DELAWARE LAWYER

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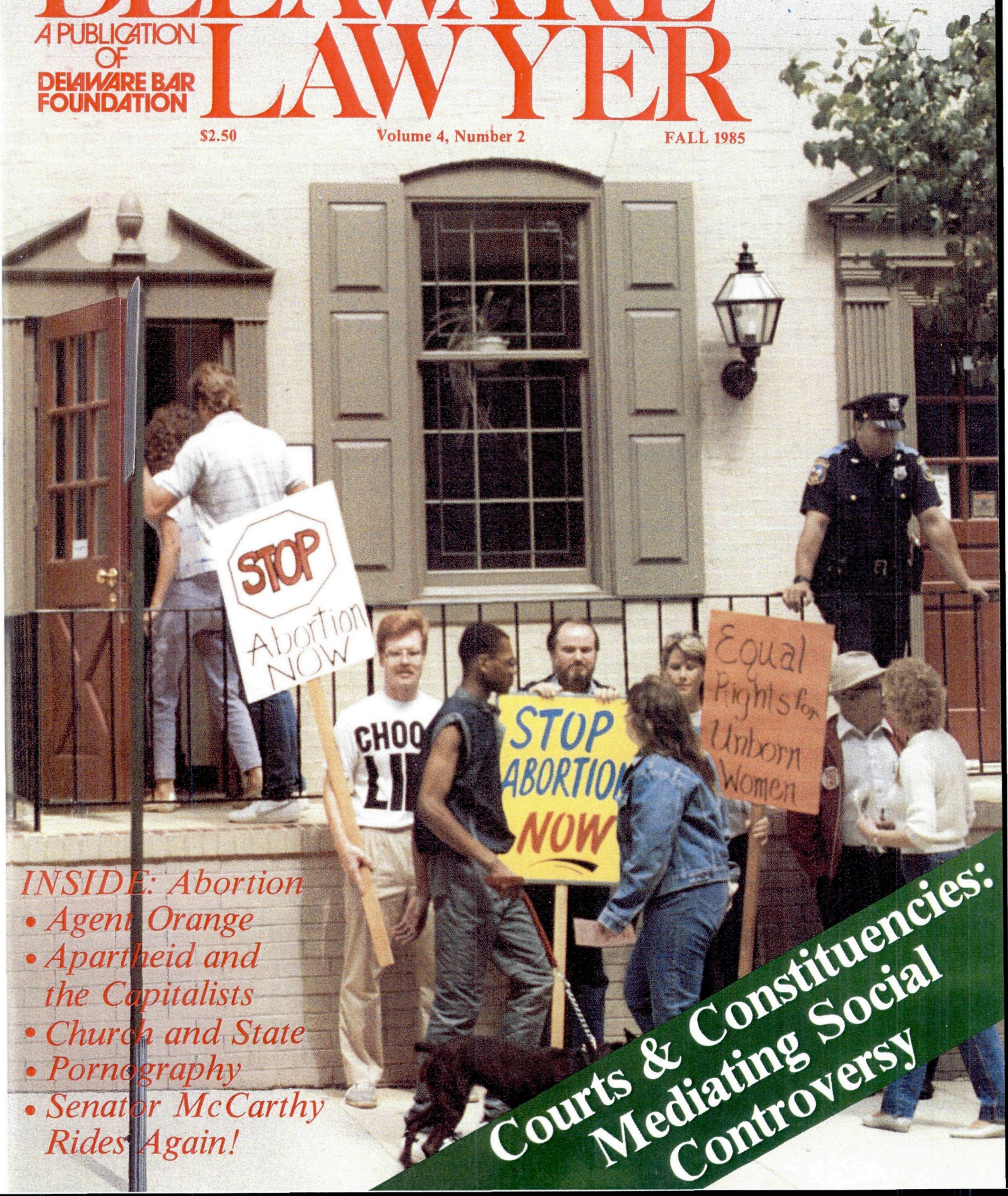

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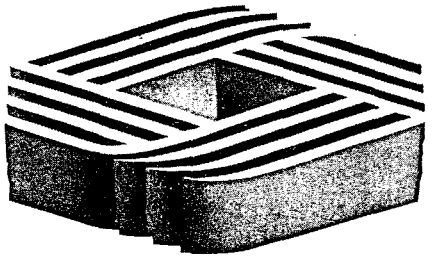

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Contents

COVER: On Saturday morning, June 29 *DELAWARE LAWYER* interviewed anti-abortion protestors at 12th and Orange Streets in Wilmington. Excerpts from those discussions appear in these pages. The orderly but unsettling confrontation shown on the cover is the fitting emblem of this issue. How does the law deal with the collision of strongly held views on the most vexing disputes that arise in a free and pluralist society?

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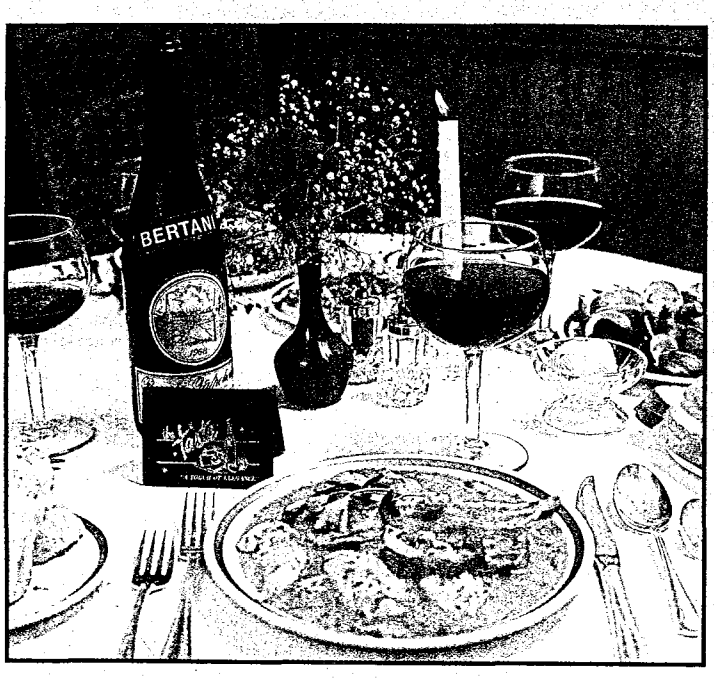

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I M

Kenneth C. Haas, who has served as a special editor of this issue, is an Associate Professor in the Division of Criminal Justice in the Department of Political Science at the University of Delaware where he has won two Excellence-in-Teaching Awards. He specializes in criminal law and the law of corrections and post-conviction remedies. His articles, including "Reaffirming the Value of Life — Arguments Against the Death Penalty" (DELAWARE LAWYER Summer 1984), *have appeared in many law reviews and social science journals. He is co-author of* Crime and the Criminal Justice Process *and* The Dilemmas of Punishment. *His scholarly work has been widely cited in law reviews, and by the United States Supreme Court.*

Courts and Constituencies: Mediating Social Controversy

This issue of DELAWARE LAWYER addresses the increasingly important role played by the courts in determining social policy. It is a familiar complaint that in recent years an "imperial judiciary" has generated more far-reaching social and political change than Congress and the Presidency combined. As some see it, the courts have demonstrated an unseemly haste to override majorities that prevail in legislative assemblies to advance the causes of favored minorities. This has prompted noisy — but as of yet unsuccessful — congressional attempts to limit federal court jurisdiction in abortion, school prayer, and desegregation cases.

There is disagreement among scholars, lawyers, and judges over what kinds of questions the courts may properly adjudicate, particularly in areas where the Constitution is silent, such as abortion, sexual behavior, and school prayer. Was Justice Harry Blackmun's lengthy, detailed analysis of medical history, pregnancy, and abortion in *Roe v. Wade* an example of superb judicial craftmanship or a case of judicial overreaching at its worst? Should an unelected, life-tenured federal judge be able to tell the duly elected representatives of the people of Indianapolis that the First Amendment forbids them to make actionable as a civil offense the presentation of material that presents women as sexual objects who enjoy pain, humiliation, and rape? Is it judicial nit-picking or merely a reasonable interpretation of the Establishment Clause to invalidate a state statute providing for a moment of silence at the start of each school day on the ground that the statute mentioned silent prayer as one possible way to pass the "moment"?

All too often, the answers to such questions depend upon whose ox is gored. Those who agree with a particular decision or series of decisions praise a court for its "principled interpretation" of statutory or constitutional law, while those who disagree condemn the same court for making value judgments that should be left to the "more democratic" branches of government.

What all serious students of judicial policymaking realize is that litigation *does* shape social policy and will continue to do so for the foreseeable future. Despite the outcry in some quarters over the perils of judicial activism, overt or open defiance of unpopular court decisions by public officials or by ordinary citizens remains extraordinarily rare. Nationally and legally, such diverse groups as blacks, women, the poor, prisoners, homosexuals, the physically handicapped, mental patients, labor union members, labor union opponents, veterans, environmentalists, animal lovers, abortion proponents, abortion opponents, and political dissidents are well aware that judges and juries have awesome power either to advance their causes or to turn them upside down.

Having sworn allegiance to the Constitution and laws of the United States, federal and state judges have no choice but to resolve disputes in which litigants claim that the other branches of government have failed to comply with such fundamental, but vaguely worded constitutional guarantees as "due process of law" or "equal protection of the laws". It is the power to give detailed meaning to ambiguous clauses in the context of specific cases that makes the courts the ultimate guarantors of individual rights in a nation where the majority rules. It is hoped that this issue of DELAWARE LAWYER will contribute to thinking about the legitimacy of litigation as a way to advance causes and the manner in which courts shape social policy.

Kenneth C. Haas

Standing Up to Be Counted

The Price of Good Conscience

The two accompanying articles about abortion could hardly be described as friendly to those who march under the banners of "Right to Life". In order to achieve a more balanced picture (and to ensure the democratic decency of a right to be heard) DELAWARE LAWYER interviewed several of the protestors who regularly devote their Saturday mornings to picketing Delaware Women's Health Organization, Inc. at 1205 Orange Street. On the morning of June 29, Lois Rasys, our production manager, and Bill Wiggin of the Board of Editors, armed with cameras and a tape recorder, witnessed the following scene.

Volunteers carrying signs protesting abortion (see accompanying photos) stationed themselves throughout the 1200 block of Orange Street, some across the street from the clinic, others directly in front. Two weeks before our visit there had been a sit-in at the clinic offices. On the day we visited the site a policeman stood duty near the door to the clinic. Two representatives of N. O. W. were on hand to escort the women who avail themselves of the clinic and who must run a gauntlet of disapproval (strictly non-violent) and pleas to reconsider what they have come to do. It must be unnerving for these young women, frequently accompanied by sheepish young men, to execute a painful decision amidst a tumult of public reproach.

The choice these women have made is no less painful to the protestors, who impressed us as gentle, thoughtful people, eloquent and deeply sincere in their conviction that abortion defiles the sanctity of life in the interest of selfish personal convenience. These people have been regularly and roundly abused, jeered, spat on, and, of course, arrested. Paired in the public mind with the violent element that bombs abortion clinics, they face a great deal of unprovoked hostility in standing up for what they deem right. As they have every reason to be on guard, we approached the interviewing process with some trepidation. Our concerns were groundless: the protestors were courteous and friendly, and almost pathetically eager to share their views. Herewith a sampling of their comments.

I. On public hostility to Pro-Life demonstrations:

Mr. Jack Younce: "We don't like to say things about the press but we'll have something going on down here and they don't even show up. A couple of weeks ago, *Cosmopolitan* sent down a reporter. She got out of her cab, went inside to get her interviews, and that was it. She didn't even talk to us."

Q: She only interviewed the other side?

Jack: "Right, she had no interest at all in what we thought. And then you always have the possibility of somebody taking a swing at you. Like this morning, we had one guy who came by, grabbed two signs and ran with them. Then there's the name calling, the threatening. One guy came up and asked the police this morning what was the charge here for assault and battery if he decides he wants to punch somebody. Of course, if it's a good cause, then you've got to be willing to sacrifice, to be willing to pay whatever it takes. And I know that by just coming up here in the winter time, it's got to be the coldest place in the state of Delaware. The wind blows through here and I have actually been here when my beard froze from my breath.

"But that's a small price to pay when we think that there have been babies saved here. It would be small if you took it in percentage, but if we can save one, that's one human being that is going to have a chance to live, breathe, and have a life."

Q: You are, I believe, a non-violent group?

Mr. Tom Monroe: "Right. But the media are not portraying it *that* way. You can see the policeman there—as if we were going to try to storm the place. They [the media] try to portray it as a violent movement. We want *life*. Violence goes against that. We believe the violence is taking place right in the operating room in there."

II. On Pro-Life efforts to persuade pregnant women to reconsider their decision to abort:

Q: You have been able to talk some out of it, haven't you?

Jack Younce: "Oh yes. Some will take the literature and once they're inside they will sit and read it. And they say 'what are we doing?' We've asked the clinic to just let us put our literature in there. They say they're for choice. Great! Just give them a choice."

Q: Has the clinic been cooperative?

Jack: "No. They won't let us put any of our stuff in the building. And as a matter of fact, a lot of times the N.O.W. women here will take the literature right out of the girls' hands. They will put their arm around the girls. And boy! If we even look like we're going to [do the same], they're ready to hang us. We'll try to talk to a girl and they will just come right in and take her away. We've asked them: 'If you want to escort the girl, escort the girl, but when we're talking to her give us that right. If she doesn't want to talk to us, she'll walk away from us. Then she's yours.'"

Q: We're looking at what motivates people to participate and what kind of forethought goes into social activism in the 80s. Why are you here?

Bob Cole: "The best answer to that inquiry is to get a view inside that building over there and see the killing that is going on... Killing of the innocent speaks for itself... I think an excess of words by itself is a distortion. You lay a dead baby on the table and what can you say about it?"

III. Pro-Life Alternatives

Spokesmen for the Pro-Lifers were quick to explain that, in addition to seeking to persuade women to reconsider decisions to abort, they offered supportive services during pregnancy.

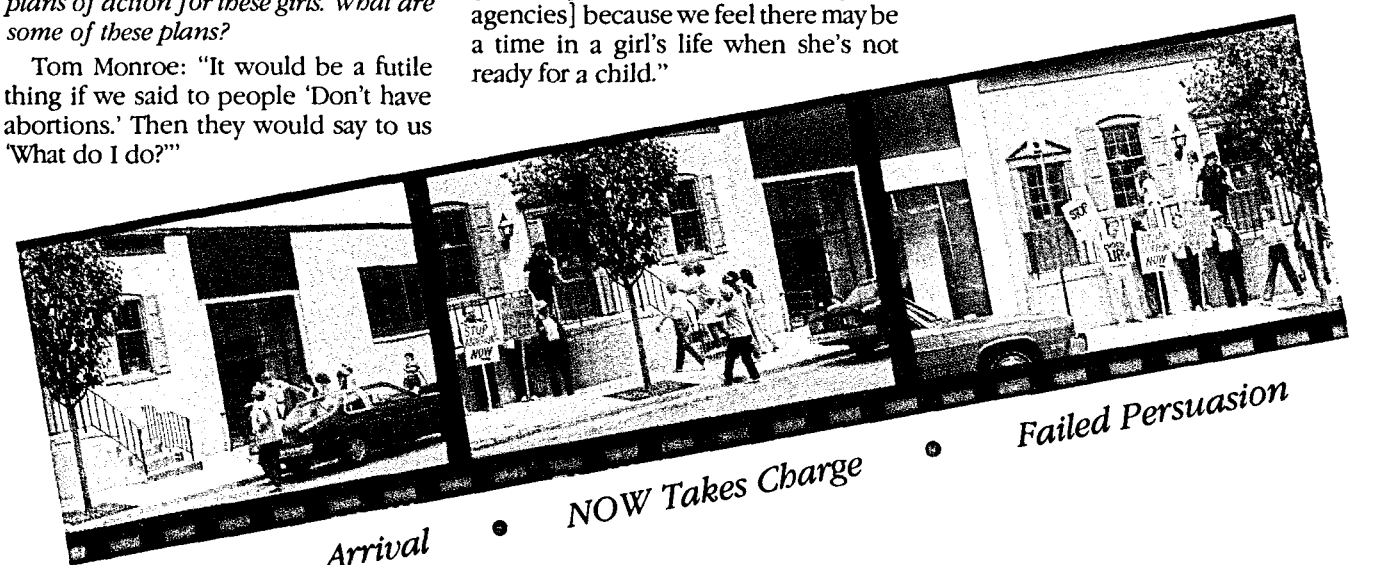
Q: I'm surprised to find that you offer alternatives, that you are not just standing up for your views, but that you have plans of action for these girls. What are some of these plans?

Tom Monroe: "It would be a futile thing if we said to people 'Don't have abortions.' Then they would say to us 'What do I do?'"

Jack Younce: "We don't...just tell them 'Look don't do it.' We're associated with Crisis Pregnancy Center, Birthright, and the different groups that offer assistance in every way."

Q: Do you have an adoption program?

Jack: "One they can go through is Bethany and adopt out the children. And there are different ones that we can go through. We refer them to [adoption agencies] because we feel there may be a time in a girl's life when she's not ready for a child."



Q: Have the media shown that you offer alternatives?

Tom: "Again, it's that slanted view of what's coming out because the establishment is for abortion. Basically, our nation is aligned that way."

Jack: "The other side tells us they're pro-choice. Then give them a choice! Let them hear both sides. Then if they choose to have an abortion, there's nothing we can do about it. They can do it legally."

IV. A Well Organized Campaign

The Pro-Life forces have some extremely effective literature with which to combat abortion. It is well designed, professionally executed, and emotionally compelling. One protestor we interviewed had this to say:

"I got involved about six months ago after watching a program on cable called *The Good Old Boys.* It showed the saline babies burned and stuff like that. I always knew it [abortion] wasn't a good thing. And I could never do it myself. But I figured [if others did it] it was none of my business.

"I hadn't realized that it really is a baby—and I have three children. The doctors fool these women into thinking it's not a baby. It's just a fetus or a tissue or some of this garbage they tell you. After you see these pictures you know. I think most people, 90% of people, who would look at these pictures would realize that it's horrible. It's murder. I had never thought that it's murder before, ever."

V. Preconceptions about Pro-Lifers

Pro-lifers, portrayed in the popular press as puritanically ruthless (and frequently lethal) busybodies, present a very different picture when you take the trouble to talk with them. Sincere and unyielding in their opposition to what they regard as morally wrong, those with whom we spoke were consistent in their eschewal of violence and their compassion for those they regard as sinning or ignorant. One young mother who had been arrested during a sit-in at an abortion clinic had this to say:

"Babies are the most innocent people in the whole world. People are worried about the death penalty. I'm not for the death penalty at all because I don't think anyone on the earth has the right to take anybody's life. I don't care who they are or what they are, unless it's in self-defense. But as far as people deciding which person should die, I can't believe that's right. Only God has the right to decide if somebody should die."

Another protestor observed: "Every time a girl comes down here, I guess you kind of think maybe next week it will be different. Each time a car comes and a girl gets out and she goes up those steps and she goes into that mill, part of me just dies. Here come some girls

now. You know what's happening and we try to convey it to them. But for some reason they don't understand that's a real live baby inside them. My heart goes out to them. It really does. I feel so sorry for them. If they would just listen for a few minutes. If we could just redo the law and make this illegal again. I know there would be back-alley abortions, but (sigh) at least some of the girls, some of the babies, would be saved."

Q: Does this thought bother you at all: the rich would be able to fly to Europe and get it done and the poor might be consigned to the back-alley abortions?

"I hope that the police (you can see that the policeman up there is monitoring this mill and he's keeping us away from it. He's doing a super job. His call to duty is really shining.) I just hope that if it were illegal, his call to duty would reverse and he would be out on the streets finding back-alley abortionists. And he would be standing there as an armed guard not allowing any girls to go in. That would be my hope. And the rich going to Europe? I guess I would get on that plane and I would try to stop them, try to educate them, and tell them how wrong it is."

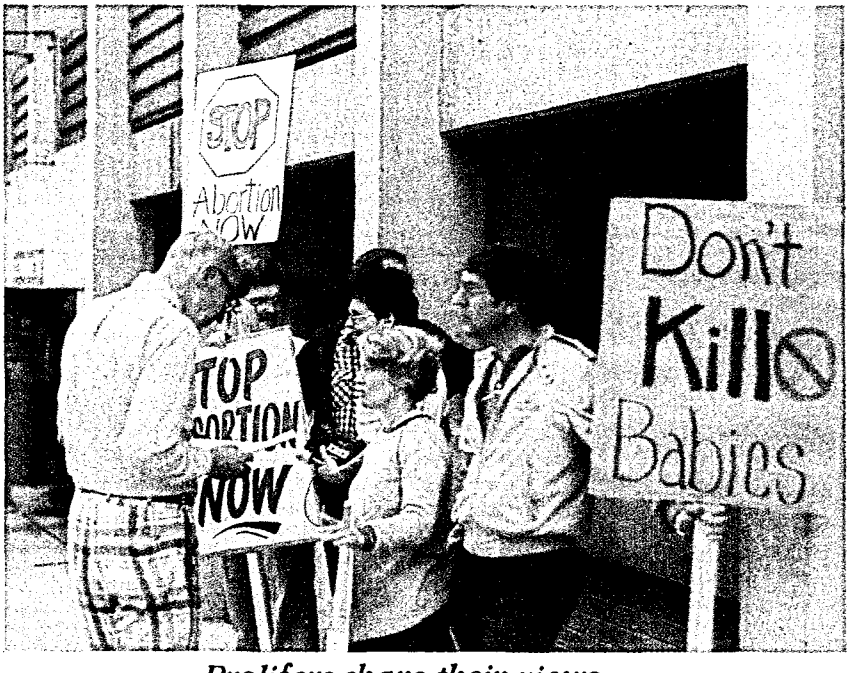
VI. The Sit-in

We spoke with two women who had been arrested during the June sit-in at the clinic. They were out on bail. Both were resigned to the likelihood of going to jail*. Their freedom pending trial was conditioned on their staying away from the clinic. We interviewed them at a good distance from *1205* Orange Street. This is "Monica's" story:

Monica: "I was arrested at the sit-in at the Women's Health Organization. We don't understand why they call it a health organization because they are murdering there all the time. Murdering little babies. And people are coming here from out-of-state every week. And they stay in there a few hours and they come out and they've had their abortion.

"I know they are lobbying to change the law and we need that, we need prayer, and we need more people coming out but it seems that with the morality of the whole nation people just don't care enough. They are turning their eyes away from it, rationalizing that it's not a human life yet.

Dialogue? NOW, but not now.



Prolifers share their views.

"It's just come down that we've been lead by the Lord to do this. And we're willing to sacrifice ourselves for these little babies to stop the killings.

"Initially, I got involved with my daughter and son-in-law. We'd just sit around and talk about the issue. And we were just lead by the Lord. And I said I would go down to the clinic the next Saturday and that's when we began—in the winter. It was freezing out, we all had our scarves, gloves, and boots and everything on. We started coming down every Saturday. Trying to sidewalk counsel girls. At the beginning, all I did was pray because I was afraid to go up to anybody to even give them a piece of literature. Then gradually I started offering literature and just approaching them saying 'we'd like to help you. We'll take you home with us, help you financially, whatever you need, we'll help you.' We've been doing that now for about a year and a half."

**Nobody went to jail. In late July after a fairly lengthy trial, the Court convicted the protestors and imposed suspended sentences and the costs of prosecution.*

Q: A couple of weeks ago, you were arrested. Tell us about that and how it arose and what followed from that.

Monica: "Just three months ago, I was against any kind of direct action because I felt you're breaking the law. but [now] I really see it that we're not breaking God's law. We've prayed about this. The people in Pennsylvania who are involved in this are pillars of the community. It also took them a long time to make that decision. But once you make the decision, you come to see it through the Lord, in prayer. Because in the world's eyes we're breaking the law."

Q: What exactly did you do that caused you to be arrested?

Monica: "We went up in a group and we said that we refused to leave until they stopped the killing. It was completely non-violent. They called the police who came and asked us to leave. We told them the same thing and we showed them literature and why we were there. So they called their superiors. More police came, and they asked us to leave again. We told them why we were there. We knew we were going to be arrested. Eventually they came with their wagons and hand-cuffed us, took our names, and took us down to the police station. We were finger-printed, photographed. And we're out on bail."

Another sit-in participant, also on bail pending trial, had this to say about the enlightened conduct of the Wilmington police in what must have been a very sticky situation: "The Wilmington police were the best."

Q: Were you courteously treated?

"They were very professional. My first sit-in was Bridgeport, PA where I saw this big, fat cop beating on women and I'm not kidding you. I couldn't believe my eyes. Picking up chairs and breaking them. They got so riled up because the people went in the procedure room where there's a killing machine and barricaded the door. They [the police] couldn't get in so they got angry. And they beat the place up and then tried to put a suit against us for destroying things."

Q: But here in Wilmington, how was it different?

"The cops came in and they were nervous because they didn't want to arrest us. They tried to talk us into leaving many times. Usually in a sit-in you're out in a half hour to an hour at the most. The cops are there in five minutes and you're out. This was unreal. The Wilmington police let us stay there for four hours.

"We made up a flyer that said to the police, 'If you remove us they'll start killing again. Please reconsider. We know this is your job but many people have refused to do parts of their jobs and haven't been fired.' They let us stay there for four hours until the place closed for the day. So it was worth being around for it.

"One of the girls who was arrested with us, Joan [Andrews]. She's been arrested hundreds of times. She's still in jail right now because she refused to sign the paper that said that she couldn't come here. That was the bond agreement. It's the principle of it—that she won't sign it."

Q: Is she being well treated in jail?

"Oh, yes. She said it's great. She said that's the best jail she's ever been in. And she's been in many, many, many.

"The Wilmington cops were really nice to us. They even came to the cells. Some protestors wanted cigarettes. They took the money and bought them cigarettes. And they never said anything nasty to us. And they put these fake handcuffs on us—plastic. As soon as they put them on I took them right off. We went in the police station and just handed them the handcuffs. By then, we all had them off. They said 'OK, throw your handcuffs away now.' They said 'we have to get you out of here before dinner time because we can't afford to feed all of you.' "

Q: But they did?

"... Roy Rogers, across the street. They did and they brought some for the other prisoners. And they let us out at five o'clock."

"They were really good. They could have taken us out of there [the clinic] and the place could have done business. But they let us stay there. They said their van broke down. I know these were all excuses because there was no way all this could have happened."

Q: They may have been hoping that you would leave by yourself...

"They knew that we weren't going to leave. They tried to talk us into that. They realized that there was no possible way. When they first came in they told us, 'You are all under arrest.' But even three hours later, the cop said if anyone wanted to leave and not get arrested, go ahead. Which was a miracle because no cops do that."

VII. One Woman's Viewpoint

A principal "Pro-choice" argument is that the issue of abortion is exclusively the business of women who, since they must bear the inconvenience of pregnancy, should alone decide how their bodies are to be tenanted. Not all women share that view.

Q: I think a woman's point of view is important... We're rather directly involved... Would you identify yourself?

"Yes, I'm Jody Monroe from Newark."

Q: What motivated you to participate?

Jody: "We were informed pretty much about the clinic and the processing on Saturday mornings through our church. Some people are very active in it in our church and we just felt it is what we need to do too. There is something that has to be changed. The abortion laws have to be changed and we have to do something about it—standing down here educating the public just a little bit. There are some people who don't agree with abortion and they give up their Saturday mornings just to stand on the street corner. That's what we thought we needed to do."

Q: When you say the laws need to be changed, in your opinion what should that change be?

Jody: "To make abortion illegal."

Q: You don't see it as one of many alternatives such as better preventive planning?

Jody: "Yes, that's got to be a part of it too. But it's just a black and white issue: abortion has to become illegal. I am in awe. I believe conception is just the greatest miracle of God. And I believe that in an abortion clinic we destroy that miracle unmercifully, ruthlessly and violently. Someone is going to have to pay for that one day.

"We're out here too for the women's sakes. To save them from hell months or years down the road—the terrible guilts, self-condemnation — not just for the baby's sake. We're out here to show the love of Jesus not only to the babies to try to save their lives, but to the women and to the escorts,too. Sometimes it's hard, but you have to love your enemies as well."

Uncivil Disobedience

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Joan L. Rosenthal
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ACLU Delaware
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Delaware League for
Planned Parenthood Chairman

Eleven years ago the U.S. Supreme Court issued its landmark decision in *Roe v. Wade* 410 U.S. 113 (1973), overturning restriction on a woman's access to abortion. We do not intend to debate here the pros and cons of abortion. Our concern is with the methods being used by those who do not support this decision.

The anti-abortion forces have tried to do everything possible to overturn *Roe v. Wade* and to prevent women from making their own choice as to when and whether to bear children. There have been attempts to amend the Constitution, to find loopholes in the court's decision, and to enact regulatory barriers whenever possible. The election of a President who supports this agenda and the election of several New Right Senators have given new hope to the anti-abortion forces. The Republican platform in 1980 and again in 1984 supports a constitutional amendment banning abortion and provides for a litmus test for judicial appointments based on "pro-life" positions.

So far, all of these efforts have failed. Public opinion is overwhelmingly in agreement with the *Roe v. Wade* decision. Along with this, pro-choice groups have become more organized, vocal and sophisticated.

It now appears that the anti-choice forces, having failed to achieve their goals through legal and constitutional means, have turned to acts of harassment and violence. The rhetoric of intolerance has only served to encourage these illegal activities.

Anti-abortion extremists have escalated their incidents of violence against reproductive health clinics, threatening the well-being and lives of thousands of people. Equally important, they serve to impede women from exercising their First Amendment rights — constitutionally protected rights to obtain abortions under safe and legal conditions.

In 1982 there were 39 incidents of violence against reproductive health clinics. In 1983, this number rose to 123, including break-ins and harassment. In 1984 there were 200 reported incidents. That same year the number of major violent attacks — bombings, arson, and attempted arson — had risen to 30. (Some of these clinics did not even provide abortion services they provided only family planning services.)

These figures do not tell the whole story. The more sensational acts of violence receive much coverage by the media, but there are untold numbers of other forms of harassment that may be equally effective in discouraging the exercise of constitutional rights. Women are accosted as they enter the clinics. They are abused verbally and called "baby killers" and "murderers". Doctors, staff, and volunteers have received threats and have been picketed at their homes. Bomb threats have caused evacuation of clinics and thus possible harm to patients who have had to be transported to other facilities for further treatment and recovery. There have been scores of clinics invaded, burglarized, and vandalized. The amount of physical damage has been considerable:

1985

SAN DIEGO, CALIFORNIA
(March 16, 1985)

A Molotov cocktail ripped through the lobby window at the Birth Control Institute, causing an estimated $8,000-$10,000 in damage.

COLUMBUS, OHIO
(Specific date unkown)

A defective pipebomb was discovered in front of the Founders Clinic after the snow melted.

POMONA, CALIFORNIA
(February 26, 1985)

The Pomona chapter of Planned Parenthood-World Population Los Angeles was the target of an attempted arson. A defective incendiary device was found on the roof of the clinic building.

MESQUITE, TEXAS
(February 22, 1985)

The Women's Clinic and the shopping center in which it was housed were completely destroyed by arson. Damage was estimated at $1.5 million. Two firefighters were treated for injuries.

WASHINGTON, D.C.
(January 1, 1985)

The Hillcrest Women's Surgi-Center was bombed, causing extensive damage to the clinic and to an apartment building located across the street. The explosion shattered 250 windows in the apartment building. Total damage was estimated at $60,000. Three men were arrested and charged in connection with the bombing of seven abortion clinics in the Washington, D.C. area.

1984

PENSACOLA, FLORIDA
(December 25, 1984)

The office of Dr. Bagenholm was bombed, causing $100,000 in damages. All three Pensacola bombings on December 25 occurred within three blocks of each other. Two men and two women were arrested and charged with the three Christmas Day bombings and the bombing on June 25 in Pensacola (See below).

