the arguments of state officials in an indeterminate number of potential situations. So, inevitably, the Court has had to assess whether a state should require that abortions be performed in specially accredited hospitals, whether a state could require the approval of a special committee prior to abortion, whether saline abortions could be banned, whether a minor girl could be required to notify or consult with a parent before going to court to prove that she had given knowing consent to an abortion, etc. “Pro-life” or “pro-choice,” it's hard not to be ground down into indifference when confronting the sheer moral pedantry involved in toting up the Court's constitutional ledger sheets.

In another area of strong feelings, state aid to parochial schools, the judicial detail is equally amazing. Textbooks can be supplied to pupils, but not to schools. They can, however, be stored on school premises. But projectors and maps cannot be supplied even to parents, and guidance service can be provided only off school grounds. Parochial school parents and principals must eagerly await the elaboration of the “map/textbook” distinction in future lawsuits.

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ruling that judges, unlike almost all state and federal executive officials, are immune from civil rights liability even when they *intentionally* deprive citizens of their constitutional liberties. In effect, the Court decided that the uninhibited exercise of judicial power was so important that judges must, in one respect at least, be above the law of the land.

So we can expect to see more of the Burger Court's unique brand of judicial activism in the coming years. Although the Constitution might mean less, it will be applied to more situations. The decisions of the elected branches might often be upheld, but only if they happen to conform to the private assessments of the particular justices sitting on the Court. More is tolerated, but only after everything is "reviewed." With the style and rhetoric of legal conservatism, we are being pushed toward a more pervasive, more detailed reliance on the courts. The contours of the Constitution blur and begin to disappear. All that is left in its place is the belief of judges in their own power.

## APPENDIX B

[The following is the text of an address by Dr. C. Everett Koop to the American Family Institute meeting in Washington, D.C., on November 20, 1980. Dr. Koop is an internationally-famed surgeon who has for many years been Surgeon-in-Chief of the Children's Hospital of Philadelphia, the largest such institution in the Western Hemisphere.]

### **The Family with a Handicapped Newborn**

by C. Everett Koop, M.D.

It is with a sense of gratitude that I speak to you today on some of the circumstances, problems, and benefits that arise when a handicapped child is born into a family. Were it not for a body such as the American Family Institute, it would be easy to become discouraged over an event such as the White House Conference on Families. That conference was convened by those to whom reality was only relative and attended by more enemies of the family than by those who saw the family as the basic moral building block in our society — a place of nurture for what an earlier and more moral generation saw to be the best things in life. That was before hedonistic life styles and worship of the nonexistent god of secular humanism undermined the foundation of the family that provided us with the standards, the morality, and the self-giving love enabling us to reach out to others less fortunate.

The family is not threatened by poverty, by inadequate education, and the lack of a more beneficent social-planning government. Indeed these deprivations, when they exist, mold, knit, and glue together a family structure that can survive and prosper in the face of adversity.

Take the trend of the past several decades, the encroachment on the traditional family structure by all the anti-family forces abroad in the land today, add to that the narcissistic preoccupation with health, and compound it all with the economic jargon of modern medicine — cost effectiveness — and you must agree that the *ordinary* family is at risk. Deliver a handicapped baby into that family and risk becomes a reality in potential disaster — disaster for the family in part but especially for the youngster.

Let me set the stage: a family is expecting a baby for nine long months and their mental image is that of the bright-eyed adorable baby on the label of Gerber's baby food jars. The expected labor arrives, the delivery is difficult, and the mother wakes not to cuddle the Gerber baby in those first precious moments of bonding but to be told her baby had a congenital defect and even now is *en route* with her husband to a distant city where complex surgery will be performed in an effort to save the child's life, after which a long process of habilitation must take place for the youngster to

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assume a normal role in society. The props are gone. Hope has become despair. Joyful expectancy has been replaced by a fear of the unknown, a devastating anxiety of how to cope. She does not know whether the medical estimate of form and function is realistic or grossly deficient, and overall there is the thought of impending doom, particularly associated with economics.

