

The Constitution and the Moral Order

By WILLIAM J. BENNETT*

In a well-known passage Learned Hand has described the place of law and the Constitution in the maintenance of civility:

You may ask what then will become of the fundamental principles of equity and fair play which our constitution enshrines and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.¹

This penetrating formulation of the relationship between pervasive societal values and enshrined constitutional principles has evoked an equally probing response from Professor Freund. Freund contends that Judge Hand's portrait of the role of courts tends to suggest "a people lost beyond redemption or healthy beyond the need of saving," while "our situation falls between."² He notes that "[t]he restraints that the Constitution forbids are, essentially, only those of public, not private, action."³ Freund is aware, of course, that maintenance of a spirit of moderation and other values requisite to a civil, healthy nation—sensi-

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1. L. HAND, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 181 (I. Dillard ed. 1952) (address by Learned Hand at the 250th anniversary of the founding of the Supreme Judicial Court of Massachusetts, Nov. 21, 1942).

2. P. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 88-89 (1961) [hereinafter cited as FREUND].

3. *Id.* at 88.

ble as well as sensitive—demands more than a constitution. Nevertheless, he emphasizes that constitutional law has a role:

The question is not whether the courts can do everything but whether they can do something. Moreover, the cleavage between growth from within and alteration imposed from without is not absolute. Education and the practice of self-improvement may be fostered by judicious judicial intervention.⁴

Freund offers as examples of such judicious intervention the voiding of restrictive racial covenants and segregation in the public schools—decisions that he says “break down barriers.”⁵ The removal of such barriers touches and informs even so-called private belief and action: a change of environment can alter attitude and behavior.⁶ Nor should the educational function of the courts be overlooked; Freund reminds us of Professor Meiklejohn’s image of the Supreme Court as a teacher instructing us about our best, our national, purposes.⁷ Finally, the courts, particularly the Supreme Court, serve an important symbolic function. The courts stand for the values they announce, articulate, and defend in their decisions, even, as Professor Bickel has shown, when they decide not to decide.⁸

Few of us in these times need to be reminded of the importance that attaches to the interpretation of the Constitution by the judiciary and the legislature. Law school classes devote careful attention to this; legal journals attempt regular explication of its significance. That they do so is appropriate. The very pervasiveness of this focus, however, suggests that Learned Hand’s perspective—that the values expressed in

4. *Id.* at 89.

5. *Id.*

6. I had an experience in the South that illustrates Professor Freund’s point regarding the way the removal of barriers by the judiciary fosters changes in attitude and behavior. While visiting a junior high school classroom in Florence, South Carolina, in March, 1974, I was shocked to see all the white children sitting on one side of the room, with all the black students seated on the other. When the children saw my shock and their teacher said, “What is this zebra-skin classroom?” the students laughed and returned to their original seats, undifferentiated by race. The students were playing a joke on the “visiting Yankee,” but their freedom to laugh about this situation was certainly made possible in part by the change in law that had joined them together. Friends of mine throughout the South report similar experiences; however, I have neither had nor heard of such experiences in Boston in recent years.

7. A. MEIKLEJOHN, *FREE SPEECH* 32 (1948), *quoted in* FREUND, *supra* note 2, at 25; *accord*, Rostow, *The Democratic Character of Judicial Review*, 66 *HARV. L. REV.* 193 (1952) [hereinafter cited as Rostow]. “The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.” *Id.* at 208.

8. *See* Bickel, *The Supreme Court, 1960 Term: Foreword: The Passive Virtues*, 75 *HARV. L. REV.* 40, 50 (1961).

the Constitution must live elsewhere before and while they live as law—merits renewed emphasis in this era. Beyond the contribution of courts and legislatures, basic values such as equity and fair play require a generative source. The need remains for what Freund himself has characterized as a regeneration that must come from within,⁹ a continual regeneration that is expressed in the lives of citizens.