PENSACOLA, FLORIDA
(December 25, 1984)

The office of Dr. William Permenter was completely gutted after a bomb exploded.

PENSACOLA, FLORIDA
(December 25, 1984)

A bomb exploded at the Ladies Center, which had recently moved to new quarters after being bombed June 25. Damage was estimated at $100,000.

SUITLAND, MARYLAND
(December 24, 1984)

A bomb exploded outside the Metropolitan Family Life Planning clinic, causing extensive damage to the first floor of the building. The clinic was not damaged.

SANTA ANA, CALIFORNIA
(December 23, 1984)

Planned Parenthood of Orange County was the target of an attempted arson causing minimal damage.

ROCKVILLE, MARYLAND
(November 19, 1984)

A bomb exploded outside the Randolph Medical Center, causing an estimated $50,000 in damages. The build-

ing houses the office of Planned Parenthood of Metropolitan Washington, D.C.'s Rockville, Maryland, chapter.

WHEATON, MARYLAND
(November 19, 1984)
The Metro Medical and Women's Center was completely gutted after a bomb exploded, causing $350,000 in damages.

HOUSTON TEXAS
(November 11, 1984)
Arson at the Alameda Medical Square clinic caused extensive smoke damage. Damage was estimated at $500,000.

EUREKA, CALIFORNIA
(October 17, 1984)
Planned Parenthood Association of Humboldt County was the target of an attempted arson, causing minimal damage.

MARIETTA, GEORGIA
(September 20, 1984)
A Molotov cocktail ripped through the front window at Planned Parenthood Association of the Atlanta Area's Cobb County Clinic. Damage was estimated at $15,000.

SAN DIEGO, CALIFORNIA
(September 13, 1984)
The Birth Control Institute was the target of arson. Damage was estimated in excess of $80,000.

ATLANTA, GEORGIA
(September 13, 1984)
A Molotov cocktail exploded at the Northside Family Planning Services. Damage was estimated at $5,000.

WEBSTER, TEXAS
(September 8, 1984)
Arson at the Clearlake Women's Center caused $120,000 in damages.

HOUSTON, TEXAS
(September 7, 1984)
The Concerned Women's Clinic was the target of two arson attempts.

HOUSTON, TEXAS
(September 7, 1984)
A Molotov cocktail exploded at the Women's Outpatient Clinic, causing $10,000 in damages.

HOUSTON, TEXAS
(September 7, 1984)
The West Loop Clinic was the target of arson, causing $90,000 in damages

HOUSTON, TEXAS
(August 20, 1984)
A Molotov cocktail exploded at Cypress-Fairbanks Family Planning of Houston. Damage was estimated at $30,000.

ANNAPOLIS, MARYLAND
(July 7, 1984)
A firebomb exploded outside the Annapolis Clinic of Planned Parenthood of Maryland. Damage was in excess of $40,000.

WASHINGTON, D.C.
(July 4, 1984)
An explosion at the National Abortion Federation caused extensive damage.

PENSACOLA, FLORIDA
(June 25, 1984)
The Ladies' Center was destroyed by a bomb, causing an estimated $200,000 in damages.

FOREST GROVE, OREGON
(May 12, 1984)
The Bours Birth and Surgery Center was the target of two arson attempts.

EVERETT, WASHINGTON
(April 19, 1984)
A fire ignited by gasoline caused $60,000 in damages at the Everett Feminist Women's Health Clinic. The same man was arrested and convicted for three of the Everett arsons and the Bellingham incident. (See below)

EVERETT, WASHINGTON
(March 26, 1984)
Arson at the Everett Feminist Women's Health Center caused $10,000 in damages.

ST. PETERSBURG, FLORIDA
(March 16, 1984)
The Ladies' Choice Clinic was destroyed by explosives. Damage was estimated at $60,000.

BELLINGHAM, WASHINGTON
(March 4, 1984)
A Molotov cocktail exploded at the Bellingham Family Practice Clinic, causing an estimated $70,000 in damages.

COLLEGE PARK, MARYLAND
(February 28, 1984)
The Prince George's Reproductive Health Services was destroyed by a firebomb. Damage was estimated at $70,000.

NORFOLK, VIRGINIA
(February 17, 1984)
Six pipe bombs exploded at the Hillcrest Clinic, causing minor damage estimated at $1,000.

DOVER, DELAWARE
(January 13, 1984)
The Reproductive Care Center was destroyed by arson when a Molotov cocktail was thrown through the front door. Damage was in excess of $100,000.

In March of this year, Congressional hearings were held on the nationwide epidemic of bombing and other violence at reproductive and family planning clinics. The hearings were chaired by Congressman Don Edwards (D-Ca), who heads the House Judiciary Subcommittee on Civil and Constitutional Rights. In explaining the purpose of the hearings, Congressman Edwards stated: "The purpose of these hearings is most emphatically *not* to debate the pros and cons of abortion. We take as our premise the holding of the Supreme Court which have ruled that abortion in the earlier stages of a pregnancy is a fundamental right. Rather, our purpose is to consider whether, in specific instances, unlawful activities directed against abortion clinics have infringed constitutional rights of reproductive freedom."

On April 3, 1985, Professor Rhonda Copelon, Associate Professor at CUNY Law School at Queens College and an attorney with the Center for Constitutional Rights in New York City testified at these hearings. A part of that testimony follows.

Figures collected by the National Abortion Federation indicate more than a 300% rise over 1983 in violent acts against abortion clinics, family planning clinics and doctors.[1]

These tactics are not simple expressions of opinion. They are part of concerted plans to intimidate women and close abortion and reproductive health clinics. In May 1984, 600 abortion foes met for a three day conference on how to close abortion clinics.[2] *Joseph Scheidler, director of the Pro-Life Action League, and a leading advocate of these tactics, unabashedly urges their use to prevent women from going to the clinics and thus force their closing from a lack of customers. Scheidler's instructions are contained in a forthcoming book entitled Closed: 99 Ways to Close Abortion Clinics.*[3] *In his testimony before this very committee on March 6, 1985, he*

refused even to condemn the bombings.

It is not without significance that this unprecedented wave of harassment and violence against abortion clinics and patients comes upon the heels of judicial and Congressional rejection of the anti-abortion position. I am referring to the reaffirmation of Roe v. Wade by the Supreme Court in 1983[4] and the Senate's subsequent rejection of a broad range of proposals for statutes and constitutional amendments, which sought to undermine or eliminate the right to abortion.[5]

It is thus fully appropriate and legally obligatory that we look to and utilize the remedies designed in the nineteenth century to quell the waves of violence perpetrated against Black people who sought to exercise their newly won rights. Intimidation and interference with abortion are growing, as they tend to do, in the context of crusade-like passions and inadequate remedies. On the state level, police and prosecutorial responses range from active support to tacit approval, to conscientious law enforcement. But even where law enforcement is conscientious, a dilemma remains — particularly where the intimidation and interference does not involve bombing and arson to which the Bureau of Alcohol, Tobacco and Firearms can respond. Much of the harassment consists of lesser crimes and torts of trespass, assault, harassment, invasion of privacy and minor destruction of property. The penalties for these acts are not substantial. What goes unpunished — and is therefore allowed to continue and to escalate — is the violation of civil rights.*

To summarize the foregoing, the actions of the anti-choice protestors fall into two categories: 1) picketing of clinics and verbal and physical harassment of women and staff; and, 2) violent, criminal acts against clinics such as bombings and arson.

As to the first, courts are being called upon to balance the interest of freedom of expression and assembly of the anti-choice protesters and interference with the constitutional rights of women. This is a classic constitutional confrontation, similar to that raised in the clash between the First Amendment protection of freedom of the press and the Seventh Amendment right of the defendant to a fair trial in a criminal proceeding.

Recently, clinics have sought injunctions against picketing and harassment claiming that the tactics of intimidation and coercion interferred with women's constitutional rights of both groups. This decision is on appeal to the Supreme Court of the State of Washington. Similar injunctions have been issued in California, and more requests for injunctions, and subsequent appeals, can be expected.

As to the second category of criminal acts of violence against clinics, the issue is whether the response by local, state and federal authorities is adequate to protect the health, safety and civil rights of women seeking abortions, and health care providers associated with reproductive health clinics.

The U.S. Justice Department's position is that the 18 U.S.C. §241 of the civil rights statutes require a conspiracy to interfere with clearly defined federal right before it can prosecute. As Victoria Toensing, Deputy Assistant Attorney General, Criminal Division, testified at the April 3, 1985 hearings on Abortion Clinic Violence: "Up to the present, the investigation of the many, scattered abortion clinic attacks has failed to develop any evidence of a coordinated, organized campaign. . . This type of activity does not pass the threshold under our guidelines that would warrant the FBI to assume overall command of our efforts and displace the BATF [Bureau of Alcohol, Tobacco and Firearms], which has been doing a splendid job."

Another basis for the Justice Department's assumption of jurisdiction is the Fourteenth Amendment, which provides in pertinent part that "no State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." To date, the Justice Department has only investigated one incident of physical and verbal harassment in New York, stemming from the arrest by an off-duty police officer of a woman who was escorting another woman from a clinic. The involvement of the police officer formed the basis for State action. The outcome of this investigation, and

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*Trespass? *How shocking! But it appears to be perfectly OK (if not obligatory) to trespass at the South African Embassy. See in this issue, Valerie Han's article on the spiritual beauty of lawbreaking. One distinction between Wicked Trespass and Holy Trespass seems to turn on whether the ox being gored is a fashionable ox. W.E.W.*

whether others will occur, remains to be seen.

It is important to emphasize that, just as we support a woman's right to choose, we support also the right of free expression and free speech by those who oppose this right to choose. It is only when these individuals and groups attempt to shut down family planning and reproductive health clinics that they go beyond their constitutional rights of free expression.

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[1]Patricia Donovan, "The Holy War," 17 Fam.Plan.Persp. 5,6, Table 1 (1985)

[2]Id. at 8.

[3]Id. at 9.

[4]City of Akron v. Akron Center for Reproductive Health, _____U.S. _____, 103 S.Ct. 2481 (1983).

[5]See "Constitutional Amendments Relating to Abortion", Vols. I and II, Hearings Before Subcommittee on the Constitution, Senate Judiciary Committee on S. J. Res. 17, S. J. Res. 18, S. J. Res. 19, and S. J. Res. 110 97th Cong., 1st Sess. (1983).

Roxanne E. Jayne is an Associate Counsel with Hercules Incorporated. She served a term on the Board of Directors of the Delaware League for Planned Parenthood, Inc., and was Co-Chair of the Public Affairs Committee.

Joan Rosenthal, Executive Director of the Delaware Affiliate of the American Civil Liberties Union, has served that organization for many years. In May Delaware State Bar Association honored Joan at the annual Law Day luncheon by conferring on her the Association's Liberty Bell Award, which is granted only to laymen and for the purpose of recognizing community service that strengthens the effectiveness of the American system of freedom under law.

Sonia Sloane knows whereof she writes. She was President of the Board of Directors of the Delaware League for Planned Parenthood from 1980 to 1984 and is now Chairman of the Board. In addition, Sonia has been a member of the Board of the Delaware Affiliate of the American Civil Liberties Union since 1971 and Treasurer of that organization since 1978. Sonia's combined concern for civil rights and the issues of family planning makes her a singularly apt choice for collaboration on the accompanying article.

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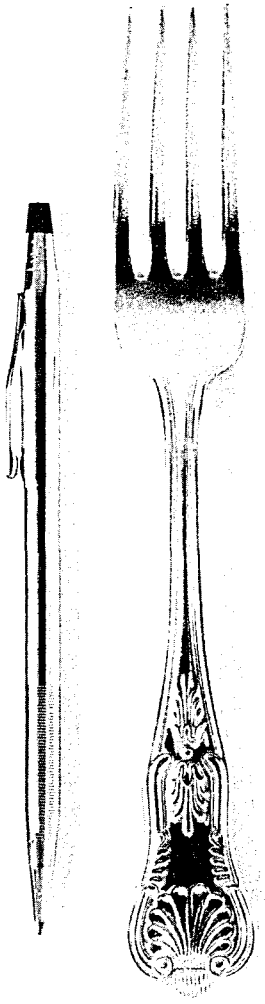

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The American Abortion Debate An English Perspective

Peter Alldridge

The manner in which the abortion issue is contested in the United States has been a source of surprise to one used to the calmer waters of the U.K. abortion debate. In this short paper I shall outline the position taken in English law, and contrast the position in the U.S., brought about by *Roe v. Wade*. Against that background I shall review the moral arguments deployed, and say why abortion will cease before long to be an issue seriously debated.

The English Position

At Common Law, abortion was permitted until the moment of "quickening" (i.e., when the mother felt the child move in the womb). In the nineteenth century, legislation consolidated in the Offences Against the Person Act 1861 s. 58 made abortion criminal. In 1929 Parliament added, by the Infant Life (Preservation) Act the offence of child destruction, which is committed by destroying a child capable of being born alive. A pregnancy of 28 weeks is presumed to give rise to a child capable of being born alive. It is not clear whether evidence may be adduced to show a younger fetus to be capable of being born alive (my own view is that it cannot).

In 1938 Dr. Alec Bourne, an eminent obstetrician, was prosecuted at his own suggestion (in order to clarify the law) for carrying out an abortion on a fourteen year old rape victim. The trial judge seized on the presence of the word "unlawfully" in the definitions both of child destruction and abortion. If these activities were only criminal when done "unlawfully", he reasoned, there must be assumed to be a "lawful" means of carrying them out. This, he declared, would be when they were done to safeguard the life or health (health being widely understood to include mental health) of the mother. Bourne was acquitted by the jury and the possibility of appellate review did not arise. However abortion was not widely available in proper medical facilities before 1967.

In 1967, in response to the activities of pressure groups, Parliament enacted the Abortion Act. The Act began its existence as a Private Members' Bill introduced by David Steel M.P. (now leader of the Liberal Party). The (Labour) Government of the day did nothing to impede the Bill. Section I of the Act provides (in part) as follows:

> I. (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—
>
> (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or
>
> (b) that there is a substantial risk that if the child were born it would be seriously handicapped.
>
> (2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

The assumption made by those who drafted the Act was that abortion was in general more dangerous than live childbirth. It is now clear (the National Health Service releases statistics to this effect) that the rate of maternal death is lower when the pregnancy is terminated by abortion than live childbirth. Consequently s.I(1)(a) above will allow any doctor to authorize an abortion if "the continuance of the pregnancy would involve a risk to the life of the pregnant woman . . . greater than if the pregnancy were terminated." Although there is discrepancy in practice between different areas of the U.K., few doctors do behave in this way. Nonetheless, *as a matter of law* the United Kingdom does now sanction abortion on demand. Although there are occasional moves to reduce the threshold for lawful abortions from 28 to 24 or 20 weeks, this state of the law commands sufficient Parliamentary support that attempts to alter it founder.

The state of the law in the United States on the other hand, was laid down by a court. At least in so far as the constitutional rights of women are concerned, the Supreme Court in *Roe v. Wade* prescribed U.S. abortion law. As to state restrictions on abortion, the court held:

> (i) During the first trimester of pregnancy a state could not restrict a woman's right to abortion: the decision rested with her and her physician.
>
> (ii) During the second trimester of pregnancy the state could regulate the abortion procedure to protect the mother's health.
>
> (iii) During the third trimester, the fetus being assumed to be viable [i.e., capable of living independently of the mother] a state could proscribe abortion except where necessary to protect the life or health of the mother.

I want to turn to the ethical issues involved in abortion, in order to show *Roe v. Wade* to be incoherent whilst the Abortion Act in the United Kingdom is morally defensible.

The Ethical Issues

The moral argument put forward by those who oppose abortion is simple. It is that the fetus is a human being deserving concern and respect equal to that owing the rest of the species. It follows that to kill a fetus is to commit murder. This claim can be met by two weak arguments.

Weak Arguments for Abortion

A. There are those who argue (others are branded as so arguing) that abortion should be protected as being an exercise of a woman's right to choose. This raises the question, "To choose what?". Save for extreme supporters of animals' rights, there would be general agreement that a woman who chooses (having satisfied herself that there is some

reason to act) to kill a worm in her garden does no significant wrong, and would certainly not be a proper object of criminal sanctions. No one would concede her the right to choose to kill her mother. Simply to release "A woman's right to choose" fails to address the crucial question of the moral status of the fetus, and is thus an incomplete and ineffective argument for abortion.

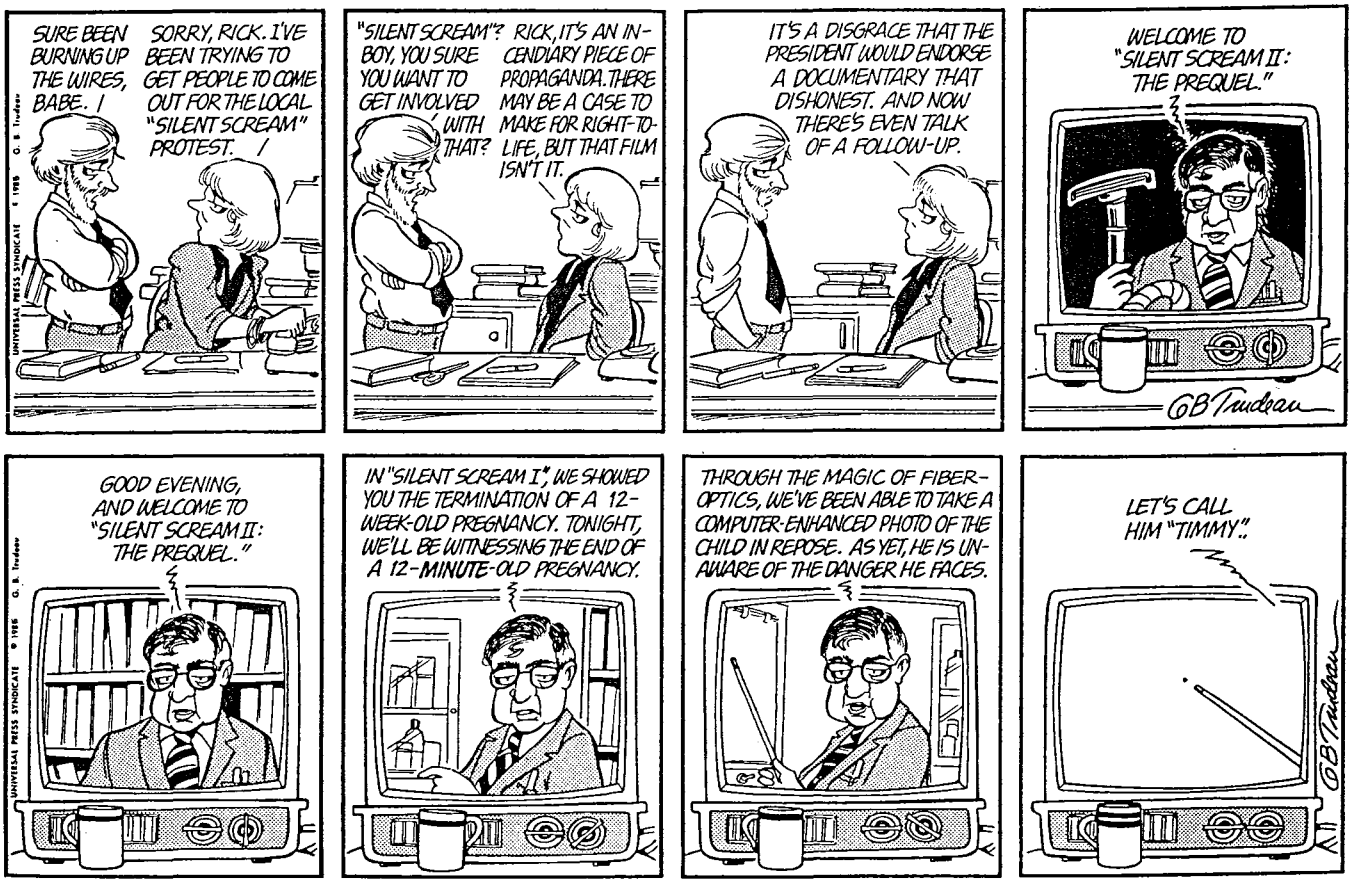
B. Consequentialist arguments are put for abortion. It is said that unless abortion is legalized and controlled, then there will be suffering and death brought into the lives of those who have illegal abortions, and suffering would be brought into the lives of those who do not have illegal abortions but who would have lawful abortions were they available.

Now if the moral status of the fetus is not that generally accorded to humans, the argument is not necessary. It seems that the proponents of this line of argument actually concede that the fetus is entitled to the same concern and respect accorded the rest of humanity, but seek to set off "deaths" of fetuses against other deaths (persons killed in unlawful abortions). There are at least four objections to this argument. First, it is not at all clear that more people (given that it appears to be conceded by this version of consequentialism that the fetus ranks as a person) would die if abortion were made illegal. The burden must be upon the consequentialist to produce evidence to this effect. Second, there are those who find the conscious trading-off of human lives one against the other to be morally repugnant. There is a story (most probably unfounded) that Churchill knew of the planned air-raid that devastated Coventry, but did not order any particular precautions to be taken for fear of giving notice to the Germans that their signals were being intercepted and decoded, the preservation of which secret would save lives. It seems that whilst most of us are not placed in the unfortunate position of having to make such decisions, we cannot blame someone who is in such a position for making such a decision. Third, there are some who adopt the distinction between "acts" and "omissions". They say that it is not so bad to fail to intervene to save life (e.g., by making abortion illegal in the knowledge that deaths will occur through illegal abortions) as it is consciously to be a party to its termination (e.g., by making abortion lawful). It is less reprehensible, on this view to give no aid to victims, for example, of famine in Ethiopia, than it is to send parcels of poisoned food, notwithstanding that the victim ends up just as dead and that the party concerned could have prevented the deaths by giving aid. If this view is taken, the consequentialist argument for abortion has no strength.

Fourth, the fundamental flaw with the consequentialist line of arguments is that adumbrated earlier: in so far as this line of argument adverts at all to the moral status of the fetus it appears to concede that abortion terminates the

SILENT SCREAM II: THE PREQUEL

BY GARRY TRUDEAU

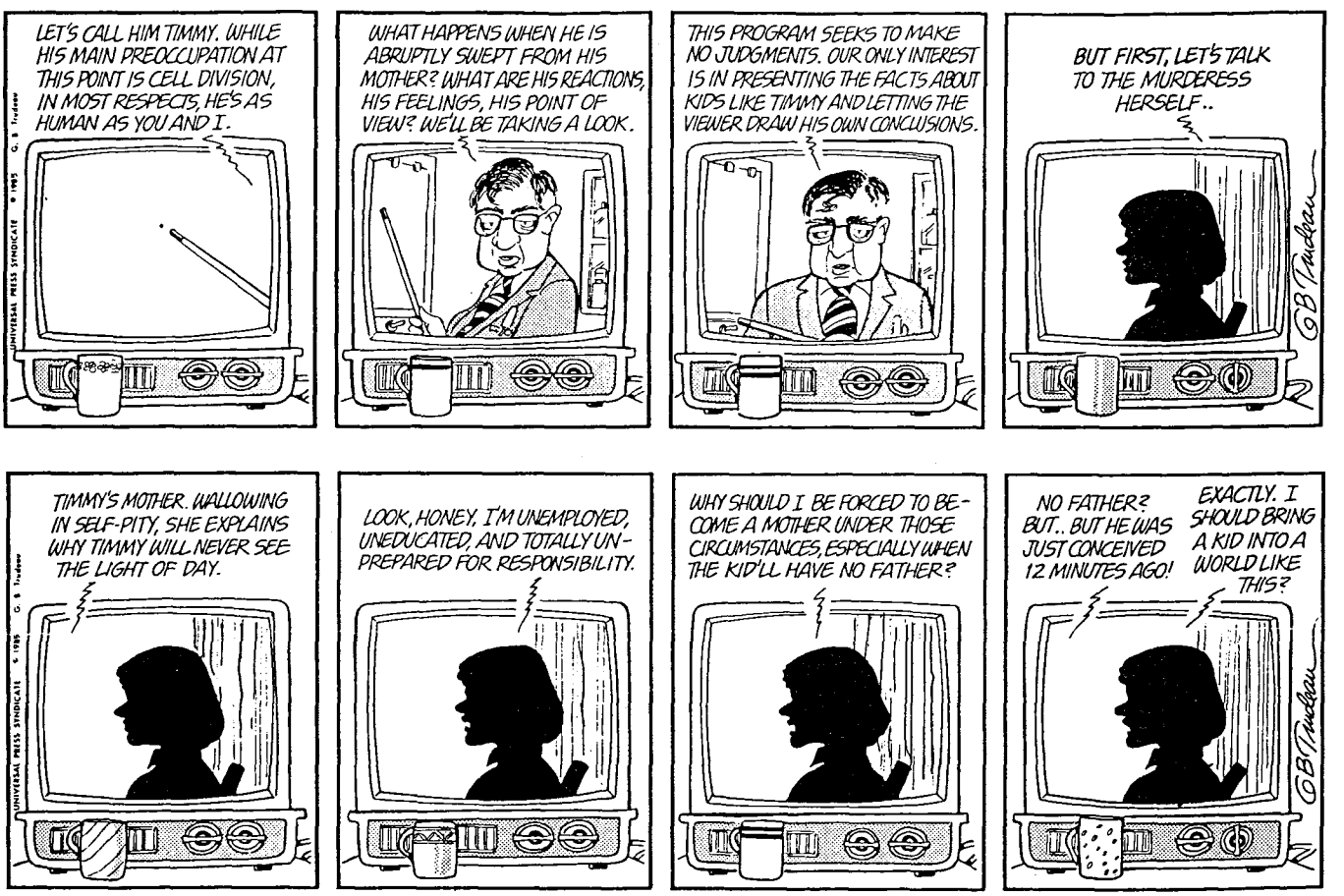


life of a person no less valuable than the rest of humanity. By making this concession and then going on to argue for abortion the consequentialist seeks to justify murder. Any argument for abortion that fails to consider, or concedes, the issue as to the moral status of the fetus is similarly flawed.

The Moral Status of the Fetus

A persuasive defence of abortion, therefore, must show that a fetus is not a person entitled to equal concern and respect with the rest of the human race. This requires argument for a negative proposition, which is notoriously difficult. However, a start may be made by looking at the arguments of anti-abortionists. There are three fallacies to be found in the arguments advanced in the recently publicised film, "The Silent Scream". First, there is the proposition, "A fetus Looks like a human being, and should be granted equal rights with human beings." To this end photographic techniques are employed to make the fetus look larger than it is, and the photographs on anti-abortion literature generally depict a fetus in the advanced stages of pregnancy. The argument is fallacious. Simply to look like a baby is not enough (and the argument would only defend the fetus from the time —about 12 weeks — when it begins to resemble one). A doll can look like a baby, but would not be allowed equal rights with babies. Second, it is argued that a fetus is sentient and so should be treated as a human being. However all living things are sentient in the sense that they react to stimuli. The reaction of the fetus in "The Silent Scream" — curling up when poked — is one which would be shared by the common earthworm. Third, anti-abortionists engage in the presentation of "experts". These are generally medical practitioners who explain the senses in which the fetus is anatomically comparable to a baby. Medical practitioners have little or no training in moral philosophy, and since the issue is a philosophical one (when does personhood accrue?) not a biological one (when is a certain definition of "life" satisfied?) a medical practitioner is not necessarily "expert" at all.

But there is a fall-back position adopted by anti-abortionists. They can say that although a fetus is not a person entitled to equal concern and respect with other members of the species, nonetheless it is valuable as a potential human being. This is a discrete argument against abortion. It is a weaker claim, but nonetheless easier to support. Suppose it could be shown that there were people whose lives could be enriched by adopting someone else's child, and that they were desperate so to do, then it might be argued that the fetus as a potential source of happiness and fulfillment to its future adoptive parents ought to be protected, notwithstanding the inconvenience and suffering thereby inflicted on the mother. This was never a particularly persuasive argument, because it would involve saying that a mother has a duty owed to would-be adoptors to bear the child against her will. But now, not only is it unattractive: recent advances in biotechnology have rendered possible such things as "in vitro fertilization", "surrogate motherhood", artificial insemination, and so on (See generally the report of the Warnock Committee on Human Fertilization and Embryology, a report commissioned by the British Government, published in July 1984.) There can never now be a need for a woman to

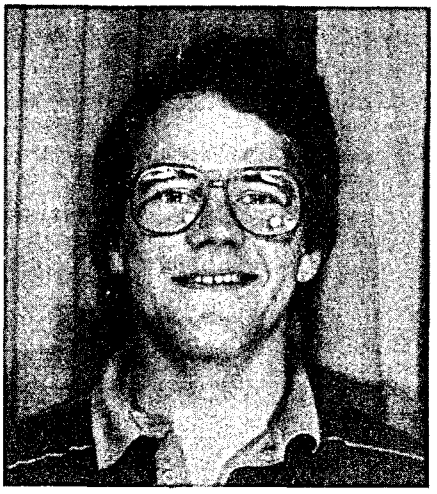


bear an unwanted child for the benefit of others.

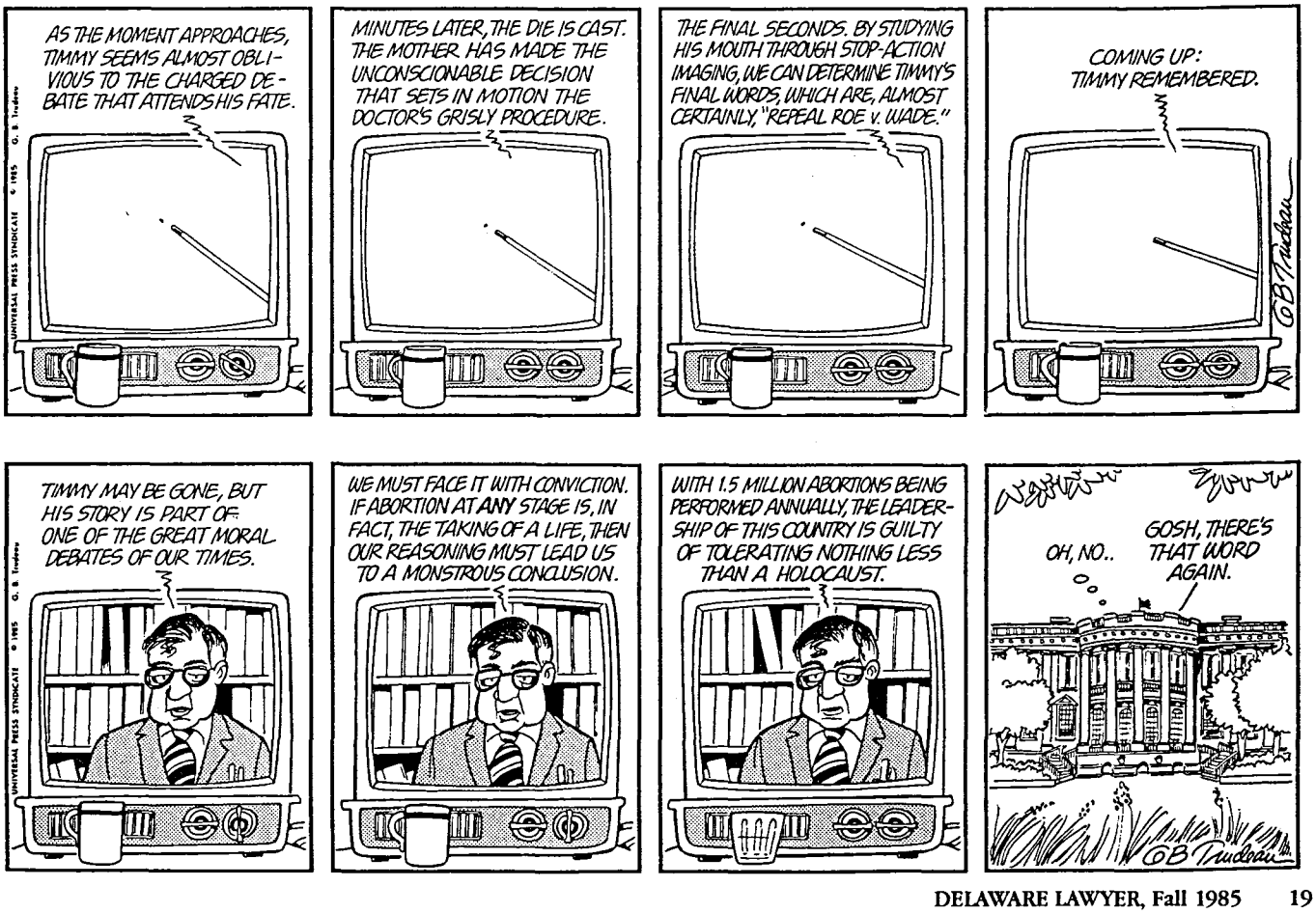
The only other possible argument against abortion by claiming the fetus to be valuable as a potential human being would be to say that irrespective of its value to others (e.g., adoptive parents) it is of value in itself. But if all fetuses are valuable in themselves as potential human beings, there should be no reason to draw the line of legal destruction of potential human beings at the moment of conception. Contraception should be illegal. Furthermore, there should be a positive duty to conceive as many valuable potential human beings as possible. This is not a view it is necessary to discuss further.

