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BOOK REVIEWS

THE CEASE-FIRE MAY BE PREMATURE . . . REACTIONS TO CEASE-FIRE ON THE FAMILY

ALLAN CARLSON*

Douglas Kmiec's *Cease-Fire on the Family: The End of the Culture War* is a unique contribution to an increasingly crowded debate on the status of the family in America. While furnished with the footnotes and related paraphernalia of scholarship, the book is written for a popular audience. Indeed, normal parents in real families are Mr. Kmiec's intended readers, as he turns his back on the "chattering class" of opinion mongers that infest our public discourse.

Cease-Fire on the Family seeks to reinvigorate communities of virtue, resting on "a positive vision of what can be achieved through the family and a skeptical . . . view of what cannot be achieved through law and politics."¹ The author crafts a vision of social reconstruction resting on the reservoirs of strength and purpose to be found within each family.

On these broad themes, Mr. Kmiec is undoubtedly correct. Investigation of the social history of the last 150 years shows that families cannot blame all of their woes on others. The disturbing reality is that the steady deconstruction of family life over this time often came with the ready compliance of families.

For example, a recent speaking engagement led me to review the history of fatherhood in America. Sixty-five years ago, author Wyndam Lewis wrote concerning the French, Industrial, and Bolshevik revolutions:

The male, the Father, is in all these revolutions, *the enemy*. It is he that has been cast to represent *authority*. Therefore, it was he, the male head-of-the-family, who has been aimed at in every insurrection. The break-up of the Family . . .

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1. DOUGLAS KMEIC, *CEASE-FIRE ON THE FAMILY: THE END OF THE CULTURE WAR* 5 (1995).

must begin and end with the eclipse of the Father-principle.²

One can trace in the U.S. a clear course of paternal decline: the loss of autonomy and of control over dependents through industrialization; the emergence of compulsory state education and the *parens patriae* legal principle in the mid-19th century; a shift in custody-preference from fathers in age of James Kent, to mothers by the age of Jane Addams; the full socialization of children's time through child labor laws, and of their insurance value through the institutions of Social Security; the displacement of fathers under the welfare umbrella through the rise of the "mother-state-child" family; and the discovery of a "right to privacy" in the U.S. Constitution, with the practical result being the husband/father's loss of legal standing concerning the potential abortion of his child.

The odd thing about this litany is that none of these changes in law or policy were imposed by, say, bands of powerful women; or by bizarre sexual minorities; or by any other external force. In every case, these changes were implemented by men themselves, by fathers. In some cases, new perceptions of justice may account for the change, or some inexorable force of history. But I believe an equally strong, or stronger, motivation was the desire by these architects of reform to flee the responsibilities of both liberty and patriarchy. They sought what Hilaire Belloc has called "the servile state,"³ to be secure, well-fed, and content in a modern form of servitude. In elevating "rights" and abandoning "duties," modern mankind has in fact merely perfected a new and happier version of moral and material slavery, that aspect of modernity that dare not speak its name.

In light of this, Mr. Kmiec properly contends that families still have within themselves (and even within the contemporary American legal setting) the power to be families, the ability to regain institutional integrity by reintegrating lost functions back into the household. The volume opens with the expression of five principles for action:

(1) there must be a recognition that neither law nor politics is the source of personal virtue, or . . . the common good;

(2) the primary agents in pursuit of cultural and individual virtue must be . . . the smaller sovereigns—church, school, workplace, and especially the American family;

2. WYNDAM LEWIS, *THE DOOM OF YOUTH* 125 (1932).

3. See generally HILAIRE BELLOC, *THE SERVILE STATE* (1978).

(3) cultural virtue, or the common good, "depends upon a re-dedication to what I call the 'meta-virtues' that underlie the American endeavor: belief in God and a Knowable truth;

(4) we must re-learn within the family . . . the personal cardinal virtues of prudence, temperance, courage, and justice;

and (5) families must actually perform their intended function.⁴

The author structures his volume around an analysis of these five principles, and offers a wealth of practical advice on how to turn these ideals into concrete acts of everyday life. His list of "family prescriptions"⁵ is exemplary, and deserving of extended comment:

Evict the television stranger. While families in the past faced terrors of considerable magnitudes (*e.g.*, barbarian invasions, wild animals, recurring famine), the contemporary electronic invasion of the household is unique. The presence of the screen in the center of the household, its close relationship to hyper-consumerism and the incessant whetting of appetites, and its intentional suppression of the natural and the physical in favor of the artificial and the ephemeral: these qualities transform television into a powerful new Mephistopheles. Any bargain with this home-bound devil is suspect. Exorcism alone holds the promise of relief.

Focus on the news of the local community or neighborhood. The global village espoused by modern propagandists is, at once, an impossibility and a pernicious evil. I have heard a story, possibly apocryphal, of the early 20th century social reformer, Jane Addams. Her young niece had come to Hull House, to visit her famous aunt for the day. Returning home, the young girl reported to her mother that "Auntie Jane" had been cold, aloof, and uninterested in her. The mother responded: "But you must understand, dear; Aunt Jane has so many little nieces and nephews in her work that she cannot devote much time just to you." A focus on global or national issues not only displaces attention to the local, the immediate, and even the familial; it paralyzes action, for it is impossible for one individual to influence great events on the other side of the globe; but it would have been possible to improve a direct personal relationship, or even a neighborhood through personal acts. Mr. Kmiec's call for attention to "the local" is the correct way to regain a sense of the possible, particularly for children otherwise bombarded by electronic illusions.

4. KMIEC, *supra* note 1, at 2.

5. *Id.* at 17-22.

Restore real functions for the family. Family decline in America, measured through marriage, divorce, and fertility rates, began as far back as the 1840's, and continued at an accelerating pace through 1940. These years saw the family "defunctionalized" as productive functions of every sort—ranging from food preservation and the weaving of cloth to the education and protection of children—passed to the industrial and governmental spheres. Then, for a magic period of a quarter century's duration, from 1940 to 1965, the trend lines reversed. The marriage rate climbed, the divorce rate fell, and the marital birth rate nearly doubled, in the celebrated "baby boom." But during the 1965-80 period, this apparently successful effort at family reconstruction collapsed, and the old trendlines came roaring back, with a vengeance. I am convinced that the critical weakness of the briefly restored family system of the 1950's lay in the failure to bring real functions back into the home. Mr. Kmiec's new call for that action is right and proper. My only quarrel here is that his recitation of examples, ranging from a family game of charades to home repair and gardening, while correct in a way, fails to underscore the magnitude of the needed response. A few shared family hobbies will not do the job. Rather, the task requires the return of critical productive functions to the home (such as home education or gardening aimed at self-sufficiency) if it is to reposition the family on culturally defensible ground.

Designate family times. The author's advice here is valid. Yet I reemphasize that this commitment of time must be more than for shared recreational events. It needs to foster among family members a sense of needing one another, not only as objects of affection and mutual encouragement, but also as persons investing time, skills, knowledge, and energy into the family enterprise.

Aspire to higher standards than the law designates. The law, even at its best, represents a lowest common denominator of moral expectations. Families with a living religious faith face a special imperative here, and enjoy affirmation from theological traditions that "set the bar higher." Christians, as example, are called to live by standards fixed by Jesus. Regarding divorce: "Whoever divorces his wife, except for unchastity, and marries another, commits adultery."⁶ Concerning adultery: "You have heard that it was said, 'You shall not commit adultery.' But I say to you that everyone who looks at a woman lustfully has already committed adultery with her in his heart."⁷ No one who claims to "follow Christ" can have illusions as to the acceptability of "creative

6. *Matthew* 19:9.

7. *Matthew* 5:27-28.

divorce" or extra-marital affairs, even if the law encourages the former and winks at the latter.

As a "home schooling" father, I can personally testify to the truth of Mr. Kmiec's central message. Within a few weeks of "bringing our children home," some eight years ago, we had discovered that this reclaiming of a once-abandoned function and responsibility had transformed the nature of our family. We now needed each other, and relied on each other, for critically important tasks. Our children's store of practical knowledge, and their capacity for creative endeavor and moral action, now rested on my wife and me. Priorities and time commitments shifted, as our house became a school. We also sought out other ways to extend this exhilarating sense of independence, resting on the productive home restored.

But there are certain problems with the argument in *Cease-Fire on the Family*, an analysis of which casts light on the real difficulties, minor and great, facing aspects of Mr. Kmiec's project. At the "quibble" level, while Mr. Kmiec properly rejects federal or state "school vouchers" for use at private and church-run schools, he does embrace tuition tax credits as the desirable alternative. While I have no quarrel with the author's claim that these *should* pass Constitutional muster, I believe that such credits pose their own problems. If the tuition tax credit is a *federal* tax preference, then it represents a further *federalization* of school finance. If it comes through the states, it still means the contravening of local school finance authorities. Either approach, I believe, violates the principle of subsidiarity, as applied to taxation and education. In addition, a tax preference for only one form of expenditure represents an unnecessary intrusion by government into the family economy. It would be far better, I believe, to seek *general* tax relief for families, through larger deductions or credits (or both), linked to the number and age of children. The income *retained* by families could then be used as *the parents* saw fit, lodging the decisions in the *first* human community.

