THE PLURALIST GAME

FRANCIS CANAVAN*

The United States is a pluralist society. That is a commonplace and is taken as stating the problem to which the American relation between religion and the law is supposed to furnish the solution. The general principle of that relationship is an official governmental neutrality among all creeds, one that respects all beliefs but grants no favor to any of them. The name of the game is pluralism and the rules of the game can be summed up in one word: neutrality.

Unfortunately, however, our pluralism keeps changing. Today's pluralism is no longer that of even a quarter of a century ago. As the divisions on matters of fundamental belief become more and more pronounced in our society, the principle of neutrality becomes more difficult to apply to it.

As recently as 1960, the late John Courtney Murray, S. J., described the religion clauses of the First Amendment as "the twin children of social necessity, the necessity of creating a social environment, protected by law, in which men of differing faiths might live together in peace."[1] The faiths did indeed differ, and that fact constituted a political problem. It was also true, however, that all of the religions that had adherents numerous enough to matter shared a common Judaeo-Christian tradition. Moreover, it was the respects in which they were substantially the same, namely, their moral teachings, that were politically significant and made the living together of their followers in peace a practical possibility. Now we must take notice of the fact that the differences both in faith and morals are steadily becoming deeper.

"Disintegration is the defining experience of the culture of modernism," a young professor at the Harvard Law School has written.[2] This was, to be sure, a somewhat delphic statement, but a few quotations from other writers will suggest what he meant by it.

". . . [O]ne of the reasons why the novel has suffered so many strange mutations this century," an English literary critic has remarked, "is simply that the old shared assumptions about the nature of reality—the way of things, the why of things—have broken down. Increasingly, people are left bewildered at the workings of the world around them."[3] An important reason for this breakdown is the increasingly successful struggle of the individual self to free itself from the constraint of social norms.[4] According to the American critic, Lionel Trilling, the

---

* Professor of Political Science, Fordham University.

1. J. MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 57 (1960).

2. R. UNGER, KNOWLEDGE AND POLITICS 26 (1975).

3. Tanner, *The Great American Nightmare*, 216 The Spectator 530 (Apr. 29. 1966).

4. One of the best descriptions of this process is P. RIEFF, THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD (1966).

"particular concern of the literature of the past two centuries has been with the self in its standing quarrel with culture."[5]

A group of sociologists explain in more detail that

> modern identity is *peculiarly individuated.* The individual, the bearer of identity as the *ens realissimum,* quite logically attains a very important place in the hierarchy of values. Individual freedom, individual autonomy and individual rights come to be taken for granted as moral imperatives of fundamental importance, and foremost among these individual rights is the right to plan and fashion one's life as freely as possible. This basic right is elaborately legitimated by a variety of modern ideologies.[6]

This view of the individual and his rights has found its way even into the U.S. Reports, as this passage from the pen of the late Justice Douglas reveals.

> Many of [the rights referred to in the Ninth Amendment] in my view come within the meaning of the term "liberty" as used in the Fourteenth Amendment.
>
> *First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.*
>
> These are rights protected by the First Amendment and in my view they are absolute, permitting of no exceptions.[7]

Admittedly, Justice Douglas was as thoroughgoing an individualist as ever sat on the nation's highest bench, and he wrote the above words in a concurring opinion in which no other Justice joined him. Nonetheless the attitude he expressed permeates contemporary American society and is shared by many who could not tell the Ninth Amendment from the First but are convinced that the Constitution endows them with an armory of absolute rights.

What follows from this degree of individualism has been pointed out by Iredell Jenkins: "Our skepticism regarding judgments of moral value springs from the fact that we are uneasy about what man should be; the ideas of freedom and equality have seduced us into accepting the doctrine of the ultimacy of the individual, with the result that every man becomes the sole judge of his own good."[8]

A handful of quotations such as these of itself proves nothing, of course. But it would be easy to fill a book with passages taken from a wide range of publications that reveal a growing awareness that the moral and intellectual consensus on which our society has lived is disintegrating. There is a widely diffused feeling that we are ceasing to agree even in basic respects on what man should be and how he should live. In consequence, much to the distress of politicians and political commentators, moral issues are being injected into law and politics which they would prefer to keep out. But given the nature of American pluralism today, it is hard to see how they can be kept out or how our traditional response to "divisive" issues can continue to work.