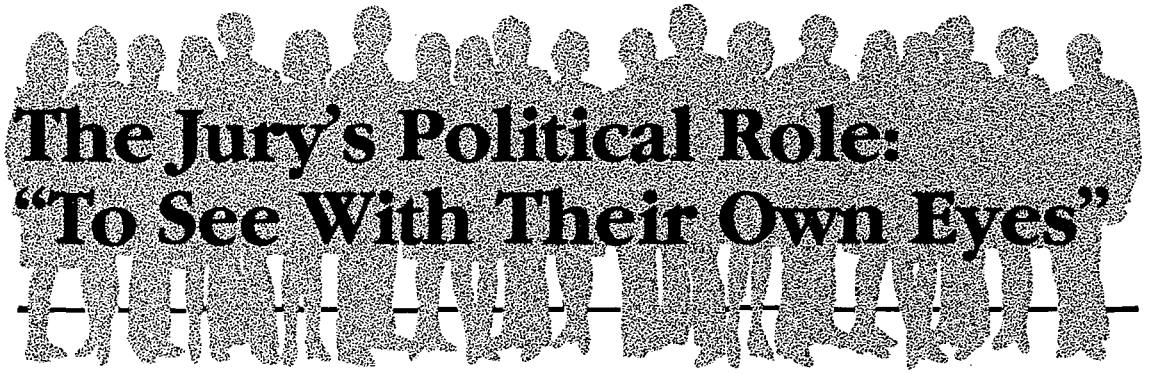
Conclusion

There can be no ethical support given to the distinction between trimesters in *Roe v. Wade.* Although some arguments put for abortion do not bear analysis, nonetheless the main claim of the anti-abortionists, that abortion is murder, is only tenable if better reasons are supplied than have been hitherto to show that a fetus is a person entitled to equal concern and respect with human kind generally. Moreover, in the next ten years, when the full effects of the resolution in reproductive technology become felt, abortion will simply cease to be a live issue.



Peter Alldridge is a lecturer in law at University College, Cardiff, visiting in the Division of Criminal Justice, University of Delaware, and researching on stereotypes of Americans in the novels of P.G. Wodehouse.





The Jury's Political Role: "To See With Their Own Eyes"

Valerie P. Hans

On May 17, 1985, a jury acquitted eight anti-apartheid demonstrators charged with trespassing at the South African Consulate in Chicago. Defense attorneys presented the defense of necessity to the jury, arguing that the activists' conduct was necessary to avoid greater public injury from the apartheid policies of the South African government. According to one juror's report, the jury was split initially. But after jurors read the Illinois statute that excuses some criminal conduct by reason of necessity, they concluded that "the defendants had to do what they did." As one defendant rejoiced after the jury verdict, "A jury of our peers acquitted us but indicted the government of South Africa."[1]

In Toronto, Dr. Henry Morgenthaler was also acquitted by a jury of his peers last November on charges that he violated Canadian laws regulating abortions. Since 1967, the laws of Canada have permitted abortions if continuation of pregnancy poses risks to a woman's life or health. But the law also requires a cumbersome and time-consuming review of each request for an abortion by specially selected boards of accredited hospitals. Furthermore, citizens opposed to abortion rights have taken control of some review boards, with the result that, in certain hospitals, no abortion requests have been granted for years. To alleviate what he saw as a pressing social problem, Dr. Morgenthaler opened abortion clinics, first in Montreal and later in Toronto and Winnipeg. His actions were in clear violation of Canadian law. Yet in four separate trials, juries acquitted the doctor of wrongdoing.[2]

It is doubtful whether the judges sitting in these cases would have reached the same verdict. Nevertheless, were the decisions fair and just? Was it appropriate for jurors in the antiapartheid case to interpret the defense of necessity generously? Was justice done when Morgenthaler juries ignored the law entirely? An observer's assessment may depend on whether he opposes apartheid or supports abortion rights. Indeed, these jury decisions may be due in large measure to the fact that the majority of citizens both oppose racial discrimination and support abortion. But a larger question is at stake here. Under what circumstances, if any, is it right for juries to ignore the dictates of law in arriving at their verdicts?

The political role of the jury has come into the spotlight recently, not only in these two cases but also in the trials of members of the religiously based sanctuary movement and the *Ponting* case in England. Legal scholars have labelled as "jury nullification" the refusal of juries to apply the law when they believe that to follow the letter of the law would result in injustice. Jury nullification is actually a form of jury equity, the practice of deciding cases in line with community notions of justice and fairness. Jury nullification may constitute a strong repudiation of the law, as in the *Morgenthaler* case, or may be present in a weaker version, when juries take a merciful view of the facts or interpret the law generously, as in the anti-apartheid case.

Most people feel at least somewhat uneasy about giving any decision-making group in society the prerogative to disregard the law. However, the great legal scholar Wigmore maintained that precisely this power of juries is essential in assuring justice. He noted that law and justice are on occasion inevitably in conflict. While law is a general rule, justice is the fairness of the outcome in a particular case considering all the circumstances. Because lawmakers cannot anticipate every set of circumstances, it is up to the jury to adjust the general rule of law to the justice of the specific case.

Many features of the jury allow jurors to reach decisions that are contrary to the law. First, jurors deliberate in secret. Unless jurors themselves talk, no one will know about the content of their deliberation or the reasons underlying their decision. They deliver their verdict as a group. Thus no one individual is accountable for the decision. Unlike judges, juries need give no rationale for their verdict, and the decision they reach is not binding upon future cases. Finally, in cases of acquittal, there is no opportunity for appellate review of the jury decision. Thus the very structure of jury decision-making permits the jury to be absolutely unaccountable for showing mercy to defendants.

Juries did not always enjoy this veritable lack of accountability. In Great Britain, *Bushell's Case,* decided in 1670, established the principle that jurors could not be punished for deciding a verdict contrary to the evidence or the wishes of the Court. The case arose from the trial of the two Quakers, William Penn and William Mead, who were charged with preaching to an unlawful assembly. The motivation behind the charges was to harass members of the fledgling Quaker movement. Jurors repeatedly refused to convict the two defendants, despite considerable pressure from the judge. As a result the twelve jurors found themselves jailed along with the defendants! The jurors were eventually released, and a suit by one of the jurors, Edward Bushell, laid the foundations for jurors' freedom from culpability for their verdicts.

In England, there were numerous instances in which juries exercised their political power. For instance, in the 19th century, there were over 200 offenses that were punishable by death. Many of these crimes were minor and a number involved political dissent. Juries often acquitted rather than send a defendant to death for such offenses. Indeed, in 1819, English bankers requested that the death penalty for forgery be eliminated, since juries simply

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would not convict forgers when the death penalty was the mandatory result of conviction. Historians maintain that this reluctance of juries to convict led to the decline of capital punishment in England.

Opposition to English laws also figured in the most famous case of jury nullification on this side of the Atlantic. In 1735, John Peter Zenger, publisher of the *New York Weekly Journal,* ran articles highly critical of the New York governor, a British appointee. The governor was very unpopular with colonists. Nevertheless it was a crime at that time to publish any article, whether true or false, that was critical of the government. Zenger stood trial on charges of seditious libel. According to existing libel law, the jury was to decide only whether Zenger had published the critical articles, while the judge was to decide whether the articles were actually libelous. In an eloquent defense for Zenger, the attorney Andrew Hamilton argued that these laws of libel on the books were wrong and usurped the rightful function and power of the jury. He attempted to persuade the jury that its duty was to acquit Zenger rather than follow unfair laws: "Jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow subjects." The jury apparently agreed with Hamilton and deliberated only a few minutes before acquitting Zenger of libel.[3]

The jury proved to be an important tool for abolitionists before the Civil War. The Fugitive Slave Laws enacted in 1850 outlawed helping slaves escape or impeding their capture and return. Northern juries frequently acquitted abolitionists who had assisted slaves even though the facts in the cases clearly indicated guilt.

These historical cases are often used to praise the wisdom of our system of jury trial. Yet over the nineteenth century, respect and trust in the jury began to wane, and events occurred that increasingly restricted the jury's power. As more judges were legally trained, their role expanded from that of mere presiders over the proceedings to key interpreters of law for lay jurors. Although it was widespread practice to allow juries to decide the law as well as the facts in the early days of this country, the jury's right to do so was limited toward the end of the nineteenth century. In *Sparf and Hansen v. United States,* 156 U.S.51 (1896), the United States Supreme Court, in a seven-to-two vote, curtailed the right of juries to deliver a merciful verdict that was at odds with the evidence. In *Sparf,* two sailors were charged with murder for throwing a fellow sailor overboard. The defendants argued that they should be found guilty only of manslaughter, and asked the judge to instruct the jurors that they could render a verdict either of murder or manslaughter. The judge refused on the grounds that there was no evidence to support a manslaughter verdict. The judge instructed the jury: "In a proper case, a verdict for manslaughter may be rendered, . . . and even in this case you have the physical power to do so; but as one of the tribunals of this country, a jury is expected to be governed by law, and the law it should receive from the court." 156 U.S. at p. 62. The defendants were convicted, but appealed on grounds that the jury had been improperly instructed. The Supreme Court rejected the appeal and stated that juries should not be permitted to reduce penalties or nullify laws, since they were likewise unable to increase penalties or create new laws.

Jury nullification surfaced as an issue more recently at the time of the Vietnam

War. There was widespread opposition to American involvement in Southeast Asia, and many Americans engaged in acts of civil disobedience to express their outrage and to call attention to moral issues regarding the Vietnam War. As these defendants came to trial, their attorneys often attempted to argue that the defendants' behavior was justified on the basis of the questionable legality and morality of the war. But judges characteristically ruled that the defendants' motivation was irrelevant. Few judges allowed defense attorneys to tell the jury about its historic power to nullify the law by acquitting the defendants. The trial of Benjamin Spock and several others on charges that they conspired to encourage young men to burn their draft cards was typical. According to one account, jurors in that case were sympathetic to Spock and his codefendants. But in his charge to the jurors, the judge told them that they must use the law that he gave to them and not their own views of the law. The jury convicted Spock and several of his codefendants, apparently with some anguish. The following comments from some of the Spock jurors interviewed by Jessica Mitford are instructive:

Of course you wonder if you made the right decision; but the way the judge charged us, there was no choice. People I've talked with since the verdict are sympathetic to the actions of Spock and Coffin—they seem to think the jury should have been there to decide if the law is right or wrong, but we weren't there to decide that. You can't have juries deciding whether laws *are right—there are certain laws on the books.*[4]

I'm in agreement with what they're trying to accomplish—my friends were amazed I found them guilty; but they did break the law... I don't have to stress where my *sympathy lay. Like Raskin, I think it's a senseless war. But my personal views don't count . . . I'm convinced the Vietnam war is no good. But we've got a Constitution to uphold. If we allow people to break the law, we're akin to anarchy.*[5]

The dilemma of the jurors was acute: How could they simultaneously uphold the rule of law *and* achieve justice in the Spock case? The power of the judge in leading the jurors to follow the rule of law and to ignore their personal sentiments is apparent in the following Spock juror's comment:

I knew they were guilty when we were charged by the judge. I did not know prior *to that time—I was in full agreement with the defendants until we were charged by the judge. That was the kiss of death.*[6]

Since *Sparf*, the Supreme Court has not directly discussed the propriety of jury nullification. However, perusal of Supreme Court opinions on the function of the jury over the last two decades reveals dicta indicating that the Court sees the jury's chief function as political. In *Duncan v. Louisiana* (1968), the Court stated that the "right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."[7] In *Taylor v. Louisiana* (1975), the Court described the jury's purpose: "to guard against the exercise of arbitrary power—to make available the common sense judgement of the community as a hedge against the overzealous prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."[8] Finally, in a long line of decisions, the Court has consistently maintained that the jury cannot be the "organ of a special class" but must fairly represent the entire community. I interpret these decisions to mean that the Courts supports the infusion of community sentiment in jury verdicts, and would sanction, under

certain circumstances, jury verdicts at odds with unfair laws or oppressive prosecutorial practices.

Whatever the Supreme Court has had to say about jury lawlessness, systematic research has shown that juries sometime bend the law to reflect community notions of justice. In their landmark book, *The American Jury*, Harry Kalven and Hans Zeisel asked judges presiding over jury trials to report the jury's verdict in a specific case and compare it with the verdict the judge would have reached had the case been tried by judge alone. In 78% of the trials, judge and jury would have reached the same verdict. However, in the remaining 22% of cases, the jury's sense of justice led it to a different verdict. Interestingly, these disagreements occurred almost always when the evidence in the case was close, suggesting that jurors bend the law or facts rather than ignore them entirely. The explanations for the disagreements constituted something of a casebook of jury law. For instance, juries had an expanded view of permissible self-defense that went beyond the bounds prescribed by law. Jurors sometime excused defendants if their victims played a contributory role. They acquitted some defendants if the offense was a minimal one or the harm done was trivial. Juries also showed reluctance to convict defendants charged with unpopular laws such as game and liquor violations.[9] Subsequent research has confirmed that while the strength of evidence is the prime determinant of jury verdicts, jurors do take into account their own views of justice in specific cases.[10]

Some legal scholars, recognizing the important political role of the jury, have advocated instructing jurors about their right to deviate from the law if it is required to achieve justice.[11] According to the results of one survey, there might be strong public support for such instructions. A 1977 survey asked Canadians the following question:

> Do you think that jurors in all criminal cases should be instructed that "it is difficult to write laws that are just for all conceivable circumstances. Therefore, you are entitled to follow your own conscience instead of strictly applying the law if it is necessary to do so to reach a just result?"

Canadians overwhelmingly supported this instruction, with 76.4% responding that it should definitely or probably be given, and only 15.4% stating that it should not be given to jurors in criminal cases. Furthermore, those Canadians who had served on a jury were even more supportive. Fully 92.6% of respondents with previous jury service thought the instruction should be given, compared to 75.4% supported from those without prior jury service. Canadians, then, appear to want the jury to have some flexibility in applying the letter of the law.

The results from a survey of Canadian judges stand in sharp contrast to this public support. Judges who had jurisdiction to hear criminal jury trials were asked whether they felt that jurors should be given the equity instruction. The answer was a resounding no: Just 4.5% of judges agreed that jurors should be so instructed.[12]

What would happen if juries were given such instructions? Would there be chaos in the courts with juries routinely ignoring the law? Would prejudice play an even greater role in jury verdicts? The experiences of Delaware's neighboring state of Maryland give us some insights into how such an instruction might work. In most states, juries decide questions of fact while the interpretation of the law is left to the judge. But in two states, Maryland and Indiana, juries have the constitutional authority to judge both the facts and the law. In line with the Maryland Rules of Procedure, the standard judge's instruction to the jury is as follows: "Anything which I say about the law, including any instructions which I may give you, is merely advisory and you are not in any way bound by it. You may feel free to reject my advice on the law and to arrive at your own independent conclusion." Because juries and not judges are the final arbiters of the law, counsel may argue differing interpretations of the law to the jury. Political scientist Gary Jacobsohn surveyed Maryland judges about their views of this jury instruction. Overall, the judges felt that the law had minimal impact, but they believed that when it affected a case it benefited the defendant. Despite the instruction, the Maryland trial judges retained considerable power over the jury. One judge, for instance, mentioned, "When the jury is told that they are judges of the law, I doubt that they have any grasp of what is meant." The degree to which the judges emphasized the jury's right to decide

the law varied from courtroom to courtroom and was related to the judges' attitudes toward the jury and the propriety of jury nullification.[13]

Psychologist Irwin Horowitz has also collected some data that suggest the likely impact of jury instructions about its political role. He used the method of jury simulation to explore the effect of jury instructions about nullification. In his research, he asked whether the jury functions differently if it is given nullification instructions, whether the impact of such instructions depends on the precise form in which they are given, and whether their impact also depends on the type of case in which they are given. His answer was yes to all three questions. Ohio jurors who had already served as real jurors listened to a murder case, a drunk driving case, or a case involving euthanasia. The simulated jurors received either standard Ohio pattern instructions, Maryland pattern instructions, or "radical nullification" instructions, which described the jury's historic power to ignore the law and decide cases in line with community sentiment. The instructions made no difference whatsoever in the murder case. However, in the other two cases, the radical nullification instructions affected the simulated juries' decisions. Juries were more likely to convict the drunk drivers and to acquit the euthanasia defendant. Furthermore, when jurors received radical nullification instructions they were more likely in group deliberations to discuss the instructions and their personal views and experiences and less likely to discuss the evidence. Juries receiving the Maryland pattern instructions behaved no differently from juries with standard instructions. It may be that jurors did not really understand the instructions, or that the Maryland instructions affect jury decision making only when attorneys argue differing interpretations of law (which they did not do in the jury simulations).[14]

Whether juries should be encouraged or discouraged from exercising their political role is a profoundly difficult question to answer. On the one hand, I worry that such instructions would increase the strength of many unfavorable sentiments. For instance, would black defendants be more likely to be convicted by prejudiced juries? Would prejudicial pretrial publicity have even greater impact on jury verdicts? On the other hand, on the basis of my own and other research on the jury, I have great respect for it as an institution. In most instances, juries appear to reach fair and just decisions. By refusing to allow the jury to hear information about its power to adapt the law to specific cases, we may be usurping the rightful function of the jury and undermining its original political purpose. Indeed, we are left with something of a paradox. We expect the jury to follow the law. Yet we also expect jurors "to see with their own eyes" and to ignore the law on occasion. This tension between following the rule of law and making exceptions to the law is an ineluctable part of the institution of the jury.

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FOOTNOTES

[1]"Eight in South Africa Protest Are Acquitted of Trespassing." *The New York Times,* May 19, 1985, p. 40.

[2]Quinn H. (1984, November 19). Abortion wins another round. *Maclean's,* pp. 46-49.

[3]Katz S. N. (Ed.) (1972). *A brief narrative of the case and trial of John Peter Zenger,* by James Alexander.

[4]Mitford, J. (1969). *The trial of Dr. Spock.* New York: Alfred A. Knopf. Quote is from pages 234-235.

[5]Mitford, pp. 227-228.

[6]Mitford, p. 232

[7]*Duncan v. Louisiana,* 391 U.S. 145 (1968) at 155.

[8]*Taylor v. Louisiana,* 419 U.S. 522 (1975) at 530.

[9]Kalven, H., & Zeisel, H. (1966). *The American Jury.* Boston: Little, Brown.

[10]Myers, M.A. (1979). Rule departures and making law: Juries and their verdicts. *Law and Society Review, 13,* 781-797. Brooks, W.N., & Doob, A.N. (1975). Justice and the jury. *Journal of Social Issues, 31,* 171-182.

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Organized Chaos: The 1975 Wilmington Teachers' Prosecution

Christine M. Harker

A good part of this issue, devoted to the responses and accommodations of the law to social activism, considers the behavior of dedicated people who transgress in the name of principles they hold larger than law. Whether the cause is apartheid or sanctity of life, the sincerity of the law-breaker is generally fierce and selfless.

But not always. Ten years ago in Wilmington, school teachers went out on strike in defiance of state law. To display the righteousness of their cause many of them also saw fit to get themsleves arrested for disorderly conduct and obstructing access to a public building. They thought they'd get away with it. Instead they got a nasty surprise: the City fought back. The teachers had mistakenly expected prosecutorial torpor. And they foolishly miscalculated the extent of public sympathy they could enlist: since the holy crusade in which they marched was baldly mercenary. To make it worse, it became apparent that very dew of them were prepared to pay the consequences of civil disobedience. (It's hard to dredge up sympathy, much less respect, for a martyr who goes bravely to the stake, cluthcing a fire extinguisher.) Perhaps the most startling feature of Ms. Harker's account is the ignorance and self-delusion displayed by those whom we entrust the education of the young.

On September 2, 1975, The Wilmington Federation of Teachers, a 900-member union, called a strike against the Wilmington School Board. With desegregation on the way, these could be the last negotiations between these two entities. The likelihood of consolidating school districts made it important for the union to show its strength as a bargaining agent and for the Wilmington teachers to establish a firm economic base for their futures in whatever new districts might result from desegregation. The significance of the strike and its success were therefore much greater than a "typical" school teachers' strike.

At the time of the strike I was the Chief Prosecutor for the City of Wilmington. Timothy M. Rafferty and Joseph Capodanno, both admitted to practice under special rule, were fellow prosecutors. It was a good team: we were all fairly new lawyers with much of our youthful idealism still intact. More important, we were all suited to the organized chaos of Municipal Court.

Initially, the prosecutors were not involved in any aspect of the strike. The civil side of our office handled the Court of Chancery work, injunctions, and contempt proceedings. Chancery found five union leaders in contempt and fined the union $5,000 plus $1,000 a day more for each day the strike continued. The prosecutors were able to view, with some amusement, the frenzied activity going on in the "other part" of the Wilmington Law Department.

Our relief at not being involved ended abruptly on September 22. I got an early morning call at home from Perry F. Goldlust, who was the civil attorney for the city primarily involved in the strike and negotiations. He suggested that I get to the School Administration building at 14th and Washington. Union teachers were staging some sort of demonstration. The criminal side of the office would now be involved.

I got to the scene between 7:30 and 8:00 a.m. The Wilmington police had been there for some time, taking pictures and maintaining whatever order was possible. Various school and city officials were milling around wondering what to do. I joined them.

The teachers were standing in lines, 4-5 people deep, some grimly serious, some having a good time. The atmosphere reflected this divergent behavior, changing from the tense to the carnival-like, depending on police movement. The block of teachers at the front door solidified at each bullhorn request to disperse. At the lower entrance, a radio was playing and several teachers were dancing to the music. There was also an air of fearful expectation. All police efforts to get those blocking the building to disperse had failed. The battle lines were clearly drawn, and there was no backing down.

Chief John McCool and I discussed our options and decided on arrests. When reflecting on this decision, I am usually overcome by the feeling that there was some other clever way to deal with the situation that eluded us. If there was, it still eludes me.

The police set up a perimeter line around the teachers, after a final series of bullhorn announcements that if they did not disperse, they would be arrested. The long and tedious tasks of arrest and prosecution had begun. In all 253 people were taken into custody for obstructing ingress or egress to a public building (11 Del C. §1324, Class C misdemeanor) and disorderly conduct for failing to comply with a police order to disperse (11 Del C. §1301 (e), Class B misdemeanor).

When the arrests started, tension was at its highest. The police faced the possibility of resistance and the teachers faced the fear and uncertainties of being locked up. Memories of the city problems of the late sixties were all too fresh in the minds of some officers. Newer officers had heard the stories and had been prepared for such con-

Civil disobedience should not, however, confer amnesty on protesters. The corollary to breaking the law to make a point is acceptance of responsibility for one's actions. The rules are supposed to be for everyone, no matter how strongly you believe that your case is just.

It was my opinion the majority of the teachers in the incident at the school administration building were not ready to take responsibility for their criminal acts. Civil disobedience is often commended; it can always be punished. High purpose or moral justification does not give immunity to lawbreakers.

Clifford B. Hearn

Stanley W. Balick

Henry A. Heiman

tingencies through the training that Wilmington had since instituted. While no one really expected the situation to escalate, the fear was there and everyone was ready.

The arrests were very orderly. There was no resistance. The teachers behaved well and followed orders. Some moved to the back of the lines, either to avoid or delay arrests. This stopped after it was seen that nothing terrible was happening to those arrested. Initially, police used vans and metal handcuffs, then cars and plastic handcuffs. Before the arrests were completed they had run out of cuffs.

By the time half of the arrests were made, an air of cooperation prevailed. Both sides had resigned themselves to the tedious process of getting names and pictures at the scene and were working together to get it all done as quickly as possible.

Finally, the last police car of arrested teachers pulled away and the scene was clear. With only a few working hours left in the day, school administrators could get to their jobs.

The action shifted to the city side of the Public Building. Concerned with our own immediate situation, those of us at 14th and Washington did not realize what was going on at police headquarters. The rapid influx of 253 people, albeit orderly people, was severely taxing police and court resources. Though we had warned them of the mass arrest, they were in danger of being overcome by sheer numbers.

The physical crush was, of course, the most immediate problem. The cells were soon full, so were the roll-call room, the halls, and any place else people could fit, short of the Chief's office and the radio room. T.V. cameras from Philadelphia were getting excellent shots of teachers packed like sardines pressing against the windows of the public building. The only solution was to process the defendants as quickly as possible.

The police and prosecutors in the city were accustomed to dealing with a high volume of cases and all of us had kept mass arrest and civil disorder manuals handy for some years. Now we would see if the process would work. Paperwork was a big problem. After typing a few arrest reports, the police and Tim Rafferty resorted to modern technology, the copy machine. Forms with the basic information were run off and the defendants' pedigree information was filled in later.

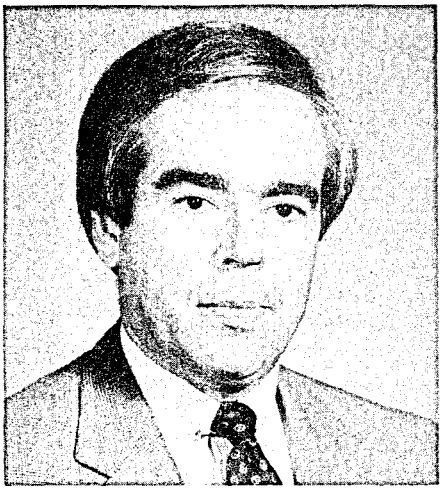
Municipal Court had opened for arraignments, which started even before the last of the teachers had been cleared from 14th and Washington. To avoid having to arrest the same teachers twice in one day, the request was made of the court to have a condition of bail that the defendants not return to the scene. The court, after arguments from counsel including Clifford B. Hearn and Stanley W. Balick, who were representing the union teachers, also imposed a release condition that the teachers could not leave their homes, except to go to work, between 9:00 a.m. and 4:00 p.m. each day. This restriction was later challenged and vacated by Superior Court, though contempt citations were upheld. See *Rambo v. Fraczkowski* (350 A2 774, 1975).

The routine procedure at arraignment for misdemeanors was to read the charges, enter the plea, determine if counsel was necessary and if there would be a public defender appointed, to set bail and a trial date. These arraignments were somewhat different since defense counsel were there and the release conditions were unusual. A big problem was trial dates. The court typically set dates according to an established schedule by type of crime, need for a public defender, and the shifts of the arresting officers. Trying each case separately would have taken forever, but mass prosecutions weren't anyone's idea of due process. The court finally decided to try the cases ten at a time, using both court rooms. The rest of the court calendar for the coming weeks would have to be juggled around these cases. Of the three Municipal Court judges, Chief Judge Alfred Fraczkowski and Judge Carl Goldstein would hear all of the cases because a close relative of Judge Leonard L. Williams was among the arrested teachers.

In the week after the incident at the administration building, over a hundred teachers were charged with official misconduct (11 Del C. §1211, Class A misdemeanor) for "refrain(ing) from performing a duty imposed by law." These cases were dismissed in Municipal Court and appealed by the state on the issue of teachers' status as "public servants" within the meaning of the statute. *State v. Barshay* et al (364 A2 830, 1976).

With the initial excitement over, we settled down to the task of preparing the prosecution of the cases. The police had used a limited number of arresting officers, which turned out to be both good and bad. This kept the number of different officers needed in court, therefore off the street, to a manageable number. It also meant that each officer had to correctly identify

Timothy M. Rafferty



David S. Swayze

many defendants. Fortunately, we had hundreds of photographs of the scene and one of each defendant with the arresting officer to help.

Other than the arresting officers, we needed police witnesses to testify how the entrances to a public building had been blocked, that there had been numerous orders to disperse, and how the "impregnable police perimeter" had been established.

We decided to use the patrol officer who had first been on the scene and reported the incident, the ranking officers who had set up the perimeters and made the bullhorn announcements, and the arresting officers. We tried to use as few police as possible to minimize interference with normal operations.

One ranking officer whom we considered as a possible witness was reluctant. His testimony would have greatly facilitated identification since he knew many of the teachers involved. But his primary responsibilities in the department were in community relations and youth aid and he was afraid that testifying against the teachers would make him less effective in dealing with the community in the future. He was not asked to testify.

Another ranking officer, whom we were using as a witness, was called for jury duty during the continuing prosecutions. I told him to show up in Superior Court in full uniform and explain to the judge that he was needed in Municipal Court. He was back by 9:30 a.m.

Tim Rafferty attempted to call *me* as a witness during the first trial before Judge Goldstein. Defense counsel objected, since I had been involved in preparing the case and "knew what to say." The objection was sustained.

We ended up with a team of police witnesses who stayed with the cases throughout the prosecutions. The trials became routine after the initial procedures were established. As expected, identification was the big problem. The prosecutors had gone through the hundreds of photos, matched arrest pictures to the scheduled cases, and located pictures by which individual defendants could be identified in the lines of teachers blocking the door. As long as the arresting officers could identify the defendants in court, convictions were easy.

Defense counsel, which now included Henry Heiman, requested that their clients be allowed to remain in the public seats in the court room and not at the defense table until such time as they were identified. This request was granted.

Initially, this system presented no problem. The prosecution had to rely entirely on an arresting officer's ability to recognize those who had been arrested. The most difficult identifications arose when several people of the same general appearance were in one group of ten. Others were easy—the only bald black man of the 253 was identified with no problem. At one trial, an officer could not find the defendant in the court room. During the discussion on a motion to dismiss, the defendant did not stand when the judge called his name. He had left the court room before the officer testified. The officer identified him easily when he returned. In all the subsequent trials, defendants were

Only one teacher that I was aware of raised the principle of civil disobedience. He entered guilty pleas to both counts, stating that he had broken the law on purpose to help bring public attention to the issues involved in the strike. While others may have felt the same way, he acknowledged it publicly. We respected him for recognizing the responsibilities of protesters and that civil disobedience results in sanctions.

admonished not to leave the court during the proceedings.

Identification was also difficult when there had been a change in a defendant's appearance. At one trial, Tim Rafferty noticed that a defendant looked familiar (we had practically memorized faces from pictures) but somehow different when the now routine defense motion was made to allow the defendants to remain in the audience. Mr. Rafferty expressed concern that one of the defendants had altered her looks from the time of the incident and was wearing a wig. Judge Fraczkowski ordered any defendant wearing a wig to leave, take it off and come back. One defendant did. From then on, defendants were allowed to stay in the audience but with an additional caveat that they not alter their appearance in any significant way.