There is also a degree of confusion in the book's stance toward politics. On the one hand, Mr. Kmiec calls for a de-emphasis on "what is remote or secondary (politics, law), and embracing what's real and primary (the one-to-one instruction of parent to child, minister to church member)."⁸ On the other hand, he makes absolute statements—*e.g.*, "The school chosen for a child must be a genuine extension of the family"⁹ or "Set

8. KMIEC, *supra* note 1, at 15.

9. *Id.* at 58.

Family Policy In Relation to the Desired Norm"¹⁰ that can only be achieved through brutal political victories, followed by undoubtedly controversial changes in the law.

This points to two larger problems relative to the call for a "cease-fire" on the family.

First (and using the same imagery), *one side in a war does not wisely declare a unilateral cease-fire, particularly when it has already lost most of the institutional "bunkers" on the battlefield.*

The family has real ideological and cultural enemies, seeking political and institutional power for their own ends. Among them we might count:

*The neo-Malthusians, or population controllers, who dominate the publishing houses, the major foundations, and the Federal bureaucracy, and who seek to destabilize the family in order to reduce American fertility;*¹¹

*The sexual revolutionaries, from Kinsey to Hefner to the various AIDS coalitions, who dominate the public schools, control Federal research funding, and enjoy the active encouragement of the advertising and publication industries;*¹²

*The liberal feminists, who deny the relevance of the biological differences between man and woman, who meaningfully control 98 percent of colleges and universities (and nearly the same percentage of mainline Protestant seminaries), and who view the autonomous family as a patriarchal ploy.*¹³

At another level, it may be unwise to seek peace with a "modernity" that can never be reconciled with a strong-family system. Mr. Kmiec acknowledges, in an important sentence, that "work and family; government and families are best seen as competitors."¹⁴ But he does not explore the full implications of these phrases. For example, the distinguished Princeton University

10. *Id.* at 126.

11. See generally JACQUELINE R. KASUN, *THE WAR AGAINST POPULATION: THE ECONOMICS AND IDEOLOGY OF WORLD POPULATION CONTROL* (1988) (arguing that the population control bureaucracy aims at establishing draconian controls over families, churches and voluntary institutions).

12. See generally EDWARD BRECHER, *THE SEX RESEARCHERS* (1969) (analyzing the peculiar modernist ideologies of the Kinsey group and other 20th century investigators of human sexuality).

13. See generally FEMINISM, CHILDREN, AND THE NEW FAMILIES (Sanford Dornbusch and Myra Strober eds., 1988) (Contributors argue that both advanced industrialization and the demands of sexual equality require "new" family models.).

14. KMIEC, *supra* note 1, at 124.

sociologist Norman Ryder has ably summarized the root conflict between "government" and family. Looking at the experience of many nations, he concludes (with approval):

[State] [e]ducation of the junior generation is a subversive influence. . . . The reinforcement of the [family] control structure is undermined when the young are trained outside the family for specialized roles in which the father has no competence . . . Political organizations, like economic organizations, demand loyalty and attempt to neutralize family particularism. There is a struggle between the family and the State for the minds of the young.¹⁵

In this conflict, the state school serves as "the chief instrument for teaching citizenship, in direct appeal to the children over the heads of their parents."¹⁶

Equally blunt regarding the root conflict between "work" and family was the early 20th century family advocate Ralph Borsodi, who wrote: "Against the family, that remarkable instrumentality slowly evolved to meet the imperious biological mandate that we reproduce our kind, the factory wages a ruthless war of extermination."¹⁷ Or as G.K. Chesterton phrased the same point: "But if it be true that Socialism attacks the family in theory, it is far more certain that Capitalism attacks it in practice. . . . From its first days in the forest . . . [the family] had to fight against wild monsters; and so it is now fighting against these wild machines."¹⁸

It is undeniable that the modern state and the industrial economy have grown only as the family has declined. These partners in family dismemberment have in fact siezed or gained functions at the expense of families and they grow again as families surrender still more (most recently, infant and early child care). Such foes would seem to have no interest in a cease-fire, particularly with an opponent as battered as the average contemporary family.

Second, a cease-fire will succeed only if it rests on a viable strategic situation. Constitutionally, the family, as all other "little platoons" in American life, has been soundly routed by the incorporation of the 14th Amendment into the Bill of Rights. Real communities built on moral principles necessarily inhibit or discriminate

15. Norman Ryder, *Fertility and the Family Structure*, in POPULATION BULLETIN OF THE UNITED NATIONS 15, 29-32 (1983).

16. *Id.* at 20-32.

17. RALPH BORSODI, *THIS UGLY CIVILIZATION* 417 (1929).

18. G.K. Chesterton, *The Superstition of Divorce*, in COLLECTED WORKS, VOL. IV, 260 (1987).

against certain behaviors and eccentric individuals. They encourage the immoral to find other places to live, using both law and custom. They place limits on certain economic transactions (e.g., a ban on prostitution; a prohibition of sales on Sunday; restrictions on abortion or the distribution of contraceptives). Such acts are central to their self-definition and survival. Yet the "incorporation" doctrine has battered community after community: from towns attempting to defend minimum levels of decency to fathers seeking to prevent the abortion of their children. Families and other natural communities will never be safe from the arbitrary intrusion of Federal authority until this Amendment is repealed, or the incorporation doctrine undone.

Mr. Kmiec's entirely appropriate call for "Mega-Virtue No. 1—Belief in God," as a foundation for cultural virtue and family life, also overlooks the discouraging truth that religious enthusiasm *by itself* cannot sustain a familial counter culture for more than a limited time. To cite an example, American Catholics in the post World War II era exhibited striking defiance of anti-family pressures, marked by a dramatic turn toward larger families. In 1953, only 10 percent of Catholic adults under age 40 reported having four or more children, virtually identical to the 9 percent for U.S. Protestants. By 1958, the Protestant figure was still 9 percent, but the Catholic figure had more than doubled, to 22 percent. Most surprisingly, these new large Catholic families were concentrated among the better educated, with the greatest increase among Catholic women with college degrees. This fertility increase also enjoyed a positive association with weekly attendance at Mass.

Yet between 1968 and 1972, this unique "Catholic fertility" disappeared. Mounting economic pressures on families, the disappearance of the informal American "family wage" system through the application of Title VII of the Civil Rights Act of 1964,¹⁹ shifts in the Federal tax code that undercut provisions favorable to marriage and children, and mounting propaganda regarding "The Population Bomb" all played a role in this demise.

For a time, American Mormons—or Latter-Day Saints—seemed to be another exception. While fertility tumbled elsewhere in the U.S. during the "baby bust" of 1965-80, the birth rate and average completed family size actually rose in Mormon-dominated Utah. Doctrinal emphasis by LDS leaders on the

19. See ALLAN CARLSON, FROM COTTAGE TO WORK STATION: THE FAMILY'S SEARCH FOR SOCIAL HARMONY IN THE INDUSTRIAL AGE 54-59 (1983).

desirability of large families appears to have caused this divergence. After 1980, though, Mormon fertility began to fall, as wives and mothers moved into the workforce. Large families could no longer be supported by one income, while the two-career family was structurally incapable of rearing a large number of children.

These examples suggest that religious pro-family sentiment can defy modern economic disincentives to marriage and children for, at best, a generation. The family's true *renewal* as an institution requires as well the creation of a *compatible* material environment, resting on the creation of a household-centered economy embracing family production as well as consumption.²⁰ The life commitments of the Amish, whom Mr. Kmiec does cite as a "profoundly counter-cultural" model for emulation,²¹ point to the real cost imposed for living in this day as families, and the sort of society we must become before the family might find peace.

Crafting such a world will mean challenging the most vested and powerful of interests: from the corporate hedonists on Madison Avenue to the educational monopolists at the National Education Association. They will not accept *their* marginalization without a fight, nor will they allow any "counter-culture" to grow beyond a *limited* size, without taking extraordinary efforts to destroy it.

This is not a situation conducive to a compromise peace, however desirable that goal might be. Restoration of the family institution, at a meaningful level in this time and place, threatens the whole "modernist" enterprise. While I would like to fully embrace Mr. Kmiec's formula for reconciliation, I fear that cultural, political, and economic strife over the family is only just beginning. Accordingly, albeit with regret, I believe that the call for a cease-fire on the family is premature.

Instead, families need to take a sober accounting of the pressures that the modern "corporate state" can bring to bear, and craft a plausible political strategy to counter them. With the use and abuse of governmental power seen as a common denominator of these pressures, families should act according to certain principles:

(1) Constitutional rights and liberties, understood as *restraints or limits* on federal and state power, need be restored as guiding Constitutional principle;

20. See *id.*, at 102-09, 159-71.

21. KMIEC, *supra* note 1, at 11-12.

(2) every act that diminishes the sway and authority of central government *makes* possible some strengthening of family life;

(3) families need to organize into real communities (e.g., extended kin; sympathetic neighbors; religiously grounded residential consociations) that offer broader protection to familial living;

and (4) a true family politics should rest on the election of persons dedicated to this familial vision of civil liberties.

Only in a polity resting on these principles might we find an *authentic* and *lasting* legal and social peace.