For we are no longer a pluralist society composed of a multitude of religious

---

5. Quoted in Kluckhohn, *Have There Been Discernable Shifts in American Values in the Past Generation?* in E. MORISON, ed., THE AMERICAN STYLE 196 (1958).

6. P. BERGER, B. BERGER & H. KELLNER, THE HOMELESS MIND: MODERNIZATION AND CONSCIOUSNESS 79 (1973).

7. Doe v. Bolton, 410 U.S. 179, 210-11 (1973) (Douglas, J., concurring).

8. Jenkins, Book Review, 16 AM. J. OF JUR. 302, 316 (1971).

branches that sprang from a common stem. Lush as the variety of creeds in America has always been, by far the greater part of them held the Bible in common and in most respects taught substantially the same moral code. Historians will be quick to point out how large the number of the unchurched was even in colonial times, how soon the influence of the Enlightenment made itself felt on these shores and how much indifferentism and outright skepticism coexisted almost from the beginning with religious faith. They are right, too, but only up to a point.

There never was a religious Golden Age in this country, or in any other for that matter. Nor was there ever a static period in which the religious situation in America stood still for decades. But recognition of these facts should not blind us to the extent to which a common religious and moral tradition perdured through centuries of change and fragmentation. As late as 1931 the U.S. Supreme Court could declare: "We are a Christian people. . . ."[9] It is a measure of the distance we have come in the last half-century that one cannot imagine the Court saying that today.

Our pluralism has increased and is increasing. This is, to be sure, a not unexpected development. It means only that a profound cultural shift that began centuries ago on the other side of the Atlantic has finally eroded what remained of the earlier religious and moral tradition in the minds of multitudes of Americans. It has incidentally also left millions of other Americans with the feeling that they are now strangers in their own land. Today we are forced to ask whether the picture of an impartial state presiding with what Chief Justice Burger has called "benevolent neutrality"[10] over the peaceful coexistence of a multitude of sects still fits the facts to a serviceable degree. In the face of the new pluralism that is emerging we must inquire how realistic is the ideal of neutrality as we have understood it up to now.

The neutral state, as we have inherited it, is the liberal state. The historical genesis of liberalism and the state it formed is no simple thing. It was the product of many factors, and what they were and how they interacted is a matter of considerable dispute among scholars. But for our present purpose it is safe to say that liberalism was a response to the situation created by two great movements, the Reformation and the Enlightenment. One of these replaced the unity of medieval Christendom with a multiplicity of churches. The other, as Lester G. Crocker has put it, was "the beginning of the godless age"[11] in which Christianity in any form eventually ceased to be the common religion of Western culture.

An early response to the religious divisions that followed the Reformation was crystallized in the phrase, *cujus regio, ejus religio.* That is to say, the government of a country would determine its religion and require all inhabitants to conform to it. But since this policy, far from ending strife, made control of the government an

---

9. United States v. Macintosh, 283 U.S. 605, 625 (1931).

10. Walz v. Tax Commission, 397 U.S. 664, 669 (1970).

11. Presidential Address of Crocker in L. MILIC, ed., THE MODERNITY OF THE EIGHTEENTH CENTURY xviii (STUDIES IN EIGHTEENTH CENTURY CULTURE, Vol. 1) (1971).

object to be gained by armed force, the solution that eventually prevailed was to take religion out of politics.

Doing this did not necessarily require a formal "separation of Church and State" such as was established in the United States by the First Amendment. Great Britain has shown that a formal religious establishment can become compatible with a high degree of religious liberty. But it did require that a man's freedom to follow his own religion or no religion should not be denied or seriously burdened by governmental action.

Freedom of religion was but one instance of liberalism's instinct for taking neuralgic issues out of politics. Liberal politics must be confined to matters of secondary importance like war and taxes (curious as it may sound to say that) because bitterly though citizens may disagree about these things, they do not usually take up arms against each other about them as they did over religion. Not only religious issues, however, but all issues that engender more emotion than the political system can bear must be excluded from politics. Preeminent among these are moral issues because they both deeply affect the way people live and are closely connected with their more general fundamental beliefs, be these religious or secularist.