Despite continuing identification problems, we estimated that we had about a 75% conviction rate. There had also been strike-related prosecutions for contempt (curfew violations), disorderly conduct, resisting an officer and offensive touching (spitting in someone's ear). The system worked, and worked well throughout.

Throughout the trials, the different teachers' reactions continued. Some were nonconfrontive, open and almost friendly. Some were hostile, others bewildered and nervous. Sometimes before the start of a trial, we would get into a discussion of the strike and what was likely to happen next.

I was unpleasantly surprised at a number of things during the course of the prosecution. One was that the teachers had little idea of how the criminal justice system worked. Many perceived us as part of a big conspiratorial group against them: a group consisting of police, the civil attorneys, the prosecutors, the court personnel, and the judges. A few even included defense counsel!

Another thing that really surprised me was the lack of feeling of civil disobedience underlying the teachers' actions. At least, not of civil disobedience as I understood it. Civil disobedience is often prompted by "both a desire to make propaganda and to challenge the law," according to "the little red book" of the late sixties, *Concerning Dissent and Civil Disobedience* by Justice Abe Fortas. These elements were both here: the challenge to the "no strike" laws and the publication of the issues and importance of the strike.

Civil disobedience should not, however, confer amnesty on protesters. The corollary to breaking the law to make a point is acceptance of responsibility for one's actions. The rules are supposed to be for everyone, no matter how strongly you believe that your case is just.

It was my opinion the majority of the teachers in the incident at the school administration building were not ready to take responsibility for their criminal acts. Civil disobedience is often commended; it can always be punished. High purpose or moral justification does not give immunity to lawbreakers. There was strong current of self righteousness throughout, which lead the teachers to label any opposition as "enemies" and to feel indignant at any loss of ground. I think that the teachers in the blockade somehow felt they were going to get away with it and that their exoneration was the only way that justice could prevail.

This might have been because of a feeling of "strength in numbers." Unfortunately for them, they misjudged the capacity of the city criminal justice system. Who would spend the time and resources to process and prosecute 253 school teachers? The city prosecutors and Municipal Court were then handling about 2,000 cases a month. Municipal Court has a tradition of working until the calendar is clear. It is not unusual for court

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to stay in session well past business hours to finish a trial. While 253 added cases were more than a drop in the bucket, they were manageable because of established court procedures.

There may also have been a belief by the defendants that amnesty would become part of the negotiations. This was never seriously considered by the prosecutors. We were not privy to what was happening in negotiations and the strike. Frankly, we did not care unless it involved criminal activity. The civil attorneys did not discuss the possibility of amnesty with us, nor would we have welcomed such discussions. There was no attempt by the City Solicitor (then David S. Swayze) to interfere with policy or decisions made by the criminal attorneys in conducting prosecutions.

The union also was not aware of the enthusiasm and dedication of the prosecutors. Tim Rafferty and Joe Capodanno handled the great bulk of strike-related prosecutions. They also handled the appeals in *Barshay* and *Rambo* in Superior Court. They thrived on the work! It was their first opportunity to handle major prosecution (in terms of numbers, not degree) and to deal with issues that needed to be briefed. How often do fledgling lawyers get the opportunity to do highly visible work like this?

They were extremely busy, but they welcomed each new turn of events as a challenge. They prosecuted, researched, briefed, and argued with the enthusiasm of true advocates. Any union strategy that might have assumed that there would be less than vigorous, prosecution certainly missed the mark.

For whatever reason, be it advice from counsel or the union hierarchy or just a feeling of "they wouldn't dare," the teachers seemed to be unprepared for the reality of prosecution and conviction. Some of them accepted it stoically, some fought, and a few *lied.*

Those few who tried to lie their way out of conviction were prosecuted zealously. One defendant, through counsel, told of how she was only there to deliver a message to someone in the line and had inadvertently gotten caught in the "impregnable police perimeter." Counsel asked if we could please enter a nolle prosequi in her case, since the arrest was obviously a mistake. Apparently she did not know that we had pictures of her throughout the day from as early as 6:30 a.m. standing in the back row of the lines of teachers. The pictures were admitted at trial and she was convicted.

Only one teacher that I was aware of raised the principle of civil disobedience. He entered guilty pleas to both counts, stating that he had broken the law on purpose to help bring public attention to the issues involved in the strike. While others may have felt the same way, he acknowledged it publicly. We respected him for recognizing the responsibilities of protesters and that civil disobedience results in sanctions.

I suppose that my biggest disappointment at the time was that the strike actions did not live up to my expectations of dissent and protest. I had been somewhat involved in the limited protest activities at the University of Delaware in the late sixties and embraced civil disobedience as a political tool to effect change. But that was not what the union strike was really about. It was about *money.*

There were, of course, other issues, but they were tangential to the need to get teachers' salaries as high as possible before desegregation occurred. This was not necessarily bad; it just did not fit into my rather naive idea of what they should have been doing. The protest at 14th and Washington was a strategic show of power on the part of the Wilmington AFT to help their cause at the bargaining table.

In the long run, they accomplished their major goal. Wilmington teachers went into the new school district with salaries an average of $2,000 higher than suburban teachers. They had fought successfully over the years for salary raises through the power of collective action by being aggressive and taking the risks of strike and protests.* The Wilmington teachers "won" in many respects, but the union did not survive. Teachers of the new "desegregated" district elected a local of the more conservative National Education Association as their bargaining agent.

The teachers also lost in many ways. The mass arrests at 14th and Washington, I think, only solidified the "other side" of the negotiations. While it inconvenienced school administrators for one day, there was no significant impact on the city policy makers. The arrests and prosecution were handled by other people and did not draw on the resources of the school board or the civil attorneys. It did, however, draw significantly on the financial and legal resources of the union, thus reducing their capacity to fight on other fronts.

It was also a major inconvenience to police and court personnel who already had a large workload. Many of these people, under different circumstances, might have supported the union. The situation that existed, however, caused resentment.

The loss, on appeal of the *Barshay* case, which went to Superior Court on the issues of official misconduct was a potentially significant one for future strikes. Superior Court held that teachers *are* public servants and that if they strike in violation of 14 Del C. §4011, they are amenable to prosecution for official misconduct. This could be a powerful tool for a school board fighting a teachers' strike.

Ten years later, the Wilmington School District and the Wilmington AFT are gone and there are different faces in the city prosecutor's office. In Municipal Court, at the time of this writing, a new brand of protesters are facing prosecution. (See interviews with Pro-Life supporters in this issue.) As in 1975, they will be tried on the issues of law, not the issues *being protested.*

The author wishes to thank Captain Francis T. Monaghan of the Wilmington Police Department, Roger Barton, Chief Clerk, Wilmington Municipal Court, and David Eckhardt, Criminal Justice Major, University of Delaware, for information and statistics.

For an interesting discussion of the salary differential problem see James H. Sills, Jr. "Equalizing Teacher Salaries," Urban Education, Vol. 17 No. 3 October 1982, Sage Publication.

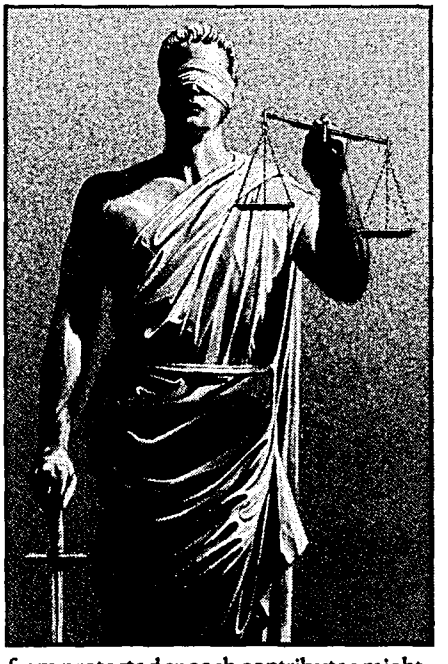
The New Pornography Laws

Leslie F. Goldstein

Catherine MacKinnon, professor of law at University of Minnesota Law School (formerly of Yale) and Andrea Dworkin, prominent feminist woman of letters, have been leading a nationwide crusade to stamp out pornography. They have not been without some success. The Minneapolis city council adopted an ordinance that they drafted, only to have it vetoed by the mayor. Indianapolis did enact an ordinance of their drafting, but last November, after a trial in which some attorneys on both sides as well as the deciding judge were female, it was held unconstitutional. *American Booksellers Association, et. al. v. Hudnut,* 598 F. Supp. 1316. As of this writing the case is on appeal and a similar ordinance is pending in Los Angeles. The MacKinnon-Dworkin approach to pornography and the reaction of the federal district judge to their approach are best understood by contrasting the rationale of their new ordinances with the Supreme Court's traditional doctrine of obscenity law.

Supreme Court Doctrine: Anti-Obscenity

In 1957 the U.S. Supreme Court, after a number of dicta that had mechanically asserted the common law rule that "obscenity" is no part of "freedom of speech or of the press,"[1] confronted directly the issue of obscenity. In deciding *Roth v. U.S.* (354 U.S. 476), which upheld a U.S. postal rule that banned the mailing of "obscene, lewd, lascivious, or filthy" books, pamphlets, pictures, and letters or any "other publication of an indecent character," (18 U.S.C. §1461) the Supreme Court did two notable things: first, it emphatically affirmed that obscenity was categorically excluded from First Amendment protection, with the justifying *explanation* that obscene utterances are "utterly without redeeming social importance" and that *because* they "are no essential part of any expression of ideas, and are of such slight social value as a step to the truth," the "social interest in order and morality" outweighs whatever slight value they may have. This exclusion of obscenity



from protected speech contributes mightily to an understanding of the *goals* of freedom of speech and press. They include the "expression of ideas" and the societal quest for truth. But it says precious little about why obscenity should be banned—or even excluded from protection (perhaps it's valueless but also harmless?). All we are told is that it somehow interferes with social order and morality, but we receive no enlightenment concerning how that might be so.

The second thing the *Roth* court did was to define obscenity: it is material that, when considered as to its dominant theme and viewed by the lights of the contemporary adult community, deals with sex in a manner calculated to appeal to prurient interest. The court further defines "prurient interest" first by reference to Webster's definition—arousing sexual longing—and then by alluding to the ALI standard of "shameful or morbid interest in nudity, sex, or excretion," and the Court suggests both by reference to the ALI definition of "obscene" and by quoting the lower court judge in a companion case that "offensiveness" to community standards was also a relevant part of the definition. The relevant descriptive phrase from the ALI quotation was "goes beyond customary limits of candor" in representing sexual matters.

Through the influence of a 1962 two-justice opinion by Justice Harlan (*Manual Enterprises v. Day,* 370 U.S. 478), this latter concern evolved into the "patent offensiveness" requirement in the obscenity definition. Justice Harlan described this element as involving "obnoxiously debasing portrayals of sex" and he explained (for himself and concurring Justice Stewart) that, while appeal to prurient interest *defined* obscenity, the tendency to debase or deprave provided the justification for banning obscenity. The Supreme Court did little to build upon this explanatory initiative until the 1973 *Paris v. Adult Theater* (413 U.S. 49) decision.

Meanwhile, in 1964 (*Jacobellis v. Ohio,* 378 U.S. 184) the Court had announced that the "contemporary community" whose standards reigned would be the *national* community and in 1966 (*Memoirs v. Massachusetts,* 383 U.S. 413) a three-justice plurality (Brennan, Warren, and Fortas) joined for all practical purposes by Justice Stewart, added to the prurient appeal and offensive-degree-of-candor rules the definitional *requirement* that in order to be judged obscene the material must be *"utterly* without redeeming social value." (This group joined by the absolute freedom duo of Black and Douglas thus found *Fanny Hill* to be legally not obscene.)

Then in 1973 after a variety of mass circulation intellectual journals such as *The Public Interest* had run essays condemning the consequent flood of trash unleased on American consumers, the Supreme Court backtracked from these latter two requirements in *Miller v. California* (413 U.S. 15). The relevant community standard became local; and *"utterly* without redeeming social importance" gave way to a rule that bannable material must lack "serious literary, artistic, political, or scientific value." Within a year (*Jenkins v. Georgia,* 418 U.S. 153 [1974]) the Supreme Court backtracked on its own backtracking and said that, at least as to the "patent offensiveness" requirement there was some *nationally* minimum content that had to be honored by local communities. To be banned as obscene

anywhere in the nation, material, at the least, had to graphically and explicitly depict "hard core sexual conduct."

While the Supreme Court busied itself with expanding and contracting the definition of "obscenity," it did little before 1973 to let the American public know what was bad about this stuff. In 1969 the Court created an apparently absolute right to possess obscenity in the privacy of one's home and asserted that legitimate societal interests in regulating such material extended only to its public distribution. And the only societal interests that the Court could come up with on behalf of the latter sort of regulation were (1) safeguarding the special vulnerability of children and (2) protecting against intrusion into "the sensibilities or privacy of the general public." Why these concerns ought to receive protection was not discussed.

Finally, in 1973, in the companion case to *Miller, Paris Adult Theater v. Slaton* (413 U.S. 49), the Court undertook to explain to the public what legitimate state interests might justify a ban on obscenity; they included "the interest of the public in the quality of life and the total community environment, the tone of commerce..., and, possibly, the public safety itself." Moreover, the nation had a right "to maintain a decent society." Again the Court did not explain what the phrase "decent society" entailed, but the justices seemed to have in mind the form or style of life—publicly advertised, widely sold, graphically explicit displays of sexual conduct seemed to clash with that societally desired, and desirable, tone of decency.

And even more than the tone of life in commercial centers was arguably at stake here, the Court finally acknowledges in some detail. It was reasonable for legislators to believe (even if it were not provable beyond scientific doubt) that the prevalence of pornography in a community operated to encourage "antisocial behavior." As it is certainly widely believed that exposure to good books and art "lift the spirit... enrich the human personality and develop character," so it is equally plausible to expect that widely prevalent "crass commercial exploitation of sex" might have a "tendency to exert a corrupting and debasing impact leading to antisocial behavior" and might operate to "debase" and "distort" a "sensitive, key relationship of human existence." In short, the spread of obscenity within a society can reasonably be believed to debase and corrupt—to dehumanize—relations between men and women in that society.

One might wonder at this point why the community majority should have the right to ban one sort of pictures and writing just because it found them distasteful and/or corrupting while others in the community (e.g., commie-haters) could not ban the kind of writing they found distasteful, corrupting, or even threatening. The Court's answer was traceable to what they had said in the *Roth* case—obscenity is no part of the exchange or expression of ideas. This had been clarified in a case that followed *Roth* by one year, *Kingsley Pictures v. Regents of N.Y.*, 360 U.S. 684. There the Court had declared unconstitutional a statute that operated to ban films that defended or "portrayed as desirable or proper" behavior believed by the community to be sexually immoral. This law the Court reasoned *did* strike at expression of ideas, that which was at the heart of First Amendment protection.

It is, then, as sale of physical titillation that the Court allows "obscenity" to be banned, rather than as persuasion to do the sexually immoral. The former, the Court added in *Paris*, was conceptually much more akin to ordinary commercial regulation than to regulation of "speech" or "press" in the constitutional sense of those terms. "Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a state's broad power to regulate commerce and protect the public environment."[2]

The Court's outlook then, as to why obscenity (a) is not "speech or press" and (b) is prohibitable, could be summarized as follows: Obscenity operates as a sexualized or eroticized physical conditioning upon its consumers, rather than by addressing either their thoughts or their emotions. As such, it nonetheless can gradually shape the attitudes of people in a community in such a way as to debase their relationships with one another. Moreover, the tone or atmosphere in areas where obscenity is widely marketed can itself come to operate with this debasing impact. Thus, if communities want to, they can ban obscenity.

The Feminists' Argument: Anti-Pornography[3]

The foregoing paraphrase of Supreme Court doctrine on obscenity reads as peculiarly abstract; there is a fleshless, airless quality about it, almost as though it had no links at all to human reality. For instance, when the Justices refer in *Paris* to "a sensitive, key relationship of human existence," they do not even say aloud that they are talking about sexual/emotional relations between men and women. This must be inferred by the imaginative reader. The Court has never told the American public what is negative or debasing or corrupting about being more than customarily candid in sexual explicitness ("patently offensive") or about arousing a reader's or viewer's sexual longing. The Court's abstraction from, or silence about, these matters has led certain lawyers, including Catherine MacKinnon, to jump to what I believe to be an erroneous assumption: namely, that the Court's obscenity doctrine presumes that sexual freedom *per se* is bad, i.e. that it is motivated by Puritanical, repressive concerns.[4] (I address this misunderstanding below.) The Court's own peculiar silence has contributed to this misunderstanding. But not everyone has been silent.

Previous obscenity legislation upheld by the Court has been criminal law, enforced by police "crackdowns"; the new laws are civil, to be activated only at the initiative of the purported victim and aimed to strike the eight billion dollar per year porn industry[11] where it will will be hurt most—in the profit column.

Long before the emergence of a vocal, feminist anti-pornography movement in the late seventies, political scientists, legal scholars, and other social commentators had begun to pursue seriously the question, what is bad about pornography? In fact, it is fair to conclude that this scholarship was influential in prompting the Court's mild retrenchment in the *Miller* and *Paris Adult Theater* cases, for some of it was quoted in the majority opinions. In my judgment, the best of this scholarship provides a grounding for a synthesis of the MacKinnon-Dworkin approach and

the Court's own approach. I shall conclude with a delineation of that synthesis.

Like the best of this scholarship, Catherine MacKinnon's and Andrea Dworkin's studies and those of their allies take a hard look at what is *in* pornography and, unlike the Supreme Court, they describe its contents both concretely and analytically. It is characteristic of pornography as a genre to eroticize male subjugation of females. This has been noted in a number of scholarly studies that attempted to characterize pornography in contradistinction to erotic art,[5] but it does not take an expert to figure it out. One of the most effective tactics of the organization, Women Against Pornography, is to give guided tours of porn shops so that the uninitiated can observe firsthand the degree to which this material eroticizes male sexual domination, both violent and non-violent, over women. Pornography reduces women either to their sexual parts or to slaves of their sexual parts and endorses the appropriateness of the use of these parts to gratify the male's passions. Whole female persons are reduced to sexual objects (i.e., dehumanized) to be used as instruments for other people's (males') passions. (There is, to be sure, a sense in which pornography degrades the male user as well, but it is a sense analogous to that in which slavery dehumanizes the master as well as the slave. To give vent to one's passions, unrestrained by a sense of the dignity of other human beings upon whom one acts, is *per se* dehumanizing, but there is no doubt in pornography which gender is analogous to the master.)

Unlike Supreme Court obscenity doctrine, the MacKinnon-Dworkin approach sets out to draw attention to the harm caused by pornography. The preamble of their model ordinance (Section 1)[6], which is duplicated in sections 1 and 2 of the pending Los Angeles County ordinance and is paraphrased in Section 16-1 of the Indianapolis ordinance[7], states

Pornography is sex discrimination [and it poses] a substantial threat to the health, safety, peace, welfare, and equality of citizens in the community.

Pornography is a systematic practice of exploitation and subordination based on sex that differentially harms women. The harm of pornography includes dehumanization, sexual exploitation, forced sex, forced prostitution, physical injury, and social and sexual terrorism and inferiority presented as entertainment. The bigotry and contempt it promotes, with the acts of aggression it fosters, diminish opportunities for equality of rights in employment, education, property, public accommodations, and public services; create public and private harassment, persecution, and denigration; promote injury and degradation such as rape, battery, child sexual abuse, and prostitution...; contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life...; (and) damage relations between the sexes...[8]

This model ordinance makes actionable as a *civil* offense "trafficking" (producing, selling, distributing, or exhibiting—except by libraries) in pornography; (forcing someone to see pornography;) attacking someone in a way "directly caused by specific pornography" (both attacker and trafficker being liable for damages); and coercing (forcing, intimidating, or fraudulently inducing) someone to perform for pornography. The latter offense is the subject of national legislation currently being promoted by Senator Arlen Spector (Pornography Victims Protection Act, Cong. Rec. §13191,

Oct. 3, 1984). Under the "trafficking" provision any women can bring a civil suit for damages.

And the model ordinance defines as pornography:

The graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (1) women are presented dehumanized as sexual objects, things, or commodities; or (2) women are presented as sexual objects who enjoy pain or humiliation; or (3) women are presented as sexual objects who experience sexual pleasure in being raped; or (4) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (5) women are presented in postures or positions of sexual submission, servility, or display; or (6) women's body parts... are exhibited such that women are reduced to those parts; or (7) women are are presented as whores by nature; or (8) women are presented being penetrated by objects or animals; or (9) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.[9]

The ordinance adds provisions—ones that may seem to be at odds with the sex discrimination target of the law—to allow men, transsexuals, or children used "in the place of women" (i.e., as sexually dominated other) also to sue as victims "who allege injury by pornography in the way women are injured by it." The statute requires also that works be judged as a whole, not by isolated sections.[10]

There are a few obvious contrasts, then, between the MacKinnon-Dworkin approach and the Supreme Court approach: (1) where the Supreme Court speaks of appeals to prurient interest (or arousals of lust) and of patently offensive degrees of sexual explicitness, the new version speaks of a combination of graphic sexual explicitness with the eroticized, or sexualized, domination of one human being by another (usually of women by men, but not necessarily). I shall argue below that this difference is not so great as may first appear. (2) Previous obscenity legislation upheld by the Court has been criminal law, enforced by police "crackdowns"; the new laws are civil, to be activated only at the initiative of the purported victim and aimed to strike the eight billion dollar per year porn industry[11] where it will be hurt most—in the profit column. (3) Where the Supreme Court explicitly *exempts* works of serious literary, artistic, political, or scientific content (i.e. ideational content) from the unprotected category "obscenity," the new ordinances purposefully do not. This is a difference of very serious, and I believe constitutional, implication.

Both MacKinnon and Dworkin argue forthrightly that work of serious artistic merit ought not to be exempted from the civil penalties on pornography.[12] Their point of view has some parallels with the Supreme Court's group libel decision (*Beauharnais v. Illinois*, 343 U.S. 250 [1952]). There the Court upheld a law punishing printed material that exposed racial or religious groups to ridicule or contempt, as applied to a political leaflet protesting a proposed ordinance. Even though political persuasion would seem to be at the heart of protected expression, the Court was willing to say that the harm done to a group's reputation affected its members' life chances in substantial enough ways to render unprotected the speech doing such harm. Moreover, the law upheld was one that did not allow truth as a defense. Libel law has changed substantially, however, since 1952, and the change was largely motivated by a concern to protect political speech. (*N.Y. Times v. Sullivan*, 376 U.S. 254 [1964]; *Gertz v. Welch*, 418 U.S. 323 [1974]). Now the First Amendment is understood to protect *all* true speech (defamatory or not) and, as to private individuals, all defamatory speech that is made in the reasonable (i.e., not negligent) belief that it is true.

The other Supreme Court parallel to the MacKinnon-Dworkin argument is in the *N.Y. v. Ferber* (458 U.S. 747 [1982]) child pornography decision. There the Court ruled that the socially compelling interest of protecting children outweighed whatever modest First Amendment interest an "artist" might have in using the children to pose for sexually explicit pictures. Thus, the pictures produced did not have to qualify constitutionally as "obscenity" (e.g., by lack of artistic merit) in order to be criminally actionable. Except for the sections on "coercion into performing for pornography" and forcing pornography on someone, the MacKinnon statute's parallel to *Ferber* is a weak one. Adult women are not needy of the protective arm of the state to the degree

that children are, and, more important, the harm proscribed by the *Ferber* statute was perpetrated by concrete behavior against children. The harm caused by trafficking in pornography is a real one and a serious one, but it is to a large degree a harm done by means of shaping societal attitudes. And the freedom to try to shape societal attitudes by the use of words—whether by seriously political or scientific or literary speech or by the use of seriously artistic images—would seem to be right at the core of First Amendment values.

The absence of an exemption from "pornography" for works of serious artistic, political, literary and scientific merit is in my view a fatal flaw in the MacKinnon-Dworkin approach.[13] It was also one of the many grounds on which Judge Barker ruled that the "pornography" banned in Indianapolis swept much more broadly than the narrow category of "obscenity" that the Constitution allows to be banned (598 F. Supp., at 332).[14] As I argue below, I (unlike Judge Barker)[15] believe the other aspects of the Court's obscenity definition have the potential to be merged with MacKinnon and Dworkin's pornography definition, but this one difference will not go away. Only an amendment to the MacKinnon-style ordinances on this point can save them.

MacKinnon herself tries to argue it both ways. In her *amicus* brief for the Indianpolis case on behalf of Linda Marchiano (the woman who now claims that she was forced at gunpoint and coerced by hypnotism and repeated beatings to perform in a number of pornographic films as the actress Linda Lovelace), MacKinnon adopts the Supreme Court outlook that pornography is not speech: "Pornography works as a behavioral conditioner, reinforcer, and stimulus, not as idea or advocacy. It is more like saying 'kill' to a trained guard dog—and also the training process itself." (Brief at p. 28, see also p. 31.) But if it is not speech or press in the sense that it does not operate in the realm of ideas, then it CANNOT be of serious artistic or political merit. MacKinnon makes the error of conflating technical excellence of execution with artistic merit; she refers to "beautiful prose" and to "well-written obscenity." (p. 40) Surely the standard, "serious artistic merit," however, would call for more than a nice style; at a *minimum* the work would have to contain substantial ideational content and it would have to express that content in the realm of ideas. It could not operate strictly through titillation. So it would seem that even for the sake of sheer consistency MacKinnon should exempt works of serious merit from the pornography definition.

At the level of judicial First Amendment doctrine, the case for the "serious merit" exemption is even stronger. The assumption that underlies our societal commitment to freedom for the exchange of ideas, whether in a rhetorical or an artistic mode, is the assumption that the human spirit or human personality is enhanced by hearing and sifting through the debate, even if extremely harmful ideas are exposed in the process. MacKinnon's claim is that all "pornography" even when it is of serious artistic merit (if such a thing exists; cf. note 5 above) is closer to the name-calling of unprotected "fighting words" or to the deliberate defamation of libel than it is to exchange of ideas. When it comes to works of serious artistic merit (*if* there be any that are truly pornographic in the sense of her statute), I find it hard to accept her assertion and would argue for First Amendment protection.

Toward a Synthesis

If MacKinnon and Dworkin were to add to their ordinance, the traditional exemption for works of serious "artistic, literary, political, or scientific merit," I believe the statutes would withstand constitutional scrutiny and, moreover, would be good laws. The degradation

of women that is the target of their ordinance in my view is the *same* "debasement" that underlies the requirement of "patent offensiveness" in the traditional obscenity definition. Why is going beyond the community bounds of candor in explicitness about sex something properly subject to community sanction? Listen to the answer of political scientist Harry Clor:

Imagine hypothetically, a man who is required to perform every act of his life in public and in the nude. Would those observing his acts be able to respect him, and would he be able to form a concept of his own dignity?... Our dignity, or sense of self-respect, appears to depend heavily upon there being some aspects of our lives that we do not share indiscriminately with others... The characters [generally female] of pornographic literature are without dignity because they are totally at the mercy of passions and physiological reactions.

In the usual pornographic novel, love is reduced to sex and sex is vividly reduced to the interaction of organs and parts. The "characters" [female] are not presented as persons; they are (or in the process of the plot they become) little more than sexual instruments, stimulating in the reader [generally male] the desire for [generally female] sexual instruments. This [work]... is predominantly calculated to arouse depersonalized desire... [i.e.] the systematic arousal of passions that are radically detached from love, affection, personal concern, or from any of those social, moral, and aesthetic considerations that make human relations human. Persons then become things to be manipulated for the gratification of the manipulator. [Violent obscenity]... is only the logical conclusion of this way of viewing and representing human beings.[16]

The insertion of the terms "male" and "female" into this lengthy excerpt was my doing, but it is clear from Clor's own discussion of a sampling of pornographic material that he examined that he was quite conscious which gender gets reduced to a mere instrument to gratify the passions of which other gender. He explicitly refers to the "systematic violation, humiliation and domination of women" (p. 99) and he argues that the most blatantly violent versions of this domination are "only the most extreme and flagrant form of an appeal that [is] present" in even the depiction of a "woman in the 'spreader' pictorial" (i.e., a close-up photo of female genitalia with legs spread apart.) (p. 101.) Pornography *by* its graphically sexually explicit, "patently offensive," portrayals that are calculated to arouse lust *does* reduce women to objects, to dehumanized things. *That* is why this kind of portrayal offends. Not because it advocates a sex-is-fun ideology of which some communities may disapprove, but because it "patently" assaults, by its depictions, the humanity of the dominated victims it portrays. This theme has been present, albeit rather mutedly, in Supreme Court obscenity doctrine, particularly in the references to "debasement" or "depravity," essentially from the beginning, and if the MacKinnon-Dworkin ordinances stimulate the Court to flesh out the theme, giving it more emphasis and importance, our constitutional law will only benefit. Their emphasis on the concrete harms wrought by pornography on the societal image of woman and on relations between the sexes has the potential for adding a long-needed clarity to the rationale underlying the Supreme Court's obscentity doctrine.

Appendix

In *theory,* some things are bannable under Supreme Court obscenity doctrine, but not actionable under the MacKinnon-Dworkin obscenity statues, and, conversely, their laws in theory would ban some other material protected by obscenity doctrine. It is my hunch that the *actual* non-overlapping categories are smaller than people imagine (and by my argument category B would disappear). In any case, a diagram of the overlapping and non-over lapping categories would look like this:

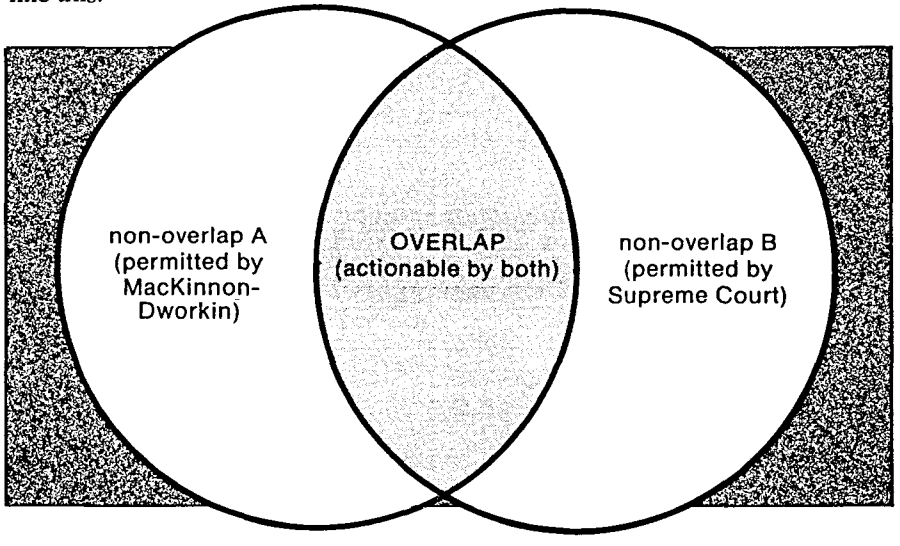
Non-overlap A covers all sexually explicit material that lacks serious merit, appeals to prurient interest *and* surpasses contemporary community standards about candor re: sex, but does *not* show women (or anyone used in the place of women) in a dehumanized posture. Presumably this would include erotic depictions in which no one is subordinated to anyone else *or* is relegated to subhuman (object) status. (It is hard to see how such art could really violate community standards. At least, I would argue that community standards have no reason to censure such erotica.)

Non-overlap B covers graphic sexually explicit material that also includes one or more of the statutorily described forms of dehumanizing or dominating women and that *also* has serious artistic, literary, political, or other merit. I believe this to be a very small category (for works considered as a whole), but I urge that the MacKinnon-Dworkin statutes be amended to eliminate it.

