

In *Wade and Bolton*, the Court adopted the principle of the 1857 Dred Scott Case,¹⁵ where the Supreme Court held that a free descendant of slaves could not be a citizen and said that slaves were not even persons. It is the same principle that underlay extermination of the Jews, that an innocent human being can be defined as a nonperson and killed if his existence is inconvenient or uncomfortable to others or if those others consider him unfit to live.

The bloody reality of legalized, permissive abortion is awful. So, too, is the devaluation of all human life implicit in the reasoning of the Supreme Court. For instance, the supposed power of the state to protect the life of the unborn child even after viability evaporates in light of the license for abortion whenever it is sought to promote the mental health of the mother. But it is significant that the Supreme Court denied even this illusory power to the state prior to viability. The Court went on to describe viability as “the capability of meaningful life outside the mother’s womb.”¹⁶ The idea seems to be that the only human beings who can claim the protection of the state for their lives are those whose lives have the potential to be meaningful, with the meaning of that requirement apparently to be determined by the Court.

Opposition to the Supreme Court’s abortion decrees has naturally centered upon the Constitution. An anti-abortion amendment to the Constitution was introduced in the Congress within a week of the decisions,¹⁷ and numerous amendments are now pending. The legal weaknesses of the abortion decisions and the merits of the various proposed amendments have been analyzed elsewhere.¹⁸ It is not my purpose to repeat such a legal analysis here.

CONSTITUTIONAL SUFFICIENCY: THE DEEPER QUESTION

The efforts to amend the Constitution are commendable and they could have a good chance of success. However, there is another important aspect of the matter that has received little if any attention. This aspect is the weakness implicit in accepting the Constitution as the self-sufficient criterion for opposing the abortion rulings and for reversing them. It is time to consider whether the abortion rulings were not really attributable in major part to the Constitution itself. Or, more specifically, whether they were not attributable to the moral and religious indifferentism which was built into the Constitution.

The point of departure for this inquiry is not *Roe v. Wade* but a less widely known abortion decision handed down by the New York State Court of Appeals in 1972. Fordham University law professor Robert M. Byrn, one of the earliest and strongest advocates of the rights of the unborn, brought a proceeding in the New York courts to challenge the constitutionality of that state’s permissive 1970 abortion law, which Professor Byrn attacked as a violation of the unborn child’s constitutional right to live. In *Byrn v. New York City Health and Hospitals Corp.*,¹⁹ the New York Court of Appeals did two significant things. First, the court found as a fact that the unborn child is a living human being:

“It is not effectively contradicted, if it is contradicted at all, that modern biological disciplines accept that upon conception a fetus has an independent genetic ‘package’ with potential to become a full-fledged human being and that it has an autonomy of development and character although it is for the period of gestation dependent upon the mother. It is human, and it is un-questionably alive.”²⁰

Secondly, the court ruled that the unborn being could legitimately be defined as a nonperson by the legislature:

“What is a legal person is for the law, including, of course, the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person (e.g., Kelsen, *General Theory of Law and State*, pp. 93-109 . . .).”²¹

It is significant that the New York court relied on Hans Kelsen as an authority for its conclusions. Kelsen’s ‘pure’ theory of law, according to one analyst, is

“. . . perhaps the most consistent expression of analytical positivism in legal theory. For it is characteristic of legal positivism that it contemplates the form of law rather than its moral or social contents, that it confines itself to the investigation of the law as it is, without regard to its justness or unjustness, and that it attempts to free legal theory completely from all qualifications or value judgments of a political, social, or economic nature.”²²

Kelsen views the ‘legal person’ as “the subject of legal duties and legal rights.” According to Kelsen, the law does not have to regard all human beings as persons and a law would be no less valid because it excluded some innocent human beings from the category of persons.²³

Law, in Kelsen's view, is a form into which contents of any kind may be put, according to the prevailing social views. The content of law may be changed every day by those to whom lawmaking power has been entrusted. The possibility of natural law is categorically denied by Kelsen. Law is "not an eternal sacred order, but a compromise of battling social forces." It is a purely mechanical apparatus, capable of protecting and sanctioning any political, social or economic set-up.²⁴

Another commentator sees Kelsen's "pure theory of law" [as] sheer positivism, excluding from the domain of jurisprudence the 'irrational' idea of justice as mere emotion."²⁵

Roe v. Wade and *Doe v. Bolton* are bad decisions.