A SEPARATE PEACE

JAMES HITCHCOCK*

Douglas Kmiec's book, *Cease Fire on the Family: The End of the Culture Wars*, indeed proclaims good news. Anyone who has a formula for ending the culture wars can truly claim the title of statesman and put his fellow citizens in his debt.

His proclamation of the end of the culture wars resembles Francis Fukuyama's exhilarating announcement of the "end of history," following the collapse of Communism.¹ Such proclamations usually turn out to be at best very premature, because the solutions to most problems themselves give rise to other, unforeseen problems. Kmiec has many wise things to say, and attractive proposals to offer. In the end, however, the book does not really fulfill its promise, and in fact illustrates how new problems are created while trying to solve others.

The wit Oscar Wilde once said that "socialism would take too many evenings,"² and the modern socialist Irving Howe admitted that this was one of the most profound criticisms of socialism ever made. In a way this is Kmiec's point—in fighting political battles over the family and moral values, people who are called "cultural conservatives" risk losing the very thing they supposedly treasure—family life. It is indeed salutary to remind people that politics finally does not have to do with what is most important in life and that one can live a happy and meaningful life almost oblivious to politics.

This is especially true of people for whom the health of the family is at the heart of their concerns. How ironic if children are neglected as their parents leave home to attend yet one more political rally on behalf of "family values." It is the criticism which feminists often hurl at people like Phyllis Schlafly—If you are so attached to the family, why don't you stay home and devote yourself to your own?³ There is no completely satisfactory answer to this, and it especially extends to conservatives, as mod-

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1. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 310-311 (1992).

2. OSCAR WILDE, *THE SOUL OF MAN UNDER SOCIALISM AND OTHER ESSAYS* 245 (1970).

3. See generally CAROL FELSENTHAL, *THE SWEETHEART OF THE SILENT MAJORITY: THE BIOGRAPHY OF PHYLLIS SCHLAFLY* 6, 186-89, 203-04 (1981).

ern America understands that term. What different kinds of conservatives have in common is a suspicion of centralized political power, to the point where some regard government as in a sense the enemy, and a major aim of political action is to reduce government power. Thus true conservatives ought to stay away from politics as much as possible. Private life ought to take precedence over public in almost every case. Instead, from the beginning of the Reagan administration in 1981, conservatives have flocked to Washington seeking employment and influence.

The best parts of Kmiec's book are matters of common sense and experience, things which most people know instinctively but need to be reminded of—make time for family life, plan and organize family activities, make the evening meal a meeting place for the family, make each family member feel important, respond to family members in need, strengthen the bonds of the extended family, pay close attention to children's educations, and let religious and moral beliefs truly rule within the family. Kmiec spends chapters going over this ground, which is both familiar and, most readers will probably admit with a twinge of conscience, often neglected.

This is more than just another self-help book because there is a central philosophical point, which is that no government can save people who do not save themselves, the basis of a healthy society is a healthy family, and no one except the family members themselves can produce the latter. Better to live in a misgoverned state (Kmiec does not actually say this) and a healthy family than in the reverse, since healthy families can form their members and offer them support, while the functions of government ought to be minimal—maintaining domestic peace, guaranteeing the currency, conducting foreign policy, providing for the common defense. Kmiec admits that some government decisions, especially by the courts, are unwise (politics is a "fool's game"), but suggests that people can live with them so long as their family life is strong.⁴

He also calls attention to ways in which law and government impinge on the family in ways often unnoticed. People should concentrate first on their local communities in terms of law and public policy, since it is in the local community that the conditions of healthy family life are mainly determined. (For example, do zoning laws permit grandparents to live with their married children, thus strengthening generational bonds?)

4. DOUGLAS KMIEC, *CEASE-FIRE ON THE FAMILY: THE END OF THE CULTURE WARS* 5-8 (1995).

But Kmiec does also have a political point, as his title indicates, since the exhortation to eschew politics is, as every person left of center would certainly admit, itself a political decision.

As a law professor and former Assistant Attorney General of the United States, Kmiec understands how the law works and has strong opinions on how it ought and ought not to work. Along with other conservatives he believes that court decisions and legislation have often gone to absurd lengths in regulating the ways in which people live together, and his call for a withdrawal from politics to a great extent reflects that revulsion against the misuse of political authority to attain particular social goals. But some of his own examples reveal the inadequacy of the analysis.

Thus he reports that Wal-Mart stores enunciated a policy whereby employees involved in extra-marital affairs could be dismissed. Kmiec considers this a legitimate way of giving social support to stable families. However, employees filed suit, and the company was forced to rescind its policy. Obviously far-reaching legal and philosophical issues are at stake here: whether public policy ought to encourage and support the traditional family or ought to remain neutral between the family and "alternative lifestyles;" whether private companies have the right to require moral behavior of their employees; whether the government has the authority to invalidate such requirements. Such are the kinds of issues which give rise to the "culture wars." These are real and important questions which are both practical and philosophical, and they cannot be ignored.

Liberal opinion holds that policies like that of Wal-Mart are unconstitutional and should be overturned by the courts, since sexual behavior is wholly private and should be subject to no external regulation. Thus one of Kmiec's examples of support for the family outside politics is itself invalidated by politics.

The same is true with many of his other examples—that doctors and nurses who oppose abortion should enjoy "conscientious objector" status and not be forced to participate, and that religious symbolism and religious ideas should be permitted in the public schools and in other public places. The former right is at present a precarious one, in that the acceptance of abortion is being made a requirement of medical education, and some abortion advocates argue that doctors and hospitals have an obligation to provide abortion services in the same way that they provide other services. As for public manifestations of religion, it

does not need reiterating that the courts long ago outlawed most forms of it.⁵

Kmiec is of course aware of these facts but writes as though somehow they were beyond the political process, so that, by eschewing politics and concentrating on their own families and local communities, cultural conservatives can achieve their goal of a good society.

The first and last word on the subject was really uttered by Jerry Falwell at the time he founded the Moral Majority. Evangelical Protestants, he noted, tended to be non-political, precisely because they believed that politics could not save them and that they should look inward, to their families and churches. But politics, they discovered, would not let them alone, and they soon became a major new political force during the 1980's, largely because they felt that the government was itself undermining their beliefs and their way of life.⁶ What Falwell said in 1981 remains true today, indeed even more so, because the culture wars have expanded greatly in the intervening years.

Kmiec offers wise advice when he urges people to embrace higher standards of behavior than the law itself prescribes. One vice of a litigious society is the tendency to assume that anything is permitted which the law somehow does not "cover," so that morality vanishes in a continuing game of trying to evade the letter of the law. Conversely, there are people (probably not very many) who think that all moral principles should be enshrined in law, either as requirements or as prohibitions.⁷

But the exhortation to exceed the demands of the law is not a new idea and has been part of Christianity, to cite one example, since the beginning. It is at the heart of St. Paul's diatribes against "the law."⁸ Moral people have always understood that the

5. For example, public prayer and moments of silence in public schools were forbidden in *Engel v. Vitale*, 370 U.S. 421, 424 (1962), *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963), and *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). The posting of the Ten Commandments in public schools was forbidden in *Stone v. Graham*, 449 U.S. 39, 40 (1980). Scenes of the birth of Jesus may be included in publicly sponsored displays at Christmas provided they are put in a secular context of celebrating the season. See *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 601 (1989).

6. THE FUNDAMENTALIST PHENOMENON 186-219 (Jerry Falwell et al. eds., 1981); DINESH D'SOUZA, FALWELL, BEFORE THE MILLENNIUM: A CRITICAL BIOGRAPHY 89-118 (1984).

7. This is, for example, the position of a small group of Calvinists. See ROUSAS JOHN RUSHDOONY, THE INSTITUTES OF BIBLICAL LAW 1-14 (1973).

8. See, e.g., *Romans* 1:12-24.

obligation to do what is right emanates from some higher source than governmental legislation.

Kmiec recognizes, although only in passing, that many of his positive proposals do run into legal and political barriers as things now are—the virtual banishment of religious expression from the public schools, for example, and strict governmental regulation of the ways in which families may make use of their own landed property.⁹ The law does seem to preempt morality in many cases, and more and more the courts make themselves the arbiters of morality as well as law, liberal judges habitually appealing to what they consider self-evident principles of justice transcending politics. Public schools cannot be what perhaps most parents want them to be, because of the restraints of governmental regulations and court decisions. The Catholic principle of subsidiarity, by which social functions should be undertaken by the smallest and most local institution capable of performing them,¹⁰ is swallowed up in the seemingly inexorable growth of the omniscient state.

Thus Kmiec unintentionally puts his readers in a dilemma. They are well advised to follow his exhortation to fashion for themselves the best families they can, and to make sure that they do not weaken the family by default. No “family values” enshrined in public law or policy can ever compensate for unhealthy families. But what are these families to do when, as inevitably happens, they run up against the awesome power of the state to prescribe and proscribe acceptable forms of behavior?