1 *Rosen v. U.S.*,161 U.S. 29, 42 (1896); *Chaplinsky v. N.H.*, 315 U.S. 568, 571-2 (1942); *Beaubarnais v. Ill.*, 343 U.S. 250, 266 (1952).

2 Lest the reader need any confirmation of this characterization of the genre by expert testimony, a variety of it is cited in a recent "Note" in *Harvard Law Review,* 90:460 (Dec. '84).

(1) Finnis, "Reason and Passion": The Constitutional Dialetic of Free Speech and Obscenity," *U. Pa. Law Rev.* 116: 222 (1967) at 237: "[An appeal to prurient interest] disrupts the contemplative and intellectual component of the aesthetic attitude and, through direct emotional stimulation, obscures the *idea* which the work, as art, symbolically expresses..." cited at 472, n. 74.



(2) Feinberg. "Pornography and the Criminal Law," in *Pornography and Censorship* (D. Copp and S. Wendell eds., 1983) at 105, 114: Obscene materials are "simply devices meant to titillate the sex organs *via* the mediation of symbols."

(3) S. Marcus, *The Other Victorians: A Study of Sexuality and Pornography in Mid-Nineteenth Century England* (1974, 281: "Pornography is not interested in persons but in organs. Emotions are an embarassment to it and motives are distractions."

Or for those who incline toward the reliability of a practioner's viewpoint, we have it on *Newsweek's* (3/19/85) authority that a major producer of pornographic films condemns as mistaken his competitors' move toward "upgrading production values" (read: making films of more serious merit) on the grounds that they are losing sight of "the first rule of porn: 'giving the customer an erection,'" p. 61.

3 By saying "the feminists," I do not mean to imply that all feminists support the anti-pornography movement. Like the issue of freedom to choose abortion, this is one that divides the self-professedly feminist community.

4 "Note" (*supra*, n. 2), at 466. Also Catherine MacKinnon, "Not a Moral Issue," *Yale Law and Policy Review.* Vol. 2: 321 (1984). Also, Mary Kay Blakely, "Is One Woman's Sexuality Another Woman's Pornography?" *MS.* (April, 1985), 37, at 40, quoting MacKinnon, "[The existing laws on obscenity addressed] an injury to morality but did not address a harm to people." "[The obscenity framework rested on] some kind of intellectual axis between sexual repression on the one hand and sexual freedom on the other... [and functions to] make the harm to women invisible."

5 E. Kronhausen and P. Kronhausen, *Pornography and the Law: the Psychology of Erotic Realism and Pornography* (New York: Ballatine Books, 1959). Also, James V. P. Check, "Questions of Definitions, Harm, and Community Standards," paper presented at annual American Psychological Association Convention, August, 1985.

6 Blakely (n. 4 *supra*), at 46 - 7.

7 My references to the Indianapolis ordinance came from the *American Booksellers' Assoc. v. Hardnut* decision, 598 F. Supp., at 1320 - 1326.

8 See n. 6 *supra.* I cite the model ordinance because that one is likely to be debated and adopted in other cities. The Indianapolis ordinance had provisions essentially identical to these.

9 Again, these were pretty much duplicated in the Indianapolis law at Section 16 (q) (1) - (6) except that it omitted the "whores by nature" provision, and the reduction-to-body-parts provision, and it altered item (1) in the model provision to read "Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use..." 16 (q) (6).

10 The Indianapolis ordinance stated quite clearly that "isolated parts or isolated passages" are *not* actionable under the trafficking provision, but the federal district judge nonetheless wrote that the ordinance "does not require that the material... be 'taken as a whole.'" 598 F. Supp., at 1339. It is hard to read that particular conclusion as deriving from anything other than willful blindness.

11 MacKinnon "Not a Moral Issue" (n. 4, *supra*) at pp. 332-3 ("Besides, if a woman is subjected, why should it matter that the work has other value?"). Dworkin, in *Philadelphia Inquirer* interview, April 17, 1985, I-E, at 3-E, col. 2: "Lots of art is pornography, and this pornography is used in hurting people."

12 J. Cook, "The X-Rated Economy," *Forbes* 1978:18.

13 "Note" (*supra*, n. 2) agrees, at pp. 472-4.

14 Having established that the ordinance restricted protected speech, she then ruled that eliminating the damage pornography does to societal attitudes about women was not a compelling enough interest to justify the encroachment on protected freedoms (at 1335-1337).

15 Judge Barker also finds almost all the operative phrases of the Indianapolis statute (e.g. "graphic sexually explicit subordination") void for vagueness (598 F. Supp., at 1337-1339). I, for one, find them at least as clear as the Supreme Court's obscenity guidelines (e.g., "patently offensive") and generally *more* clear. Moreover, she finds unconstitutional "prior restraint" in the statute's provisions for injunctive remedy against forcing someone to participate in making pornography or forcing someone to look at it (at 1340-2). I have no idea where she gets the idea that *acts of force* are somehow subject to the traditional doctrine that government may not impose prior restraints on the *press* That section of her opinion wins the Most-Likely-to-be-Overruled-the-Soonest Award.

16 "Obscenity and Freedom of Expression," pp. 97-129 in Harry Clor, ed., *Censorship and Freedom of Expression* (Chicago: Rand McNally, 1971) at pp. 102-104.

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The Supreme Court and the Separation of Church and State

James Magee

Since the late 1970's, ultra-right forces have become increasingly more powerful, and certainly more vociferous, in American politics. Deeply held religious convictions have animated a majority among the right-wing political movement, and the dominant inspiration comes from the tenets of fundamentalist Christianity preached across the country by well-known political ministers of the gospel, such as Jerry Falwell and Jimmy Swaggart. The far right has found a comfortable and influential place within the Republican party and the Reagan Administration. Campaigning against President Reagan in the 1984 election, Democratic candidate Walter Mondale attacked the influence of the right-wing religious movement claiming that Falwell had said that he would name at least two appointees to the Supreme Court during a second Reagan administration. One or the other was surely exaggerating, but the recently acquired political clout of ultra-conservative religious fundamentalism is real and considerable.

Some liberals who oppose and fear the power of political fundamentalism see its influence on public policy as dangerous and in conflict with the basic principle of the separation of church and state, which they see grounded in the First Amendment to the United States Constitution. Yet this amendment also guarantees freedom of speech and the right to petition the government for a redress of grievances. Fundamentalists, like anyone else, surely are entitled to exercise their rights and do not surrender them merely because fundamentalists' political activity proves fruitful and harmful to the cause of liberalism. The activities of Martin Luther King, Jr., were religiously motivated but could hardly be deemed as colliding with the First Amendment because they bore fruit in the form of civil rights legislation and increased opposition to the war in Indochina. Nevertheless, the "fruits" of successful fundamentalist political pressure may be held unconstitutional by the courts, ultimately by the Supreme Court of the United States, as in conflict with the Establishment Clause of the First Amendment. For example, a 1981 Arkansas law, undoubtedly inspired by fundamentalist belief in the Book of Genesis, required that all public schools "give balanced treatment to creation-science and to evolution-science." In *McLean v. Arkansas Bd. of Education,* 529 F.Supp. 1255 (E.D. Ark. 1982), a federal district court invalidated the law as a direct violation of the Establishment Clause, concluding that the law's purpose and effect were purely religious.

Not all governmental actions challenged in court as in conflict with Establishment principles are the product of fundamentalist political pressure, nor is the collision as clear-cut as that found by Judge Overton in the *McLean* case. In fact, the governing constitutional law precedents attempting to articulate the scope of the prohibition found in the Establishment Clause had been developed before Jerry Falwell and fundamentalism were seen as contenders in the national political arena. The remainder of this essay explores some contemporary issues involving the separation of church and state and the prevailing constitutional principles designed by the Supreme Court in the hope of resolving these persistent issues.

The language of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . " The purpose of this prohibition was clearly to protect state religious establishments against congressional actions. The state of Delaware, for instance, according to Henry J. Abraham in his *Freedom and the Court,* "demanded Christianity, . . . assent to the doctrine of the Trinity, . . . [and] assent to the divine inspiration of the Bible."[1] But almost all of the legislation successfully challenged as violative of the First Amendment in the postwar era have been state laws. As diversity and freedom of religion spread throughout the United States from the 19th to the 20th centuries, the pressure to make the states adhere to the demands of the First Amendment intensified, culminating in the "incorporation" of the religion clauses against the states through the many folds of the "due process" clause of the Fourteenth Amendment, which curtails state authority. Ironically, and somewhat illogically, in the 1930's and 1940's, the Supreme Court read the First Amendment as forbidding state religious preferences that the amendment had originally been designed to safeguard against national power.

Beginning in *Everson v. Board of Education* (1947), the Supreme Court has embarked on a collision course with state and federal legislation that has left a wake strewn with uncertainty and inconsistency in the constitutional law of the separation of church and state. In *Everson* itself the Court permitted what it seemed to insist was proscribed by the Establishment Clause. Involved here was the validity of a New Jersey law that reimbursed transportation costs of parents who send their

children to private schools (predominantly Roman Catholic in this case). In a 5-4 decision, Justice Black, who wrote for the majority, concluded that "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, the clause against the establishment of religion by law was intended to erect a 'wall of separation between Church and State'." Yet the majority here held that the wall had not been breached by New Jersey's indirect subsidy, even though the Court demanded that "The wall must be kept high and impregnable. We could not approve the slightest breach."[2] One of the four dissenters, Justice Jackson, argued that the majority's handling of the issue reminded him of "Julia who, according to Byron's reports, whispering 'I will ne'er consent,' consented."

By denying police and fire protection to churches, a state would impede the free exercise of religion through its absolute separation of church and state. Some state aid is therefore necessary if only to avoid confrontation with the Free Exercise Clause. The two religion clauses, in other words, are in tension with each other, and some accommodation is inevitable.

But what if the "wall" were kept impregnable in so far as no aid from the state, however small, indirect or direct, could be legally given to support religion? Justice Black claimed that the aid upheld in *Everson* benefited the children, not religion (however, the reimbursements made it easier financially for parents to send their children to parochial schools, thus obviously indirectly aiding the religiously affiliated schools). A state that conforms literally to the demanding standards of the "wall" metaphor would invariably have problems meeting its obligation under the Free Exercise Clause.

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In *Abington School District v. Schempp* (1963), the Supreme Court, aware of the inherent tension between the clauses, advanced an alternative measure of constitutionality. Holding unconstitutional a Pennsylvania law requiring Bible reading at the start of each public school day (the law excused individual children on written instructions from parents or guardians), Justice Clark, in an 8-1 decision, wrote the opinion for the Court and announced the following test: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[3] This test embodied the *neutrality* theory, proposed earlier by Philip Kurland in his *Religion and the Law* (1962). Concurring in *Schempp*, Justice Brennan demonstrated that the test unsuccessfully tries to mask the inescapable judicial need to balance competing interests so as to accommodate the demands of both religion clauses in the First Amendment. How would the *Schempp* test, for example, resolve the issue of whether the federal government can excuse from compulsory military service those who can show conscientious religious objection, or of whether the government can furnish drafted soldiers with government supported chaplains? Chaplains and exceptions for conscientious objectors surely enhance religion; but if the government were to deny either, would it not confront problems with the Free Exercise Clause, inasmuch as such denials can be construed as inhibiting religious freedom?

In *Sherbert v. Verner* (1963) the Supreme Court did what it had refused to do two years earlier in *Braunfeld v. Brown* [one of the *Sunday Closing Laws Cases* of 1961]: it required a state to make an exception, for individual religious reasons, from an otherwise general application of a secular law. Mrs. Adell H. Sherbert, a Seventh Day Adventist and for 35 years an employee of a textile mills company in South Carolina, was fired from her job when the firm changed the work week to six days and she refused thereupon to work on Saturdays, her Sabbath. She filed for unemployment compensation, but the State Employment Security Commission denied her claim. South Carolina's workers' compensation law denied benefits to insured workers who, without good cause, refuse to accept suitable work when offered by the employer or employment office. Sherbert would not accept such work because it required her to work on Saturdays.

Speaking through Justice Brennan, the Court held that South Carolina had to make an exception for Mrs. Sherbert so as not to violate her Free Exercise rights. Yet, as Justice Harlan complained in dissent, the exception seems to force the state to contradict the Establishment Clause. Indeed, in the *Sunday Closing Laws Cases* of 1961, the Court rejected pleas for religious exemptions from Orthodox Jews for precisely the reason voiced by Harlan. Obviously what had come about was a judicial conclusion that in the absence of overwhelming state need, deeply held religious convictions should be accommodated through exemptions from otherwise valid secular state laws.

In 1968 the Court seemed too accommodative in its decision upholding a New York law requiring school districts to lend textbooks to students of private schools in grades 7 through 12, who were predominantly Catholic school children. This subvention from the state cost New York taxpayers approximately $25,000,000 annually. In a 6-3 ruling in *Board of Education v. Allen* the Court, *per* Justice White, saw this state grant as constitutionally similar to state payment of transportation costs approved by the Court in *Everson* (1947). The rationale, once again, was that the aid was directed toward the children (the "child benefit" theory) and that it did not directly enhance religion. The dissenters, including Justice Black, the author of *Everson*, Justice Douglas, who provided the fifth crucial vote in *Everson*, and Justice Fortas, saw the matter very differently. Buses were inherently neutral, while books constituted an integral part of the educational process. In fact, the books lent under this statutory arrangement were chosen by the private school officials and could have been, and often were, very different from the books selected for students in the public schools. It is true that school board officials were instructed not to lend religiously oriented texts to the the private

schools. But subtle overtones and undertones might make this *proviso* difficult to guarantee; and the difficulty in ensuring such a distinction, as will be shown below, can itself render a statutory scheme unconstitutional.

The presidential election of Richard M. Nixon brought sundry promises to restore the rights of the people, to undo, in other words, some of the Supreme Court's more controversial constitutional decisions. The most arrant ways of the Warren Court, candidate Nixon had said, were its momentous decisions shackling the "peace forces" in favor of criminals. But other contentious holdings irritated the would-be president and the constituency that would elect him to office—for example, the Court's banning of teacher-led Bible reading *(Schempp)* and state sponsored prayer *(Engel v. Vital [1962])* in the public schools. Between 1969 and 1971, President Nixon succeeded in appointing four justices to the Court, thus substantially altering the composition of that tribunal. Some libertarians predicted wholesale reversals or, at least, widespread retardation of the libertarian legacy of the Warren Court. However, the Burger Court, in the area of church-state relations, proved more satisfying to libertarians than had its predecessor—at least during the 1970's.

In *Lemon v. Kurtzman* (1971) the Court ventured another reformulation of the criteria designed to measure constitutional infirmity in this area of constitutional law. Invalidating "parochiaid" packages from two different states, the Court, led by Chief Justice Burger (in 8-0 and 8-1 decisions) developed a "tri-part" or "three-pronged' text that governs today, at least in cases directly raising questions of the separation of church and state: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion."[4] Applying this test the Court struck down direct monetary grants to private schools, including a 15% salary supplement to teachers of secular subjects and reimbursements for the cost of teaching specified secular subjects. The Court agreed that the laws sought to achieve secular purposes, but declined to consider whether the primary effect of the state actions here advanced or inhibited religion, for the Court was convinced that neither law could survive the "excessive entanglement" prong of the *Lemon* test.

The Court reasoned that sectarian elementary and secondary schools are inherently unable to separate the religious from the secular goals that they seek to achieve. State subsidies destined for secular purposes inescapably support the religious mission of these schools. Any attempt to provide state oversight to assure that its aid furthered only secular activities would lead to "administrative entanglement" forcing state agents to make tenuous distinctions as to what was and what was not secular and sectarian. The Court also argued that undesirable "political entanglement" would ensue if such state aid were condoned; annual appropriations would lead to political and electoral divisiveness involving whether and how much aid the state should provide. The prevention of division along religious lines, reasoned the chief justice, was one of the fundamental purposes of the First Amendment.

As Justice White protested in dissent, the Court seemed to be creating a *per se* rule that any aid to sectarian elementary and secondary schools violates the Constitution. The Court did, in fact, distinguish such schools from sectarian colleges and universities where the secular, educational interests predominate over the religious. On the same day as *Lemon* the Court (5-4, but without a majority opinion) upheld a federal grant that had the effect of helping to finance the construction of buildings on four church-related colleges (the Court struck down that part of the statute that would have allowed these colleges to use such buildings for religious purposes after a period of 20 years). This one-shot subvention to religious colleges whose principal mission was secular education, and whose students were mature enough to distinguish between the sectarian and secular, was seen as presenting no problem with the "entanglement" prong of the *Lemon* test.

That the Court seemed inclined toward a *per se* rule is indicated by the incoherence of the "excessive entanglement" doctrine. Because the Court argued that the sectarian cannot be isolated from the secular in elementary and secondary religious schools, *any* state attempt administratively to ensure that its assistance would accrue only to the schools' secular activities would be doomed by "administrative entanglement." The double-barreled assault on state aid to parochial schools would come in the form of the inevitable "political entanglement" that the Court decried as inconsistent with the religion clauses. (It is difficult to comprehend how political entanglement can constitute an independent reason for invalidating state aid to religious schools, especially when the speech and petition clauses of the First Amendment seem flatly to forbid excluding sectarian influence and participation in the political process.)

However, no *per se* rule emerged in practice as the Court, during the 1970's, confronted an assortment of state "parochiaid" packages and seemed willing to accept some forms of assistance as consistent with the Establishment Clause. In the 1980's the Court has been far more tolerant, not just of aid to religiously affiliated schools, but of governmental fostering of religion in general. The Court, however, has been extremely fragmented and without any coherent disposition. Three justices (Brennan, Marshall, and Stevens) seem opposed to all forms of governmental aid; for others (White, Rehnquist, O'Connor, and Burger) appear very permissive as to what the Establishment Clause will tolerate; the remaining two (Blackmun and Powell) occupy the middle ground (though Blackmun has increasingly tended to align himself with the Brennan bloc) and frequently determine the outcome of any given case. Obviously, the dissent rate in this area of constitutional law is inordinately high, even for the Burger Court. Justice White expressed the frustration of the Court when he said in a 1980 decision: "But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country." Reflecting on the approach taken by the Court, he said that it "sacrifices clarity and predictability for flexibility. . . . "

On this advice, no attempt will be made here to discern a coherent rationale reconciling the Court's holdings on aid to religiously affiliated schools. The best that can be gleaned from the Burger Court's troublesome confrontation with this issue is a tabulation of results—that is a statement of what has been tolerated and what has been held unconstitutional. Though by no means exhaustive, as it cannot be here, the following account illustrates the plight of the Court.

The lending of textbooks to private, sectarian schools has been approved on the basis of the Court's holding in *Allen*. But it is difficult to comprehend how *Allen*, decided in 1968, could have survived the three-pronged test of *Lemon* established three years later. Surely excessive entanglement would result from the state's obligation to make certain that no books with sectarian overtones be supplied to students of parochial schools. The Court's answer that lending textbooks might indeed fail *Lemon* but that precedent should prevail only confuses the matter.

In cases decided in 1973 and 1975 a divided Court seemed to make clear that states could not purchase certain secular educational services from nonpublic schools or reimburse such schools for costs incurred in administering examinations and tests, even

though both were expected of the private schools in order to meet the states' educational requirements. However, in 1977 a thoroughly fragmented Court concluded that an Ohio law, costing nearly $90,000,000 over two years, was *constitutional* insofar as it provided to primarily Roman Catholic parochial schools "books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services," but was *unconstitutional* insofar as the law provided for "instructional materials and equipment and field trip services." Justice Powell began his separate opinion with this understatement: "Our decisions in this troubling area draw lines that often must seem arbitary." Again, in 1980 the Court upheld a New York law that provided a direct cash payment to primarily Roman Catholic elementary and secondary schools as a reimbursement for the performance of various testing and reporting services mandated by the state, despite the fact that many of these services such schools would have to undertake anyway for their own internal records. But the Court, in a 5-4 decision, upheld, for the first time, a direct monetary subvention to religiously affiliated schools. The Court did not reverse any prior decisions to reach this result. Yet if it is true, as the Court has insisted, that in such schools it is nearly impossible to separate the religious from the secular missions, such direct financial subsidies will inescapably aid the sectarian purposes of these schools.

In 1973 the Court (6-3) had also made it clear that a state could not help parents of parochial school children through aid in the form of tuition reimbursements or tax credits. The permissive wing of the Court (excluding O'Connor who was not appointed until 1980) thought that such parental assistance was consistent with the Establishment Clause. In 1983, in a 5-4 decision, without reversing the 1973 precedent, the Court found no constitutional defect in a Minnesota law that allows taxpayers in computing their taxes to deduct expenses incurred for "tuition, textbooks, and transportation" in sending dependents to elementary and secondary schools. According to Justice Rehnquist who wrote for the majority, this law was "vitally different from the scheme struck down" in 1973 because the tuition grants and tax credits invalidated in the earlier statute were provided only to parents of children in private schools. Here all parents, "whether their children attended public school or private," can deduct educational expenses. The Court also said that what is involved here is a genuine tax deduction; the earlier invalid law involved a tax credit.

These distinctions, of course, are trivial. As Justice Marshall pointed out in his dissent which was joined by the three other dissenters, for purposes of Establishment jurisprudence the distinction between a tax credit and a tax deduction is a formalism without substance. Moreover, the tax deduction benefit, though on paper available to all parents, was overwhelmingly available only to parents of private school children, 96% of whom attended sectarian schools. Marshall was also able to establish that "Fewer than 100 of more than 900,000 school-age children in Minnesota attended public schools that charge a general tuition."

Of the majority of justices who in 1973 had held invalid New York's tax credit scheme, only Justice Powell switched and joined the permissive wing of the Court, the justice who earlier had expressed his concern about the appearance in Establishment law of "arbitrary" lines. The permissive wing has been fortified with the presence of Justice O'Connor, creating a fairly cohesive bloc of four justices willing to tolerate much in the way of state aid to religiously affiliated schools. In the 1980's the fifth vote seems increasingly more available from Justice Powell who, in the 1970's, was disposed rigorously to enforce the *Lemon* tri-part measure of unconstitutionality.

In 1984 the same 5-4 alignment of justices upheld the city of Pawtucket, Rhode Island's public use of a creche, or Nativity scene, in its annual Christmas display—something the city had been doing for 40 years. The narrow majority insisted that the Nativity scene here must be judged in the context of the Christmas holiday season rather than in isolation, as a purely religious activity. The city's action was treated as one promoting a secular purpose inasmuch as it was promoting the Christmas holiday season. The creche was seen as merely "a passive symbol" included among reindeer, snowmen, and Santa Claus, the traditional secular ingredients of a Christmas display. No excessive entanglement and no effect of furthering religion could be seen by the majority.

The dissenters, of course, saw differently, recognizing the creche as sym-

bolizing a specific Christian message that cannot be mistaken despite the fact, so important to the majority, that the creche was displayed amidst an otherwise secular celebration. Justices Blackmun and Stevens objected to the Court's denigration of the religious message of the Nativity scene. They also concluded, as did Justices Brennan and Marshall, that the holding is clearly inconsistent with precedent. Though Chief Justice Burger, who wrote the Court's holding, purported to apply the *Lemon* test (incorrectly, according to the dissenters), he made a curious remark indicating that perhaps a majority of justices no longer consider *Lemon* controlling. He said there is "no fixed, *per se* rule" under the Establishment Clause and that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensistive area." In some cases, he said, "the Court did not even apply the *Lemon* 'test.'" Is a majority of justices, then, preparing to move away from the stringent test that, for almost fifteen years, prevailed as the governing criterion (despite the incoherent arrangement of results reached by the Court)? Certainly the addition of Justice O'Connor to the Court and Justice Powell's more accommodative disposition increase the likelihood of decisions more tolerant of governmental involvement in religious activities—regardless of whether the Court adheres to or discards the *Lemon* test.

The Burger Court has been sensitive to Free Exercise claims, holding in a 1981 case similar to *Sherbert* (1963) that a state cannot deny unemployment compensation to a Jehovah's Witness who had quit his job because of deeply held religious beliefs. Only Justice Rehnquist dissented. Nearly a decade earlier a unanimous Court agreed with members of the Old Order Amish religious sect in Wisconsin who argued that they have a Free Exercise right to refuse to send their children to high school despite a state law requiring children to attend school at least until age 16. Chief Justice Burger, who delivered the opinion of the Court, recognized "the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." But the Free Exercise Clause must be respected as well, he said, clearly demonstrating the difficulties embedded in the tension between the two religion clauses.

The Supreme Court has been heavily involved in the shaping of the public law of the separation of church and state. As religion in the 1980's has become an increasingly visible and powerful force in the American political system, it is no coincidence that issues involving the separation of church and state remain very prominent and continue to find their way to the nation's highest tribunal. The 1984-85 Term of the Supreme Court had a docket in which religion questions predominated. The Court agreed to hear seven cases raising Free Exercise and Establishment questions, a record number of church-state cases for any one year. In one the Court unanimously rejected the claims of a Christian evangelical group that it had a Free Exercise right to refuse to pay minimum wages, in violation of federal law. to members who worked in the group's hog farms and automobile repair shops. Another involved the highly publicized case from Scarsdale, New York, where the question was whether a city can forbid a private group from erecting a creche in a public park. Hospitalized during oral argument in this case, Justice Powell did not participate, and the Court split 4-4, thus failing

to resolve this issue, instead leaving intact a lower court decision that seemed to require, though in the most ambiguous language, the city to accommodate the demands of the private group. One can only speculate about the line-up of the justices, but a good indication of where they stood might be found in the division of the Court in the first Nativity scene case discussed earlier.

Another case, as of this writing still undecided, involves a "parochiaid" package from the city of Grand Rapids, Michigan, which has been copied in more than 18 other school districts in the state. Under this arrangement, public school teachers go into private schools (the great majority of them Roman Catholic) and teach remedial and enrichment courses to the students. All religious symbolism is removed from the classrooms in which these courses are taught, and the instructors have been told not to discuss any religious subject. Under this scheme the private school students receiving this instruction are called "part-time public school students". A lower court invalidated the program, and the Supreme Court agreed to hear the appeal of the Grand Rapids school district. The Court could avoid the substantive issue altogether, because there is some question here as to whether taxpayers who challenge this aid package have the requisite "standing to sue." Should the Court reach the substantive constitutional issue, it surely will be divided and very likely in favor of the aid to the private schools, with or without the *Lemon* test.[5]

Alabama Governor George C. Wallace brought a case to the Court seeking to defend his state's adoption of a voluntary "moment of silence" at the start of each public school day. (The state also had a law requiring public school instructors to lead willing students in a devotional prayer, but the Court let stand a federal appeals court's declaration that the official prayer was unconstitutional under *Engle v. Vitale* [1962], discussed earlier.) An attorney filed suit on behalf of his three minor children, claiming that his children were exposed to ostracism from their peers when unwilling to participate in the moment of silence. In early June the Court (6-3) invalidated the "moment of silence" law only because, said Justice Stevens for the majority, Alabama's law stated that the moment could be used for prayer; he seemed to make it clear that other moment of silence laws would survive as long as there is no official statement that the "moment" could be used for silent prayer.

The constitutionality of a Connecticut law is pending before the Court, a law that requires *private* employers to respect *any* sabbath of their religious employees with a day off from work. Connecticut is demanding of private employers something that the Court has not yet required of the states themselves under the Free Exercise Clause. In still another case, the Court once again split (4-4) this time on whether Nebraska can constitutionally require photographs on drivers' licenses issued by the state against a sincere religious aversion to "graven images" held by a licensed Nebraska driver. As in the Amish case and *Sherbert,* tension between the religion clauses is present here; the test that the Court used in those earlier cases was whether the state's requirement is needed to accomplish a compelling state interest. It is difficult, given prior cases and this test, to see how the Court could have ruled in favor of the state of Nebraska. However, the Court was evenly divided, and it is not difficult to surmise, given the polarization of the present Court, how individual justices voted in this case.

In addition to the immediate parties to these current lawsuits, some 34 different interest groups have submitted "friend of the court" briefs lobbying heavily in favor of their views. The Reagan Administration has supported religion in all of these cases except the Nebraska license case. When the Court has resolved these difficult issues, it will have once more, fashioned important public policy for the country. Typically, the judicial resolutions handed down will provide the legal bases of still more constitutional law cases that courts will have to settle in the future. For example, the Court has already agreed to review three more religion cases during its 1985-86 Term. One case involves the question whether states can deny welfare benefits to otherwise eligible recipients who refuse, on sincere religious grounds, to supply a social security number. Another case concerns the right of a Jewish Air Force captain who was prohibited from wearing a yarmulka on base. The third case involves the sensitive area of federal authority to compel physicians and hospitals to provide medical treatment to severely deformed babies in which parents choose to withhold such treatment. The Court will inevitably become embroiled once more in the task of fashioning public policy in this immensely difficult and controversial area of constitutional law. Having found a prominent place in the politics of the 1980's, religion, not accidentally, has become a major concern of the judiciary.

Postscript

After I completed this essay and delivered it to the editors, the Supreme Court decided the three major religion cases remaining in the 1984 Term. In *Estate of Thornton v. Caldor* the Court, over the lone and unelaborated dissent of Justice Rehnquist, held unconstitutional Connecticut's controversial law requiring employers to honor any Sabbath of any of their employees. The Court discerned a violation of the *Lemon* test in that it saw the state law as having the primary effect of impermissibly advancing a particular religious practice.

The last two rulings — *Grand Rapids School District v. Ball* and *Aguilar v. Felton* — provoked outrage within the Reagan Administration and among conservatives in Congress. Secretary of Education William J. Bennett criticized as "terrible" and as showing a "fasti-

dious disdain of religion" the Court's invalidation of the "parochiaid" package from Grand Rapids and New York City's use of federal funds for a program in which public remedial education teachers were sent into parochial schools. Writing for a badly fragmented Court, Justice Brennan, once more applying *Lemon*, found that the Grand Rapids program had the principal effect of advancing religion and that the New York scheme resulted in excessive government entanglement with religion. Supporters and opponents of the Court's conclusions agreed that the Court's word on the subject would not be the last.

[1](New York: Oxford University Press, 1982), p. 223.

[2]330 U.S. 1, 15-16 (1947).

[3]374 U.S. 203, 222 (1963).

[4]403 U.S. 602, 612-13 (1971).

[5]A federal aid package, similar to that from Grand Rapids, awaits a decision from the Court. It involves a provision of Title I of the Elementary and Secondary Education Act of 1965.

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Civility & Civil Rights

The Art of Disagreeing Without Being Disagreeable

William J. Conner

Since its founding in 1957, The United States Commission on Civil Rights has grappled with the tough issues. Inevitably it has been at the center of controversy over such tough nuts as minority voting rights, school desegregation, affirmative action, fair housing, and equal opportunity. It has functioned as the conscience of the Federal government, not by operating programs of its own, but by monitoring the way the laws and policies of the Federal Government are carried out "with respect to discrimination or denials of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin or in the administration of Justice" (Sec. 104 (a) (3), Civil Rights Act of 1957, 42 U.S.C. 1975; United States Commission on Civil Rights Act of 1983, Sec. 5(a) (3)). It has also monitored the activities of State and local governments and of private groups that have created such discrimination in voting, education, housing, employment, the use of public facilities, and transportation.

The Act provides that the Commission shall appoint "at least one Advisory Committee within each State" (1953 Act, Sec. 105 (c); 1983 Act, Sec. 6(c)). In Delaware the Advisory Committee has submitted reports to the Commission on such topics as The Policy and the Minority Community in Delaware (1970), The Delaware Prison System (1974), The Working and Living Conditions of Mushroom Workers (1977), Metropolitan School Desegregation (1981), and Migrant Farmworkers (1983). Most recently the Delaware committee sponsored an all-day conference on November 19, 1984, concerning the Status of Civil Rights in Delaware, at which Mary Frances Berry of the U.S. Commission was the featured speaker.