But they are more. They signal the fact that something is wrong with the Constitution itself. I do not mean the obvious wrong—that the Constitution is now interpreted to sanction baby killing when it ought not to be so interpreted. Rather, I mean that the Constitution itself is now seen to be an exercise in positivism. The Constitution for at least a century has been regarded as a law unto itself. It now appears further as a document which liberates the state from the constraints of a higher law. It therefore recognizes no standard which would invalidate the exercise of tyranny according to constitutional forms. One basic reason for this deficiency in the Constitution is to be found in some original assumptions that underlay the Constitution. These assumptions involve the relation of the Constitution to God and the natural moral law.

According to Professor Edward S. Corwin, the United States Constitution was influenced by two basic natural law concepts: first, that Natural Law is entitled by its intrinsic excellence to prevail over any law which rests solely on human authority; second, that Natural Law may be appealed to by human beings against injustices sanctioned by human authority.²⁶

There was implicit in the United States constitutional scheme a governmental right and duty not only to recognize the existence of God but also to conform its laws to the natural moral law of 'which God is the Author. The Declaration of Independence affirmed "the laws of nature and of nature's God":

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their

Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

There are, in other words, God-given limits which no government can exceed without forfeiting its claim to legitimacy.

This concept, of course, did not originate in the Declaration of Independence. The Declaration drew heavily on John Locke's emphasis, especially in his *Second Treatise on Civil Government*, on the natural and inalienable rights of the individual.²⁷ And the statement by Lord Coke in *Dr. Bonham's Case*²⁸ is familiar, that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adudge such Act to be void."²⁹ In 1761, James Otis delivered his famed speech against writs of assistance. "Then and there", said John Adams of Otis' speech, "the child Independence was born."³⁰ Speaking of the unwritten and the implicit proscriptions of the British constitution, Otis said:



An act against the Constitution is void; an act against natural equity is void; and if an act of Parliament should be made, in the very words of this petition, it would be void. The executive Courts must pass such acts into disuse.³¹

The Declaration of Independence seems to have embodied the concept argued by George Mason before the General Court of Virginia in 1772, that:

All acts of legislature apparently contrary to natural right and justice are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; whose authority can be superseded by no power on earth.... All human constitutions which

contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of Justice.³²

This bears a similarity in some respects to the teaching of Thomas Aquinas, that:

Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.³³

Other citations could be advanced to support the proposition that American law at the time of the Constitution recognized the natural law as a higher standard to which human law must conform.³⁴ (A different question, beyond the range of this discussion, is the extent to which the framers of the Constitution intended the powers of judicial review to be exercised by federal or state courts.)³⁵ But the recognition at that time of a higher law that would prevail over contrary acts of the legislature did not include a recognition of a moral arbiter apart from government itself. Such an arbiter, whether the Pope, or anyone else, would determine the meaning of the natural law in a way that would be morally binding upon courts as well as upon other branches of government. Nature abhors a vacuum. And since no arbiter external to government was recognized, it is not surprising that government began to make itself the arbiter. In the climate of legislative supremacy prevailing at that time, it was also understandable that the ultimate authority would come to repose in the legislature as opposed to the courts. Judge Cooley noted that:

except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance.³⁶ What Judge Cooley summarized here is the condition of constitutional positivism which came to dominance in the American courts in the mid-nineteenth century.