In a way Kmiec’s proposals recall the debate between Booker T. Washington and W.E.B. DuBois over the appropriate way for black people to seek a place in American society. Washington’s advice to his fellow blacks—“Let down your buckets where you are”—contained much wisdom but, as DuBois and others pointed out, the society would not permit blacks simply to make their own way through their own efforts. Obstacles were erected at every point. Thus in the end both Washington’s and DuBois’s strategies proved to be necessary.¹¹

9. KMIEC, *supra* note 4, at 68, 139.

10. For a discussion of the principle, see OSWALD VON NELL-BREUNING, *THE REORGANIZATION OF THE SOCIAL ECONOMY* 158-209 (B.W. Dempsey, S.J. trans., 1936).

11. See generally THOMAS E. HARRIS, *ANALYSIS OF THE CLASH OVER THE ISSUES BETWEEN BOOKER T. WASHINGTON AND W.E.B. DuBOIS* (1993); BOOKER T. WASHINGTON AND HIS CRITICS: *BLACK LEADERSHIP IN CRISIS* (Hugh Hawkins ed., 1974).

Kmiec is no doubt familiar with the famous dissenting opinion of Justice William O. Douglas in the case of *Wisconsin v. Yoder*,¹² where Justice Douglas questioned whether parents have the right to "impose" their own beliefs on their children.¹³ While Douglas held a minority view, it is a question which has never gone away and which lies just beneath the surface of the culture wars.

If cultural conservatives were to abandon the political battle it is possible to imagine a society, a generation from now, whose contours may seem far-fetched by today's reality but are a logical and natural extension of the governing mentality of the welfare state, the almost inevitable extension of the tradition of "social engineering" whereby ordinary citizens are deemed incompetent finally to manage their own affairs and must progressively (in a double sense) yield the direction of their lives to professionals supported by the power of government. (That agenda is already implicit in the requirement of universal public schooling, although until fairly recently the public schools were not a major battleground for those clashing assumptions.)

Beginning with an appropriate concern for the physical welfare of the citizens, which private people and private agencies cannot always provide, this mentality inevitably crosses the line into a concern with the psychological and spiritual "health" of the citizens as well, so that, just as parents cannot be permitted to starve their children or deny them medical care, they cannot be allowed to inflict psychological "damage" on them either. Just as scientific discoveries concerning nutrition and disease must be implemented, if necessary by public authorities, so "discoveries" about the human person proclaimed to be equally scientific must also be implemented.

- The concept of "fit parenthood" has been expanded to the point where in effect people need licenses to produce children and, if they produce them, to raise them. "Unfit" parents are not just those who seriously neglect or abuse their children but also those deemed to hold inappropriate attitudes which they should not pass on to their children.

- Even for those who do have parenting licenses, the government rigidly controls the number and spacing of children.

- Children are sent to public schools from a very young age, since it is deemed a form of abuse to deprive a child of the appropriate nursery-school or day-care experience.

12. 406 U.S. 205, 243-49 (1972) (Douglas, J., dissenting).

13. *Id.*

- All forms of home schooling, except for the very young, are forbidden, as the task of education is entirely given to chartered public institutions. (This was actually proposed on the floor of Congress a few years ago and was only defeated by an impressive flexing of political muscle by the "religious right."¹⁴)

- The schools are officially committed to the aggressive proselytizing of children on behalf of "progressive" beliefs, for example, that sexuality exists primarily for pleasure and that no form of sexual activity should be eschewed, so long as precautions are taken.

- As part of the same educational milieu children are taught that all religious dogmas are false, because dogma itself is false and unhealthy. Whatever children may learn about religion from their parents or their church, they unlearn during five days per week of compulsory schooling.

- No private schools are permitted, since they are considered divisive. "Equality" requires an absolutely uniform system of education in all parts of the country, on all levels.

- While formal freedom of worship is permitted, all public manifestations of religious belief are prohibited as a violation of the First Amendment.

- All appeals to religious belief in public discussion are immediately ruled inappropriate, and laws invalidated which are shown to have been influenced by the religious beliefs of their sponsors. (This was the plaintiffs' contention in *Harris v. McRae*.¹⁵)

- Churches are no longer exempt from taxation, so that many are forced to sell their property and some even to close.

- Crucial health-care decisions, specifically what kinds of treatment should be extended to elderly or seriously ill people, are placed in the hands of government agencies which administer comprehensive health-insurance programs.

- Just as the government in effect determines who can come into the world, it also determines when people should leave it, again through the apportionment of health-care resources.

- Those who declare themselves "conscientious objectors" to governmentally mandated abortion, euthanasia, and other practices become second-class citizens. Their refusal to participate in the "mainstream" of society entails that they be denied training offered to those who do support public policy and that they be

14. Brian Robertson, *Home Schoolers Chalk Up Increased Visibility, Movement Reveals Itself as a Potential Political Force*, WASH. TIMES, Nov. 17, 1994, at A6.

15. 448 U.S. 297, 318 (1980).

excluded from or marginalized in the professions, especially medicine, law, social work, and education.

Had it not been for the emergence of the New Right in the 1970's and 1980's¹⁶ the country might be far along precisely this road. For social conservatives the culture wars are essentially defensive, so that final victory is never possible and it is also never possible to measure exactly how much worse conditions might be if one had never fought.

Among other things the New Right has succeeded in keeping abortion alive as a public issue, of thwarting most government funding of it, and even in restricting its availability (for example, in the third trimester of pregnancy); in defeating or repealing "gay rights" legislation; in defeating the Equal Rights Amendment which was viewed by many conservatives as enshrining a feminist view of society; in having an affect on the curricula of some public schools; in protecting the rights of parents to educate their children at home; and in protecting the rights of religious schools conducted by rather marginal denominations. Although the New Right's relation with the Republican Party remains a troubled one, the party feels the necessity of at least attempting to assuage these concerns, and there have been measurable gains, such as the appointment of conservative judges (Antonin Scalia, Clarence Thomas) during the Reagan and Bush administrations.

Perhaps above all, the popular attitude towards strong central government greatly altered after 1980, to the point where even liberals sense little popular support for ambitious extensions of government programs, a result for which the New Right can take at least partial credit. When conservative politicians do not actively support the agenda of the cultural conservatives, they nonetheless aid their cause in simply failing to extend the scope of government activity.

Kmiec's point was in a sense made by John Adams, at the very beginning of the country's history, when he remarked that he pursued politics so that his children could pursue commerce, so that their children could pursue arts and learning¹⁷—first construct a sound polity, within which citizens can safely lead their lives. Alas! Adams' estimate was far too optimistic, and in each age the struggle to build a sound polity must be fought

16. For a discussion of the phenomenon, see generally JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991); JAMES DAVISON HUNTER, *BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR* (1994).

17. JACK SHEPHERD, *THE ADAMS CHRONICLES: FOUR GENERATIONS OF GREATNESS* xxviii (1975).

again, at the very least because new questions arise in each age to which public-spirited men must turn their attention. (A Christian would also say that the reality of sin means that evil forces, by no means all of which can be identified with one's political opponents, are never finally dormant prior to the Millenium.)

In declaring an end to the culture wars Kmiec seems in some places to go rather far in the direction of neutrality, even though on the whole his commitment to conservative principles is evident. Thus he puts "right to worship" and "rights to life" in quotation marks,¹⁸ as though they are merely political slogans which obscure complex reality. But surely the long train of cases involving the free exercise of religion and the legal status of abortion have not been trivial or chimeric; most of them involve real and serious issues. His warning that overturning *Roe v. Wade*¹⁹ "will not bring the unborn back to life or even prospectively stop the killing . . ." ²⁰ is perplexing, in that, as pro-lifers always point out, the same can be said about laws against murder. On abortion his position seems to be close to that of the bumper sticker, "Disapprove of Abortion? Don't Have One." Cultivating respect for unborn life in one's own family does little to give the unborn the protection which the law owes them.

In order to achieve the truce he seeks, Kmiec has to minimize the real conflict between the two sides in the abortion debate, and he does this by arguing that what both sides "really" want is not to change behavior (permitting abortions versus forbidding them) but to change moral attitudes through law, which the law is incapable of doing. But such an assumption is gratuitous and unprovable. Surely neither side now expects to persuade its opponents, except in rare cases, and both sides would be happy to see their favored policies enacted into law and enforced, no matter what public-opinion polls might show. This is not a war over abstract ideas but over living realities, whether one looks at it from the point of view of the unborn child or from the point of view of the woman who regards pregnancy as a calamity.

However, even in discussing the relation between law and morality Kmiec seems to dig far too wide a chasm. It is true that classical Catholic thought holds that not all actions which are immoral ought also to be illegal,²¹ but that is not the same as

18. KMIEC, *supra* note 4, at vii.

19. 410 U.S. 113 (1973).

20. KMIEC, *supra* note 4, at 7.

21. *Id.* at 9 (citing THOMAS AQUINAS, *SUMMA THEOLOGICA* I, q. 95, a. 1 (Fathers of the English Dominican Province trans., 1948)).

saying that actions which are illegal are not immoral. Ideally, in a free society they must be, because there is no other justification for regulating people's conduct except to prevent acts which do palpable harm. What would one think of a society whose citizens refrain from theft, for example, because there is a law against it, but steadfastly refuse to admit that theft is wrong? Even arbitrary legal regulations like speed limits rest on assumptions about morally responsible behavior.