The Struggle Over New Directions

This brief description suggests the struggle conducted by the Commission and its 51 Advisory Committees (all states and the District of Columbia) with difficult and controversial issues. Since 1981, however, a parallel struggle within the Commission and in the Congress, the Administration, and the press has revolved around the makeup of the Commission, the powers of the President to appoint and remove members, the role of the Commission, and the renewal of its statutory mandate. The Advisory Committees have also been caught up in this controversy, and *their* role structure and membership have also been re-examined.

Appointment and Removal

The first battle arose over the question of removal of long-time Commission Chairman Arthur S. Flemming, a vigorous and outspoken leader, a former Secretary of Health, Education and Welfare. The 1957 Act provided that members of the Commission should be appointed by the President subject to confirmation by the Senate, with the President designating the Chairman and Vice Chairman. No mention of removal of a member was included. President Reagan, holding more conservative views on many of the issues before the Commission, pressed for a new Chairman, and in 1982 appointed Mr. Clarence M. Pendleton, Jr., of San Diego to replace Dr. Flemming.

In the summer of 1983, the Administration announced three new nominations to the Commission. In October, the President moved to terminate the appointments of three sitting Commissioners, but a Federal court ordered two of them reinstated on the ground that the Commission as an independent agency, was not subject to Presidential control.

Reauthorization and Restructure

The battle then raged around congressional reauthorization of the Commission. Its authority was to expire on September 30, 1983, but the Congress and the President were at odds over the makeup and the powers of the Commission. Following a temporary extension to November 29th, the authorization expired, leaving the Agency in limbo until a compromise was finally struck, resulting in passage of the 1983 Act, which was approved by the President on November 30.

Senator Joseph Biden of Delaware, ranking Democratic member of the Judiciary Committee, and Senator Arlen Spector, Republican of Pennsylvania, played leading roles in negotiating the compromise that preserved the Commission. Senators Dole, Laxalt, and Thurmond represented the Administration's views. At one point, it appeared that the Congress might recast the Commission as an agency of the Legislative Branch, comparable to the Controller General's Office or the Office of Technology Assessment, but that prospect was not agreeable either to the Administration or to many of the Congressional proponents of the Commission; hence, a hybrid structure was created.

The bill as passed provided for eight members of the Commission rather than six. Four are appointed by the President, two by the President pro-tempore of the Senate, and two by the Speaker of the House of Representatives. Not more than four can be of the same political party. The Congressional appointees must be recommended by the Majority and Minority leaders of each house. The President designates the Chairman and Vice Chairman. An important addition was the provision that "the President may remove a member of the Commission only for neglect of duty or malfeasance in office" (Sec. 2(d)).

The President's brief message upon signing the bill (H.R. 2230) noted the controversy surrounding the Commission and the statute, and expressed his conviction that "With the bill I have signed today, and the quality of the appointments that can be made to the Commission, there is cause for confidence that the Commission's best years

are yet to come." He appended a short statement by the Department of Justice noting that, since half of the Commissioners are appointees of the Congress, the Commission is not clearly within any one of the three branches of government created by the Constitution, and its members are not "Officers of the United States" under the Appointments Clause of Art. II, Sec. 2 of the Constitution. The statement observed that, therefore, while the Commission may "continue to perform investigative and informative functions, it may not exercise enforcement, regulatory, or other Executive responsibilities that may be performed only by officers of the United States." Justice further observed that agencies that do not fit into our tripartite system should not be created, and that this unique agency should not become a precedent for the creation of similar agencies in the future. Justice also objected to the limitations on the right of the President to appoint and remove "Officers of the United States" as impermissably diluting his powers.

It would not appear that the reservations expressed by Justice will have any practical effect upon the new Commission, since like the old it is concerned with investigating and with recommending action. It is noteworthy, however, that Sec. 6(i) (1) continues the power granted the old Commission under Sec. 105(i) of the 1953 Act "to make such rules and regulations as are necessary to carry out the purposes of this Act."

Personnel of the New Commission

President Reagan reappointed Clarence Pendleton as Chairman and appointed Esther Gonzoles-Arroyo Buckley of Texas, Morris Abram of New York, and John Bunzel of California as members. The House Minority Leader named Robert Destro of Catholic University Law School in Washington, D.C. The Majority Leader named Mary Frances Berry of Washington, D.C., who has served as a member and as Vice Chairman of the previous Commission. The Senate Minority Leader named Blandina Ramirez, also a member of the previous Commission, and the Majority Leader named Frances Guess, Commissioner of Labor of Tennessee.

The 1957 Act had provided that the Staff Director for the Commission should be appointed by the President "after consultation with the Commission" and with the advice and consent of the Senate. The 1983 Act stipulated appointment by the President "with the concurrence of a majority of the Commission." The President appointed Linda Chavez (Gersten) in April of 1983, and she was re-appointed under the new statute. She was named Director of Public Liaison at the White House on April 9, 1983, and Max Green became acting Staff Director on April 22. Mark Disler, who had been brought by Ms. Chavez from the Civil Rights Division of the Justice Department to be General Counsel of the Commission, returned to Justice as Deputy Assistant Attorney General for Civil Rights upon her departure for the White House he was replaced as General Counsel by James Mann.

Still another variable in the new equation has been provided by the Chairman, Clarence Pendleton. His views on civil rights can only be described as radical, and are distinct from those of the other Commissioners. He insists that race plays no significant role in our society, but is merely a matter of "pigment"; that minority advancement depends wholly on individual initiative and hard work; and that it is racist to call for preferential treatment for minorities. In addition to pressing these views, he has also taken a political position against the nation's black leadership, accusing them of leading blacks into a "political Jonestown", and has assailed

The majority of the new members of the Commission brought a new perspective to the Commissioner's role, and indeed to what should be regarded as civil rights meriting the Commission's attention and protection.

Changing Priorities

The majority of the new members of the Commission brought a new perspective to the Commissioner's role, and indeed to what should be regarded as civil rights meriting the Commission's attention and protection. One theme has been that not every economic disadvantage suffered by minorities or women is a civil rights issue. Another is that affirmative action involving quotas is reverse discrimination, and should not be employed. A third is opposition to busing as a cure for school desegregation.

These perceptions have led the majority to a new view of the Commission's role. Instead of investigating the activities of Federal and State government, the Commission turned to conducting research and convening conferences on comparable worth*, segregation in housing, redistricting as it affects voting rights, and access to public facilities by the handicapped. These are serious efforts to come to grips with important civil rights issues and to provide an opportunity for fair debate. The new Commission approaches the issues, however, from a perspective much closer to the current administration's position than did the prior Commission.

* *See the Peterson-Purzycki debate in DELAWARE LAWYER, Spring 1985.*

the doctrine of comparable worth as "the looniest idea since Looney Tunes."

Some have accused him of being a "Stepin Fetchit", carrying water for the Reagan administration's efforts to dismantle civil rights. Pendleton insists that he is merely expressing his convictions, and that he happens to share these convictions with the President.

Pendleton's views are shared to a degree by Linda Chavez, who was Staff Director until her recent move to the White House. She testified with Pendleton on the merits of the Civil Rights Act of 1984 and on efforts to reverse the *Grove City* decision of the Supreme Court, and participated with him in the press conference in which comparable worth was treated with derision, even though the Commission itself had not taken a position on the issue.

New Roles for the State Advisory Committees

State Advisory Committees (SACs) established under the previous Commission had ranged in size from 11 to 29 members. They had engaged in a wide variety of activities, and their range of concerns had reflected the latitudinal conception of civil rights held by the earlier Commission.

In April, 1984, Ms. Chavez wrote all of the SACs advising them that the Commission had mandated several changes. It had decided to reduce the size of all

SACs to 11 members, and to have them meet at least once each quarter, rather than a minimum of twice a year. It also ruled that reports generated by the SACs would not be published until they had been reviewed and approved *by the Commission itself,* instead of its staff. Release before Commission approval was prohibited.

SACs were also advised that statements by SAC members as such outside of established channels would result in their removal.

These strictures were received by many holdover SAC members with consternation. They had been appointed and had operated under different premises, and they were perturbed not only by the new procedures but by the more limited view of what constituted "civil rights" adopted by the new Commission. They were particularly indignant over the claim that the Commission lacked jurisdiction to concern itself with many of the issues which had previously been dealt with by the SACs.

One of these issues was treatment of migrant workers. Studies and hearings had been pursued in 1982 and 1983 in Virginia, Maryland, and Delaware concerning treatment of migrant farm workers. Grave deficiencies had been identified in housing, sanitation, health services, working conditions, pay, and education. The Maryland report had been completed and published in June, 1983, but the Delaware and Virginia reports were both still undergoing final editing when the new strictures were adopted by the Commission.

The new General Counsel ruled that the Commission lacked jurisdiction over the concerns of migrant workers because they were not a protected group identified in the statute. The SACs pointed out that the migrants were predominatly of minority races and color, and that they were being denied equal protection of the laws *vis a vis* the permanent residents of the states involved. The Commission staff remained unmoved.

The SACs then protested that the refusal to release the reports not only undid the results of several years of effort, but prevented the SACs from advising their state and local authorities about conditions that they might remedy. Considering the amount of staff time and effort devoted to generating the reports, this was undesirable.

With support from some of the Commissioners, a compromise was finally found. The reports would not be approved by the Commission and would not be printed. However, the SACs would be authorized to release them and to discuss them with State and local authorities on condition that they bear a notation that the Commission has not approved or endorsed them, and had found no violation of Federal civil rights laws. The SACs are now free to press for remedial action at the State and local level. A meeting with Delaware Secretary of Labor Matthew Fallis has already taken place.

Meanwhile the Commission staff was reviewing the membership of the SACs and reducing their size to 11 members. By the spring of 1985, nearly all of the Chairmen had been replaced and a number of new faces appeared on the Committees.

The Delaware State Advisory Committee

Since 1983 Horacio D. Lewis of Newark had been Chairman of the Delaware SAC. In August, 1984, he resigned because of disagreement with the policies of the new Commission and also released the text of the draft migrant workers report, then still being reviewed by the Commission staff. Mrs. Shirley Horowitz was appointed Acting Chairperson in his place, and she organized and moderated the November, 1984 *Conference on Civil Rights in Delaware.* In November, the writer was named Interim Chairperson, and in May, 1985 became Chairperson of the reconstituted Delaware Committee.

Holdover members of the Committee were Emily G. Morris, elected Prothonotary of Kent County, and Dr. Glover A. Jones, senior research chemist at the DuPont Company and a longtime civil rights leader. Newly appointed were Jan Blits of Newark, an assistant professor at the University of Delaware and author of articles on education and children's rights; Robert G. Carey of Wilmington, counsel to the governor between 1972 and 1974, a former chairperson of the Delaware Agency to Reduce Crime; Ralph A. Figueroa of Dover, member of the Governor's Council on Hispanic Affairs and a Delaware Department of Labor counselor to migrant workers; Blanche M. Fleming of Wilmington, a commissioner on the Delaware Post-Secondary Education Commission and on the Governor's

Title VI Advisory Commission; Henry A. Heiman of Wilmington, a practicing attorney and co-chairman of the Anti-Defamation League of B'nai B'rith of Delaware; Glen Dale Weston of New Castle, the manager of EEO and special Programs at Hercules; Lynn D. Wilson, a law clerk for the Superior Court of the State of Delaware and a Delaware task force member for the White House Conference on Families; and Raymond Wolters of Newark, a professor of history at the University of Delaware.

At their organizing meeting on May 20, 1985, the reconstituted Committee released the Migrant Workers Report, and authorized the Chairman and members Morris, Jones, and Figueroa to present the Report to Delaware officials with an oral update. The Committee also gave some direction to completing the report on Civil Rights in Delaware and set its next meeting for September.

Civility And Civil Rights: A Reprise

What is the outlook for the Commission and its Advisory Committees in the light of this history? Commissioner Mary Frances Berry in *The Nation* for February 2, 1985, took a pessimistic view, saying that she regarded the new Commission as politicized and an apologist for "the Administration's retreat on civil rights protection." Many other critics deplored Chairman Pendleton's role, characterizing him as a hatchet man attacking the nation's black leadership.

More recently the waters have appeared somewhat calmer. The Commission seems to be meeting more regularly and dealing with issues and studies, including taking a 5 to 2 position against the doctrine of comparable worth, and endorsing by a split vote a partial legislative reversal of the *Grove City* decision. The departure of Ms. Chavez as Staff Director may reduce complaints about the high public profile she had assumed.

Chairman Pendelton seems also to have moderated his rhetoric. While he says President Reagan has expressed complete satisfaction with Pendleton's articulation of the issues, he has nevertheless indicated he will do more listening and less talking so that the emphasis will be on the issues instead of him.

At the State Committee level, the appointment of new members and chairpeople will doubtless lower the controversy to some extent. The decision to release some of the impounded SAC reports will also reduce frictions.

Some feel that the more restricted role adopted by the new Commission represents not just the conservatism of the current Administration, but is also a reflection of the fading of the national consensus on civil rights in the 1960s and the splintering of views among former supporters of the civil rights movement. If this be true, there may be hope in the fact that the new Commission is biting off smaller chunks of the problems and chewing them harder, and that a new air of civility seems to be creeping into the discourse, both within the Commission and without.

Professor Bill Conner is one of those protean and multi-talented figures whom it is possible to envy, but impossible to dislike. The key word in the title to his article is the key to the man. His ability to get along with and to understand those whose views he many not share have made him extremely effective in public and private life for over forty years. After twenty years as an attorney with the Dupont Company he became the first elected County Executive of New Castle County and held that post with distinction for six years. He next performed a varied service for the Federal government. Since 1977 Bill has been a professor of law at Delaware Law School of Widener University. As the current Chairman of the State Advisory Committee to the Civil Rights Commission, he continues to practice the diplomacy that makes government work.

Politics, Sentiment, Disinvestment and South Africa

(An Inquiry into Pious Chutzpah)

Robert J. D'Agostino

Like the chants of primitives to a rain god, the cry for disinvestment* as the "cure" for South African apartheid is heard in the land. And like a primitive chant, little thought and much emotion accompanies the cry. It is as if good intentions are an acceptable substitute for thought, analysis, and wisdom.

Disinvestment, divestment, or social investing is a means urged upon pension funds, university endowments, and governments to influence events by withdrawing investments or refusing to invest in businesses that follow disapproved policies or do business in disapproved countries. Today South Africa is the target and apartheid is the disapproved policy.

Disinvestment policies may be pursued by individuals, private and public pension funds, university endowments, state and local governments, and the federal government. An individual is free to press his views, control his investments, and make whatever gestures for which he is willing to take the consequences. The federal government is responsible for foreign policy, and consistent with Constitutional authority, the legislative and executive branches may well decide on a mandatory disinvestment or restricted investment policy.

In the context of affecting the internal affairs of South Africa, an individual's disinvestment decisions are most certainly unproductive; for the Congress to mandate disinvestment is unwise, unproductive, and of dubious morality; for the others, disinvestment is probably illegal, unconstitutional, unproductive, and immoral.

The Constitution leaves the conduct of foreign policy exclusively in the hands of the federal government. An effort to sever American economic involvement with those foreign nations has potentially significant impact on relations with target countries. Since disinvestment statutes aimed at South Africa currently in place in Connecticut, Maryland, Massachusetts, Michigan, Nebraska, and about fifteen municipalities interfere with the conduct of foreign relations, they probably violate the Supremacy Clause.

In addition, state and local divestment acts interfere with commerce. The test to determine the constitutionality of that interference is whether a state statute, on balance, promotes legitimate local concerns without interfering unduly with national concerns. Divestment does not promote local economic concerns, since it does not reflect concern for the stability of the investments; rather it purposely interferes with foreign and interstate commerce.

Aside from Constitutional challenge, a trustee who sacrifices the beneficiary's financial well-being for any social cause violates both his duty of loyalty to that beneficiary and the prudent investment standard. A trust must be administered solely in the interest of the beneficiary. The Employee Retirement Income Security Act (ERISA) codified these duties of loyalty and prudent investing in its sole interest and exclusive purpose rules. (As ERISA does not apply to state and local pension plans, they, not private plans, are the initial targets of the divestment lobby.)

Whether a disinvestment policy is moral involves two issues. First: Is withdrawal from countries whose internal policies we disapprove more or less likely to bring about the change desired? Is responsible involvement really **immoral?**

For example, U.S. companies were the first to bargain with black labor unions in South Africa. They generally are signatories to the Sullivan Principles, which provide for black-white equality in employment, and are leaders in offering educational opportunities to blacks. Withdrawal from South Africa will most assuredly harm the very persons advocates of divestment claim they wish to help.

Given such facts, it is most certainly wrong to call responsible investment immoral. It is more logical to call it **moral** because it is a more effective way to influence policy and because it demonstrably enhances life.

The second issue: Who is setting the social investment agenda and who is paying the price? Many divestment proposals are directed at pension funds, not in order to further the interest of pensioners, but in disregard of their interests. By taking advantage of the separation of ownership and control, pressure groups attempt to politicize the investment process. The adoption of a political investment strategy carries with it the risks of lower returns on investment and a higher investment risk. Is it moral to ask the elderly to surrender retirement income? When people are directly confronted with adopting social or divergent investing voluntarily, they generally refuse. Stockholders routinely vote no on motions to withdraw investments in South Africa; the mutual funds that limit investments to "socially responsible" companies are small.

In responding to pressure for Harvard to divest stock, President Derek Bok discussed the proper role of a university and the importance of its remaining as free from outside political pressure as possible. Is the threat to academic integrity posed by the advocates of divestment moral?

The issue of disinvestment is, of course, most closely tied to South Africa. The claimed moral underpinning for a policy of disinvestment is as an anti-apartheid policy. A discussion of disinvestment's morality is inexorably tied to whether it will be productive, that is, whether it will have its intended effect upon South Africa.

Although Congress has not passed a disinvestment bill, the House and the Senate have both passed anti-apartheid

*See the excellent monograph published by The National Legal Center for the Public Interest, "Disvestment: Is it Legal; Is it Moral; Is it Productive?" (Washington, D.C.).

bills, which taken together would forbid loans to the South African government, restrict new investments, and restrict the importation of Krugerrands and the exportation of computers.

I recently testified before the Subcommittee on International Finance and Monetary Policy of the Banking, Housing, and Urban Affairs Committee on Senator Edward Kennedy's anti-apartheid bill (S. 635), which would have given the president authority to waive the prohibitions and restrictions of the Bill, subject to ongoing Congressional debate and approval. I was privileged to engage in a lively exchange with Senators Heinz, Sarbanes, Sasser, and Proxmire as to whether the various bills "To express the opposition of the United States to the system of apartheid..." would indeed influence the internal policies of South Africa in the directions intended.

The goals of our attempt to influence the internal affairs of South Africa are two: (1) to maintain a government friendly to the United States and the Western alliance; (2) to have a government built upon the principles that made the West great, that is, respect for the individual and liberty. How best might we achieve these two ends?

Certainly the United States can influence the internal affairs of other countries for better or for worse. The United States often and inadvertently influences the affairs of nations for the worst. One only has to look at what the past administration did in Iran and compare the Shah's regime to Komeini's. Contrary to some popular opinion, the United States was supportive of the Sandinista takeover of Nicaragua, and although some would still argue that the Somoza regime was worse, those are becoming an increasingly small minority. Regardless of whether you agree with the foregoing, the point is that if the United States is not careful, it may influence matters for the worse, not the better. There is an old saying about how the wise must undue the damage done by the good.

It is quite apparent that the system of apartheid in South Africa violates those very principles that the West is founded upon. It is a totalitarian system, neither the most brutal nor the most complete existing in the world, but nevertheless a totalitarian system. It is certainly not a unique system, although based upon race. Many of the governments, particularly some of the neighboring governments to South Africa, have political systems based upon the authority of one tribe over another, which is no less racism nor ethnocentric repression than the South African system.

It is a truism that what brings unrest is change. Things are getting better for the black population of South Africa and all the statistics show that is so. Between 1970 and 1979 the wage gap between white and black narrowed in all economic sectors, including mining, industry, construction, retail trade, banks, insurance, and the government. In the mining industry whites earned twenty times the salary of the blacks in 1970, but by 1979, whites earned less than seven times as much. Real wages for blacks tripled between 1970 and 1979. In some of the professions the advancement of blacks and other non-whites in South Africa has even been more dramatic. In 1979 blacks in the medical profession were earning around 75% of the white salaries. It is no coincidence that in the same time that the blacks have made great gains, three things have been ocurring. One, American companies, signatories to the Sullivan Principles, have been equalizing work conditions and demonstrating in a graphic way that blacks can accept the responsibility and do the work that whites can do. Second, up until recently, the South African economy was a boom economy with a severe shortage of white skilled workers. Previously restricted professions and job classifications were suddenly open to blacks because of the economic necessity or because of the growth of black employee unions. Third, South Africa has been denationalizing many industries, shifting decision-making to businessmen cognizant of competition from managers beholden to politicians.

South Africa is a country divided against itself. Economic liberty and a totalitarian system cannot co-exist. The increasing economic power of blacks along with reforms largely pioneered in American companies must inevitably lead to the end of apartheid. What will come after is the real issue. It is the economic involvement of the United States and the growing economic strength of the blacks that has led to their increased power and to the recent concessions by the South African government.

As Aaron Wildavksy pointed out in a very interesting article in the Spring 1985 issue of **THE PUBLIC INTEREST,**

"Experience showed that our intellectual ability to measure failure was far greater than our collective capacity to cause success by altering human behavior." Again, commenting on the lessons learned from public policy research, Dean Wildavsky stated, "'Steady as she goes' may not be as glamorous as 'full speed ahead', but it is protective of mankind's modest capacity for virtue disciplined by intelligence." Most certainly experience has taught us and the research bears out that "there is little knowledge about how to transform institutions overnight except by force, and none of how to cope with the consequences."

Disinvestment is a bad idea. Even though the anti-apartheid bills that have passed only merely restrict investment, they are bad bills. They will be counterproductive. The United States just does not have as much economic clout as the bill implicity assumes. Substitution effects will make up for any product boycotts, whether for computers or anything else. The South African economy has substantially slowed, so reduction in American investment is economically meaningless; there already has been a significant reduction in American investment. In fact, the past is a guide to the future, *increased* American investment is more likely to end apartheid than is decreased investment. Bills like S. 635 would make South African internal policies a question of continuing debate in the United States Congress with that Congress exercising implicit supervisory authority over South Africa as it approves or disapproves every policy change. The United States is inviting the South African government to dig in its heels with such a bill. In so far as these restrictions would hurt the South African economy, it would put the very people out of work that we are intending to help. I don't believe in putting a man out of work and allowing that man's family to go hungry so that some abstract and high moral principle may be upheld, especially since those demanding the gesture will not have to take the consequences.

Conclusion

The Federalist Papers were written to convince the American population of the closing decades of the 1700's to support a U.S. Constitution. A bunch of farmers and small merchants debated ideas contained in some of the finest political tracts ever written. If we are truly concerned with issues of human rights, and human values, then we must put an end to the grandstanding, expose the secret agendas, stop sloganizing as a substitute for thought, and apply reasoned analysis based upon stated goals. If we do so, the issues of apartheid and the U.S. relationship to South Africa will come into perspective and might even be handled rationally.

Robert D'Agostino, a long-time editor of this magazine (and a frequent contributor) recently testified before the United States Senate on the vexing topic of corporate investment in South Africa. An almost solitary voice of calm in the febrile chorus of indignation occasioned by apartheid, Bob is not easily mistaken for a limousine liberal.

Judge Weinstein and the Agent Orange Case

Remarks by Grant B. Hering at the Delaware State Bar Association Luncheon in Wilmington on November 26, 1984

The following article is a reprint verbatim of a speech given at the luncheon meeting of the Delaware State Bar Association held last November. The speaker, Grant Hering, a litigation partner in the New York firm of Cadwalader, Wickersham & Taft, has generously permitted DELAWARE LAWYER to reprint his remarks, which we think will be of unusual interest to our readers, given the complexity, magnitude, and public concern peculiar to the litigation he describes.

Grant is a native Wilmingtonian. His brother, George, is a partner of Morris, James, Hitchens and Williams.

Thank you Tom (Hunt). It was a real surprise and pleasure to be in the trenches this past spring on the Agent Orange case with you and Maynard Turk.

This was one of those cases that, like the war giving birth to it, left its mark on every participant. As you may recall, a $180 million settlement was reached at about 3 A.M. on the day the trial was to begin, May 7th of this year.

The class action case began in February 1979 with the filing of a 162-page complaint in the Eastern District of New York on behalf of named and unnamed Vietnam veterans and wives and children charging the Government and a major portion of the chemical industry with deaths and dreadful injuries as a result of exposure to a herbicide called Agent Orange.

The name comes from the orange band painted on the drums containing this particular mixture, which consisted of 50% 2-4-D and 50% 2-4-5-T, each a domestic herbicide in use for many years. The 2-4-5-T had trace amounts of dioxin, referred to throughout the case by plaintiffs as "the most toxic chemical known to man." The trace amounts were from 1-2 PPM to 15 PPM. Other agents named Blue, White, Purple, Green and Pink were used but the case centered on Agent Orange. The spraying occurred from 1962-1970 at a rate of 3 gallons per acre vs. 1 gallon per acre for domestic herbicide use. Overall, between 17-19 million gallons were used and it was estimated that 36% of mangroves, 10% of forests, and 3% of cultivated areas were sprayed — overall 8-10% of Vietnam. An irony is that our soldiers wanted and welcomed defoliation at the time and studies have estimated that 50,000 lives were saved by ridding the combat areas of foliage.

The veterans claimed that dioxin caused chloracne (a skin disease), various forms of cancer including soft tissue sarcoma, porphyrin cutanea tarda (a liver condition), miscarriages to wives, and birth defects to children.

Plaintiffs sued on theories of strict liability, breach of warranty, intentional tort, and negligence.

All told, about 600 cases filed in state and federal courts were transferred by the multi-district panel to the Federal Court in Brooklyn where the class action was filed. The plaintiff class was variously estimated to be between 20,000 and 100,000 with the best guess being in the 30,000 range. The damages claimed were close to unimaginable.

As difficult as the case was from a factual and legal point of view, the deeply charged emotions that engulfed the litigants made it unique. No one can improve on Judge Jack Weinstein's eloquence in his 358-page opinion 60 days ago upholding the fairness of the settlement following hearings in five cities across the country:

"In listening to hundreds of witnesses around the country and reading the poignant letters of many veterans, their wives and parents, a repeated refrain makes it clear that more than money is at stake. The veterans feel that out of love of country they went to its aid and fought bravely in a brutal war. In return, they believe, they were sprayed with chemicals that insidiously are destroying them. They were vilified by their countrymen on their return because the war became unpopular. Their perception is that they are denied proper treatment by the Veterans Administration to the point where many of them shun the VA's medical and other facili-

ties. Their families suffer as they waste away. And, perhaps even more important, they fear that they have been damaged genetically so that many choose to have no children or live in the despair of having sired children with birth defects who may spread this genetic damage to future generations."

"Vietnam veterans and their families desperately want this suit to demonstrate how they have been mistreated by the country they love. They want it to give them the respect they have earned. They want it to protect the public against future harm by the government and chemical companies. They want a jury 'once-and-for-all' to demonstrate the connection between Agent Orange and the physical, mental and emotional problems many of them clearly do suffer."

The case can be divided into two time periods — the period from 1979 to September 1983, and the seven-month period from October to 1983 to settlement in early May 1984. The first period was consumed with motion practice, and extensive discovery on the Government Contract Defense. That defense has three elements:

1. That the Government established the specs for the product;
2. That the manufacturers complied with the specs; and
3. That the Government had equal or greater knowledge of the dangers of the product.

Judge Pratt scheduled a trial for the summer of 1983 limited to the issue of the Government Contract Defense, then cancelled it because issues raised in connection with the defense were intertwined with issues of liability and causation, then withdrew from the case having been elevated a year earlier to the Second Circuit.

Enter Judge Weinstein in October 1983, known to those Columbia Law School graduates in the room as a popular and brilliant Professor, and to all for his treatise on Evidence.

Judge Weinstein never wears robes in the courtroom, likes to sit at the opposite side of Counsels' tables for motions, talks gently, is exceedingly polite to counsel, is always prepared, and knows how to take control of a complicated case. At his first meeting with counsel on October 21, 1983, following introductions, he announced a May 7th trial date, ordered plaintiffs to select and try 10 test cases, brought back into the case two chemical companies dismissed by Judge Pratt, and said he was keeping the Government in the case as a party or as amicus even though it had previously been ruled immune under the *Feres Stencel* doctrine of the Supreme Court, which creates an exception to government liability under the Federal Tort Claims Act by exempting Uncle Sam for service related injuries.

With only seven months to trial, the Judge permitted discovery to proceed at whatever pace the parties wanted — sometimes as many as four to five groups of depositions a day, hearings before the Magistrate every Wednesday, and hearings before the Judge usually on Thursday. Some of the hearings before the Magistrate lasted 12-13 hours. When May 7 approached and the parties were unable to schedule all the necessary depositions, the Judge granted permission for discovery to proceed during trial, estimated at 12-18 months. To keep the May 7th trial date in the forefront of everyone's mind, at the beginning of March, posted at the front of the courtroom calendar pages of the months of March, April and May, and each day his clerk would cross off another day with a red marker.

Looking back, it is obvious that Judge Weinstein was determined to bring the case to an orderly and early conclusion — by settlement rather than trial, if at all possible.

In early 1984, he issued two long erudite opinions, one on conflicts holding that despite diversity jurisdiction the 50 states would inevitably look to some kind of national consensus law for the substantive law of the case, and he would formulate and state what that national consensus law was.

The second was a revision to Judge Pratt's decision dismissing the Government from the case. Judge Weinstein reinterpreted the *Feres Stencel* doctrine and held that, while the Government was immune from suit for the veterans' injuries, it was not immune for injuries to wives and children. So, not only were there seven chemical companies on the hook but now the Government — at least for a portion of the alleged liability.

He rejected several motions for adjournments, motions to strike the jury demand, motions for summary judgment on the ground, among others, that the plaintiffs could not prove which defendant's product caused injury to any particular plaintiff.

During court hearings, he constantly hammered away at plaintiffs to produce medical evidence of causation — that

The Honorable Jack Weinstein

dioxin in trace amounts could cause the alleged injuries. Then he would hammer away at the defendants, saying that he would apply theories of enterprise liability so as to shift the burden of proof back to the defendants to establish that their products did *not* cause any particular plaintiff's injury. And, he emphasized time and again his faith in a 12-person jury to resolve the matter fairly, never indicating that there might be insufficient evidence to submit the case to the jury in the first place, or to withstand a motion NOV after the trial.

Then, 17 days before trial, he made his move. He called counsel to chambers and announced that he was appointing three prominent practitioners as special masters to act as go-betweens among parties and the Court.

(1) With the case careening to trial and all parties feeling less than fully prepared for a 12-18 month trial, (2) with plaintiffs concerned over whether they could finance a long trial, sustain a jury verdict on causation based on available medical evidence, and overcome contractor immunity based on the Government Contract Defense, plus substantial problems of statutes of limitations, (3) with the defendants gravely concerned that a jury, sitting for a year or more and seeing a parade of injured veterans, wives and deformed children, plus highly technical medical evidence, would return a verdict in the billions, Judge Weinstein summoned counsel and principals to chambers Saturday morning, May 5th, at 10 A.M. and warned that they might not leave until the trial began. The gap at that point was between $50 and $100 million, depending on whom you spoke to. That Saturday

was quite a scene. In one courtroom, the Magistrate had one team of counsel doing jury weeding of the 400 who appeared out of 1,200 summoned and filled out a 35-page questionnaire the week before. In a second courtroom, the defendants' counsel and principals caucused. In a third courtroom, the plaintiffs' counsel made their home.