After the Fourteenth Amendment in 1868 forbade the states to “deprive any person of life, liberty or property, without due process of law,” the courts began to infuse natural law concepts into that due process clause. The extent to which that clause embodied in

its meaning the natural law concepts which were more openly employed in an earlier day is a fertile subject for academic and judicial discussion. The controlling concept today, however, is positivistic. There are no overarching principles of natural law to which even the due process clause must conform. Rather if natural law principles today have any vitality in the constitution, it is because they have been enacted or construed into the due process clause. When the meaning of the due process clause is altered by amendment or judicial decision to contradict them, the natural law principles interpose no barrier that will be recognized by any branch of government. Similar considerations apply to the Fourteenth Amendment’s equal protection clause, which embodies certain principles of fairness and natural justice and which was directly involved in the 1973 abortion cases. Thus it was that the United States Commission on Civil Rights issued a report in April, 1975, supporting the Supreme Court abortion rulings, which was entirely positivistic in tone. The Commission applied to the abortion rulings the statement made by President John F. Kennedy on the school prayer decisions, that “I think it is important for us, if we are going to maintain our constitutional principles, that we support the Supreme Court decisions, even though we may not agree with them.”³⁷

What is often overlooked is that the positivistic denial of the natural moral law and of the objective moral order of which it is a part, inevitably leads to a conception of the law as force. The philosophy of the natural law, wrote Father William Kenealy, S.J.: maintains that there is in fact an objective moral order within the range of human intelligence, to which human societies are bound in conscience to conform, and upon which the peace and happiness of personal, national and international life depend. The mandatory aspect of the objective moral order we call the natural law. In virtue of the natural law, fundamentally equal human beings are endowed by their Creator with certain natural rights and obligations, which are inalienable precisely because they are God-given. They are antecedent, therefore both in logic and in nature, to the formation of civil society. They are not granted by the beneficence of the state; wherefore the tyranny of a state cannot destroy them. Rather it is the high moral responsibility of civil society, through the instrumentality of its civil law, to acknowledge their existence and to protect their exercise, to foster and facilitate their enjoyment, by a wise and scientific implementation of the natural law with a practical and consonant code of civil rights and obligations.³⁸

On the other hand, said Father Kenealy:

If man is essentially no different from ‘a baboon or a grain of sand’; if we are simply ‘cosmic ganglia’; if ‘functioning is all there is’; if truth is merely ‘the majority vote of the nation that can lick all others’; if ‘the sacredness of human life is a purely municipal ideal, of no validity outside the jurisdiction’; if the ultima ratio of law is simply physical force:-if these things are true, as Mr. Justice Holmes thought they were true, then we have no rational defense against the philosophy of totalitarianism; we have fought a war in vain; and American democracy is doomed to extinction. And if the thought of the legal profession and the teachings of the law schools are to follow Holmes, ‘the greatest of our age in the domain of jurisprudence’, then our profession and our schools will play a tragic part in the disintegration of American society.³⁹

In the United States, the state regards itself as liberated from the restraints of any objective moral order higher than the Constitution itself. And in to-day’s climate of judicial activism, the meaning of the Constitution is ultimately determined by the justices of the Supreme Court. But the rhetoric of democracy is maintained. Thus the law comes to be regarded in theory as a reflection of consensus with the content of that consensus to be determined ultimately by the lawgivers.

RELIGION AND THE CONSTITUTION

With the rejection of the higher law in our constitutional scheme has come the rejection of the Higher Reality. There was a theistic foundation to the original recognition of the natural law in our governmental scheme. It is not surprising that the vitality of the natural law as a restriction on government action reflected the vitality of the commitment to theism in that scheme. As the recognition by the state of the natural law became diluted, so too did the recognition of the Author of that law, and vice versa. But just as our original recognition of the natural law was ambivalent in its failure to acknowledge a moral arbiter of that law, there was a corresponding weakness in the constitutional treatment of religion as such.