Curiously, in his wide dichotomy between law and politics on the one hand and family life on the other, Kmiec seems to come close to adopting what is often considered the classical Lutheran theory of the state, whether or not it accurately reflects Martin Luther himself, whereby political action has no moral or religious significance whatever and is a distasteful duty undertaken by a few, out of charity to the many.²² Classical Catholic thought has always attributed a more positive purpose to political society.²³

But will John Adams' descendants therefore never be free of the burdens of politics? Kmiec would have made a more compelling case if he had merely invoked St. Paul's teaching that there are a variety of gifts and that not all are called to do the same thing.²⁴ It is a delicate matter, because only hermits are exempt from the responsibilities of citizenship, and the temptation to withdraw from public life is for most people stronger than the temptation to excessive action. However, the talent for political action is not one which all people possess, and many are not called to be active (which is not the same as saying that they can be inattentive).

If social conservatives should pay attention mainly to their local communities, who is supposed to pay attention to the national scene? Given the fact that liberals regard the state as the great machine for social change, a default by conservatives virtually insures that liberals will be unimpeded in their efforts to use Federal authority to remake the world. This is crucial because Federal authority now always trumps state or local authority, which is itself precisely a major issue in the culture wars. Social conservatives who succeed in building local communities based on sound principles soon find that the long arm of the Federal government reaches even there.

22. J.W. ALLEN, *A HISTORY OF POLITICAL THOUGHT IN THE SIXTEENTH CENTURY* 15-34 (1928).

23. *See generally*, JACQUES MARITAIN, *MAN AND THE STATE* (1951).

24. 1 *Corinthians* 12:1-11.

Although he probably does not intend this, Kmiec's proposal might also be seen as a restatement of a classic argument against democracy and in favor of a more restricted republican form of government, in which the citizens mainly concentrate on their private lives, delegating the business of government to representatives whose characters they trust but whose policies they do not closely scrutinize. Thereby conservatism, unlike socialism, will not take too many evenings.

But, if politics is a "fool's game," as Kmiec insists,²⁵ then public policy will always be made by fools, even if chosen by their fellow citizens who are wise.

Douglas Kmiec has remained an active, public-spirited citizen who, even as his book was being widely discussed, was himself on Capitol Hill testifying before Congress on a variety of issues.²⁶ Here let us trust the man's deeds more than his words, the teller more than the tale.

25. KMIEC, *supra* note 4, at 7.

26. See, e.g., Ruth Marcus, *Blame Checks and Balances; System Stalemate*, WASH. POST, Nov. 15, 1995, at A23; *Prepared Statement of Douglas W. Kmiec. . . the Partial-Birth Abortion Act of 1995*, FED. NEWS SERVICE, Nov. 17, 1995.

**A REPLY TO DRS. CARLSON AND HITCHCOCK:
STILL A FOOL'S GAME — THE MISTAKEN
PURSUIT OF FAMILY VIRTUE THROUGH
POLITICS & LAW**

DOUGLAS W. KMIEC*

There is no greater honor than to have one's work reviewed by thoughtful commentators, such as Allan Carlson and James Hitchcock. As President of the Rockford Institute, Allan Carlson is a true scholar of the family. The Institute's monthly "Family in America" supplies well-researched and powerfully presented expositions on such matters as the family wage, the primacy of home life in a federalist system, and the need to counteract public policy that fosters divorce and illegitimacy. Dr. Carlson's personal writing, including *From Cottage to Work Station: The Family's Search for Social Harmony in the Industrial Age* and *Family Questions: Reflections on the American Social Crisis* make him one of the most respected voices in family matters in America and abroad. Similarly, James Hitchcock,¹ as a legal historian and Catholic commentator of the first-rank has written on social policy affecting the family in ways that make him one of America's most formidable allies of the family. Certainly, nothing written in this brief response should be understood as reducing my genuine admiration for the work of these fine men.

Drs. Carlson and Hitchcock take me to task for calling for a "cease-fire *by* the family." This is a mis-reading. The book's title as well as its content stresses the significance of a "cease-fire *on* the family," *not* the family's unilateral surrender to pernicious legal and cultural influences. In this, the book is a call for both law and politics to stop intermeddling in matters that only families can address. To pick just two handy examples, it is a call to the present Democratic President of the United States as well as the present Republican Governor of California to stop misleading the American public into thinking that knowledge [some-

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1. Dr. James Hitchcock served as editor of *Communio* for a dozen or more years, and is the author of many books, including: *THE RECOVERY OF THE SACRED* (2d ed. 1995); *THE POPE AND THE JESUITS* (1984); *CATHOLICISM AND MODERNITY* (1979); and *THE DECLINE AND FALL OF RADICAL CATHOLICISM* (1971). His commentary is regularly syndicated to influential Catholic newspapers.

times called “educational achievement”), chastity [sometimes known as “sexual responsibility”], self-reliance [colloquially “personal initiative”], or any other virtue can be acquired by federal or state funding.² But in calling for political actors to stop speaking and acting in areas beyond their competence, it is necessarily also an injunction to families to get to work fulfilling *their* responsibilities. Families need to stop being gullible enough to believe that pronouncements of a president or a governor can substitute for real parental time and commitment. Further, parents have no call to be demoralized when the promised political salvation fails [as it inevitably must].

Dr. Hitchcock, and to a lesser extent Dr. Carlson, are too willing in their analysis of *Cease-Fire* to look to politics, and its end-product law, as the source of family renewal. The law dominates our lives. Far too much. Paul in his letter to the Corinthians asks plaintively: “Must brother drag brother into court, and before unbelievers at that? Why, the very fact that you have lawsuits against one another is disastrous for you.”³

Notwithstanding Paul’s reproach, we have dragged our brothers — and submitted the very direction of our lives — to president, congress, and yes, court, for judgment on everything from abortion to contraception to religion in schools and other public contexts to a claimed “right to die” by our own hand.

Catholics and Americans of many faiths are greatly troubled by what the law has tendered as its answer to these issues. Rightly so. The taking of innocent life has been transformed from crime into constitutional right; sexual relations outside of marriage sanctioned so long as it is “safe”; religious expression largely expelled from public school; and a right to choose death or assisted suicide proffered as simply another aspect of personal autonomy or choice.

These issues, and a good many others, are the battleground of the “culture war.” A “war” sometimes described as a contest

2. As one author put it, “[e]very time the president spoke of teamwork [in his 1996 State of the Union address], he clearly meant government work; every time he talked of our ‘common effort,’ there was government involved; and every time he said ‘we,’ it was we the government. ‘We must also provide childcare so mothers can go to work without worrying about their children,’ he said . . .” Arianna Huffington, *Should We Take Clinton Seriously?* WALL ST. J., Jan. 25, 1996, at A14. Similarly, California Governor Pete Wilson in his 1996 State of the State address proposed “efforts to discourage teenage pregnancy, including a \$15.7-million media campaign, [and] \$34 million to fortify specialized community groups and a public-private mentoring program for at-risk youth.” Dave Leshner, *Wilson Makes Renewal Call for Moral Values*, L.A. TIMES, Jan. 9, 1996, at A13.

3. *I Corinthians* 6:1.

between the “traditional” and “progressive”; but more tellingly revealed as between those who believe in an objective source of right and wrong and those who don’t. Repeatedly, the political left and right, brandishing legal brief and party platform as pointed saber, sally forth into one public forum after another vowing to save us with the 5th vote of a Supreme Court Justice, the subparagraphs of the “Contract with America,” or some slickly packaged political program cobbled together with rhetoric and sound bite in the basement of the White House.

Cease-Fire on the Family declares this a “fool’s game,” and one that disregards St. Paul’s admonition and fundamentally confuses the difference between law and morality. Morality governs all of life and its aim is the doing of good. By contrast, law cannot make one a better person or lead a better life. At most, the law can create the minimum conditions necessary for civil order, and within that order, allow the proper agents — most notably, family and church — to instruct in matters of morality; to, if you will, teach virtue.

A failure to distinguish law and morality undermines genuine moral instruction. Laws are fashioned for the masses, and as a consequence, they seldom nurture our best or highest aspiration. Every parent should recognize the statement “it’s not against the law” as a close cousin of “everybody’s going [to see the R-rated movie or to stay at the party well past curfew or to skip out on religious services early to get to the ball game, etc.]” Perhaps these matters seem inconsequential, but in truth, they are symptomatic of a willingness to forego ethical standard in order to follow the crowd with the resigned shrug: “Oh well, this is the 90s.”

Worse, far too many Americans, have an uninformed, greatly weakened, or nonexistent faith. People in this unhappy condition cannot withstand what the Holy Father recently labeled “the culture of death” — the constant barrage of reported violence and socially irresponsible portrayals of sexual license in film, book and television program. Drowning in death’s culture, it is mistakenly assumed that what law allows — abortion, artificial contraception, demeaning entertainment — is morally acceptable.

Confusing law and morality overstates as well the capacity of the law to do good. The law is a fairly blunt and cumbersome instrument. Often imposed from top-down, the law has great difficulty accommodating local variation of opinion or practice. Even as the shadow of the over-labored O.J. Simpson trial fades from our memory, to assert that legal justice is swift would surely strain national credulity.