It is my belief that the baby — my patient — will do best in the heart of his family and that the shattered family can be rehabilitated. I know what can be accomplished in the habilitation of a child born less than perfect. I know what can be done with that child's family. I know that these children become loved and loving, that they are creative, and that their entrance into a family is frequently looked back upon in subsequent years as an extraordinarily positive experience. I am aware that those who never had the privilege of working with handicapped children after the correction of a congenital defect think that the life of the child could obviously be nothing but unhappy and miserable. Yet it has been my constant experience that disability and unhappiness do not go hand in hand. The most unhappy children I have known have been completely normal. On the other hand, there is remarkable joy and happiness in the lives of most handicapped children; yet some have borne burdens which I would have found difficult to face indeed.

Believing that when the family and the handicapped child are given the proper support and guidance, they will all be better for the experience, it has been my lifelong practice to provide this support and guidance. And I know it works.

A young man now in graduate school was born without arms below the elbow and missing one leg below the knee. He was the victim of the prescription of Thalidomide to his pregnant mother at the time of limb budding. When his father stood at his bassinette in the hospital where he was born, he said only this: "This one needs our love more." With that love and muddling through, it had a happy ending — which is really now only the beginning of this young man's productive life. The love they needed, they had; the muddling through could have been better.

Here is how the young man feels today: "I am very glad to be alive. I live a full, meaningful life. I have many friends and many things that I want to do in life. I think the secret of living with a handicap is realizing who you are — that you are a human being, somebody who is very special — looking at the things that you can do in spite of your handicap, and maybe even through your handicap."

This family-in-crisis is a threat to itself as well as to other families, indeed to all society as well. It is a crisis situation which must be faced; it has a solution; indeed it has long term benefits even for you and me.

One of the so-called treatment options in a youngster such as I have just

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described is to do nothing and let the baby expire from inattention. The relativistic ethic in medicine which permits this has been the target of my concern and my anger and has occupied a major part of my time for the past two years. I allude to it only in passing to say killing the patient to get rid of the defect has never been a part of responsible, moral medical practice.

For almost thirty-five years now, I have devoted the major part of my professional life to the management of children born with a congenital defect. Because I was the sixth person in the United States to limit his surgical practice to the care of children, I was in my early years a surgeon of the skin and its contents. Therefore, my experience with congenital defects is broader than just the field that ordinarily is now called general pediatric surgery. Although in more recent years I have become a specialist's specialist and my interests have been confined to those congenital anomalies incompatible with life but nevertheless amenable to surgical correction, early on I was concerned with the management of cleft lips and palates, orthopedic defects, spina bifida and its complications, congenital heart disease, and major urologic defects.

There was a day when medicine was not only a profession but was considered to be an art. There were even those who considered it to be a calling such as the ministry. A man who practiced medicine was called to a compassionate ethic that led him to the service of his fellow man. He worked in diagnosis and treatment in the realm of trust between the patient and himself. When he dealt with a child or an incompetent adult, he dealt in the realm of trust between the patient's family and himself.

One of the distortions in society which will not benefit any family and least of all the family we are discussing is a change in semantics and hence philosophy in the practice of medicine.

The semantic change which has crept into medicine is one in which the patient is called the consumer. The patient is called the consumer as though he were eating cereal. The physician is called a provider as though he were delivering gasoline. We refer to the health care delivery system as though it were some monolithic structure from which the consumer had the right to expect only success. Delivery systems and consumers imply contracts. Contracts imply restrictions and the restrictions that are implied are not just on the physician but they end up being restrictions on the type of health care actually delivered — the very thing that the system is seeking to avoid by the semantic change.

One of the complications of this change toward consumerism is the expectancy of perfection. There was a day when the patient (not the consumer) had confidence in his physician in such a way that he saw him practicing in the realm of trust, knew he was going to get the best that was possible for his physician to accomplish. Now after the provider has out-



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lined for the consumer what his expectancy is from the ensuing relationship, if the result is either less than perfection or less than the provider's estimate of his approach to perfection, then the consumer feels it is his right to be compensated for the discrepancy. The only way he can be compensated is by a financial reward following a malpractice litigation. Human bodies are not like carburetors; the same thing does not affect all patients in the same way. There is an inherent failure-rate in all that the physician seeks to accomplish.

I would like to suggest to you some of the things that happen in reference to the handicapped newborn and his family. Eventually one physician assumes the responsibility for primary care; he is the overseer, the guide, and the counselor. He will be representative of one of four kinds of physicians.