That part of the First Amendment which deals with religion reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” Both clauses have been applied against

the states by the Supreme Court. The critical issue with respect to both religion clauses of the First Amendment is the definition of religion. Is religion limited to theistic beliefs or is it broad enough to encompass non-theistic beliefs as well?

The second, or free exercise clause, presents no problem. It should be construed, of course, to protect the free exercise of belief of atheists and agnostics as well as Baptists and Catholics. And it has been so construed by the courts.⁴⁰

The more difficult problem concerns the meaning of religion in the establishment clause. The original meaning of this clause is clear. According to Judge Thomas Cooley, the “establishment of religion” which the clause was designed to prevent “meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others.”⁴¹ The establishment clause commanded impartiality on the part of the federal government as among the various sects of theistic religions, that is, religions that profess a belief in God. Government could generate an atmosphere of hospitality toward Christianity and theistic religions in general, so long as no substantial partiality was shown toward any particular theistic sect or combination of sects.

Justice Joseph Story, who served on the Supreme Court from 1811 to 1845 and who was a leading Unitarian, summarized this aspect of the First Amendment:

Probably at the time of the adoption of the Constitution, and of the first amendment to it...the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

The real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.⁴²

The establishment clause in its neutrality mandate regarded Christianity or at least theism as the common denominator of all religions. Non-theism was not included within the definition of religion for that purpose. Government itself could profess a belief in God, and, so long as a practical neutrality was maintained among theistic sects, the neutrality command of the establishment clause would not be breached. For example, the First Amendment right of government to profess the truth of theism is shown by the fact that on September 24, 1789, the very same day that it approved the First Amendment, Congress called on the President to proclaim a national day of thanksgiving and prayer.⁴³ President Washington issued the thanksgiving proclamation on October 3, 1789, and all Presidents except Thomas Jefferson and Andrew Jackson have followed suit.

There is abundant evidence that the original constitutional posture of the government of the United States with respect to religion was one of generalized promotion of Christianity or at least theism, while protecting the free exercise of religion of all, whether believers or not. (When I use the term theism in this respect, I include therein all religions that profess a belief in God, including both deistic and theistic beliefs in God with their variant interpretations of the nature of God and His providence.) Two examples might be mentioned. In 1844, the Supreme Court of the United States observed:

It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania...in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public....⁴⁴

In the case of *Holy Trinity Church v. United States*,⁴⁵ the Supreme Court unanimously held that a Congressional statute prohibiting the immigration of persons under contract to perform labor, did not apply to an English minister who entered this country under a contract to preach at a New York church. The Court recited the legislative history of the act and then said:

But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this

affirmation....

..If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth.... These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.⁴⁶

The American system worked well as long as the people generally adhered to Christianity and as long as they recognized the general Christian principles of natural law as implicit elements of the Constitution. But the American Christian consensus eroded. In the 1963 decision which outlawed prayer in public schools, Justice William Brennan aptly said:

[O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all,⁴⁷

As the American religious consensus changed, so, too, did the posture of government toward religion. In 1961, Roy R. Torcaso was refused a commission as a Maryland Notary Public because he refused to comply with the requirement of the Maryland Constitution that all public officials declare their "belief in the existence of God." The Supreme Court invalidated this requirement because it unconstitutionally invaded Torcaso's "freedom of belief and religion."⁴⁸ In *Torcaso*, the Court held that the Maryland requirement that public officials declare their belief in the existence of God was invalid because "the power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in 'the existence of god.'" The court for the first time expressly declared that nontheistic beliefs are to be considered religions in the constitutional sense:

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess his belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers,

and neither can aid those religions based on a belief in the ex-istence of God as against those religions founded on different beliefs.⁴⁹

Under this quoted clause was a footnote specifying that: Among religions in this country which do not teach what would commonly be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.