Because the nature of our Constitution, by careful original design, and less reliable modern reinterpretation, radically separates church and state, the more we look to the law [the instrument of the state] to answer moral questions, the less influence religious instruction [church] can logically have. When law substitutes for morality, individuals anchoring life's meaning in faith must either awkwardly suppress belief in the public square or generate the suspicion that somehow they plan to "impose" religious tenets upon nonbelievers. When I served President Reagan as his constitutional legal counsel, for example, my arguments against abortion were met by the response that having the government assume a pro-life position was an unlawful establishment of religion. This was nonsense, of course, but it illustrates how using the law as primary moral educator can raise distrust and aggravate, not lessen, cultural tension.

Now, please don't misunderstand. The message here is not to "privatize" religion and moral instruction, but to the contrary, to emphasize its centrality by having the law — as much as possible — get out of the way of morality's first-team: the family and the church and by prodding this first-team off the side-lines. The indispensable role of family and church was well understood by James Madison and others of our founding generation who knew that only a virtuous people could be free. Yet, when families and local parish churches are distracted from their duty of moral formation by the false hope that a new social program or the next Supreme Court opinion will soon come to the rescue, the cardinal virtues of prudence, temperance, fortitude and justice go undefined, untaught, unlearned, and certainly, unapplied. Even as vital a concept as freedom, itself, is twisted into an ugly form of self-gratification — the freedom to do whatever one wants, rather than the freedom [and its implied obligation] to pursue the common good.

Only parents can instill in a child an appreciation for the cardinal virtues, as well as the over-arching importance of both belief in God and an acceptance of a knowable truth. *Cease-Fire* is devoted to helping with these important responsibilities in the most straightforward way — parent to parent. *Cease-Fire's* objective is thus the end of the culture war, not by imposed legal edict, or with some premature resignation that Drs. Carlson and Hitchcock mistakenly infer from what I have written, but with practical guidance that builds one soul at a time.

Since neither of my reviewers fault much of the book's substance, it might be concluded that any disagreements we have are simply a matter of emphasis or approach. In this case, however, emphasis and approach are important. If families perceive that

all is already lost because the law either presently, or is on the verge of, affirmatively destroying the family unit, then too little personal effort will be devoted to many important subjects that remain well within the grasp of each individual family. As suspicious of state interference with family as I am, the level of its intrusiveness must not be overstated. For example, Dr. Hitchcock gives us the following parade of horrors: "the concept of 'fit parenthood' has been expanded to the point where in effect people need licenses to produce children,"⁴ the government "controls the number and spacing of children,"⁵ schools teach that "all religious dogmas are false,"⁶ "government in effect determines who can come into the world, [and] it also determines when people should leave it, . . ."⁷ Similarly, Dr. Carlson worries that I have overlooked entire categories of aggressive family enemies, which he identifies as the "neo-Malthusians" [population controllers] who he asserts dominate "the major foundations and the federal bureaucracy,"⁸ the sexual revolutionaries who he proclaims "enjoy the active encouragement of the advertising and publication industries,"⁹ and the "liberal feminists," who [he argues] meaningfully control 98 percent of colleges and universities . . . , and who view the autonomous family as a patriarchal ploy."¹⁰

To be sure, all of these influences are present within our culture, but I am not pessimistically prepared to concede their domination. No neo-Malthusian ever dared disparage my five children to my face, and if my home state is licensing parenting, it's news to me. Feminist voices are more active in the university today than in past years, but those who might choose to be identified in this way are not of one mind, and as shrill or mindless as gender politics can sometimes get, it has not been the dominating concern of any of the public and private universities I have taught at over the past two decades. The sexual corruption of the media is another matter. It is indeed pervasive, but it still has one greatly redeeming characteristic, it is largely within *my family's* control. No electronic box need be stationed prominently in

4. James Hitchcock, *A Separate Peace*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 635, 640 (1996).

5. *Id.*

6. *Id.* at 641.

7. *Id.*

8. Allan Carlson, *The Cease-Fire May be Premature . . . Reaction to Cease-Fire on the Family*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 625, 630 (1996).

9. *Id.*

10. *Id.*

my living room, and even if stationed there, it has no warrant to be operating without my express permission.

The above assemblage of threat and villain leads Dr. Hitchcock in particular to conclude that “[f]or social conservatives the culture wars are essentially defensive.”¹¹ And on this point, we have genuine disagreement. The culture war will be won only when the opportunities to form culture *within the home* are embraced and placed far above the abstractions and distractions of political game theory. Inhabiting law schools, we sometimes forget that not all Americans are legally trained to fret over the enigmatic footnotes within the latest 5-4 judicial “landmark.” In the academy and research centers, we perhaps fail to perceive that millions of men and women have little time or patience for often arcane academic discussions about gender roles, when food has to be purchased and prepared, children need to be disciplined and encouraged, and darn it, the house is in need of repair again.

Dr. Carlson does seem to exhibit a greater appreciation for this down-to-earth reality in his recounting of the story of the niece of social reformer Jane Addams, who was baffled by Aunt Jane’s “cold disinterest” toward her during a visit. Her mother’s explanation that “Aunt Jane has so many little nieces and nephews in her work that she cannot devote much time just to you” is truly emblematic of an age that is willing to engage in serious social responsibility frequently only at an elevated level of abstraction. Caught up as we are with high theory or professional achievement, we — like Aunt Janie — find little time for raising our own families, let alone reaching out in community to directly [face-to-face] help others. We are, in short, the delegation generation: day care substitutes for parenting in the home; school-based “values clarification” displaces instruction in sexual temperance in church; ethical standards once learned by watching responsible adults interact within a real neighborhood, a true village, are given over to the government as village.¹² And having delegated much of our personal responsibility and been distracted by the claimed pervasive influence of neo-Malthusians, feminists, and other supposed culprits, we are equally quick to assign blame to any but ourselves [see, for example, much of modern tort law and the litigation explosion generally].

No, the culture war will not be won defensively in political battle, but offensively within the home and church, and the prospects of that success are not increased by confounding mothers

11. Hitchcock, *supra* note 4, at 642.

12. *Cf.*, HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE* (1996).

and fathers into thinking that only when a human life amendment is passed, for example, will human life be respected. The unequivocal protection of human life under law is wise public policy, but it matters more if men and women who are blessed with new life within a marriage: value their marriage in ways that consciously sustain it; value their children more than marketplace rewards; and finally, value a genuine "civilization of love" by responsibly situating themselves and their children within religious and local communities that can nourish practical wisdom with God's revelation in times of doubt or disappointment.

Jim Hitchcock need not worry, as he apparently does,¹³ that I have become overly neutral in the legal protection of life, especially the life of the unborn. My recent testimony in support of the Partial-Birth Abortion Ban Act is surely sufficient to allay any doubt.¹⁴ Dr. Hitchcock acknowledges this, and asks that I be judged more by my political deeds, than by the words I have extended to families in *Cease-Fire*.¹⁵ But respectfully, what I believe Dr. Hitchcock and all of us must be concerned with is the extent to which we have missed opportunities with our own children, with our fellow parishioners, and even with ourselves to fully appreciate what it means to revere God's gift of life as sacred.

What are these opportunities? Here, I would run the risk of restating the book, itself, but in view of the thoughtful commentary supplied by both my reviewers, let me just briefly recap, with these specific injunctions to families:

1. Understand and share with children how the "why" of life can be found only in belief in God.
2. Help children resist moral relativism and the distortions of modern scientific skepticism with a fuller understanding and reliance upon the "knowable truth" of the natural law.
3. Reclaim the parent's role as primary educator by enrolling children in schools consistent with a family's faith. If those schools are nonexistent or too expensive [in part because of unjust government school monopolies as discussed at length in *Cease-Fire*¹⁶], educate children at home. Estimates put present home school populations between one-half to

13. Hitchcock, *supra* note 4, at 643.

14. *The Partial-Birth Abortion Ban Act of 1995: Hearing Before the Senate Committee on the Judiciary*, 104th Cong., at 169 (Government Printing Office Nov. 17, 1995).

15. Hitchcock, *supra* note 4, at 645.

16. See DOUGLAS W. KMEC, *CEASE-FIRE ON THE FAMILY* 57-73 (1996).

over one million students, and these home-educated students consistently outperform their public school counterparts.¹⁷

4. Accept the fact that virtues are acquired through learning and practice; they just don't happen. Reclaim life from the television, accepting that much of what passes for much entertainment is the antithesis of virtue in substance, and a master thief of family time.
5. Give specific meaning and application to the virtues of prudence, temperance, fortitude, and justice within one's own home.¹⁸
6. Elevate family over work. Slow down. Make time for family functions from meals to shopping to reading to the repair jobs around the house. Participate with children in all of these things; let these simple endeavors substitute for individual outside leisure [or even political] activities that separate families. Every child doesn't have to be in multiple extra-curriculars; every parent shouldn't be spread thin trying to deliver children to these appointed places or accommodating work commitments that exceed or strain personal capacity. Understand work as a means to family fulfillment, not as an end in itself. Exhibit a willingness to forego personal economic opportunity as well as greater sensitivity to the co-responsibility of parenting. Where both husband and wife are professionally trained, efforts should be made to sequence careers, rather than pursuing them simultaneously.
7. Choose neighborhoods carefully. Avoid the sterile, single-use suburb and its attendant dependence upon the automobile. Children need to be needed; to be obligated to community; to have functions, whether assisting with shopping chores, watching siblings, caring for an elderly relative or neighbor, helping coordinate a church youth group. In many modern families, the only function undertaken by children is the planning of their own recreation. Neither parents nor children can connect with other lives driving by at 30 mph or in places where diverse opportunities can only be reached by car.