Liberal government therefore is neutral government. But to make this assertion only raises the question: neutral about what? The answer to that question turns out to be itself a political and even a moral issue. Robert Dahl, for example, has discussed a number of ways in which people who believe in political equality, and therefore in democracy, may yet protect themselves against majority decisions which they regard as overbearing and oppressive. One of them is this:

> . . . sometimes a matter about which we disagree can be turned over so completely to the domain of personal choice that no generally binding decision is required. Two familiar issues of this kind are the religious instruction, if any, to be given one's own children and whether they are to be educated in public or private schools. A few years ago the Supreme Court of the United States affirmed that the use of contraceptive devices falls in this domain. One might call this alternative a solution by Autonomous Decisions.[12]

We may thus seem to have an answer to our question. Government should be neutral about matters that belong in the area of Autonomous Decisions. But Dahl immediately points out that the boundaries of this area are themselves a subject of continuing controversy. He explains:

> Judgments as to the appropriate domain of Autonomous Decisions are constantly changing. Efforts to define the domain once and for all have always failed. Thus in the United States, owning and driving a machine that emits exhaust fumes is rapidly moving out of the domain of Autonomous Decisions to regulation by collective decision . . ., while sexual practices among consenting adults are moving from collective regulation to the domain of individual choice.[13]

Even more important is the following consideration:

> To be sure, once we have agreed that a particular matter belongs within the domain of Autonomous Decisions, the possibility of conflict between minority and

---

12. R. DAHL, AFTER THE REVOLUTION? AUTHORITY IN A GOOD SOCIETY 19 (1970).
13. *Id.*, at 19-20.

> majority is eliminated with respect to *that matter*. But to determine what remains in or out of the domain of Autonomous Decisions requires a collective decision; decisions of this kind are often a source of very profound conflict. . . . What properly belongs within the domain of Autonomous Decisions or Consumers' Choice has been a perpetual point of controversy between majorities and minorities.[14]

What belongs in the area of Autonomous Decisions is, therefore, a question that requires a public and political decision. In making such a decision the people, through their representatives, take a public stand on what they will leave to individual choice and what they will subject to legal regulation. Leaving a matter to individual choice is as much a public decision as deciding to regulate it and implies some public scheme of values quite as much as a decision to regulate does.

In practice, of course, the controversy over a question of this kind gets such settlement as it does get through a political process in which expediency and rhetoric play a large part. Slogans such as "You can't legislate morality" and "No group has a right to impose its morality on others" are freely used. If at all possible, the First Amendment is invoked on the absolute necessity of separating Church and State. In fact, however, the size and (perhaps even more important) the financial power of the groups involved, and the importance that both sides attach to the values at stake, have more to do with the way in which the dispute is settled than does any appeal to principle.

The American people in the nineteenth century felt few qualms about banning polygamy throughout the United States, even though John Stuart Mill had warned them against doing so in Utah. Since the Mormons had exiled themselves to a remote and previously uninhabited territory in order to practice polygamy, he said, "it is difficult to see on what principles but those of tyranny they can be prevented from living there under what laws they please, provided they commit no aggression on other nations and allow perfect freedom of departure to those who are dissatisfied with their ways."[15] But the Mormons were few in number and without influence, while on the other hand monogamy was solidly embedded in the religious and moral beliefs of the great majority of Americans.

The U.S. Supreme Court, as was fitting in a First Amendment case, found a secular and political reason for upholding the federal law against the practice of polgamy in the territories. The Court declared that "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while the principle cannot long exist in connection with monogamy."[16] The ban on polygamy, according to the Court, struck a blow for political liberty. One may suspect, however, that the Court was in fact reflecting the moral conscience of the people at large.

Conversely, one may suspect that if the polygamous minority were not so small—if, say, 45 per cent of Americans believed in polygamy and many of them wanted to practice it—the Supreme Court (today's if not yesterday's) would find polygamy to be in the domain of Autonomous Decisions or, as the Court prefers

---

14. *Id.*, at 24-25.
15. J. S. MILL, ON LIBERTY, Bobbs-Merrill Library of Liberal Arts (1956), p. 112-13.
16. Reynolds v. United States, 98 U.S. 145, 166 (1878), citing Lieber, *The Mormons: Shall Utah be Admitted into the Union?*, Putnam's Monthly, March 1855, at 225.

to put it, to be included in the right of privacy. The Court would of course also have to try to gauge the feelings of the 55 per cent majority who still objected to polygamy. How strong are their feelings? Will the majority swallow a flat declaration that prohibiting polygamy is beyond the constitutional powers of government? Or must we take a more gradual approach by finding one anti-polygamy statute after another vague and overbroad while maintaining that in principle government may regulate polygamy? These would be difficult and delicate questions to answer. But one way or another, the Court, along with other agencies of government, would search for a means of taking the divisive issue of polygamy out of politics.