First, he might be a physician who will act in support of the child and the family as I have suggested. I think it is not only fitting and proper, but rewarding to all concerned as well. Secondly, there will be a physician who presents death as an option in management. Thirdly, there will be the physician who suggests institutionalization for the child in question.

Finally, there will be the physician who will be one of the previous two but who becomes hostile to the family if his advice is not taken.

What of the parents? They have several courses of action open to them. If they are not in the hands of a team that will do all it can to bring the pertinent agencies into contact with the family for their ultimate benefit, they will have to forage for themselves. These parents seek on their own what society has to offer and usually admit that they face society in an adversary position. Most apply their learning to their own child and adjust slowly and with difficulty to the life that lies ahead of them as does their child. Occasionally, a set of parents will become so incensed at the failure of support from society that they will try to do for similarly-afflicted children all they have learned to do for their own. Out of what is early on a selfish exploration there comes the desire to share with others. Of such stuff are local and national foundations formed for the betterment of specific diagnostic problems.

How does an outsider view the physician? Roslyn Benjamin Darling has done this in a book appropriately entitled *Families Against Society*. In reference to pediatricians caring for spina bifida patients being raised in intact families, she had this to say: "Some doctors were quite sympathetic toward parents of handicapped children. Others were not. A few were decidedly hostile toward parents who kept such children at home. These doctors' views are understandable within the context of their socialization and the stigmatizing society and their training in medical school where success is typically equated with curing and normalcy of function and problems are treated on an individualistic rather than on a social basis."

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I have tried to paint in broad strokes the family in crisis particularly with a handicapped child. I would like to say a few words about solutions and non-solutions as well as the side effects of society's proper care of the situation.

The first non-solution I have already referred to is getting rid of the baby. The medical profession has traditionally made its treatment of patients a reflection of our society's concern for those who are ill or helpless. Often the profession has acted as advocate for those who had no one else to stand up for them. In the Hippocratic tradition and in line with the Judeo-Christian ethic, the medical profession formerly responded with love and compassion toward the helpless child and I think that is the only acceptable way it can function in the future.

The second non-solution is all-inclusive catastrophic health insurance. Although I would like to study ways that catastrophic insurance might be effective, my great concern is that with the passage of time the definition of catastrophe becomes more and more benign and it is easy to see how catastrophic insurance could get out of hand and be the thin edge of the wedge by which a national health service becomes a reality.

The third non-solution *is* a national health service. I say that on the basis of long and intimate association with the National Health Service of the United Kingdom. I have seen it destroy the patient, not the defect, because of economics alone.

Recently when Professor Robert Zachary and I were conducting seminars in the United Kingdom, a woman rose to ask a question. This is essentially what she said:

I am a general practitioner in the National Health Service. Three years ago a daughter was born to us who had spina bifida and I was told she would die within three weeks. When a nurse told me she was being starved to death, I signed her out of the hospital against advice. She is now a bright, adorable, three-year-old girl who is the light of our lives. However, she has an incontinent bladder and orthopedic deformities which keep her from walking. Her spina bifida has never been repaired. But because I signed her out of the hospital against advice and because she was initially classified as non-treatable, there is no way I can obtain any urologic or orthopedic help for my child under the National Health Service. At my own expense I am keeping her on urinary antibiotics in order to protect her kidneys. What can I do?

Professor Zachary told her that her only recourse was to seek private care in England and I told her if she would get the child to Philadelphia, we would eventually send her home walking in calipers, controlling her urine with an ileal bladder, and she might even be the second lady Prime Minister of Great Britain.

For solutions I would like to suggest a computer that can give courage and care; second, that experience can cut costs; third, that free enterprise

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can surpass the government, and finally, that ingenuity can take the handicapped out of an institution and restore him to his home and family.

The year 1981 will see me come to the end of a thirty-five year tenure as the surgeon-in-chief of the oldest children's hospital in the Western Hemisphere. It is my hope that after the necessary adjustment, I can make available to physicians and parents a comprehensive service to take the sting out of managing a handicapped child. What I envision is a national computerized service that could be questioned by physician or parent to provide for any handicapping diagnosis, the most competent diagnostic service closest to home, the closest competent therapeutic service, a list of all the available governmental and private agencies that could be of help to the parents and their children, and finally a readout of nearby parents with similar situations who have coped with the problem in the past.