17. Dana Hawkins, *Homeschool Battles Grow as Some in the Movement Seek Access to Public Schools*, U.S. NEWS & WORLD REP., Feb. 12, 1996, at 23.

18. KMIEC, *supra* note 16, at chs. 7 & 8.

8. Defend your marriage and those of others. All marriages encounter difficulty. Yet, in the face of this difficulty, we have been mistakenly convinced by the quadrupling divorce rate over the past 30 years that such marital separation is virtually unavoidable, or complacently, that families come "in many shapes."¹⁹ If we are honest, this is not so. As managers in the workplace, we know it takes conscious effort to build the morale and commitment of a well-structured organization, why do we expect matters to be different at home? Taped to the inside of our kitchen cabinets are 911 emergency numbers for fire and other medical calamities. Yet, few of us know whom to call for help [as distinct from one-sided aiding and abetting] in the event of a marriage emergency. When those we love experience marriage difficulty, we avert our eyes out of a mistaken notion that it is a "private matter," or worse, we take sides and facilitate the division. The consequences of marital breakdown are anything but private, as the increases in child poverty and crime associated with the children of divorced parents match similar decreases in educational achievement and health.²⁰ Still, we — and shamefully too many church congregations as well — stand mute, unable or unwilling to aggressively help revive a struggling marriage, even as its failure has the most profound consequences for the community. "Each divorce is the death of a small civilization."²¹

19. A recent news item indicates that the Council on Families in America singles out the breakdown of marriage as an institution for child poverty, teen pregnancy and a host of social ills. Patricia Callahan, *Beliefs on Divorce Challenges in Study*, CHI. TRIB., March 31, 1995, at 4. (Jean Bethke Elshain, an ethics professor at the University of Chicago Divinity School, is quoted as indicating that "kids are 'haunted by divorce.' She says churches and schools that preach the families-come-in-all-shapes credo need to bring back the divorce taboo. 'It's far better to acknowledge kids hurt than to pat them on the head and say, 'It's OK; any way people live is OK,' she said.").

20. See Barbara Defoe Whitehead, *Dan Quayle Was Right*, THE ATLANTIC MONTHLY, April 1993. Children of divorce do more poorly in school, exhibit greater behavioral problems at home and in school, and engage in sexual activity and criminal behavior earlier and more frequently than children whose parents remain married. See Paul R. Amato and Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 110 PSYCHOL. BULL. 26-46 (1991).

21. Judith Wallerstein, the director of the Center for the Family in Transition, writes:

Today all relationships between men and women are profoundly influenced by the high incidence of divorce. Children from intact

9. Recognize that parenting cannot be delegated. Honestly identify day care as a dreadfully poor substitute for the love and instruction of a parent in the home. As Robert Bellah has written, "the quality of much day care is doubtful and even the best day care cannot make up for lack of parental attention."²²
10. Be authentically counter-cultural without being accusative. Decline to see movies and other activities that teach sexual irresponsibility, and explain to your children and your neighbors the nature of your objection. Be actively involved in school and church congregation, insisting upon substantive instruction that advances common and human good. Dr. Carlson posits that the "corporate hedonists on Madison Avenue" and others will not allow any "counter-culture" to grow beyond a *limited* size, without taking

families are jittery about divorce. Teachers from all over the country tell me that their students come to school wide-eyed with fear, saying that their parents quarrelled the night before and asking in terror, 'Does that mean they are going to divorce?' Radical changes in family life affect all families, homes, parents, children, courtships and marriages — silently altering the social fabric of the entire society.

JUDITH S. WALLERSTEIN AND SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* xxi (1989). John Paul II cautions: "A broken family can, for its part, consolidate a specific form of 'anti-civilization,' destroying love in its various expressions, with inevitable consequences for the whole of life in society." John Paul II, *Letter to Families*, 23 ORIGINS 637, 647 (1994).

22. Robert N. Bellah, *The Invasion of the Money World*, in *REBUILDING THE NEST* 227, 231 (David Blankenhorn et al. eds., 1990). Christopher Check has written:

For years, study after study has shown that day care breeds not only disease (middle ear infections, diarrhea, respiratory illnesses), but also psychological disorders (aggression, insecurity, withdrawal). Even with a "head start" in education and socialization, day-care children often perform poorly and have difficulty making friends once in school. And these findings portray middle-class children whose parents have chosen two paychecks, two careers and two cars over their children.

Often those who hardly qualify as social conservatives decry day care. Dr. Jack Westman, author of "Licensing Parents," said in 1988, "full-time day care, no matter how heavily funded, is not in the interests of young children, their parents or society, because it is a response to the employment of parents . . . not to the needs of children." British psychologist Penelope Leach scorns even the nanny system. Whatever the child may think of the nanny, Leach argues, the parents have revealed their willingness to have their child reared by someone "lower down society's educational and status ladder."

Christopher Check, *Our Kids Don't Deserve Day Care*, CHI. TRIB., Feb. 28, 1995, at 15.

extraordinary efforts to destroy it. I beg to differ. My understanding of the microeconomic theory embedded in democratic capitalism is that demand very quickly yields supply. We know that great literature and art, even in movie and television, can be ennobling, but are we asking for it?

In all of these things, I have not mentioned politics or law. That is not to say that politics and law could not facilitate some of the above by creating a healthier, pro-family public environment. Downsizing government and respecting the Catholic principle of subsidiarity²³ [never arrogate to a higher level that which can be accomplished below] would be a good start.²⁴ The presidential campaign has stimulated interest in making the federal tax system less cumbersome and devious in terms of special interest tax preferences. That system, as Allan Carlson has argued many times, could also be more family-friendly by increasing the personal exemption for children.²⁵ So too, state divorce laws that have been made uniformly "no-fault" could be re-drafted to re-incorporate "shame" and personal responsibility for the forfeiture of marital vows.²⁶ These reforms ought not be heartless: a

23. The Catechism puts it this way:

The family must be helped and defended by appropriate social measures. Where families cannot fulfill their responsibilities, other social bodies have the duty of helping them and of supporting the institution of the family. Following the principle of subsidiarity, larger communities should take care not to usurp the family's prerogatives or interfere in its life.

Catechism of the Catholic Church, para. 2209 (1994).

24. Dr. Carlson has pointed out elsewhere that there is a direct parallel between the decline of the family and the rise of the welfare state. For example, Dr. Carlson cites statistics from Denmark showing that between 1960 and 1981, the number of stay-at-home mothers in the country declined by 579,000, while the number of 'public sector employees' climbed by almost as much, more than 530,000 in just three areas: day care and care of the elderly, hospitals, and schools — all previously family functions. Paul Likoudis, *Rockford Institute Offers A Family Agenda Worth of Catholic Support*, THE WANDERER, March 17, 1995, at 1.

25. Tax relief is overdue for families. For the average middle-class family, the percentage of household income paid for federal income tax plus social security has risen from 4% in 1948 to over 35% in the 1990s. Christopher Check, *The Autonomous Family*, 9 THE FAMILY IN AMERICA 2 (Feb. 1995). On reforms that simulate a "family wage," see Allan Carlson, *Beyond the 'Family Wage' Quandary*, THE FAMILY IN AMERICA (Dec. 1994). Dr. Carlson there recommends providing a \$1,500 tax credit per child and income-splitting that would enable couples to file two returns at lower rates.

26. Christopher Wolfe has intriguingly suggested the possibility of an indissoluble marriage alternative, by which the couple could voluntarily agree to exclude divorce as a legal option. Professor Wolfe argues that the no-fault

requirement of proof of genuine fault must distinguish a truly abusive marriage from merely a troubled one. Along these lines, a reformed divorce process might well incorporate waiting or cooling off periods allowing family members and religious counselors adequate time to intervene in support of the marriage. Labor laws that impede employers from calculating wages or benefits in terms of overall family need could also be revised. Subsidies and encouragement for artificially contraceptive family planning could be ended so that the distortion of separating the unitive and procreative aspects of sexual love in a marriage could be lessened. The neighborhood zoning code might be scrutinized for exclusionary provisions that keep out churches, neighborhood stores, home offices, and even grandma because an "in-law" flat would contravene antiquated single-family public or private land use restrictions.