The reason for doing so would be the practical one of lessening social and political strife. The principled justification for doing it, however, would be the neutrality among conflicting beliefs to which government is committed in a liberal society. But the justification would only raise once again the questions of the matters about which government ought to be neutral, how far it should go in the quest for neutrality, and to what extent neutrality is ultimately possible.

We must admit that a liberal society has a permanent bias in favor of neutrality. The liberal state is founded on no such vision of human excellence as informed the political theories of Plato and Aristotle, no such hope of earthly and eternal happiness as inspired the medieval *res publica Christiana.* The liberal state aims only at equal liberty for all under impartial general laws. The use that men make of their liberty and the goals they pursue are for them to decide. Any attempt by society or its agent, the state, to make the decision for them must be rejected as an effort by some citizens to impose their conception of excellence, virtue or happiness on others.

The liberal state therefore aims low and attempts only to establish the conditions of ordered liberty in which men can peacefully pursue their essentially private ends. Such a state obviously never existed in its pure form. The laissez-faire state of the nineteenth century was probably the closest approach to it in actuality. It must also be remembered that the implications of the liberal view of man as a naturally sovereign individual motivated by his subjective concept of his own interest were worked out only very gradually over a period of several centuries. Liberalism reached its apogee in the Victorian era when it could still be assumed that ladies and gentlemen had a common code of manners and even of morals, and when one could still hope—with whatever misgivings—to civilize the masses through popular education and good literature. The proposal to free the individual to follow his preferences and to choose his own way of living took certain built-in checks for granted. It is only today that we begin fully to understand what liberal individualism really implies.

The liberal ideal of governmental neutrality ought to require (and in the nineteenth century was thought to require) a minimalist conception of the state. A state which aims at achieving neutrality by leaving to private choice those matters on which beliefs and values differ should try to do as little as possible. When it does act, it should do so only in areas of common material concern about which general agreement can be assumed, *e.g.,* paving the streets and providing protec-

still educate. As Justice Brennan explained in a concurring opinion, the state's concern in education is simply

> an interest in ensuring that all children within its boundaries acquire a minimum level of competency in certain skills, such as reading, writing, and arithmetic, as well as a minimum amount of information and knowledge in certain subjects such as history, geography, science, literature and law.[19]

Public education, in Justice Brennan's view, consists solely in imparting skills and factual information. These constitute objective knowledge which is value-free and neutral in content. New York, therefore, or any other city can teach them from no particular point of view and without believing anything about life.

The premise of this position, however, is a distinction between facts and values, between scientific "knowledge" and religious, philosophical or ethical "faith." But this distinction itself derives from a particular, sectarian and today much-controverted theory of the nature of knowledge. Its name is positivism and one can hardly maintain that positivism is now universally accepted in informed and intelligent circles. To make it the premise of a theory of education, therefore, is not neutrality.

Furthermore, it is questionable whether Justice Brennan's words accurately describe what public schools actually do. These schools today teach children about subjects as diverse as sex and citizenship, history and histology, law and literature. All of them are no doubt worthy subjects of study. But it requires some exercise of the imagination to believe that they can be taught merely as sets of objective facts, without value judgments and without implying criteria of evaluation, decision and action.