It is important to specify some of the basic values that are crucial to national self-definition and self-sustenance. There is no claim that the list that follows is exhaustive, that the values noted are of equal significance, or that all these values must thrive at all times. These are values, however, to which a free and healthy society is attentive, values that such a society ignores at its peril:

- 1) respect for persons, expressed in part by fair dealings among, with, and by citizens;¹⁰
- 2) regard for justice, revealed in part by a commitment to treating like cases alike, with attention to relevant differences;¹¹
- 3) the existence of relatively free and protected association, movement, thought, speech, and worship;¹²
- 4) a regard for personal and institutional excellence;¹³
- 5) broad access to the levers of social change;¹⁴
- 6) a concern for the domestication of power by responsibility in government, business, education, and even in private relationships;¹⁵

9. FREUND, *supra* note 2, at 88.

10. See generally A. BICKEL, *THE MORALITY OF CONSENT* 53-54 (1975).

11. See generally *THE POLITICS OF ARISTOTLE* 288 (E. Barker trans. 1946) [hereinafter cited as *ARISTOTLE*].

12. See Hand, *The Future of Wisdom in America*, *THE SATURDAY REVIEW*, Nov. 22, 1952, at 9. "The mutual confidence on which all else depends can be maintained only by an open mind and a brave reliance upon free discussion. I do not say that these will suffice; who knows but we may be on a slope which leads down to aboriginal savagery. But of this I am sure: if we are to escape, we must not yield a foot upon demanding a fair field, and an honest race, to all ideas." *Id.* at 55.

13. See Kristol, *Republican Virtue vs. Servile Institutions*, *THE ALTERNATIVE: AN AMERICAN SPECTATOR*, Feb. 1975, at 5 [hereinafter cited as Kristol]. "People do not respect institutions which are servile; people only respect a society which makes demands on them, which insists that they become better than they are. Without such a moral conception of oneself, without a vivid idea as to the kind of person a citizen is supposed to become, there can be no self-government. And without self-government the people perish." *Id.* at 9.

14. See Hurst, *Thoreau, Conscience and Law*, 19 *S.D.L. REV.* 1, 25-30 (1974) [hereinafter cited as Hurst].

15. The necessity for the juxtaposition of power and responsibility is, of course, eloquently expressed in *The Federalist No. 51* by James Madison.

7) a measure of magnanimity in the people for the support of worthy activities and projects;¹⁶

8) substantial support for a sound educational system that attends to the development of citizens;¹⁷

9) a spirit of tolerance coupled with a judgmental capacity that enables thoughtful criticism of what is tolerated;¹⁸

10) a concern by persons for their status as moral agents, that is, for their own virtue and dignity;¹⁹ and finally,

11) pervasive attention to fostering the conditions that bring these values into being.²⁰ Values such as these must surround, penetrate, and underlie the laws if our constitutional order is to be a moral order as well.

I. The Significance of a Moral Order

The belief that the well-being of a social order transcends the requirements of good laws and good judges is, of course, a Greek notion. This approach seeks a subtle measure of a society's health, an assessment based on the character of its people and the kind of spirit that moves them in their daily lives. What is sought is *eunomia*: literally, the "wellness" of the legal construct.²¹

16. See E. BURKE, *Speech for Conciliation with the American Colonies*, in BURKE ON THE AMERICAN REVOLUTION 70 (E. Barkan ed. 1966) [hereinafter cited as BURKE]. "Magnanimity in politics is not seldom the truest wisdom; and a great empire and little minds go ill together." *Id.* at 120.

17. See T. JEFFERSON, *Preamble to a Bill for the More General Diffusion of Knowledge*, in THE COMPLETE JEFFERSON 1048 (S. Padover ed. 1953) [hereinafter cited as PADOVER] ("The most effectual means of preventing [tyranny] would be to illuminate, as far as practicable, the minds of the people at large." *Id.*); Address by Julian Huxley at the opening of Johns Hopkins University in 1967, *quoted in* F. FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 164, 166-67 (1930) ("[T]he one condition of success, your sole safeguard, is the moral worth and intellectual clearness of the individual citizen. Education cannot give these, but it may cherish them and bring them to the front . . ." *Id.* at 166-67). See generally J. DEWEY, DEMOCRACY AND EDUCATION (1916).

18. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting). "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."

19. See Kristol, *supra* note 13. See generally PLATO, *Crito*, THE COLLECTED DIALOGUES OF PLATO 27 (E. Hamilton & H. Cairns eds. 1961) [hereinafter cited as PLATO]; ARISTOTLE, *supra* note 11, at 280-82.