If we could make this service available to parents and physicians alike, I think we would remove the terrible fear that exists that the odds are too great against the handicapped child and his family to make any effort worthwhile and to slay forever the myth that only perfect quality of life is life worth living. That is the computer that can deliver care and courage.

The first time that anything is done in medicine will almost always be the most expensive time. As experience grows, as techniques improve, hospital care is shortened, rehabilitation is quicker, and the economic impact is far less. There is a major bony defect of the chest wall in children that requires correction if one is not to be a cardiac cripple in adult life. During the operation in days gone by I used to transfuse these patients; post-operatively they were in oxygen tents; their hospitalization consumed three weeks, and their return to normal activity was delayed for three months. Now when in certain seasons of the year I do one of these every operating day, I never use a blood transfusion; post-operative oxygen is almost unheard of; hospitalization varies from three to seven days, and full activity is resumed two weeks after discharge. That is experience that cuts cost.

In the extraordinary care which is absolutely essential to the surgical management of any congenital defect incompatible with life but amenable to surgical correction, there will be certain patients who become respirator-dependent. As such they live in hospitals, they are extraordinarily expensive, and they are deprived of the nurture of the family because they cannot live at home. It does not have to be this way. Taking our cue from a remarkable French experience in a northern suburb of Paris, we now have sent a number of respirator-dependent patients home. We have had to revise the technology of their care, but in addition to the tremendous human benefits to the family and the patient, the cost has been cut from \$600 a day for care in a respiratory unit in the hospital to \$40 a day at home. As the numbers increase, I am confident that this cost can be

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reduced to \$50 a week. Incidentally the process of weaning the youngster off the respirator is better accomplished in the loving environment at home than it is in the caring but nevertheless non-family atmosphere of the hospital.

And, the care of those youngsters at home does not have to be done at the cost of the government. Given enough patients at home on respirators, the French experience has shown that competitive free enterprise can deliver a superior service to patients and families than that provided by the government, and can do it more cheaply.

This is only one instance where ingenuity can restore a child to his home and family at a savings through free enterprise over the cost of governmental medicine.

There are beneficial side effects to all of us that come from our attention on the care of the handicapped newborn. First of all, as the patient is benefited, so is his family. Secondly, the necessity for the special care required raises up a new type of paraprofessional that makes the care of the next patient easier and cheaper and also has a spinoff to the care of patients with similar or related if not identical problems. Finally, every so often there comes a time when the experience and sometimes the sacrifice of one child will provide untold benefits to other patients.

A number of years ago a newborn child was operated upon in the Children's Hospital of Philadelphia and almost her entire bowel was found to be gangrenous; the unaffected bowel was not long enough to support life. In an institution aggressively seeking innovative procedures and trying desperately to push back the frontiers of pediatric surgery, one of my colleagues resected the gangrenous bowel and kept the child alive on total parenteral nutrition. She never ate by mouth; all her nutrition was supplied by vein. The hope was that a small bowel transplant would eventually be possible to restore this child to satisfactory existence. Before that technique could be achieved, the patient succumbed but until then she had been on total intravenous feedings, gaining weight and developing according to acceptable standards over a period of 400 days. The cost was enormous. The patient died, but because she was the first ever to be maintained on total parenteral nutrition, medical science learned a great proportion of what it now knows about hyperalimentation or total parenteral nutrition from this one little girl. It is without doubt one of the greatest medical advances of the past several decades.

What we have learned from that experience was intended for her own good and not for the good of society. But it did provide society with a now-recognized nutritional technique which has saved the lives of thousands upon thousands of children and hundreds of thousands of adults around the world. In addition to that, hospital stays have been shortened, wounds have healed more quickly, rehabilitation has been possible sooner,

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and hitherto almost unmanageable situations like small intestinal fistulae have come under surgical control. Hospitalization for this nutritional support alone averages about \$300 a day and now can be done at home for about one-tenth of that cost.