The sincere effort at neutrality would seem to defeat itself. To teach children, for example, that they have interesting and complementary sexual anatomies, but that teacher, being neutral, can say no more about the proper use of them than that there are differing schools of thought on the question, appears likely to tilt the balance in favor of regarding sexual conduct as simply a matter of taste and preference, of no social consequence so long as precautions are taken against unwanted offspring. Many people today, operating through well-financed organizations (often, in fact, federally-financed), do advocate that view and try to propagate it in the schools. But siding with them is presumably not what we mean by neutrality.[20]

One can state the problem in more general terms. Decisions on public policy concern the use of means to achieve social goals. In a society where a strong consensus on the general goals of policy exists, the decisions need not concern anything other than the choice of means to the agreed-upon goals. The goals in turn are agreed upon because they derive from a prevailing view of the nature of man, of what is good for him and of what his basic social relations ought to be. As consensus on these matters breaks down, the choice not only of means but of ends

---

19. Lemon v. Kurtzman, 403 U.S. 602, 655 (1971) (Brennan, J., concurring).

20. For a report on sex-education programs in public schools that reveals how thin the pretense of neutrality often is, *see* Horner, *Is the New Sex Education Going Too Far?* The New York Times Magazine, Dec. 7, 1980, at 137 ff.

becomes a subject of controversy, and this fact cannot be indefinitely obscured by appeals to the neutrality of the state and the equality of citizens under the law.

Affirmative action programs, for example, are designed to promote equality. But they rest upon largely unexamined and uncriticized assumptions about the nature of the equality to be promoted. The most basic of these assumptions is the conception, inherited from seventeenth and eighteenth century social contract theories, of mankind as a multitude of autonomous individual subjects of rights whose relations with one another and with society are voluntary and contractual. This conception today underlies the picture of the adult and adolescent population of the United States as made up of actual or potential jobholders who may, if they wish, marry and raise children as an avocation, but whose equal access to jobs without distinction by race, sex, creed, or sexual preference is the overriding concern of the law.

The point being made here is not that this theory of equality is false, but merely that it is neither demonstrably true nor universally accepted. The exercise of human intelligence does not automatically and necessarily commit us to so radically individualistic a view of human nature or to the kind of equality that follows from it. Still believing in the basic equality of all human beings, it would be possible to conceive of man in more communitarian terms and to think of men and women as persons whose relations flow from their complementary sexual natures. In this view, differentiation of social roles that took sex into account would make sense.

Let us push the matter a little farther. The principle that the state may deny to no person the equal protection of the laws has not been understood to forbid all legal classifications but only those which are arbitrary and unreasonable. But what is reasonable? The classic liberal answer was that the allocation of social status and rewards on the basis of merit, but on no other basis, was reasonable. A man has a right to what he has earned, disproportionate though it may be to what others get, but he has a right to no more. But, as Roberto Mangabeira Unger points out, in a liberal society, belief in meritocracy itself eventually comes under attack.

> Every conventional criterion for the allocation of social advantages falls under the suspicion that it, too, is arbitrary. Even reliance on merit becomes suspect when its dependence on the distribution of genetic endowments is taken into account, for people may begin to doubt whether a man's social place should be determined by a fact of which he is not the author.[21]

One may indeed ask why he should be expected to go to the end of the line when the good things of life are distributed, merely because he was born to poor, culturally deprived and perhaps genetically inferior parents. Followed all the way through, Yves Simon explained, this line of questioning leads to the conclusion that all children should be taken from their parents at birth and raised in state nurseries, lest one child be more "advantaged" than another.[22] Given today's

---

21. R. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 172 (1976).
22. Y. SIMON, PHILOSOPHY OF DEMOCRATIC GOVERNMENT 225 (1951).

biological technology, one can dream of the day when children will not be born at all but will come out of genetic blenders in state hatcheries, so that no child will be even genetically superior to another.

Simon's answer to this line of argument was that we limit the principle of equality of opportunity when it begins to destroy the very things for which we wanted opportunity in the first place: ". . . a policy of equal opportunity begins to be harmful when it threatens to dissolve the small communities [primarily the family] from which men derive their best energies in the hard accomplishments of daily life."[23]

But Simon belonged to the school of philosophical realism and believed in an objectively real common nature of man. He was, in fact, a Thomist, therefore a sectarian. Yet the opposing and ultimately nominalist school of thought is fully as sectarian. All doctrines of equality rest upon some philosophy and some conception of the nature of man. No state can promote equality without consciously or unconsciously, explicitly or implicitly, adopting one view or another. It has been the genius of the liberal pluralist society to avoid raising such questions of fundamental philosophy so far as possible. But as the issues that surface in debates on public policy become more profound, avoiding these questions becomes correspondingly less possible. Pretending that they can be dealt with by plain, blunt common sense without resort to premises of a higher level is at best a refusal to face the issues. At worst, it is an effort to play the pluralist game with a stacked deck.