20. See ARISTOTLE, *supra* note 11, at 311-14.

21. Webster defines "eunomy" as "[c]ivil order *under* good laws." WEBSTER'S NEW INTERNATIONAL DICTIONARY 881 (2d ed. 1941) (emphasis added). In classical

Eunomia is not achieved simply when the laws are wise or well considered. Rather, it is a condition that depends on a regard throughout the society for the values the laws express and out of which they emerge. In the eunomic society the aggregate "lives" of the citizens supply the crucial evidence, for it is there that the values upon which the laws depend either thrive or perish. When a nation instead seeks self-definition or sustenance from "forms," turning to the laws alone for vindication of its well-being, the health of the society is in jeopardy. Then an inquiry into the causes of spiritual vitality or morbidity is motivated by the clearest exigency, by fear for that society's survival.

It is a commonplace that societies have been ravaged as often by decay from within as by invasion from without.²² In such a situation, law and constitution may not stand for important, fundamental values, but instead may stand alone. Then the law's symbolic function is lost, and there may be the appearance but certainly not the reality of *eunomia*. Theodore White invokes the classic example in his portrait of Cicero's Rome:

His fellow citizens could no longer agree on what they meant by "justice," or "partnership for common good"; nor could the

Greek mythology, *Eunomia* is a daughter of Zeus who watches over the affairs of men with an eye to "good order." HARPER'S DICTIONARY OF CLASSICAL LITERATURE AND ANTIQUITIES 843 (H. Peck ed. 1896).

The philosophical concept being considered here is associated with Solon and Xenophanes. For Solon, *eunomia* has to do with good order in the cosmos, which depends on the proper involvement of each individual in the life of the community. He emphasizes that "the violation of justice means the disruption" of that "life of the community," and praises the goddess *Eunomia*, who manifests her power "in peace and harmony of the whole social cosmos." 1 W. JAEGER, PAIDEA: THE IDEALS OF GREEK CULTURE 139-41 (G. Highet trans. 1939). In Jaeger's words, Solon's view of the world represents a significant movement in Greek thought away from a universe in which the gods constantly interfere in human affairs toward a conception "that every community is bound by immanent laws," and "every man is a responsible moral agent with a duty to be done." *Id.* at 141. Similarly, the philosopher and poet Xenophanes attempted to overcome the Homeric view of a universe governed by the gods and to substitute a new ideal of humanity and human action. As Jaeger says, "It was the power of this new truth to revolutionize the life and faith of mankind which made it the fitting basis for a new culture." Thus, the "pattern of *eunomia* in human society" became "the metaphysical foundation of city-state morality." *Id.* at 170.

22. Among the nicer expressions of the commonplace are those of Jean Giraudoux and John Milton. "Countries are like fruit—the worms are always inside." J. GIRAUDOUX, SIEGFRIED 14 (P. La Farge & P. Judd trans. 1928). "But what more oft in Nations grown corrupt, / And by Their vices brought to servitude, / Than to love Bondage more than Liberty, / Bondage with ease than strenuous liberty . . ." J. MILTON, *Samson Agonistes*, in THE POETICAL WORKS OF JOHN MILTON 281 (H. Darbishire ed. 1955).

handful of politicians who soon brought about a revolution. First they killed Caesar, the man whom Cicero thought to be the greatest enemy of justice and the common good. And when they beheaded Cicero a year after, it was for the same reason. Vindictiveness, passion, killing, ruled Rome; the people stood apart from assassination and execution alike because they no longer knew what to believe, and recognized that their leaders believed nothing. By then, the Republic was dead, for the myths of law that had bound the Romans in the beginning had been stripped of meaning, reduced to decorative phrases carved on the marble walls of the Empire, and the palaces of the tyrants who followed.²³

But long before a people become ruled by vindictiveness, passion, and killing, they may deny themselves citizenship in fact by their unconcern for basic values. The absence of vital beliefs about right and wrong, which precludes consensus on what is meant by "justice," will be sufficient to destroy *eunomia*. The relevance to the United States is clear. Currently, our commitment to responsible self-government is contradicted by a preoccupation with self-gratification among much of the populace²⁴ and by a willingness to relegate the task of defining justice to "law" and "constitutionality."²⁵ Such preoccupation and relegation are dangerous because no eunomic constitutional order can survive the neglect of its citizens. And, ironically, unreasonable reliance on constitutional form undermines the significant role the Constitution does have in the maintenance of a moral order.²⁶

II. The Meaning and Nature of the Constitution: The Framers

Any thoughtful examination of generally accepted definitions of "constitution" will reveal that a constitution must depend upon external values for its efficacy. Charles Howard McIlwain's classic study²⁷ distinguishes the two dominant definitions of constitution; for our pur-