I have spent my life professionally in the care of what the world calls handicapped children. All of these had a physical defect to start with, some were habilitated to be indistinguishable from normal. Others were not pristine in form or function. Some had a mental handicap as well. They live and do well in families. They merely exist in institutions. I have seen many childless couples become a family when they took a handicapped child by adoption. Other traditional natural families have expanded by the same process. It all takes a tremendous investment in vision, time, effort, and money. There are tragedies and triumphs. But blessings frequently come with braces.

I would like to close with an anecdote:

Sometime ago in preparation of a speech I was going to give in Toronto I interviewed the mother of one of my patients and told her I would like to quote her answers to two questions.

The first question I asked was: "What is the most awful thing that ever happened to you in your life?"

And she said: "Having our son born with all those defects that required 26 operations to correct."

Having performed 22 of those operations and having stayed with her during the other four, I said, "that was an easy answer and I expected it. But now tell me, what is the best thing that ever happened to you?"

And she said: "Having our son born with all those defects that required 26 operations to correct."

## APPENDIX C

*[The following is adapted (with permission of the author) from an article that appeared in the Spring, 1980 issue of Heartbeat magazine. Frances Frech is director of the Population Renewal Office in Kansas City, Missouri.]*

### **The Real Dimensions of the Problem**

*by Frances Frech*

You see the headlines everywhere. Teenage pregnancies epidemic. Teenage pregnancies rising. More abortions for teenagers. Teens getting pregnant at ever-younger ages. Panic. Crisis. Hand wringing. What can we do?

Before a problem can be solved, the real dimensions of that problem must be studied and understood. Is the situation really so bad that we must lock all teenagers in their rooms, as one syndicated columnist recently suggested? Should we be spending millions of dollars on contraceptive programs? Should we make contraceptives available where the kids are — in the schools?

One million teenagers got pregnant in 1975. That's a panic statement that has the desired panic effect. Quick, all you government officials, pour more money into the coffers of the family planning agencies before the epidemic spreads.

But how about a little common sense before you dump all those dollars down what seems to be a bottomless pit? The word "teenager" covers the age range from 13 through 19 years. The majority of the pregnancies occurred in the 18 and 19 year-old bracket. When, until now, have 18 and 19 year-old girls been considered too young to be mothers?

Of the pregnancies that were carried to term (not aborted or miscarried), 280,000 were born to teenagers who were married *before* becoming pregnant, and 100,000 were born to teenagers who married before the birth. How can it be a big social problem for married teenagers to have babies, especially if the marriage took place before the pregnancy occurred? These were not forced marriages. And even when the pregnancy happened before the wedding, we have not — until now — regarded this as a social problem so great that we need to take some sort of governmental action on the matter.

The remaining births — 220,000 — were illegitimate and represent social problems. The estimated 270,000 abortions (some sources say 300,000) were also social problems.<sup>1</sup> But now we have the dimensions down to roughly half a million.

Of the half million, we can fairly assume that at least half were in the 18 and 19 year-old group. These are young women. In virtually every state in the union they could obtain contraceptives, if they wanted any, without

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parental knowledge or consent. They are, in most states, legally adults and can marry without parental consent.

So now the dimensions of the problem can be reduced to no more than one-quarter of a million — 250,000 girls who are 17, 16, 15, 14, and 13 years old. There are also a small number who are 10, 11, and 12 years old who were not included in the original one million. Two hundred and fifty thousand girls under the age of 18 got pregnant last year. That doesn't have the panic ring of one million teenagers. The situation is serious, yes; a national disaster, hardly.

Having subtracted the older teens and the married ones, we can consider teenage pregnancies in a more manageable light. (For health and mortality statistics, of course, we will include the older group, married or unmarried.)

“Eleven Million Teenagers: What Can Be Done About The Epidemic of Adolescent Pregnancies in the United States,” a report by the Alan Guttmacher Institute, which is the research arm of Planned Parenthood, has been widely accepted as *the* source of “facts about teenage pregnancies.” The “11 Million Teenagers” in the title, by the way, refers to seven million *boys* and four million girls 15-19 who are said to be “sexually active.” The girls are further identified as being “at risk” of pregnancy. And of the four million (actually, if you read further, you discover that it's 4.3 million), 1.1 million are married, which puts a different face on the social problems picture.