Shifting the issues over into the area of Autonomous Decisions also proves to be no escape. The U.S. Supreme Court tried to do this with the abortion issue in *Roe v. Wade*[24] and subsequent cases[25] by holding that the right to decide on an abortion belongs only to the expectant mother, advised by her physician, without interference by the state, her husband or her parents. Thus, it was alleged, the state achieved neutrality on the subject of abortion: no woman could by law be required to have an abortion or prevented from having one, since the Constitution as interpreted left the decision to her alone.

The import of this holding has at times been exaggerated. For instance, Chief Circuit Judge Clement Haynsworth, speaking for a three judge federal court, has said that "the Supreme Court declared the fetus in the womb is neither alive nor a person within the meaning of the Fourteenth Amendment."[26] But it is doubtful if the Supreme Court claimed a power that God Himself might envy, that of making a live fetus dead merely by declaring it so. The Court's decision, rather, was an assertion, not that the fetus lacked life, but that the value to be attached to its life was only what its mother chose to give it. If she wanted a baby, its prenatal life was a value which the state could protect but only because she wanted it. If she did not want a child to be born, its life could be destroyed by abortion. That is to say, at

---

23. *Id.*, at 228-29.
24. 410 U.S. 113 (1973).
25. *E.g.*, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), Bellotti v. Baird, 428 U.S. 132 (1976).
26. Floyd v. Anders, 440 F. Supp. 535, 539 (D.S.C. 1977).

least for the first two trimesters, its life had no intrinsic value that the state could recognize and protect independently of the will of the mother.

The Court therefore did not really achieve neutrality by making abortion a matter of private choice immune from public control. Instead, it committed the United States to a value judgment on prenatal life. The same question will arise in regard to postnatal life when, as seems likely, euthanasia becomes a constitutional issue. According to the *New York Times,* it has already become the subject of "an emotional debate in Britain" occasioned by the publication of a booklet entitled "How to Die with Dignity" that described various methods of suicide. This debate, the *Times* reported, centered on the questions, "Is there a 'right to commit suicide,' as basic as the right to live? And if there is, is it proper to help people to kill themselves, either actively or by advising them?"[27]

The issue thus posed is both basic and unavoidable. The person whose life is to be terminated by euthanasia wants to die. He therefore claims the right to end his life, or to have it ended by a doctor, on the premise that the only value of life is a purely subjective one, and his life is no longer a value to him. The argument against letting him choose death—when all subsidiary and distracting arguments about fully informed consent have been settled—must invoke the principle that human life is a value in itself, an objective human good, that the state exists to protect. Faced with this issue, the U.S. Supreme Court could not pretend to be neutral by finding euthanasia to be included in the constitutional right of privacy, thus making life and death objects of private choice. So to decide would be to come down on one side of the controversy, that side which holds that life has only subjective value.

Similarly, arguments for recognition of the civil rights of homosexuals, to the extent that they are a demand for public acceptance of heterosexuality and homosexuality as separate but equal ways of life, pose an issue to which there is no neutral answer. This is a demand that the public commit itself to a particular view of the nature and function of sex in human life. Faced with this demand, the public and its government cannot take refuge in a specious neutrality by leaving the matter to individual consciences.

To do so would be a public declaration that in the eyes of society and its laws, sexual preferences are merely that—personal and subjective preferences of no objective validity and no public importance. That view may arguably be the correct one, but it is not a neutral refusal to hold any view at all. Nor, if adopted, would it succeed in relegating questions of sexual preference to the purely private domain.

Consider, for example, the case of *Belmont v. Belmont.* A divorced and remarried father applied in the New Jersey Superior Court for a change in the custody of his children from his former wife to himself on the ground that she was living in a lesbian relationship deleterious to the welfare of the children. According to the *Family Law Reporter,* the court "found him to be suitable as a custodian in all respects." Nonetheless, it rejected his application and ruled that "the mother is not

---

27. Borders, *Suicide Guide Stirs a Debate in Britain,* New York Times, Sept. 28, 1980, at § 1, p. 7, col. 1.

to be denied custody merely because of her sexual orientation. Her sexual preference and her living arrangement with her lover are only two of the many factors to be examined in determining the best interests of the children. . . ."[28] In so ruling, the court committed the State of New Jersey to the proposition that a homosexual union is, or can be, as acceptable a one in which to raise children as is a heterosexual one dignified by matrimony. This is something more than a decision to leave sexual preferences up to individuals. It is a public stand in regard to the institution of the family.