23. T. WHITE, *BREACH OF FAITH* 340 (1975)..

24. See J. SILBER, *THE TREMBLE FACTOR* 1 (1974). "Our children have not been corrupted by the teachings of the Old and New Testaments, but they have learned by heart the TV gospel: Enjoy yourself They know that it would be un-American to have anything less than too much. Enjoy yourself immediately, and continue enjoying yourself. That is the gospel. Television gives no indication of the social or personal price of enjoyment as a way of life—the program it so enthusiastically peddles. It simply reiterates the injunction: Engage in self-gratification." *Id.* at 13. See also Kristol, *supra* note 13. "We may think that the Sears, Roebuck catalogue is a splendid testimonial to American civilization. Most of the Founding Fathers would have found it a worrisome document." *Id.* at 5.

25. See text accompanying notes 94-109 *infra*.

26. See text accompanying note 104 *infra*.

27. C. McILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (rev. ed. 1947).

poses, however, their similarities are more significant and telling than their differences.

The modern definition of a constitution is a deliberate formulation by a people of its fundamental law; a constitution emerges at the time a people create a government.²⁸ Thomas Paine is a major spokesman for this view,²⁹ which contrasts with the more traditional position associated with Lord Bolingbroke.³⁰ This latter position is that a constitution is "the substantive principles to be deduced from a nation's actual institutions and their development."³¹ Thus, the "essential principles to which Burke and Camden and Otis appealed were no less constitutional because they were 'unwritten.'"³² The United States and French constitutions are generally cited as the best examples of the first position³³ while the unwritten constitution of Great Britain is offered to illustrate the second.³⁴ The two views are not mutually exclusive. A constitution can have elements of each, as does the United States Constitution,³⁵ which is a fundamental document subject to periodic amendment and interpretation. But either perspective requires a sense of what the "fundamental law" is and an appreciation of the values upon which the constitution rests, in the first case for the constitutive act to be meaningful, in the second for the inheritance to vest.³⁶ If these principles do not abide in the lives of the citizens, a constitution may be mere words on paper, a relic rather than a heritage. There are extreme examples: the Soviet Constitution of 1936, to which Mr. Solzhenitsyn frequently gives the lie,³⁷ and the Constitution of India in 1975³⁸ are both only decorative

28. *Id.* at 2-3.

29. *Id.* at 2.

30. *Id.* at 3.

31. *Id.*

32. *Id.* at 15.

33. *See id.* at 2, 14.

34. *See id.* at 14-15.

35. *See id.* at 15. *See generally* E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1929) [hereinafter cited as CORWIN].

36. As Clinton Rossiter has noted, "the most compelling explanation" for the high regard in which Americans hold their constitution lies in their "deep-seated conviction that the Constitution is an expression of the Higher Law, that it is in fact imperfect man's most perfect rendering of what Blackstone saluted as 'the eternal immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions.'" Rossiter, *Prefatory Note* to CORWIN, *supra* note 35, at vi.

37. The Soviet Constitution contains a catalogue of guaranteed individual liberties similar to our own Bill of Rights, including, *inter alia*, freedom of speech, freedom of the press, freedom of assembly and meetings, freedom to demonstrate, inviolability of the person, and inviolability of citizens' dwellings and secrecy of correspondence. CONSTITUTION OF THE UNION OF SOVIET SOCIALIST REPUBLICS arts. 125, 127-28 (1936).

phrases. Less severe cases, where the laws function but the values upon which they depend are corroding, are harder to detect. Great Britain is one example; the United States may be becoming another.

The Constitution of the United States can no more forge among citizens the moral relations upon which rest its principles of equity and fair play than it can create "contentment in every face, plenty on every board."³⁹ The clever definition of constitutionalism as "the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order"⁴⁰ merely highlights what it omits, serving by its deceptive attractiveness to instruct. Stronger, more personal bonds than an inattentive "trust" are required to hold men to their duties, ties that Burke described as "though as light as air, are as strong as links of iron."⁴¹ These bonds are forged by persons in their actions. The framers of our Constitution, a mix of thinkers with affinities to both Paine and Bolingbroke,⁴² recognized the importance of such bonds and the centrality of the ethics

Mr. Solzhenitsyn (among others) has often pointed out that such rights do not in fact exist in his country, perhaps most eloquently in the following portion of *The Gulag Archipelago*, 1918-56:

"Our Law is powerful, slippery, and unlike anything else on earth known as 'the law.' . . .