The special masters engaged in shuttle diplomacy, meeting first with one side, then with the other, then with each of the seven defendants as to what its share would be of a settlement should there be one. And then Judge Weinstein would meet with the parties separately. What you had, in defendants' camp at least, was three separate teams of lawyers at work: one conducting settlement negotiations, a second conducting jury selection, and a third back at the office getting ready for opening statements and the first witnesses.

Time is too short to take you through that fascinating weekend in any greater detail, but in the early morning hours on May 7th the parties agreed to a $180 million settlement, with interest at prime from that date to payment, a fund estimated at $250 million by the time a plan of distribution is worked out next spring by the Court.

Few judges, in my opinion, could have pulled off this result, and the fact it was accomplished seven months after Judge Weinstein took control of the case is remarkable.

Judge Weinstein's recent opinion ended on an eloquent note:

"In conclusion it is well to remind ourselves of President Lincoln's admonition which is as relevant now, almost fifteen years after the end of the Vietnam war, as it was six score years ago. In his Second Inaugural Address he urged us 'to bind up the nation's wounds; to care for him who shall have borne the battle and for his widow, and his orphan — to do all which may achieve and cherish a just and lasting peace among ourselves . . .' It is time for the government to join with plaintiffs and defendants in even greater efforts toward this noble goal. Whether their hurt can be traced to Agent Orange or whether they are merely 'causally unfortunate,' C.L. Black, Jr., The Human Imagination in the Great Society, 5 (1983), is beside the point in the broader context of the nation's obligations to Vietnam veterans and their families."

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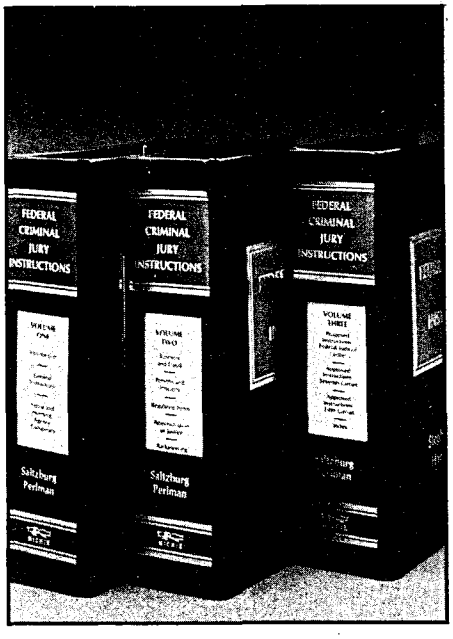

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Delaware Corporate Attorneys and DVLS

John Andrade

Joe, a poor, young, uneducated man had been given 60 days notice to vacate his questionably habitable apartment. On the 60th day, Joe returned to the apartment to finish clearing out his belongings. While at his apartment, Joe was arrested on charges of 3rd degree trespass and spent one night in jail for an offense punishable by fine only. For assistance with this legal matter Joe was referred to Delaware Volunteer Legal Services, since the Public Defender's Office did not handle this type of violation. Although usually limiting itself to civil cases, DVLS assigned the case to Bill Gonser, a DVLS volunteer and corporate attorney for the DuPont Company. Thanks to Bill's assistance, the charges against Joe were dropped. Upon leaving the courtroom Joe's sister related a problem to Bill, which required further legal intervention. Their parents had died five years earlier and their estates had not been settled. Upon investigation, Bill discovered an insurance policy, which no one knew existed, sold the parent's uninhabitable, abandoned residence, and settled the estates. Each of the 12 children in the family received just under $1000.

Delaware Volunteer Legal Services, Inc. (DVLS) was initiated in 1981 as a proposal to the Delaware State Bar Association. DVLS was to be the organized effort of the private bar to provide pro bono legal services to the poor in Delaware. The timing was important because Community Legal Aid Society, Inc. (CLASI) was facing serious budget cuts and the Reagan Administration was threatening to eliminate funding for CLASI altogether. There was clearly a need for an increase and channeling of the private bar's involvement in the pro bono effort. An important source of volunteers for DVLS were Delaware corporations. Some corporate attorneys, like Dale Stoodley from Delmarva Power, have also been active on the Board of Directors of DVLS. Presently Delmarva Power, DuPont, Hercules, and ICI are all active in DVLS, and more corporations are expected to be participating soon.

Intake of clients is handled through DVLS. Cases that generate fees are brought by clients with incomes higher than 125% of the poverty level are rejected and referred to the Bar Association's Referral Service. Accepted cases that appear meritorious are referred to volunteer attorneys. It is important to note that the sole function of DVLS is to provide free legal services in civil cases where the client cannot afford and would otherwise be unlikely to be able to retain and pay for an attorney. Thus, DVLS does not deprive lawyers of fees for cases they would have otherwise handled. Instead it provides access to a system to those who otherwise would be denied their rights because they are poor.

A program like DVLS significantly facilitates pro bono participation of all attorneys, but especially corporate attorneys. Malpractice insurance common among attorneys in private practice is rare among corporate practitioners. Seminars and other educational tools on poverty law are made available and in situations where an attorney is out of town for an extended period or suddenly inundated with his employer's work, a case can be returned to DVLS temporarily or permanently to be handled by a staff attorney. Thus DVLS is providing an efficient vehicle for corporate pro bono participation and corporate attorneys are volunteering for DVLS.

It is important to note that the sole function of DVLS is to provide free legal services in civil cases where the client cannot afford and would otherwise be unlikely to be able to retain and pay for an attorney. Thus, DVLS does not deprive lawyers of fees for cases they would have otherwise handled. Instead it provides access to a system to those who otherwise would be denied their rights because they are poor.

When I started with DuPont in 1979, volunteer work could be done in connection with Family Court or CLASI, but no formal program existed. I was advised to volunteer for DuPont's Public Defender program. Unfortunately that Program had ended when the Public Defender's Office became fully staffed years before. However, everyone I talked to had high praise for the program and I could sense that there were many colleagues who would be interested in volunteering their legal services for a worthy cause. In the meantime I had been accepting referrals of pro bono cases from the Bar Association Referral Service. However, the cases were not screened and I soon realized that without malpractice insurance I was on dangerous footing. It was obvious that for corporate attorneys to do pro bono work in Delaware a formal program was needed. DVLS filled the void.

When DVLS first solicited volunteers, it offered a one-day training session attended by hundreds of lawyers. Extensive materials were provided on all aspects of poverty law. About 50 attorneys from DuPont attended and 25 volunteered. Unfortunately the other 25 were admitted to other Bars and for reasons discussed below did not volunteer.

Typically corporate participation in the pro bono effort has been through financial donations to DVLS and by encouraging individual attorneys to participate. Hercules, however, has set up its own program.

The Law Department of Hercules Incorporated instituted a pro bono program in 1984 to provide legal services to the elderly. The Hercules Elder Law Program ("HELP") is designed to assist lower income individuals, age 60 and over, in handling the distribution

of a decedent's property for estates with assets not exceeding $12,500. 12 Del. C. §2306 provides for distribution of such an estate without appointment of a personal representative or probate.

With the full support of top management and participation by all members of the Law Department, HELP developed through a number of stages. As Roxanne E. Jayne, Associate Counsel, and Chairman of HELP's Steering Committee, explained: "We held training sessions for all attorneys, with the able assistance of Mr. Grover C. Luttrell of the Register of Wills Office. The Division of Aging was also very supportive of our efforts. We established internal procedures for handling the non-probate of small estates. Each HELP attorney was listed as a volunteer associated with Delaware Volunteer Legal Services, Inc. (DVLS). Finally, we alerted DVLS, Community Legal Aid Society, Register of Wills, and the Division of Aging that we were ready to receive referrals. That was late in 1984. We've had our first referral and are looking forward to receiving more."

To increase awareness of HELP, Hercules is preparing publicity describing the services offered. In addition, the scope of the program will expand to include the probate of small estates for lower income senior citizens.

Why? Corporate attorneys volunteer to do pro bono work mainly to fulfill a social commitment. Some also volunteer because of a yearning to litigate and appear in court. In the preparation of this article I circulated a memo among many corporate volunteers. The unanimous response: the time volunteered is well spent and clients are receiving significant benefits.

For a corporate attorney, pro bono work can provide a diversion from the typically specialized corporate work and a satisfying change of pace. However, it can be a harrying experience to be assigned, for example, to a child custody case. Not only must extensive research be done on the current status of custody law, but the attorney must contend with the unfamiliar procedures of Family Court. On the other hand, the personal satisfaction derived from assisting a parent to obtain custody of a child can more than compensate for any problems encountered during the case.

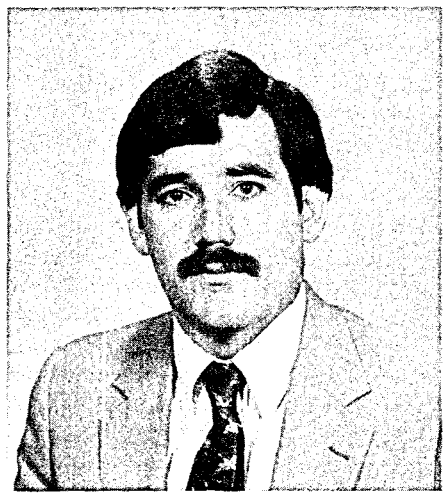
While corporate legal work brings its own rewards, it seldom produces such a profound direct effect on a client's life as a pro bono case does. Pro bono work benefits the corporate attorney by fulfilling a valuable social commitment and heightening awareness of the many pressing problems of the poor. In addition, the community benefits in that corporate attorneys typically handle pro bono cases thoroughly and competently.

John F. Lawless

Marita Hutchinson

Historically, corporate attorneys have been involved in the community in a variety of other ways, such as through participation on boards of directors of organizations like the United Way or the YMCA. Pro bono work provides a valuable link to the problems of the poor, leading to more effective community service.

In one aspect, Delaware is missing the boat on corporate volunteer attorneys. Over 50% of these in Delaware are members of Bars other than Delaware's. To volunteer in Delaware they



John Andrade, a relatively recent addition to the Delaware Bar, has already established an enviable record of achievement in his chosen profession. He is a founding father of Delaware Volunteer Legal Services, the Bar Association's pro bono branch. John, who works in the legal department of the DuPont Company, graduated from Delaware Law School summa cum laude *in 1978. He was admitted to practice in his native Connecticut in 1979 and, after clerkship to former Justice William Quillen, in Delaware in 1980. In addition to his demanding pro bono work, he serves as an adjunct professor at the law school of which he is a distinguished graduate.*

For more information about Delaware Volunteer Legal Services, please call the following numbers:
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Kent and Sussex Counties

would have to fill out lengthy forms. When I attempted to convince many of my colleagues to complete the forms, I was told that it was unreasonable to complete a long, objectionable form just so they could volunteer their time. While many argue that the form is not that serious a problem, the fact remains that out-of-state corporate attorneys, have not been willing to comply with this requirement. Interestingly, a Sunday News-Journal article of May 23, 1982 on DVLS, discussed a case being handled by James Carter of ICI, one of the first volunteers assigned a case. However, Carter was not able to continue with the case, despite extensive legal and litigation experience, because he was not a member of the Delaware Bar. DVLS and the poor of Delaware lost the services of a well-qualified lawyer. I am not advocating lowest standards of representation for the poor, but that the advantages to a poor person represented by an attorney in good standing with an out-of-state bar over *no* representation must be recognized.

Corporate attorneys with no experience in private practice may face practical problems in handling a pro bono case. In one of my very first cases, a problem arose regarding an appeal bond. As I had no previous experience to draw from, I consulted a local attorney who had handled dozens of similar cases. Surprisingly, he had no idea of how to deal with the problem. But he referred me to his resident expert, *his secretary,* who quickly provided me with the information I needed.

Many corporations permit the reasonable use of company time and facilities for pro bono work but expect their attorneys to carry a full business workload. In addition they usually permit the reasonable use of office space, supplies, and services, including secretarial help.

Recently, John Landis, Supervising Attorney for DVLS and Director of the Delaware Law School Clinical program, suggested to Jack Lawless, a DuPont attorney, that a law student, Marita Hutchinson, assist him on a case. Marita interviewed witnesses, prepared drafts of a Motion and a Brief, and made a significant contribution. While collaboration with a law student may not be helpful in every case, it should be used more: a law student can be particularly helpful to a corporate attorney who in some cases must spend significant amounts of time familiarizing himself with simple procedural matters and recent pertinent case law.

Future

While participation by corporate attorneys in pro bono work has been encouraging, much more can be done, and much more is planned for the months ahead. The first solicitation of volunteers for DVLS took place more than three years ago. Since that time many area corporations have hired new attorneys. In addition, under the new Delaware banking laws, many banks are moving into the area and hiring corporate attorneys. DVLS plans a new solicitation of volunteers. Additional efforts will be made to simplify the process by which out-of-state corporate practitioners can participate in DVLS.

Corporate attorneys are a valuable resource, willing and capable of making a significant impact on the legal needs of the poor in Delaware. The poor benefit and the community gains an additional legal resource to supplement publicly funded programs. The corporate legal department potentially increases the satisfaction of its employees by affording options for career enrichment and volunteer involvement. The corporation can take pride in its contributions to the well-being of the surrounding community. Volunteer attorneys derive a sense of personal involvement, benefit from professional growth in new aspects of the law, and fulfill their professional responsibility to provide public interest legal assistance.

Stanley And The Women

Kingsley Amis
Penguin Books Ltd.
£2.50 (Paperback-317 pages)

Prior Restraint—
The Ladies, God Bless 'em

from Bra Burning to Book Burning

Just as we go to press, we learn that there will indeed be an American edition of Stanley and the Women. *Summit is the courageous and sensible publisher.*

And now let us discuss contraband literature. Hark back to the good old days when dirty-minded literary ladies would arrive in New York aboard the Mauretania, disembark, and then waddle through customs with forbidden copies of *Lady Chatterley* or *Tropic of Cancer* stuffed into their corsets. Well, folks, get ready for a big fat dose of deja vu! Censorship is upon us again.

Elsewhere in these pages Leslie Goldstein has furnished an acute analysis of efforts by a pair of feminists named MacKinnon and Dworkin to persuade the courts that censorship of pornography unflattering to females is both Constitutional and a Good Thing. Something of the same sort seems to be stirring in the case of Mr. Amis's latest book, published in London last year. In the New York Times Book Review of January 13, 1985 a prominent English critic, John Gross, described a literary squabble vexing readers on both sides of the Atlantic.

Kingsley Amis is a distinguished author. His books are assured of virtually automatic republication in this country, but now it seems three New York publishers have turned down *Stanley And The Women*, their decision prompted by feminist hostility. The February 4 number of Newsweek observes of the publishers, "One said the novel generated too much objection from women members of the editorial board. 'Loony feminism hasn't gone as far here as it has in America,' says Amis." Some of the characters in *Stanley* give vent to very offensive views about women. A sensible reader will presumably recognize that such views are expressed in delineating those characters, and not as a means of smuggling impermissible notions into print. Furthermore, *Stanley* is entitled to an audience because it is a fictional achievement of a very high order. As Gross put it, "Many of the views expressed in the book are decidedly objectionable, but you don't have to endorse them to find the book funny and skillful and well worth reading." It is hardly surprising that Gross would apply such adjectives to the work of one of the sharpest writers of fiction working in the English speaking world today. Those of us who have fallen out of chairs in paroxysms of helpless laughter while reading *Lucky Jim* must surely harbor a degree of resentment at being barred access to Amis's latest work. Hence this note for the benefit of the deprived.

Stanley And The Women recounts the experiences of a middle-aged Londoner (Stanley), whose son goes mad, thereby creating upheaval in Stanley's already troubled life. His first wife, a pathological liar, joins forces with the boy's psychiatrist (female), to do everything in their considerable power to destroy Stanley. Stanley's *current* wife bides her time before contriving to undermine his self-respect. Stanley also has an impartially vicious mother-in-law who specializes in making *everyone*, not just Stanley, miserable. Needless to say by the end of the story Stanley and his male friends are enthusiastically desecrating the Shrine of Women's Rights. Consider:

> *"According to some bloke on the telly the other night 25% of violent crime in England and in Wales is husbands assaulting wives. Amazing figure that, don't you think? You'd expect it to be more like 80%. Just goes to show what an easy-going lot English husbands are, only one in four of them bashing his wife. No, it doesn't mean that, does it? But it's funny about wife-battering. Nobody ever even asks what the wife has been doing or saying. She's never anything but an ordinary God-fearing woman who happens to have a battering husband... frightfully unfair."*

It is not difficult to see that this book might well outrage women libbers of limited intelligence and deficient humor—by no means an endangered species. Like many unthinking people they adopt the Persian measure of killing the herald who brings the foul news.

If there is a lesson here it may be this: A book that incurs the wrath of a fashionable and vociferous pressure group risks suppression at the hands of those who would be the first to demand an airing of their views. Censorship is for other people. Somebody (e.g. Miss—opps, sorry—Ms. MacKinnon or Mrs. Dworkin) can always find a superficially respectable excuse for censorship. And in a free society somebody else must always be ready to puncture it.

WEW

Abortion & The Politics of Motherhood

Kristin Luker
(University of California Press, 1984)
$14.95, 262 pages.

Kristin Luker, a professor of sociology at the University of California at San Diego, has written interestingly and concisely about both the shifting attitudes of Americans towards abortion since the early nineteenth century and the origin of the present heated controversy.

Recognizing the importance of the cultural background of the decision-makers of the early Republic, Professor Luker starts out with a brief survey of Greek, Roman, and medieval European views on abortion. While there were always differing views about the morality of abortions, there is no dispute that they took place. Thus, an educated American of the early nineteenth century would have been aware that the moral propriety of abortion was an issue that had been debated for centuries without final resolution.

As the century wore on, two significant trends developed. The first was the continued progress in the improvement of medical care available in urban centers. The second—perhaps more important—was the increasing insistence of the medical establishment on licensing to control the practice of medicine through minimal standards of competence required of physicians. Abortion thus became an issue in the nineteenth century, rather than earlier, because of the view propounded by one segment of the medical community that it posed so great a risk to a woman's life that it should be performed only by properly licensed physicians. The result of this successful campaign was to cut back on the activity of midwives, sellers of patent medicines for women, and charlatans. It also had the effect of eliminating a means of birth control that had been tolerated, if not dondoned, for generations.

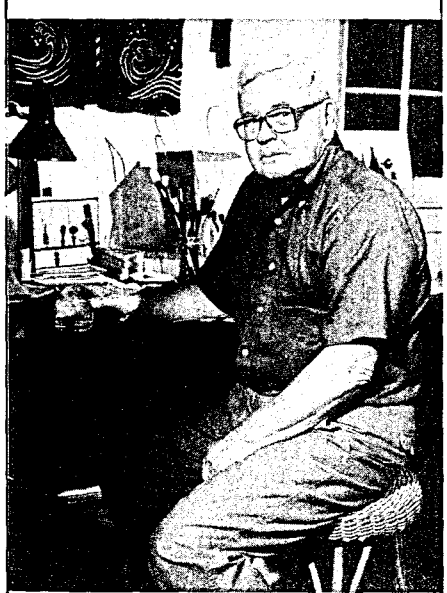
Abortion was not a major subject of controversy from about 1900 until the 1960's. During that time physicians performed abortions when the life of the mother was deemed to be threatened; this standard was interpreted by them, in consultation with lawyers and other laymen, in a fashion that, apparently, rarely led to public controversy. Abortion became an issue once again for reasons only marginally related to those that made it an issue a century earlier. Medical science had progressed sufficiently that an abortion, if performed by competent personnel with access to proper medical equipment, was not the life-threatening operation it had once been under the best of conditions. Thus the possibility of generally available abortions arose. The second critical result of this progress was that it became not only possible, but necessary, to consider the quality of a child's life, an issue that came into its own after the Thalidomide births.

The safety with which one could have an abortion by the 1960's and the ethical considerations surrounding the abortion of fetuses certain, or at least very likely, to be born with a severely diminished capacity to reach and enjoy a desirable level of existence led to changes in the way Americans viewed abortion. Discussion of the right to have an abortion, which had never really ended, ceased to be confined largely to a group that was predominantly professional and well-educated, usually doctors and lawyers, and was taken up by a far wider range of people. The extent to which abortions were available, and the justification for them, thus became better known. One consequence of this expanded public debate was that physicians of good reputation became the subject of criminal prosecutions under laws hitherto viewed, by them and their colleagues, at least, as inapplicable to what they regarded as a therapeutic procedure performed after a determination that the life of the mother was imperilled. Finally, the coincidence of the wide availability of safe and reliable methods of birth control and the entry of large numbers of well-educated women into professional and business careers led to increased emphasis on the value of family planning as a means of enabling women to plan for the birth of children at appropriate times in their lives, rather than to risk giving up careers because of unwanted pregnancies.

Professor Luker comments on these developments in detail, and carefully and shrewdly analyzes the points of difference and similarity between the pro-life and pro-choice groups of the 1980's. Her book is stimulating, informative, even-handed, and well-written. It is valuable reading for anyone who wishes to understand the abortion issue as it has developed in recent years.

RCK

Legal Handbook for Older Delawareans



Mr. Lester Long is one of our favorite elders who likes to keep up-to-date on laws affecting senior citizens. We endorse this handbook and encourage our readers to obtain copies for themselves and other family members.

The long awaited handbook on legal matters of concern to Delawarean's older citizens should be available for distribution in October, 1985. The handbook was prepared by the Senior Citizens Rights Committee of the Delaware Bar Association. Funds for publication were provided by the Delaware Bar Foundation, the Delaware Division of Aging with Older Americans' Act funds through the Senior Citizens Legal Assistance Program, New Castle County Council, Sussex County County, and Wilmington City Council.

The handbook contains information on legal and other resources available to older people in the state. It briefly describes income maintenance programs such as Social Security and Supplemental Security Income (SSI). It also discusses Food Stamps, Medicare, Medicaid, nursing home residents' rights, and protective procedures such as Adult Protective Services, guardianships, power of attorney of attorney and representative payee arrangements. Other topics are joint ownership of property, wills, living wills, anatomical gifts (organ donations), the Federal Trade Commission funeral rule, the Delaware law on pre-need funeral contracts, programs for victims of crimes, and property tax exemptions.

In addition, there are brief descriptions of a landlord-tenant law for the benefit of senior citizens, condominium conversations, and some state and federal consumer protection laws.

Copies of the handbook will be distributed at no charge, for use as a resource, to elected officials and to the aging network, which includes agencies such as senior centers, home delivered meals' programs, and nursing homes.

A person aged 60 or over can receive a free copy. Arrangements will be made in each county to make the books available for senior citizens to pick up at various locations. Call 575-0666 for locations in New Castle County and 1-800-292-7980 for locations in Kent and Sussex Counties.

Anyone over 60 who wishes to receive the handbook by mail should send a letter requesting it, accompanied by name and address, including zip code. A check for one dollar ($1.00) should be enclosed to cover postage and handling.

Other persons should enclose a check for two dollars for the cost of the handbook, postage, and handling.

Send requests to: Legal Handbook for Older Delawareans, 913 Washington Street, Wilmington, Delaware 19801.

Checks should be made payable to Delaware State Bar Association.

Random Leaves from Chairman Wiggin's "Little Red Book"

Sweet Are The Uses Of Mendacity

In Hilaire Belloc's "Cautionary Verses" Matilda told Lies and was Burned. *In this story the heroine tells ever more outrageous lies and flourishes like the Green Bay Tree. Hooray for the big, bold whopper!*

In June 1952 the ladies of the senior class of a country club college outside of Baltimore received their worthless sheepskins and found themselves unceremoniously dumped on the job and marriage markets. The class president, Becky Wentworth, who had no intention of returning to Boston to be her mother's unpaid companion, joined forces with her roommate, a Miss Sylvia Butterwick of New Canaan, Connecticut. They took a flat in downtown Baltimore and sought congenial employment. Since they had no training in disciplines useful to the business community, they reeled through a succession of part-time jobs, and between dates and parties sandwiched in night courses in stenography, bookkeeping, and rudimentary commercial law.

After six months no really attractive jobs had turned up in Baltimore and Sylvia became depressed. Becky urged her not to despair. She proceeded with customary efficiency to analyze their plight.

"Since we are both unqualified for gainful employment and have no useful skills, we have no choice but to work for the federal government. Let's go to Washington."

Becky asked her father to pull some strings for her to get a government job. Eisenhower was elected that November, and after twenty lean years, Mr. Wentworth again had some friends in Washington. In late January Becky was called to the Pentagon for secretarial testing. Her typing test was undistinguished. She achieved 35 words a minute on a very twitchy electric machine. Then a grim old woman stalked into the examination room and rattled off a lot of words at Becky, who was supposed to convert them into shorthand and type them up. Becky's notes were incomprehensible. She tore them up and walked out.

"I can't do shorthand," she said to the ogress.

"Where are your notes?"

"I tore them up."

"*That* is destruction of government property — a very serious offense." Ogress and two assistants went through the wastebasket and reconstructed Becky's notes with scotch tape. Some years later Becky said she assumed they were still in the National Archives.

The ogress then sent Becky to the offices of Admiral Pomeroy D. Sturgis, who was surprised to find himself face to face with a woman fully as tall as he was. He invited her to sit down, and she carefully lowered her well-upholstered six foot frame onto a fragile chair.

They hit it off immediately. Sturgis was within a year of retirement and he thought it would be pleasant to end his career in civilized society. He hungered for the company of equals. Most of the people he had to deal with he regarded as pushy, inconsequential little toads of scruffy origin. Becky was soothingly Anglo-Saxon and from a background like his own. If she was an obviously dreadful secretary, she was just as obviously intelligent. He'd start her in the steno pool and then dream up a job for her in closer proximity to his own office. He spoke with her for five minutes and told her to report to the steno pool the next day.

"Admiral Sturgis, I resent paying taxes to a government that would hire anyone as incompetent as I am, but many thanks." They laughed conspiratorially.

She came to work the next morning, but for several weeks she spent her days filling out forms, staring at dreary indoctrination movies, and awaiting the award of a top secret clearance. During this tiresome stretch, she and Sylvia had two strokes of luck. Housing was hard to find in Washington. Sylvia, reading the obituaries in the Times Herald, discovered a death in a nice neighborhood near DuPont Circle. They raced out and rented the corpse's apartment. The next day Sylvia landed a job as a file clerk at the FBI, where she learned many shameful things about her fellow citizens, useful for small talk at cocktail parties.

At long last Becky joined the steno pool. She got off to a bad start with the other ladies through no fault of her own when Admirals Sturgis assured them, "You're all going to enjoy Becky. She's a college girl."

They appraised Becky cautiously. On her first day she came to work in a tweed Peck & Peck suit, Pringle cashmere sweater, low heeled I. Miller alligator pumps, and no jewelry except for a scarab bracelet. She was immediately suspected of being a debutante, and her very good speech added to her coworkers' suspicions. The ladies with whom she shared one large room consisted of a supervisor, Terry Moran, a fortyish divorcee with curiously glazed hair, an elderly stenographer called Helen Clapp, and seven clerk typists, all in their twenties, and named variously Chris Lewandowski, Carmen Lippfert, Elaine Griffin, Jojo Gervasi, Stelly

Opelak, Evange Valaki, and Claudette Stoltzfuss. Stelly was fascinated by Becky's bizarre wardrobe, and stared at her endlessly with the large vacant eyes of a dying codfish. After a week or so the girls decided Becky was okay, even if she did dress strangely.

"I wonder if I ought to get some different clothes," she remarked to her roommate one evening. "The girls at work are so dressy."

"Describe," said Sylvia.

"Well, they wear black cocktail dresses."

"Low necklines, no doubt?"

"Positively ravine-like. They go in for stiletto heels and a great deal of costume jewelry. They're man hungry, of course. There are at least five women for every man in the Pentagon, and those poor girls aren't getting anywhere, aside from indecent propositions from dear General Ellsworth Schwartz."

"Has he made a pass at you?"

"No. He's under the impression that I'm Admiral Sturgis's protegée. Sturgis is his immediate superior". Becky paused meditatively. "I wonder if I should do something about my hair."

"It looks alright to me."

"Most of the girls all have long black pageboys and bangs, except, of course, Terry, and Helen Clapp, who has a blue rinse."

"You fix yourself up like those girls and I'm moving out. I don't want people to think I room with a madam."

"Well, I'm not going to knock them, Sylvia. They've all been very civil and it *is* a job."

Although Becky eventually became a favorite of the girls, she had a setback when she was awarded a promotion of which, she was the first to admit, she was wholly unworthy.

"Ladies," announced Admiral Sturgis, "we need an editorial coordinator. I'm creating the job. Now let me see. Becky, I think you'd better take it, since you're a college girl. You automatically get a GS-5." Becky wished he hadn't done this in front of the others. Carmen Lippfert hinted broadly that promotions of that magnitude were given only in exchange for a surrender of virtue. Carmen would come to regret that nastiness when questions arose about her relationship with General Schwartz.

And so, on a gray Monday she sat at her gorgeous mahogany desk where she read and discarded Lieutenant Dombrowski's report on the optimum placement of soft drink dispensers in barracks and Ensign Viglioni's interesting discussion of the psychological effect of paint colors in naval prisons. Then she swiveled her chair about and looked at the Washington Monument. This was still a great and decent nation. What should she do? She took up her pen.

"The wise and good man who makes policy pays heed to human consequences, and in doing so does not go wrong." She digested the balance of the reports and then carried her handwritten pre´cis over to Jojo for typing. When Admiral Sturgis read it that afternoon he was delighted.

"Becky, this is brilliant — and the timing couldn't be better. Were going to use that bit about policy and human consequences. Two recruits at Fort Dix just died of pneumonia, sadism, and medical inattention. We will show the military cares! (Perhaps we'll have to edit that bit about 'wise and good' policy makers. There's just so much you can expect the public to swallow.)"

Becky realized with a degree of satisfaction that she had become a literary whore.

"For Pete's sake I don't want Clapp!" he screamed at his superior. Mrs. Schwartz, who was listening from the next room, crossed herself fervently.

Carmen's brush with death worried Sturgis, who shared the common suspicion of Mrs. Schwartz. (That blameless lady was cleared some weeks later when a berserk janitor in Carmen's apartment house confessed to a series of candied assaults on women who had spurned his advances.) Sturgis hoped the assignment of Helen Clapp and a host of unimportant new duties he created for Schwartz would keep him busy. They didn't. Now that he no longer had excuses for preying on the steno pool he was at loose ends, but Helen was delighted with her new position. She had her own office and much less work to do.

Schwartz would certainly have been valiant in battle, but he was cowardly in the presence of the English language. His memoranda were appalling. A creature of the federal government, he was a stranger to the language of gentlemen, if not a declared enemy. His prose style would have made Howard Cosell retch. Schwartz's writing was flabby with abstractions and leaden with verbosity, and he confronted the terrors of composition in the desperate hope that the physical act of writing would reveal to him what he was thinking. On the other hand, Helen Clapp, an intelligent old bat, enjoyed editing Schwartz's product. It was an intellectual challenge.

"I don't want people to think I room with a madam."

A few weeks after Becky's move to the outer ring, Carmen Lippfert, who had been seeing Schwartz on the sly, got awfully sick. Everyone assumed that she'd had an abortion. Actually she had sampled some poison bonbons from a Whitman's Sampler sent to her anonymously. Mrs. Schwartz was suspected of being the donor. Carmen recovered, but only after all her hair fell out, which effectively cooled Schwartz's ardor. Becky went to see her in the hospital. She brought her a bottle of "White Shoulders" and said comfortingly, "You're looking so much better. As soon as you're out of here, were going shopping together for a really good-looking wig." Carmen became devoted to Becky.

The Admiral, well aware of Schwartz's proclivities, decided that a rotation was in order and assigned Helen Clapp as Schwartz's private secretary. He telephoned Schwartz at home to break the evil news.