Viewed from a certain angle, the ultimate liberal ideal appears to be normlessness. In its extreme form (which for some curious reason is now regarded as "conservative"), this ideal is called libertarianism. The most radical brand of libertarianism holds that there should be no social norms enforced by the state, and indeed no state to enforce them. The only norms should be those which emerge from the consent of individuals who voluntarily join a variety of social groups. But all forms of liberalism, even the most statist, regard the ideal situation as one in which the individual freely—and, of course, intelligently—sets norms for himself. If regulation is necessary, as most liberals concede and even insist that it is, its ultimate justification is that it contributes to the individual's freedom to shape his life as he will.

Normlessness, however, turns out to be itself a norm. It is a steady choice of individual freedom over any other human or social good that conflicts with it, an unrelenting subordination of all allegedly objective goods to the subjective good of individual preference. Such a policy does not merely set individuals free to shape their own lives. It necessarily sets norms for a whole society, creates an environment in which everyone has to live and exerts a powerful influence on social institutions.

This is particularly apparent in a welfare state where, for example, the argument is constantly urged that it is unjust to allow the rich and the middle class to do what the poor cannot afford to do. The first stage of argument is that the hand of the law must be withdrawn from an activity found to be included in the right of privacy. Once it has been established, however, that contraception, abortion, or divorce, for example, are little or no business of government, the argument moves into its second stage. These activities are now constitutional rights and, as such, are presented as positive claims on government. Those who cannot afford to engage in them with their own resources must be subsidized, so that they may exercise their constitutional rights as effectively as the more well-to-do. What was originally withdrawn from the power of government should now, we are told, become an object of government policy.

The U.S. Supreme Court, as we know, has refused to turn this argument into a constitutional command.[29] That does not change the fact that government is under constant pressure—to which it frequently yields—to use its power to promote or enforce new norms in the guise of leaving normative decisions to individuals. The net result is not no norms but different norms and a reshaping of the institutions of society.

---

28. Belmont v. Belmont, 6 FLR 2785-86 (N.J. Sup. 1980).
29. Harris v. McRae, 448 U.S. 297 (1980).

A similar result would follow even in a classically liberal society that did not maintain a welfare state. Such a society would not subsidize the exercise of private rights but it would nonetheless have to make up its mind on the nature and content of the rights which it would recognize and protect. Merely by making this decision it would set social norms.

For example, Anglo-American law has always given a privileged position to the institution of marriage, and to a large though lesser extent it still does so. Marriage entails obligations and some of them are legally enforceable. But it also entails rights—economic as well as strictly marital and familial ones—which find a place in the law in a multitude of ways. Now, the preferred position of marriage creates social norms. No other sexual relationship, even if tolerated by law, enjoys the same legal protection and consequent social prestige as marriage. The law discriminates systematically in favor of marriage.

In principle, a liberal society could rectify this discrimination. Doing so would require reducing marriage to the status of a private contract like any other, to be entered into and dissolved at will, subject only to the limitations created by the legitimate interests of other persons that may have arisen from the contract (the children will always be a problem in even the most liberal Garden of Eden). The content of the contract, of course, would have to be left to the contracting parties. It could include provisions for extramarital larks, *ménages à trois* and homosexual as well as heterosexual unions. The only function of the state would be to enforce the contract while it lasted.

We must ask, however, whether a society that went that far in its quest for equal freedom for all would have eliminated discrimination and achieved neutrality. At first glance, it appears that it would have. Individuals would still be free to contract heterosexual, monogamous and life-long marriages, just as before, and the state would enforce these contracts, too. All that would have happened would be the removal of an invidious distinction in favor of one form of sexual union.

But to take this position is implicitly to assert that the only value of marriage is a purely private one. The best sexual relationship is the one that best pleases the individuals who participate in it. Their pleasure is the norm because no other norm is admissible. But accepting that proposition is not normlessness. It is the clear choice of one basic social norm over all others, a choice which has far-reaching consequences for all of society.