Perhaps the single greatest pro-family legal change would be to end the public or government school monopoly. That monopoly creates the anomaly of trying to educate children without reference to God, even as the American republic was directly founded upon an acknowledgement of the "laws of nature and nature's God."²⁷ It is indeed improper for government to draft school prayers or incorporate its favored religious exercise in a compulsory school setting. However, it is equally improper to collect private family resources for education and then deny families any opportunity to use their equitable share of those resources in the religious school of their choice. That the government is practically and constitutionally disqualified from being a religious educator disables the government from telling the whole story at critical times. For example, the rate of teenage, out-of-wedlock pregnancy is exploding.²⁸ Yet, the best a

"law is not neutral. In treating marriage as a contract revocable at the will of either party, the law adopts one of the competing views of marriage. It does not permit people to really *bind* themselves to a permanent and exclusive marriage, by reinforcing the personal commitment with the force of law." Christopher Wolfe, *The Marriage of Your Choice*, FIRST THINGS, Feb. 1995, at 38. While Wolfe would allow for legal separation in cases of abuse and speculates that many couples would still likely opt for dissoluble marriages, he nicely points out the dilemma of conscience that would be confronted by young lovers. Imagine, he says, the arguments a proposed spouse would have to make for a marriage with a "bail-out" provision. "The very existence of an indissoluble marriage contract would be, for many, a sign of contradiction: an accusation to those unwilling to make the unconditional commitment, a kind of implied charge of 'second-class' love." *Id.* at 40.

27. See generally, Douglas W. Kmiec, *God's Litigator*, 70 NOTRE DAME L. REV. 1247 (1995).

28. GLENN T. STANTON, TWICE AS STRONG: A RESEARCH REPORT FOR FOCUS ON THE FAMILY 14 (1995). Stanton reports:

popular public high school health text in California can do is to suggest that sexual abstinence is a responsible choice because being sexually active might be against the student's "values" or "religious beliefs."²⁹ If a student has any serious interest in exploring the origin of those "values" or the nature of those "religious beliefs," the discussion is foreclosed in a public school. By contrast, religious instruction in the Catholic tradition can be explicit and detailed about how "[s]o-called safe sex, which is touted by the 'civilization of technology,' is actually, in view of the overall requirements of the person, radically not safe, indeed it is extremely dangerous. It endangers both the person and the family. And what is this danger? It is the loss of the truth about one's own self and about the family, together with the risk of love itself."³⁰

The religious disqualifications of government thus demonstrate the importance of the law not blocking the religious commitments of families. Separation of church and state ought not mean separation of parents from their children's education. Regretfully, that is exactly what it has come to mean when publicly-collected education resources are diverted exclusively to government schools. To facilitate parental choice in education without increased federal involvement, Allan Carlson astutely prefers general tax relief over federal education tax credits or vouchers. Dr. Carlson would link larger tax credits to the number and age of children, thereby allowing the retained

In 1960, 5 percent of all births were out of wedlock. By 1991, 30 percent of all births were illegitimate. Among whites, the numbers increased from 2 percent of all births in 1960 to 22 percent of all births in 1991. Among blacks, the numbers increased from 23 percent in 1960 to 68 percent in 1991.

Id. (citing VITAL STATISTICS OF THE UNITED STATES, 1993).

29. LINDA MEEKS & PHILIP HEIT, *HEALTH — A WELLNESS APPROACH* 166-67 (1991).

30. John Paul II, *Letter to Families*, 23 *ORIGINS* 637, 647 (1994). The Letter does not mince words, observing:

Utilitarianism is a civilization of production and of use, a civilization of things and not of persons, a civilization in which persons are used. In the context of a civilization of use, woman can become an object for man, children a hindrance to parents, the family an institution obstructing the freedom of its members. To be convinced that this is the case, one need only look at certain sexual education programs introduced into the schools[.]

Id. Along the same lines, the Pontifical Council recently reminded parents of their obligation to direct the sexual moral instruction of their children, noting that "a stable Christian marriage cannot be regarded as a matter of convenience or mere sexual attraction." Pontifical Council for the Family, *The Truth and Meaning of Human Sexuality*, 25 *ORIGINS* 529, 536 (1996).

income to be used "as the *parents* saw fit."³¹ This is an attractive proposal to mitigate unwarranted or restrictive federal spending conditions. However, given that general tax relief at the federal level has a way of never happening or at least becoming mired in the tax relief desires of too many competing interests, it may be more realistic to pursue simple, straightforward state tax credits allowing parents a credit for the exact amount expended by them in any given year on their children's education.

Well, so much for political daydreaming. Yes, as Dr. Hitchcock properly reminds us, Catholics must engage the civil authority in positive pursuit.³² In the words of the new catechism "[i]t is the duty of citizens to contribute along with the civil authorities to the good of society in a spirit of truth, justice, solidarity, and freedom."³³ But in this engagement with the state, all people of sincere religious faith must be careful not to overstate political grievance, lest people of good will be misled into either overly relying upon or unjustifiably disregarding the law. No citizen is obliged in conscience to follow the directives of civil authorities that are "contrary to the demands of the moral order, to the fundamental rights of persons or the teachings of the Gospel."³⁴ Were Dr. Hitchcock correct that "the government rigidly controls the number and spacing of children,"³⁵ citizens of faith would be well advised to non-violently resist such impertinence. But in accordance with Catholic instruction, forceful resistance must be foregone, except under carefully considered conditions, including where "there is certain, grave, prolonged violation of fundamental rights" and "all other means of redress have been exhausted."³⁶

The point of *Cease-Fire on the Family* is that we have not nearly exhausted, indeed far too often understated the redress of the culture war, that lies within the family, itself. I am convinced that Drs. Carlson and Hitchcock know this. My single caution to them as friendly counsel is that greater care must be taken in describing the extent to which family problems are political or legal in origin. The more frequently families shift blame to outside forces, be they neo-Malthusians or the Supreme Court, the less prepared families will be to look inwardly at their own strengths and weaknesses. Should this pattern continue, my reviewers may well find their political positions co-opted or ren-

31. Carlson, *supra* note 8, at 629 (emphasis in original).

32. Hitchcock, *supra* note 4, at 644.

33. *Catechism*, *supra* note 24, at para. 2239 (1994).

34. *Id.* at para. 2242.

35. Hitchcock, *supra* note 4, at 640.

36. *Catechism*, *supra* note 24, at para. 2243.

dered indistinguishable from those who have the capacity to sound family-friendly in pursuit of expanded government programs that too often are not.

By this, I do not intend to psychoanalyze Hillary Rodham Clinton's recent book on family issues, and her various multiple political personalities. As I have written elsewhere,³⁷ there is much in the first lady's book that is praiseworthy, but the political provenance of her efforts makes much that she has written seem implausible or insincere. Apparently, I am not alone in this reaction, as Mrs. Clinton has been assailed for the unbelievable nature of her declarations from both the political left and right. Liberal commentator Andrew Cockburn observes:

In [his] State of the Union speech, [the president] proclaimed the end of big government, then promptly called for state programs against teen gangs, teen TV viewers, illegal immigrants (many of them in their teens) and teen moms. Not less government, but meaner, more intrusive government. Bill wants us to start throwing stones at pregnant girls. Hillary wants social workers to kick down the girl's front door to make sure she's raising her child along state guidelines. She should change her book's title to "It Takes a Police State."³⁸

In the same over-heated rhetoric, conservative columnist James Pinkerton writes: "[n]ot only does [Hillary] Clinton believe in full federal funding for everything, but she also suggests many ways for Big Government to get bigger. She worries that 'family care-givers in America are often not regulated.'"³⁹ In truth, Mrs. Clinton actually writes: "[I]et us admit that some government programs and personnel are efficient and effective, and others are not. . . . Let us stop stereotyping government and individuals as absolute villains or absolute saviors, and recognize that each must be part of the solution."⁴⁰ Dr. Hitchcock could have written something like that in his paper — in fact, he did.⁴¹

Mrs. Clinton is finding it hard to be heard over her political self, and so too, the sirens of political salvationism be they liberal

37. Douglas W. Kmiec, *Separated at Birth? The First Lady Meets Betty Crocker*, CHI. TRIB., Jan. 30, 1996, at 13.

38. Andrew Cockburn, *Hillary Reveals Her True Colors*, L.A. TIMES, Jan. 26, 1996, at B9.

39. James P. Pinkerton, *Big Brother Knows Best for Children*, L.A. TIMES, Jan. 18, 1996, at B9.

40. HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE* 311 (1996).

41. Hitchcock, *supra* note 4, at 639, reflecting that "in the end both [Booker T.] Washington's [personal initiatives] and DuBois' [political] strategies proved to be necessary."

or conservative are now beginning to be seen as equally incredible. An overemphasis on the politics of family values, rather than the nurturing of them, is the false adoption of victim status.⁴² Families need not be victims. Rather,

[t]he family is the *original cell of social life*. It is the natural society in which husband and wife are called to give themselves in love and in the gift of life. Authority, stability, and a life of relationships within the family constitute the foundations for freedom, security, and fraternity within society. The family is the community in which, from childhood, one can learn moral values, begin to honor God, and make good use of freedom.⁴³

Maybe we ought to just start acting like it.

42. Michael Medved writes that far too many of America's youth suffer from a "plague of pessimism." Michael Medved, *Protecting Our Children From a Plague of Pessimism*, 24 IMPRIMIS 2 (1995). Medved continues: "[t]hat plague's main symptom is a cry-baby culture, a national orgy of whining and self-pity." *Id.* While Medved attributes this pessimism to the violence and cultural despair in the mass media, it can also flow from overly dour political appraisals of the capacity of the family.

43. *Catechism*, *supra* note 33, at para. 2207.