Becky moved to an office of her own on the outer ring of the Pentagon, with a mahogany desk and a view of the Washington Monument. The steno pool was on an inner ring, and its windows revealed nothing more attractive than the concrete walls of the adjoining ring.

Becky was responsible for fielding telephone calls, setting up appointments, and practicing a varied diplomacy for her bosses, Admiral Sturgis, General Schwartz, and Colonel Lippincott. It wasn't important work, but it kept her busy. Admiral Sturgis, a courtly silver haired presence, nominal head of

the branch, spent a lot of his time getting photographed at the unveiling of bellicose statuary at military installations. General Schwartz, the handsome, dissipated wreckage of a West Point roue, spent most of his working hours plotting the mass defloration of the steno pool. He was afraid of Becky. He didn't put his campaign among the ladies into high gear until Becky had moved to the outer ring.

"I really feel I was a force for good," said Becky to Sylvia. "As long as I was in the pool, he was almost a gentleman."

Colonel Lippincott was a shy pipe-smoking bachelor who developed a harmless avuncular crush on her. If only, he thought, he'd had the nerve to marry. It would have been wonderful to have a daughter like that! Lippincott dictated endless woolly memoranda on abstruse military topics and kept largely to himself. Sturgis dictated far less. He seized opportunities to flee the office on such pretexts as his statue unveilings and luncheon parties for military attache's at the embassies. He also enjoyed going over to the Hill to testify before congressional committees. The contrast between the quality of interrogation and his spuriously authoritative answers was earning him an undeserved reputation for wisdom.

Schwartz's duties were less clear. The job had been created for him, just as Becky's had been for her. He was married to a rich, deeply religious woman whose brother was a powerful senator. Mrs. Schwartz spent a lot of time playing cops and robbers with her faithless spouse and his endless string of chippies. When Schwartz was not engaged in his priapic devotions, he nursed hangovers in the privacy of his office and admired a photograph of himself (in stunning profile!) from the Howitzer (Class of 1922) or strutted up and down the endless corridors of the Pentagon, angrily flicking dust off water coolers.

In her new position Becky began to get a better idea of what Sturgis's branch did to justify its expensive existence. It was devoted to the physical and psychological well-being of military personnel. Beneath the Admiral, the General, and the Colonel there labored a score of young officers charged with analyzing news releases, complaints from the angry parents of draftees, and ugly rumors about the mistreatment of recruits. The mission of the branch was to create favorable publicity by concealing or misdescribing the horrors of military life. There was also a doomed, half-hearted effort to improve the lot of those who served. Each morning Becky would receive a collection of lumpy monographs about the conditions prevailing in ships and barracks. It was her task to reduce these aberrant literary productions to a daily report that would demonstrate the vigilance of government and the utility of the preposterous agency for which she worked. She swiftly learned that the principal function of any federal agency is survival. It was a superior educational experience for Becky, who also learned two things that would some day be very useful to her: government is by and large contemptible, and form is vastly more important than substance.

In the meantime Becky got a daily grilling from Mrs. Schwartz about the General's behavior.

"Why good morning, Mrs. Schwartz. No, he's taking an early lunch."

"Are you certain?"

"I know only what he told me."

"Everyone well in the steno pool today?"

"So far as I know."

"Everybody happily at work like busy little bees, I suppose?"

"Everyone but Evange."

"Oh? Where is she?" There was a tinge of alarm in Mrs. Schwartz's voice.

"She had to go home to Wilkes Barre. Her grandfather's dying."

"Well, thank goodness for that! I mean to say, I'm so glad she could be with him at the end. How are *you* feeling, Becky?"

"Never better. And you, Mrs. Schwartz?"

"I have a suspicious rash." Mrs. Schwartz sounded nervous. "Tell me, Becky, what does Ellsworth's secretary look like?"

"For a maiden lady in her 60's, Miss Clapp is most attractive. She has blue marcelled hair and rimless spectacles. She usually wears floral print cotton dresses, a cameo brooch, white muslin stockings, and very chic orthopedic shoes. Really a most appealing older woman. The General is delighted with her. You have to look close to see that she has a glass eye," added Becky creatively. Actually Helen Clapp was less forbidding and better dressed than Becky allowed, but Mrs. Schwartz craved reassurance, and Becky pitied her.

Becky realized that by working for the government she had turned into a fluent and resourceful liar. Now, lying is narcotic. So long as she remained in Washington, Becky, hitherto truthful as a matter of course, would march boldly from lesser to greater whoppers until this evil habit would bring her to a most interesting downfall.

"Miss Clapp sounds awfully nice," said Mrs. Schwartz, in tones of deep relief. "Tell me, Becky, did Ellsworth's eyes look alright to you this morning?"

"I couldn't tell. He was wearing smoked glasses."

"I know. Seems a funny thing to do when we're having a blizzard."

"A precaution against snow blindness, no doubt."

"That must be it. You are such a comfort. I so look forward to our little chats. I'll let you go now."

"It's always nice to hear from you, Mrs. Schwartz."

The General had a beaut of a shiner. He had acquired it the night before in a cocktail lounge fight over the favors of Jojo Gervasi. Becky requisitioned Claudette's pancake makeup and camouflaged the General's black eye. When Sturgis burst into Schwartz's office in search of Becky, he demanded an explanation. It did not please him, and he decided enough was enough.

"To be sure this is a military establishment, but there's been quite enough sword play among the typists."

Within a week Sturgis arranged for Schwartz's transfer to Fort Bragg where he would be in charge of a remedial reading program for backward draftees. Mrs. Schwartz, beside herself, called up her brother, the Senator.

"You've got to do something, Elmer! Where am I going to find a hairdresser in Fort Bragg?"

"I'm afraid you'll have to lie low for a while, Ethel. This may be a blessing in disguise. I understand Joe McCarthy is investigating Sturgis's branch."

"Whatever for, Elmer? I'm sure everyone there is intensely patriotic."

"That has nothing to do with it, Ethel. Joe's running out of headlines."

Mrs. Schwartz's brother had accurate information. One morning Sturgis received a call from the office of Senator Joseph McCarthy (Republican, Wisconsin). Becky explained to McCarthy's secretary that the Admiral was up on the Hill testifying before a Senate subcommittee and assured her that Sturgis would return the call that afternoon. The secretary asked Becky to remain on hold. In less than ten seconds that dreadful familiar voice was chewing Becky out as a "lying bureaucratic bitch. Get me Sturgis and get him quick."

"Senator, are you in your office?" asked Becky evenly. She knew of course that he was.

"What's it to you?"

"Well, if you will simply go over to the Capitol, you can probably catch him as he leaves the subcommittee."

"Hey, where are you from? Your accent is funny."

"I *beg* your pardon?"

"Don't give me any lip. Who are you and where do you come from?"

"My name is Rebecca Phillips Wentworth. I work for Admiral Sturgis, Colonel Gaffney, and Colonel Lippincott."

"Okay, and where do you come from? Are you English?"

"No. I'm of English descent on both sides of my family, but most of my ancestors arrived in this country in the seventeenth century."

Becky was not going to let herself be pushed around by a presumptuous bogtrotter. Her voice became even more defiantly patrician, and conveyed a clear warning that if the Senator chose to tangle with her, he must do so by way of the tradesmen's entrance. How could this wretched little man be Republican?

"Where are you from?"

"I grew up in Boston."

"Did you go to Radcliffe, or another one of those red schools up there?"

"I did not. But my brother, my father, both of my grandfathers, and their fathers and grandfathers before them all went to Harvard, right on back to before the American Revolution, in which many of my ancestors fought. Did any of yours?"

There was an uncomfortable silence from Tailgunner Joe. Then: "You got a security clearance?"

"Naturally. Top secret. Have *you* one? I'm not sure I should be talking so openly with you, if you don't."

"Your family all Harvard people, are they? That place is full of pinks and fairies," shot back the Senator dangerously, warming to his favorite subjects.

"Pink fairies! How enchanting! It sounds so much like a children's book. Tell me, are you by any chance a Kenneth Grahame fan?" asked Becky, trying hard not to laugh at the Senator.

"Er, no. What team does he play for?"

"Oh no, no, no," tinkled Becky in her lorgnettiest voice. "I was referring, of course, to the author of the 'Wind in the Willows'."

"Just what the hell are you talking about?" Suddenly Becky realized she was making a mistake in baiting this stupid and destructive man, who had obviously taken a fierce dislike to her. In a horrid flash she foresaw what was coming next: an investigation of subversion in the Pentagon, embarrassment for Sturgis, who had been so good to her, and a crippling of his already enfeebled efforts to keep our nation great and strong. She decided suddenly to convince the Senator that she was far more dangerous to him than he was to her, and, for good measure, crazy.

"Senator, I am delighted to talk with you. I belong to the DAR and we all admire your work intensely. Do you by any chance belong to the Sons of the American Revolution?"

"Er, no."

"Join immediately!" commanded Becky with the single-minded fervor of a religious fanatic. "Now, I want to share a concern of the DAR with you. Do you suspect that Senator Taft and J. Edgar Hoover are soft on Communism?"

"Jesus!"

"Aha! You have suspected. I can't wait to tell the ladies at the DAR."

"Hey, don't do that!"

"Would you like me to testify before your committee?"

"That won't be necessary!"

"I see. How clever of you! An undercover investigation! I won't breathe a word."

Just then Admiral Sturgis entered the room. He looked most imposing with his scrambled egg hat, his ramrod straight figure, and his empty briefcase. Becky put her forefinger to her lips and signaled an urgent injunction for silence.

"Now, let me tell you something else. Some of the fellow travelers in the State Department are trying to hobble our

efforts here. Our appropriations are frightfully stingy. I should hope we might look to a patriot like you when the next budget comes up."

"Well, that isn't exactly my line, Miss Wentworth."

"Well, surely you could send me to someone whose line it is, someone patriotic like you who suspects Senator Taft and Mr. Hoover."

"Hey, I never said that!"

"How clever!" cackled Becky in the tones of a wily lunatic. "You don't want any leaks in your investigation. Oh, Senator, I shall be so proud when you denounce them both on the floor of the Senate."

"Well, er, that may be a while yet, you know."

Becky could tell that by now Tail-gunner Joe was sweating gumdrops. "But I know you agree with me. Never fear, Senator, I should be the last one to compromise your investigation, and I know you can't hurry it. I always say, *'festina lente'*, don't you?"

"Oh, absolutely," agreed the Senator helplessly, wondering if this terrible woman was connected with the Mafia as well as the Daughters of the American Revolution.

"Senator, it has been lovely having this long, intelligent talk with a real red-blooded American. I promise to call you before the next budget message to talk about appropriations, as you suggested."

"I don't think you understood me right, Miss Wentworth."

"Now tell me, Senator, would you like Admiral Sturgis to return your call? I think I can squeeze you in before he goes to the Nerve Gas Workshop."

"That won't be necessary, Miss Sturgis."

"No, no, no! I'm Wentworth. He's Sturgis. Thank you again for this lovely chat." Becky rang off and collapsed in her chair.

"And what is the Nerve Gas Workshop?" asked Sturgis.

"Why it's just what I've been putting Senator McCarthy through." Then she explained to Sturgis everything that had happened. He was deeply grateful.

"Becky, you are superb."

"Well, I wasn't bad. I think I really frightened him. He knows there's nothing wrong here, but he needs victims. I am not cut out to be a victim," added Becky with characteristic firmness. "I don't think he'll be bothering us again, and what with Schwartz gone we won't even have to worry about the Vice Squad."

One midafternoon about a week later Sturgis emerged from his office looking very cheerful.

"Get your coat and hat, Becky. You're coming with me."

"Where to, Fearless Leader?"

"Secret Mission. Hurry up now."

"Who covers my desk while I'm gone.

"Get someone from the pool."

"Let me see. I'll get Stelly. She dotes on mahogany."

They weren't out of the place thirty seconds before Stelly was on the phone with the supervisor, Terry Moran.

"It's happened at last. He's taking her to a hotel!"

"How can you say a thing like that about Becky?"

"He's wearing a new after shave lotion. A girl can tell!"

Twenty minutes later Sturgis and Becky were in a small well-appointed sitting room with a view of Pennsylvania Avenue and Becky was telling her host and hostess all about her crazy chat with Joe McCarthy.

"Pink fairies!" exclaimed her host, doubling up in laughter. "Just wait till I tell Bob Taft he's a subversive!"

"Good for you, Miss Wentworth!" said her hostess, as Becky concluded her account.

"Where did you get her, Sturge? I could use her here," said the gentleman in whose parlor they were sitting.

"No, you don't, Ike! She's mine."

"Couldn't we have her here part time?" suggested Mamie. "Ike needs cheering up."

After a pleasant half hour Becky and Sturgis left. When Sturgis dropped Becky off at her apartment, she thanked him sincerely for the high point of her young life.

Sylvia asked her what the Eisenhowers were like.

"They're dears. She is even prettier and sweeter than reported, and he has a marvelous sense of humor."

"When do you become Secretary of State?" demanded Sylvia with the sarcasm of helpless jealousy.

"As soon as I'm funnier than John Foster Dulles."

After all this bracing excitement things got very dull. No challenging occasions arose for Becky to manufacture ingenious lies. She spent a lot of time knitting afghans and wondering if life in Washington was all that glamorous. Finally, she decided she would look for a job in Baltimore, where most of her friends were. She confided in Sylvia, who it turned out, was also tired of Washington. On evenings when they

didn't have dates they scanned the help wanted ads in the Sun Paper. Sylvia, who, it turned out entered into serious negotiations to become an assistant kennel manager in Glen Burnie. Becky hoped to be a receptionist in center city, close to the better seafood restaurants and dress shops.

"Now here's something for you, Becky."

'Needed: Executive secretary and Girl Friday for well-established broom factory. Shorthand essential'."

"Pity. I'm frightfully executive, but my secretarial skills are rusty. Do you suppose they might take me on as a test pilot?"

Nothing turned up, so Becky, who had just received her June quarter trust fund income, decided to quit first and job hunt later.

But the difficulties of quitting almost overwhelmed her. Becky felt ungrateful to Sturgis and unpatriotic to toss up her job when the government had spent so much money to get her a security clearance. She also felt arrogant in thumbing her nose at employment other girls would covet.

"Sylvia, what should I do? Everyone has been so nice to me." Then inspiration struck, and Becky smiled. "I shall lie—tastefully, of course."

"Oh?"

"I shall say I'm getting married." The next day she announced an imaginary engagement and a real resignation.

The Monday afternoon of her last week, Terry Moran, the supervisor, invited Becky for a farewell drink at the Shoreham.

"I have my car and I'll take you home afterwards."

"Terry, how nice. Can we include the other girls?"

"They're all busy."

After Terry and Becky had a drink, Becky noticed that Terry was awfully nervous.

"Becky, I have to go to the Ladies' Room. Will you please come up with me? I don't feel at all well." Becky was alarmed. They walked a great distance through the corridors of the Shoreham (Is there only one ladies' room in this ark? Becky asked herself.) Finally Terry opened a door and pushed Becky through.

"Surprise! Surprise!" screamed the entire steno pool from the recesses of a private dining room. It was a bridal shower.

"Oh my God! thought Becky. "It is wrong to lie and I am being punished."

"Surprise! Surprise!" they screamed again.

"I am completely overcome," said Becky in simple truth.

Carmen, who looked very nice in her new wig, pinned a white orchid on Becky, who noted that Helen Clapp was seated at the end of the beautifully set dinner table, scribbling on her steno pad. She would learn the next day why Helen was taking dictation. Everything Becky said between the time she entered the room and the moment they sat down for dinner would be typed up and presented to her under the heading "What You Will Say on Your Wedding Night".

"Why you even went to the trouble of getting a private room!" said Becky, as the others went into helpless laughter. "I'm flabbergasted. I don't deserve anything like this!" she exclaimed in an involuntary burst of truth.

"I apologize for naming you after a closet bowl."

Becky had never been to a bridal shower before, but she got her bearings fast. The first thing that she realized was that these warmhearted girls had spent a fortune to give her a send off. She felt like a heel. She was relieved when she learned later that Admiral Sturgis had underwritten the whole affair. The girls' outlay was limited to the shower presents. The table was banked in white flowers, mums, carnations, snapdragons, and naturally, bridal wreath. (Mrs. Schwartz, who was in on this loving conspiracy, had come all the way up from Fort Bragg to supervise the flower arrangements.) The chandeliers sported white wedding bells, made of that honeycombed paper resembling Elizabethan ruffs. There were yards of streamers, white cardboard umbrellas filled with after dinner mints, and a mound of gifts. Carmen presented Becky with a gigantic package, beautifully wrapped.

"Oh, Carmen, thank you." Helen Clapp, fountain pen poised, waited for some unintended obscenity. Becky unwrapped her gift box and drew out a lovely nightgown.

Holding it in front of her, she noted with approval that it reached her ankles. "Gorgeous! It's always so hard to find one long enough for me." Helen dropped her pen.

A bartender circulated taking drink orders, and when everyone had a glass Jojo stood on a chair and announced "Becky, we're so happy for you! But we're sad, too. Every time someone as nice as you comes into the office, they get married."

"Tell us all about your intended," urged Claudette.

"Dear God, I've got to come up with a husband somewhere," thought Becky grimly. She excused herself to repair her makeup and to do some quick thinking. When she returned she was peppered with inquiries about the phantom bridegroom.

"First of all, what's his name?"

Becky gulped. "Kohler," she replied. The name came to her from nowhere. "Chuck Kohler." (How am I going to get out of this appalling mess?) She suddenly realized that she had seen the name Kohler on the plumbing in the powder room she had just vacated.

They sat down to an elaborate dinner with champagne. Terry Moran presented Becky with all the ribbons from her gifts neatly tied around a folded paper plate. It seemed that this was the bouquet to be used at the wedding rehearsal. The balance of the evening was devoted to Becky's ingenious and tantalizing lies about Chuck Kohler. When she tottered into her apartment loaded with gifts, Sylvia raced to the foyer.

"I've been worried sick. Where the hell have you been?"

"At my bridal shower," said Becky depositing a pile of turkish towels on a radiator. "I haven't the faintest intention of explaining anything until I've taken off my shoes."

Becky got through the next day pretty well, wearing her orchid. She got awfully tired of smiling. Deeply grateful to get home that evening, she almost called off a dinner date with an Ensign stationed at the White House.

They went to a restaurant on Wisconsin Avenue. While they were sitting at the bar waiting for their table, the Ensign was paged and excused himself to go to the telephone. Becky struck up a conversation with a man sitting next her. He had a heavy Texan accent. "He

probably thinks my speech is pretty strange too," thought Becky.

The Ensign, a limp R.O.T.C. specimen called Roger Measley, reappeared and announced an urgent summons to the White House.

Roger was a short, pulpy boy with wide hips, narrow shoulders, and large drooping cheeks that reddened and puffed alarmingly when he was ill at ease.

"I'm sorry Becky. Here's ten dollars. It should cover the drinks and your cab home."

Becky was disgusted. At the very least, he should have paid the check and escorted her to a taxi. He obviously came from a very bad-mannered small town.

"Thank you, Roger," she said, accepting his banknote. "I have never before felt like a bar-hopping tart. Should I stuff this down my cleavage" she asked, waving the bill at him. Roger went into his blowfish act and fled. Texas was enchanted.

"You are one funny lady!"

"I *was* a little harsh."

"Served him right. May I buy you a drink, Ma'am?"

"No, let me buy *you* one. I want to use up my earnings of sin," explained Becky, still waving Roger's ten dollars. The Texan looked at her intently.

"Are you engaged to him?"

"No, but I wish I were."

"Him? If he weren't so fat and soft he'd be just plain scrawny." Becky realized with growing pleasure that Texas was jealous.

"Oh, I don't want to marry him. I just need to be engaged. Don't ask me to explain. It's far too complicated." Becky chanced to look up into the large mirror behind the bar only to see Terry Moran and Jojo Gervasi bearing down on her like avenging angels. "Oh my God!" she thought. "They are going to think I'm a fast woman, engaged to one man and drinking with a stranger!" She turned to the Texan.

"Would you do me a very great favor? I'm going to ask you to pose as my fiance´ for about ten minutes. I assure you I'm not asking you to do anything wrong."

"I don't understand."

"I'll explain later. I'm asking you to keep some very nice people from being hurt. You will never see me again, but I shall always be deeply grateful."

"Ma'am, I would be honored."

"Fine. Your name, in case you don't know it, is Chuck Kohler. Why, Terry, dear, and Jojo. I'm so happy you could meet Chuck."

An hour and a half later the Texan was driving Becky through Rock Creek Park in a Cadillac convertible with custom cowhide upholstery. "Not bad," she thought.

"So now you understand why I needed you to be Chuck Kohler. I apologize for naming you after a closet bowl. What's your real name?"

"Billy Joe Ledbetter."

"Dear God!"

"What do you mean 'Dear God'?"

"It sounds like an announcer from the Grand Old Opry."

"And what is your name?"

"Rebecca Phillips Wentworth," she replied, just a shade too grandly.

'Dear God!' yourself. Rebecca Phillips Wentworth sounds like the name of a maternity hospital!"

"You know, you're right!", she replied.

Billy Joe looked closely at his companion. She *was* awfully large. She was also robustly direct. He was accustomed to small, wilted Southern girls who leered out of yards of chiffon flounces and spent a lot of time blinking and dimpling, artful practitioners of salacious chastity who hinted at carnal delights while plotting only marriage. Originally drawn to Becky because she was amusing and intelligent, he was startled to realize that she was genuinely attractive.

"You mean to say you've never been engaged?"

"I do."

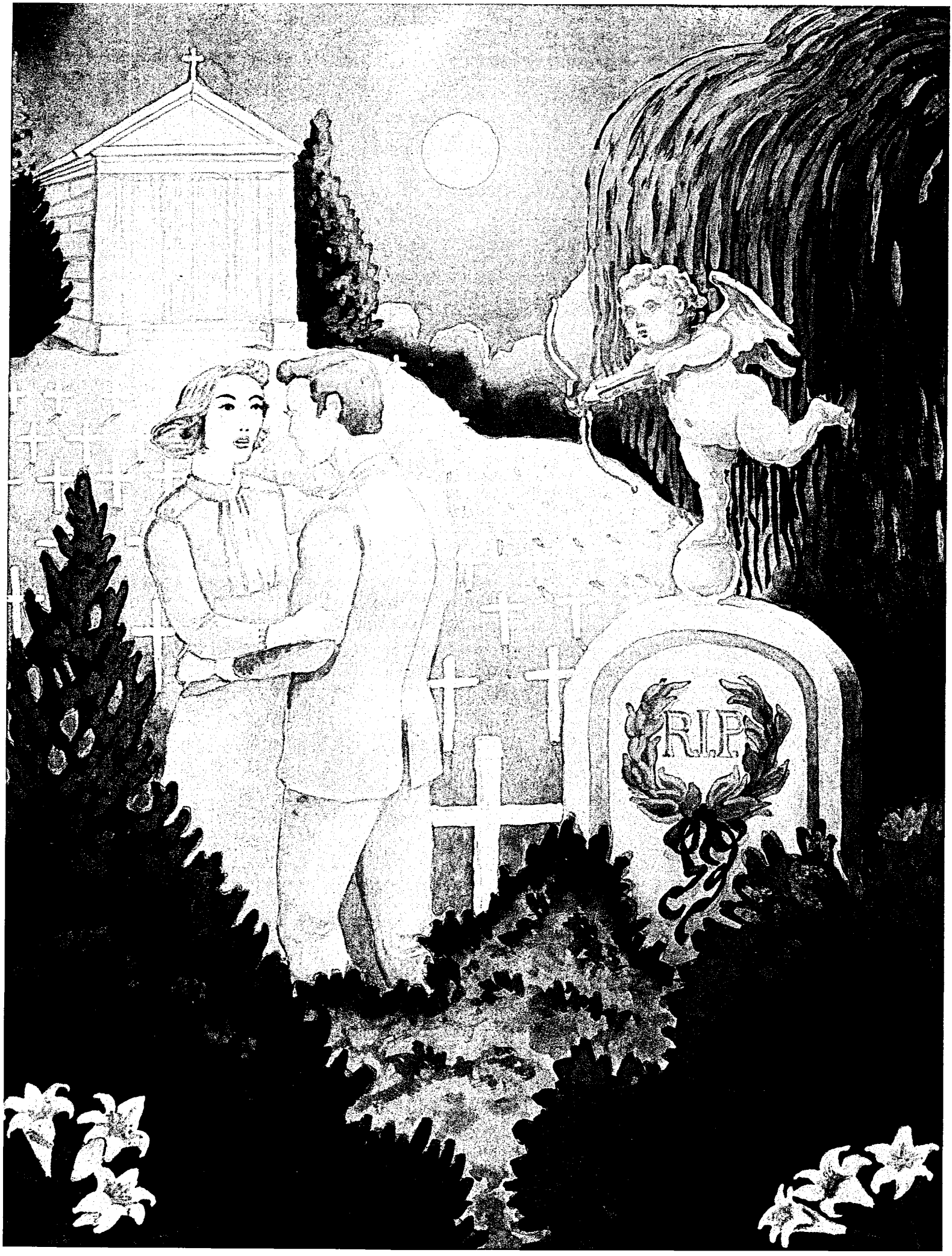
"Honest Injun?"

"Oh, yes. You see, I'm just a good sport. I don't stir romantic feelings, but old men and dogs are crazy about me!"

"You're marvelous!"

"You're a bit of all right, yourself," conceded Becky, who had the Yankee gift of understatement. When they got to Becky's apartment she invited him in. "All very proper. I have a roommate who will keep us from tearing each other's clothes off." Billy Joe was much too much the gentleman to announce that he could think of nothing he'd like better. He accepted her invitation.

"Halloo, Sylvia, are you decent? I should like to introduce you to my ex-fiance´."


R.I.P.

These two large people bumped their way through the small foyer and emerged into the living room, blinking like moles.

"Oh, not Roger?" asked Sylvia, looking up from her horoscope.

"Oh no a vast improvement."

Sylvia's greeting was chilly, for she was by no means pleased that Becky had managed to have two dates in one evening while she had had none, and her horoscope predicted a continued drought.

"I am sure you will be delighted to know that the sink is clogged again, and while you were out amusing yourself I caught two more mice in the kitchen. I am going to bed with a sick headache as soon as I empty the traps into the incinerator."

"Perhaps I should say good night," volunteered Billy Joe, looking very much disappointed.

"Oh, don't let me spoil your fun," said Sylvia as she withdrew to perform the vermin detail.

"I'd better go," said Billy Joe.

"I suppose you should, but I wish you wouldn't," said Becky, equally disappointed. Her honest statement undid him. He suddenly realized that he liked Becky better than any girl he had ever met, and that he was going to marry her if he had to kidnap her.

"What shall we do, Becky?"

"Well, let me see. Our choices are somewhat restricted by the bounds of decency." She thought for a moment. "Have you ever seen Washington by night from the other side of the Potomac?"

"Never."

"Let's take down the top of your convertible and ride over to Arlington.

"If that's what you'd like."

"Wonderful! And might we stop at that Mexican restaurant on Massachusetts Avenue for some tacos to take out?" suggested Becky, who had eaten a big steak dinner less than an hour before. "I get awfully hungry when I'm enjoying myself."

"You like Mexican food?"

"Mad for it!" Billy Joe grinned with approval.

They walked about for two and a half during which Billy Joe waxed lyrical about his boyhood home in Texas. Becky was not sentimental about real-estate, but this particular real estate was awash in petroleum, and Becky could be *very* sentimental about money. Suffused in a happy glow of upper bracket infatuation, they fell into bashful silence and paused in teir stroll. Then Billy Joe tried to put his arm around Becky's ample waist.

"Please, Billy Joe. Don't distract me. I want to see what the little man does with the bayonet."

"Sorry."

"Perfectly alright. You couldn't help yourself. After all, what is more romantic than the Tomb of the Unknown Soldier viewed by artificial light?"

"Let's go back to the car." They resumed their walk and were soon in a very shadowy spot. Billy Joe grabbed Becky firmly, swung her around and announced loudly, "You are the most wonderful woman I have ever met!"

"Shh! You could wake the dead!" It occurred to Becky that this was a pretty creepy thing to say in the middle of the National Cemetery. "Now, really, Billy Joe, had you counted on some necrophiliac spooning on a cozy tombstone?" ("Hah!" she thought. "I've got him in my power.")

"I'll let you go, if you'll agree to marry me."

"I'm not sure I'll agree to that because I'm not sure that I really want you to let me go."

"Hallelujah!"

"My sentiments exactly. Now if you'll promise to take me back to the car and act sensibly, I promise to act foolishly."

"You mean you'll marry me?"

"Without a moment's hesitation. But

"Without a moment's hesitation. But I expect a formal proposal of marriage, with you on your knees."

"In the car? That sounds kinda awkward. Passers-by might get the wrong idea."

"No, no. We'll stand outside the car."

"What if the police see me on the ground and . . . . "

"I shall explain that you were checking the pressure of the tires."

"You've thought of everything."

"I'm famous for that. Now let's get out of this boneyard."

A few minutes later Billy Joe knelt by the Cadillac while Becky looked down, wondering if she detected the beginnings of a bald spot. She really didn't care.

"Miss Wentworth, would you accept my hand in marriage and make me the happiest man in Texas?"

"Only *Texas*? And who will elate you throughout the rest of the Republic?"

"The world! The universe!"

"That's more like it. Mr. Ledbetter, I am honored by your proposal, which I accept with great happiness."

"Oh, thank you, Miss Wentworth. I am beholden to you."

"Very prettily spoken. For that you may have the last taco."

"I'll split it with you."

"Why, Billy Joe, I like that. Most husbandly. Oh, by the way, you can get up off your knees now. You're not arthritic, are you?" added Becky in mock alarm.

"Oh, no. You'll find me quite supple," replied Billy Joe with a dangerous smile.

"Well, that's a comfort. Now, aren't you going to kiss me?"

"Sure. As soon as I stop laughing."

Sylvia was having a bad dream in which hordes of mice chased her while she in turn pursued elusive escorts. She awoke to the sound of Becky bumping into a dressing table.

"Well, night owl! It's three thirty in the morning. You'll be in grand shape for work tomorrow—I mean today."

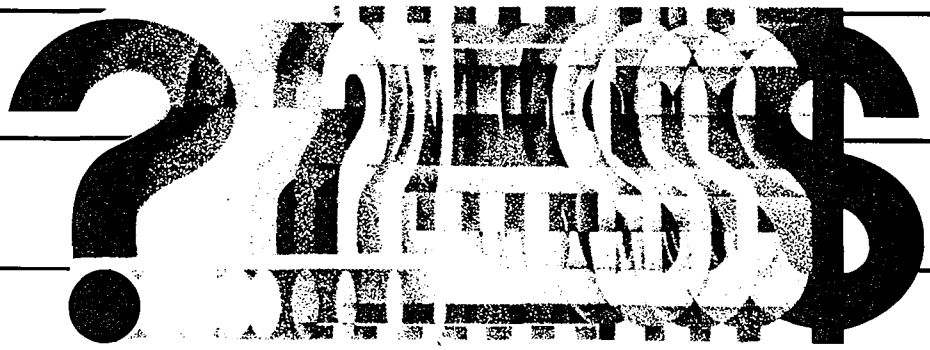
"Sylvia, I want you to be the first to know. I'm engaged again. Not bad, Sylvia! Engaged twice in one evening."

"Yes, but to the same man."

"Stop quibbling or you won't be a bridesmaid."

The author wishes to thank his technical advisor, Mrs. William E. Wiggin, for guidance in such tricky matters as the proper costume in 1953 for a gentlewoman on her first day in a steno pool and the logistics and etiquette of bridal showers.

Our appreciation to Richard Reed, a local Wilmington artist, for the illustration that accompanies this story.



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