The Guttmacher report compares health and mortality figures in the following categories: under 15, 15-19, and 20-24.<sup>2</sup> Older age groups are (conveniently?) omitted. You read that mortality risks for under 15's are 60% higher than the risks for the 20-24 year-olds. You are *not* told that the health dangers for the under-15's are 50% *less* than for 30-34 year-olds. The mortality rate in the under 15 bracket is a very low 16 per 100,000 — and in any given year, no more than 30,000 under 15 year-olds are pregnant. So in actual numbers of deaths, you are looking at fewer than 6. Had these girls waited until age 20, statistically, the deaths would have been 10 per 100,000, or between three and four. Even one death is a tragedy, but if to save the lives of two or three girls a year, we are to put thousands of them on life or health threatening contraceptives (the Pill or the IUD) or have thousands of abortions performed, the whole scene becomes sheer insanity.

The Guttmacher study claims that babies born to teenage mothers are two to three times more likely to die in the first year, than are the children born to older mothers. Source of the data is listed as “NCHS A Study of Infant Mortality From Linked Records, etc., 1973,” but the figures actually used in NCHS report are from 1960 — almost two decades ago! Which leads us to wonder about the availability of more recent statistics.

Other problems related to youthful child-bearing include job and educa-

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tional disabilities, marital instability, family sizes, lack of health insurance, lower incomes, and lack of day care centers for infants under two years old. We would never deny that these are problems, but the claims are distorted in a number of ways. For example, it's said the girl who has her first pregnancy before she's seventeen is twice as likely to drop out of high school as the girl who waits until she's 20, for her first child. Well, naturally! How many 20 year-olds are still in high school, pregnant or not? Seventy-nine percent of the 15-17 year-old mothers have had no job experience, compared to thirteen per cent of the 20-24 year-old mothers who have not worked. Once again, well, naturally! 15-17 year olds, pregnant or not, aren't old enough to have had much job experience. "Twice as many young as older families are poor." What an earth-shaking discovery! Undoubtedly there are more affluent 40 year-olds. It takes time and experience to achieve financial success. But families must be started when the parents are young, which is the very time they can't afford them.

Lack of day care centers for infants under two, would affect a working mother no matter what age she was when she had her first baby, or *any* baby, for that matter. It's a curious thing, but every baby goes through a time of being under two years of age!

It's logical that women who start their families at an early age would have larger families than those who start later. Every year a woman waits, means one year fewer of fertility. But we have a shortage of children in the United States today, with average family sizes having dropped well below replacement. So we do need *some* mothers who will have more children to restore a proper population balance — if such a thing is even possible any more, with so many couples being sterilized.

The dimensions of the teenage pregnancy problem are only about one-fourth as large as the "scare" headlines would have you believe, but they are rising and will continue to rise. Two leading factors in the enlargement of the dimensions are, surprisingly, the efforts of the family planning agencies, and not so surprisingly, the complexity of the problem.

In the twenty-year-period 1940-1960, the number of illegitimate births to teenagers increased 175%. But in 15 years, from 1960-1975, the number of pregnancies (births plus abortions) in this age range increased 310%. Before the late 1960's when abortion began to be liberalized in some states, abortion could not have been a significant factor in reducing births in the teenage population. At least, those who have done research on the subject generally agree that most of the women who went to the illegal abortionists were married women, usually women who already had children. Some would argue that out-of-wedlock births were lower because the girls got married when they became pregnant and the births didn't fall into the out-of-wedlock column. This may have played a small part, but if it were the whole story, the average age of marriage in 1940-1960 should have



been considerably lower than it was in 1960-1975. In reality, the difference was only about one year.

The following events occurred during the time period 1960-1975: The Pill arrived. By 1962 it was being widely distributed through Planned Parenthood and other family planning clinics. Now there was a contraceptive that seemed safe and effective and was simple enough for all age groups. By 1964 Planned Parenthood had dropped from its literature the statement that "abortion kills the life of a child already begun" and the organization was becoming a leading lobbyist for the legalization of abortion. One can't help wondering if they had too many pregnant clients and had to find a way to "hide the bodies" before anyone found out. Also, at this time Planned Parenthood was heavily involved in providing sex education programs for the schools and was holding seminars to train teachers in sex education. They had begun — openly — to offer clinic services for teenagers, with or without parental consent.