The result in the *Torcaso* case could be supported on free exercise of religion grounds, on the principle that it improperly infringes on an atheist's free exercise of religion to bar him from general state employment on account of his atheism. However, two years later, in the 1963 school prayer case,⁵⁰ the Supreme Court explicitly adopted the nontheistic *Torcaso* definition of religion as the standard of the establishment clause. Government, therefore, is now required to maintain neutrality, not among theistic sects while encouraging Christianity or theism in general, but as between the two types of religion, the theistic and the nontheistic. The Court commands government to suspend judgment on the very question of whether God exists. But this suspension of judgment is a false neutrality and results in a governmental preference of agnostic Secular Humanism. Justice William Brennan labored in a concurring opinion in the 1963 school prayer case to show that the ruling did not require such things as the erasure of God's name from our coinage, the repeal of the national motto, and so on. But note his rationale, which capsulized the basic meaning of the decision: "The reference to divinity in the revised Pledge of Allegiance, for example, may merely recognize the historical fact that our nation was believed to have been founded under God."⁵¹ The words "under God", therefore, can remain in the pledge only if they are not meant to be believed, only if they are a mere historical commemoration of the fact that the founders, lacking the wisdom of our Supreme Court, actually believed that this nation was "under God". The same reasoning would apply to the Declaration of Independence, with its four affirmations of the existence of God.

In the nature of things, however, governmental neutrality on the question of God's existence is impossible. A governmental assertion that God does in fact exist is a preferential affirmation of the truth of theism; an assertion that God does not exist is a preference of atheism; the currently required suspension of judgment by government on the question is an adoption of the

agnostic, non-theistic position through the implicit assertion that, as a matter of state policy, the existence of God is unknown or unknowable. The result is the establishment of Secular Humanism as the national religion.

An important factor here is that the law cannot be merely a follower of consensus. Rather, the law plays an important educative role as well. The erosion of Christian belief and the governmental withdrawal of its promotion of Christianity were concurrent phenomena. Each influenced the other. And the false doctrine of governmental neutrality as to the existence of God has adversely affected the general moral climate as well.

As a result of the outlawing of prayer in public schools, a generation of children has seen the State, in the persons of its agents, the teachers, suspend judgment on the existence of God. Patrick Cardinal O' Boyle has clearly expressed the reality that the public schools in fact teach Secular Humanism:

Of course, it may be argued that the public schools need not favor any particular religion or religion at all, for they can proceed on strictly humanistic, pragmatic and secular conceptions. But this is precisely the point. To proceed in this way is itself to establish a religion-secular humanism-and to favor this religion over all others.⁵²



Implicitly, the school children are led to believe that there is no standard of right and wrong higher than the state which the State is bound to recognize. There is no standard by which the decrees of the State can be judged other than the will of the State itself. The State is therefore set free, in its futile effort to create a secular heaven on earth, to employ any means which the Constitution can be interpreted to cover, including, for instance, the killing of babies. The false neutrality, which is official agnosticism in disguise, involves of course a rejection of the Divinely authored natural moral law as a limit on government action. The moral neutrality of government complements, too, the growing public acceptance of the New Morality and situation ethics. And the governing Jurisprudence under such a secularistic system has to be positivistic. Under such a system, permissive abortion and other wrongs can be legally justified.

THE CONSTITUTIONAL SOLUTION

It should be asked what, if any, adjustments in the constitutional system would have prevented this result. For one thing, it is clear that the problem is not one of mechanics. We are not in trouble merely because the Supreme Court justices are appointed for life with practically no accountability to anyone, or because an erroneous interpretation of the Fourteenth Amendment has made the states uniformly and excessively subject to the Bill of Rights as interpreted by the Supreme Court, or because of various other maladjustments in the Constitution. These defects, while important and harmful, do not relate directly to the basic problem of secularization discussed in this paper. The state either recognizes the higher standard of the natural moral law or it does not. If the latter, the road to absolutism is open and downhill. But even if the higher law is recognized, as it was in our constitutional system, the specific meanings of that higher law have to be determined. An arbiter is needed. If an arbiter external to the state is not recognized, the state will determine those questions for itself. And we should not be surprised when those interpretations are conducive to the expansion of government power. Ultimately, as happened to us, the state will liberate itself in theory as well as in fact from any moral law higher than itself.