After all, the Supreme Court had a point when it said in the Mormon polygamy case in 1878: "Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social . . . obligations and duties, with which government is necessarily required to deal."[30] Since marriage is a highly visible social fact, government must take *some* attitude toward it. To regard marriage and the family as the foundation of society, as the Court did in 1878, is to adopt a particular view of man and society. This view inevitably becomes the basis of coercive laws, such as those which prohibit bigamy

30. 98 U.S. 145, 165 (1878).

and polygamy. But it is an equally particular view of man and society to regard marriage and its alternatives as matters of purely private concern. If they are so regarded, then private decisions about them are entitled to protection from interference and infringement, for example, by laws to prevent landlords from refusing to rent apartments to couples who wish to cohabit without being married. Either way, some view concerning sexual relationships gets enforced by the power of law. What is impossible is to take no view at all and call it neutrality.

A pluralist society must perforce strive to be neutral about many things that concern its divided citizens. But it cannot be neutral about all of them. If it tries or pretends to be neutral about certain issues, the pluralist game becomes a shell game by which people are tricked into consenting to changes in basic social standards and institutions on the pretense that nothing more is asked of them than respect for the rights of individuals. Much more, however, is involved: on the fundamental issues of social life, one side or the other always wins.

To say this leaves unanswered the question, which issues are of fundamental importance. That is a question which any given society will as a matter of fact decide for itself. The only point that need be made here is that a society may make this decision because it must make it. There is no way of avoiding decision since the ostensible refusal to decide is itself a decision.

Nor is there any neat line that can be drawn between political issues and moral issues, or between law and morality. As we have said, the decision to leave certain moral issues to individual choice is a public decision that reflects an underlying public moral judgment. Public decisions to leave certain matters to individual consciences may be and often are wise and right, but neutral they are not.

There is also no neat line that can be drawn between religion and morality. The state, under our Constitution, is not permitted to enforce the Ten Commandments on the ground that they have been revealed by God. On the other hand, the state is not barred from enforcing certain principles of the Ten Commandments for the reason that some of its citizens believe that they have been revealed by God. Which of the commandments may or should be enforced, to what extent they should be enforced and by what legal means are open questions for public moral decision.

There is inescapably a public morality—a good one or a bad one—in the sense of some set or other of basic norms in the light of which the public makes policy decisions. These norms are moral norms to the extent that they include fundamental judgments on what is good or bad for human beings, therefore on what it is permissble or obligatory to do to them or for them. Public morality is a secular morality inasmuch as it aims only at secular goals, at the welfare of men in this world. It is not therefore a secularist morality. When discussing the welfare of human beings in the here and now we are not limited to the vision of man and his good that happens to be held by those who call themselves secular humanists. Secular humanism is not the least common denominator of all American beliefs about human welfare. It is but one sectarian view among many, and any American is free to believe that he derives from his religion a richer, fuller and more truly human image of man. He is also free to use it as a basis for the views he advocates on public policy.

Leo Pfeffer has announced the Triumph of Secular Humanism, which he seems to regard as the resolution of the Issues That Divide.[31] That victory may or may not be a fact; one sometimes has the impression that the battle is not over yet. But if it proves to be the fact, we should at least not delude ourselves about what has happened. It will not be the advent of a truly neutral state but the replacement of one view of man, with the ethic and the legal norms based on it, by another view.[32]

In the meantime the Issues That Divide will continue to divide our people ever more deeply. The pluralist game will continue to be played, of course, because there is no other game in town. But there is no need for it to keep on being a confidence game in which one side proclaims its cause as neutrality and the other side is gullible enough to believe it. Societies do face moral issues to which they must give moral answers. The answers we arrive at through the political process in our pluralist society are likely to be rather messy, somewhat confused and certainly less than universally satisfactory ones. Answers nonetheless will be arrived at, and they will have definite effects on our society. We shall play the pluralist game more honestly, perhaps even with better results, if we admit openly what the game is and what stakes we are playing for.

31. Pfeffer, *Issues that Divide: The Triumph of Secular Humanism*, 19 J. OF CHURCH & ST. 203 (1977).
32. For a cold-bloodedly realistic assessment of what will be involved in this shift of views, *see* the editorial entitled *A New Ethic for Medicine and Society*, 113 CAL. MEDICINE 67 (1970).