...
 "We have called this chapter 'The Law Today.' But really it should be called: 'There Is No Law.'

"The same perfidious secrecy, the same fog of unrighteousness hangs in the air around us, hangs over our cities more densely than the city smoke itself.

"A powerful State towers over its second half-century, embraced in hoops of steel. The hoops are there indeed but *not* the law." N.Y. Times, Feb. 13, 1974, at 12, col. 4 (emphasis added).

38. The preamble to the Indian constitution solemnly promises to "secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith, and worship; EQUALITY of status and of opportunity . . ." Preamble to *Constitution of the Republic of India*, in N. PALMER, *THE INDIAN POLITICAL SYSTEM* 92 (1961). As is now well known, India's Prime Minister Indira Gandhi, after being found guilty of violating Indian election laws (the penalty for which required her resignation from Parliament), instituted a series of repressive measures including the jailing of over 600 individuals considered politically dangerous by Mrs. Gandhi and the imposition of strict censorship on the Indian and foreign press. See U.S. NEWS & WORLD REPORT, July 7, 1975, at 23. The latter measure was used, among other purposes, to prevent any extended or explanatory reporting by the Indian media of the prime minister's ultimately successful effort to clear herself of any legal difficulties by ex post facto exculpatory legislation. See N.Y. Times, Aug. 6, 1975, at 2, col. 4.

39. CORWIN, *supra* note 35, at 150.

40. The phrase is Walton H. Hamilton's. D. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 416 (1965).

41. BURKE, *supra* note 16, at 19.

42. See generally CORWIN, *supra* note 35, at 149, 398-400, 408-09.

of persons. The framers certainly did not believe they were creating the rights and liberties of citizens, nor that the existence of the Constitution would itself be sufficient to maintain them. They believed they were constituting something,⁴³ but this constituting involved neither “making” values nor removing the citizens’ responsibility to preserve those values. Rather, they sought to give form and structure to a new government, to draft a new blueprint for governance. The Constitution was certainly intended to have moral force, but that force was to be drawn from fundamental sources, which the framers perceived in the moral environment of the new nation rather than in the document itself. In its broadest strokes the Constitution was intended to remind Americans of what they already knew.

The predominance of this view of the Constitution is revealed in the debate in the 1787 convention over the need for an extended bill of rights. In part, opposition to a bill of rights rested on the belief that the protection of individual liberties was a matter that properly belonged to the states;⁴⁴ seven of the original states had their own bills by 1784.⁴⁵ What is more interesting, however, is that significant opposition was rooted in philosophical as well as jurisdictional objections. A large number of delegates did not believe that the rights of citizens had to be written down to be effective, and there was substantial sentiment that articulation of such basic rights was unnecessary at this late stage of the development of human society. In Philadelphia in 1787, as Professor Julius Goebel has pointed out, the issue of a bill of rights “was only fugitively an issue.”⁴⁶ Goebel restates Alexander Hamilton’s view:

The Constitution was designed merely to regulate the political interests of the nation, and a minute detailing of particular rights was not applicable as it would be in a constitution which regulated every species of personal and private rights.⁴⁷

Hamilton asked: “Why declare that things shall not be done which there is no power [in Congress] to do?”⁴⁸ Indeed, he argued that a bill of rights would be but a gratuitous imitation of that primitive phase of man’s progress when rights were “obtained by the barons, sword in

43. See H. ARENDT, *ON REVOLUTION* 204 (1965).

44. See J. GOEBEL, JR., 1 *OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 248-49 (1971) [hereinafter cited as GOEBEL].

45. The states were Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Virginia. *Id.* at 101 & n.15.

46. *Id.* at 250.

47. *Id.* at 320.