The alternative is for the state to recognize an umpire, in the moral sense, external to the state itself. Since the natural moral law is the law of God, the arbiter ought to be the Vicar of Christ, because Christ is God and His Vicar speaks for Him in these matters.

The United States Constitution was and is defective in its failure to recognize the Pope as the moral arbiter of the natural moral law. This recognition, of course, would involve a recognition of the Catholic Faith as a special object of encouragement while preserving the free exercise of all religions. Such recognition of the Pope and the Church would not be inconsistent with the Second Vatican Council's *Declaration on Religious Liberty*, especially since it would practically come about only if the people themselves chose to acknowledge the Catholic Truth. But it would run counter to the pluralistic concepts that have dominated Catholic thinking in this country for some time. Father John Courtney Murray's influential concept of the lay state denied all competence to government in religious matters, including even a competence to affirm the existence of God.⁵³ And we

are now reaping the fruits of the secularized state. It is time to reassess the Constitution in its origins.

The Constitution worked well for nearly 200 years. But, in this respect, it was because the framers spent in its creation the intellectual capital they inherited from the pre-Reformation Christian civilization. Unfortunately, they built into the Constitution a concept of governmental neutrality toward religion which ensured that the United States would draw no continuing income from that Catholic tradition. Government became 'neutral' on religion and morality. It forfeited its duty to shape the consensus so as to promote virtue. Aquinas said: "The purpose of human law is to lead men to virtue, not suddenly, but gradually."⁵⁴ Instead, the law became a mere reflector of an increasingly secular consensus. The law in turn advanced that consensus by its own promotion of established Secularism. And the secularized people predictably have tended to replace the omnipotent God with the omnipotent State.

Among the offspring of the American marriage of Secularism and Positivism are the abortion decisions of 1973. The most surprising thing about the Supreme Court's abortion rulings, however, is that so many people were surprised at them. I do not mean surprise in detail. I doubt that anyone really expected the Court to go as far as it did, allowing abortion practically on request up to the time of normal delivery. But it is surprising that so many people were surprised that the Supreme Court actually decided in favor of abortion at all. In fact, the abortion rulings were an application of the prevailing contraceptive consensus. Since the late 1950's, with the advent of The Pill, the reigning moral consensus in America is contraceptive. The ultimate outcome of the contraceptive mentality, however, is abortion. Professor Ralph B. Potter, a Protestant, observed:

When a new habit of mind now attributes new life to 'rotten luck' in the practice of contraception rather than to the purposeful will of a merciful God, neglect of the countermeasure of abortion becomes irrational and superstitious retreat from the possibility of exercising control of one's destiny. Denial of accessibility to abortion comes to be seen by many as a violation of civil liberty.⁵⁵

"Birth control mores," wrote Bishop Cahal Daly of Ireland:

create a mentality of “unwanting” babies. Furthermore, it is not a practice only but a new philosophy of man and sex, a new “way of life”. It means the abandonment of self-control over sexual urges; it implicitly authorizes sexual promiscuity. The real problem of our time is that society tolerates a continuous and ubiquitous display, by every medium of mass communication, or artificial libidinous solicitation, which makes it un-naturally difficult for people, particularly young people, to be continent; and then offers a remedy, contraceptives, which merely increases the incontinence. Promiscuity is the logic of birth control; but to have promiscuity with impunity there must also be abortion and infanticide, sterilization and euthanasia. The logical contraceptionist must insist that if these cannot be generalized by persuasion, they must be imposed by law. It has long been recognized that there is a connection between eroticism and totalitarianism.⁵⁶

The Supreme Court applied the American contraceptive consensus when it defined the unborn child as a nonperson and sanctioned his murder pursuant to the canons of analytical positivism. This is so even though most Americans then opposed and still oppose unrestricted abortion. What was surprising about the Supreme Court decisions was not that they sanctioned baby killing, which the contraceptive American people would have accepted if it had been surrounded with enough rhetoric of moderation and limitation. What was surprising was that the Supreme Court advanced ahead of the consensus and discarded all realistic pretense of moderation in sanctioning abortion.