Planned Parenthood officials say that the teenagers who come to their clinics are already "sexually active." This may be true, but a question which should be asked is "What was their status the first time they attended a family planning program at school?"

Federal funding of family planning services rose from 80 million dollars to 197 million dollars in the period 1971-1975, an increase of 146%. At the same time, the number of out-of-wedlock pregnancies rose 56%, and the number of abortions performed on teenagers rose 105%. Was the money well spent? We think not.

Encouragement of teenage sexual activity is implicit in family planning programs which speak glowingly of all the great new birth control methods which are available today. The very attitude of the family planners ("the kids are going to have sex, anyway, so we'd better teach them about birth control and then we won't have to worry") precludes the use of any suggestions that it might be better to wait. But learning about birth control hasn't kept girls or boys, either one, from catching V.D. in epidemic proportions.

One night our organization showed the movie "About Sex," one of the popular films used by Planned Parenthood, to a group of parents. Most were shocked. But one woman got up and took the microphone. She identified herself as a nurse and said that she had seen "dozens of 11 year-olds giving birth while their parents were in the hospital corridors, crying," and she believed that the film could prevent such incidents. Well, the number of 11 year-olds who give birth is so small, nationally, that no single nurse in a single hospital could ever have seen dozens of them! But how could any of the methods discussed in this film — or any other sex education film — keep an 11 year-old from getting pregnant? Anybody who would put an 11 year-old on the Pill would be going against all

## APPENDIX C

concepts of good medical practice. An IUD almost certainly would not work and would be dangerous, besides. The only device left would be a condom for her partner. Which brings up another question: What age is her partner? Surely not eleven! Perhaps instead of recommending birth control to 11 year-olds, the family planners had better be notifying parents or law enforcement officials before that little girl ends up dead, strangled in a dark alley. Planned Parenthood, at its convention in Seattle in 1975, said that increasing numbers of 9, 10, and 11 year-olds are coming to their clinics for birth control advice and material. The organization admits that it doesn't tell the parents. But *somebody* in authority ought to be told, for there's child molestation or statutory rape going on, and anyone who knows it and doesn't report it is guilty of aiding or abetting a crime, or contributing to the delinquency of minors.

To sum it up, there are no safe, suitable, workable contraceptives for young teenagers. To lead them to believe otherwise is irresponsible and a lie. But even for older teens, the contraceptive approach is difficult and uncertain. Teenagers are ambivalent, not wanting to be pregnant, yet sometimes wanting to be. They are easily swayed by emotional upsets. A girl is depressed and feeling unworthy of love, so she accepts a substitute. A girl is angry with her mother. And what's the worst thing you can do to mother? Get pregnant! Teenagers are sometimes living in a dream world, they're idealistic, romantic, they're reluctant to "plan ahead" for intercourse — and that means they are not likely to give serious thought to either parenthood or its prevention.

Which is why, for all their interest in sex education and contraception for teenagers, Planned Parenthood champions abortion as a contraceptive "back-up" for those who neglected to plan. For all the organization's sexual sophistication, it seems incapable of grasping the essential point about teenage pregnancies, or any other kind: failed contraception doesn't cause pregnancies, people do. Until Planned Parenthood moves beyond the mechanics of sex, it is not likely to contribute anything useful to the problem of teenage pregnancies.

## NOTES

1. The additional 130,000 pregnancies are said by Planned Parenthood to be accounted for by miscarriages.
2. The Guttmacher study, published in 1976, used maternal mortality figures from 1974, which were the latest available at that time. But now there are newer ones, from 1977, and these show 15-19 year-olds having the lowest mortality rates of all, significantly lower than any other age bracket. The rate was 6.4 per 100,000. The next lowest was 7.4 (per 100,000) for 20-24 year-olds, and in third place were the under-15's, with 8.7. From under age 15 through age 29 the death rates were considerably lower than the overall figure of 10.6 per 100,000. From age 30 upward they rose quite rapidly, being 18.1 among 30-34 year-olds, 35.6 for 35-39 year-olds, and 66.3 for those in the 40-44 year-old age range. To sum it up, it is not the young mothers, even the teenage or adolescent mothers, who are at high risk; it is those who are 30 years old and over.

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