Abortion, which is the taking of life, differs in kind from contraception (including sterilization) which is the prevention of life. But abortion is the indispensable tool of the contraceptive mentality. There is a tendency among opponents of abortion to pretend that abortion and contraception are wholly unrelated. The distinction, however, is not between abortion and birth control. Rather, abortion is an alternate method of birth control. Abortion, contraception and sterilization are all social as well as moral evils. We must amend the Constitution to prohibit abortion. Government should prohibit

abortion. But, with due regard for the legitimate rights of privacy, government should also restrain contraception and sterilization. Instead, government today is the main promoter of all three immoral forms of birth control. And the fact is that, whether or not we succeed in amending the Constitution to prohibit abortion, we will achieve lasting results only to the extent that we come to grips with the contraceptive mentality that underlies the anti-life movement. Concurrently with the drive for an amendment prohibiting abortion, we should insist that government get entirely out of the business of promoting any form of birth control and we should begin a serious, organized effort to promote a wider acceptance of *Humanae Vitae*, the encyclical of Pope Paul VI on human life. In short, we have to fight abortion. But it is time to break the great silence on contraception and to come out of the bomb shelters on that issue.

Even more basic than the issues of abortion and contraception is the need for the United States government to recognize that it is under God and that the unalloyed truth of God is the Catholic Truth. For one thing, we need to advance the Catholic Truth on matters of life and family. In that light, the abortion amendment is a means and not an end in itself. This is why it is folly to think of compromising the abortion issue so as to accept an amendment that applies only at a later stage than fertilization or that legitimizes abortion in any case. The problem is bigger than abortion. A constitutional solution to abortion is desirable only to the extent that it is consistent with the ultimate solution to the larger problem. A strict, no exceptions abortion amendment would serve that end. But anything else would compromise the larger effort.

In brief and visionary terms the larger effort is to bring the American State to accept the moral authority of the Pope as the arbiter of the natural moral law and, ultimately, while preserving the free religious exercise of all, to recognize the Truth of the Catholic Church. Such a program may seem to be a mere fantasy. But sooner or later the moral deficiency of the American Constitution will become so evident that it will be respectable to advocate a radical solution. It must be the Catholic solution.

NOTES

- 1 *U.S. News & World Report*, Feb. 5, 1973, p.19.
- 2 See *Family Planning Perspectives*, Jan-Feb, 1975.
- 3 Draft letter of Cath. Bishops' Com. on Pro-Life Act. in *Nat. Cath. Reg.*, 1/26/75, p.2, c.l.
- 4 410 U.S. 113 (1973).
- 5 410 U.S. 179 (1973).
- 6 "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."
- 7 410 U.S. at 159.
- 8 410 U.S. at 164.
- 9 410 U.S. at 191-2.
- 10 "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." 410 U.S. at 160.
- 11 410 U.S. at 164.
- 12 410 U.S. at 165.
- 13 410 U.S. at 192.
- 14 Ford, *Mass-Prdcd...Abortion* (Cat.Med.)Nov.72,117.
- 15 *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).
- 16 410 U.S. at 163.
- 17 Human Life Amendment of Rep. L. Hogan (R-Md.).
- 18 See Byrn, *An Amer. Tragedy: The Sup.Ct.on Abortion* 41 *Ford.L. Rev.*, 807(1973); and Rice, *Overruling Roe v. Wade: An Anal. of the Prpsd.Const.Amndmnts*, 15 *Boston Col. Ind. & Com. Law Rev.*, 307 (1973).
- 19 31 N.Y. 2d 194, 335 N.Y.S. 2d 390 (1972).
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