48. C. BOWEN, *MIRACLE AT PHILADELPHIA* 245 (1966) (brackets in original) [hereinafter cited as BOWEN]. See also note 53 *infra*.

hand, from King John."⁴⁹ Others contended that to codify these liberties and privileges was an ill-advised and impossible task. James Wilson said: "Enumerate all the rights of men? I am sure that no gentleman in the late Convention would have attempted such a thing."⁵⁰ Connecticut's Noah Webster lampooned those who would nonetheless make the effort to compile a comprehensive list. He asked:

Why not declare that everybody shall, in good weather, hunt on his own . . . land, and catch fish in rivers that are public property, and that Congress shall never restrain any inhabitant . . . from eating and drinking at seasonable times, or prevent his lying on his left side, in a long winter's night, or even on his back, when he is fatigued by lying on his right.⁵¹

Raising a more poignant objection, John Dickinson urged simply that fundamental rights "must be preserved by soundness of sense and honesty of heart," not constitutional articulation.⁵² Even Madison was originally opposed to a bill of rights, thinking it "unnecessary and dangerous."⁵³ In the convention itself, the final vote was ten states to none against the proposal.⁵⁴

In the end, of course, a bill of rights was adopted, and few today would question the wisdom and prudence of enacting the first ten amendments. Even the strongest supporters of the idea recognized, however, that it could be neither a sufficient nor even the principal means of achieving a eunomic polity, a republic where the values expressed in the Bill of Rights would thrive. For example, no one is more properly associated with the movement for a bill of rights than Thomas Jefferson.⁵⁵ Yet it was Jefferson who exhorted his fellow

49. THE FEDERALIST No. 84, at 536 (H. Lodge ed. 1888) (A. Hamilton) [hereinafter cited as THE FEDERALIST].

50. BOWEN, *supra* note 48, at 245-46.

51. *Id.* at 246.

52. *Id.*

53. GOEBEL, *supra* note 44, at 425. As Professor Goebel points out elsewhere in his work, there was a fear that having a bill of rights would supply handles "for a doctrine of constructive powers." *Id.* at 320. Madison elaborated on this theme in a letter to Thomas Jefferson. While expressing approval of the concept of a bill of rights, he notes that it must "be so framed as not to imply powers not meant to be included in the enumeration . . ." He goes on to say that "there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power." Letter from James Madison to Thomas Jefferson, Oct. 17, 1788, in PADOVER, *supra* note 17, at 253.

54. BOWEN, *supra* note 48, at 244.

55. Jefferson's disappointment with the convention's failure to include a bill of rights in the Constitution and his subsequent successful fight to remedy that omission

citizens that "the most effectual means" of preventing tyranny involved illuminating "the minds of the people at large,"⁵⁶ Jefferson who argued "that laws will be wisely formed, and honestly administered, in proportion as those who form and administer them are wise and honest,"⁵⁷ and Jefferson who counseled that "laws provide against injury from others; but not from ourselves. God himself will not save men against their wills."⁵⁸ The author of the Declaration of Independence and his fellow framers would have no quarrel with Justice Frankfurter's observation 200 years later: "Civil liberties draw at best only limited strength from legal guaranties."⁵⁹

The Federalist, the authoritative exegesis of the Constitution,⁶⁰ is emphatic that the nation's survival as a "secular moral order"⁶¹ depends primarily on its citizens, rather than on its founding document. The author of *The Federalist No. 51* asserted without reservation: "A dependence on the people is, no doubt, the primary control on the government."⁶² The famous protections articulated in *The Federalist Nos. 10*⁶³ and *51*⁶⁴ are characterized as "auxiliary" to this primary safeguard, the moral vigilance of the citizenry.⁶⁵ As Madison, the principal author

are, of course, well known. As he wrote in a famous letter to Madison: "A bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inferences." Letter from Thomas Jefferson to James Madison, Dec. 20, 1787, in A. KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* 41 (1964).

56. T. JEFFERSON, *Preamble to a Bill for the More General Diffusion of Knowledge*, in PADOVER, *supra* note 17, at 1048.

57. *Id.*

58. Jefferson, *Notes on Religion*, in PADOVER, *supra* note 17, at 943.

59. *Dennis v. United States*, 341 U.S. 494, 555 (1951) (Frankfurter, J., concurring).

60. *The Federalist* is justly famous and justly relied upon by constitutional scholars and American historians alike. In the words of Clinton Rossiter, "This work has always commanded widespread respect as the first and still most authoritative commentary on the Constitution of the United States." Rossiter, *Introduction to THE FEDERALIST PAPERS*, at vii (Mentor ed. 1961).

61. The phrase is from A. KOCH, *MADISON'S "ADVICE TO MY COUNTRY"* 46 (1966) (emphasis omitted) [hereinafter cited as *MADISON'S "ADVICE"*]. See also Rostow, *supra* note 7, at 210.

62. *THE FEDERALIST NO. 51*, *supra* note 49, at 23 (J. Madison).

63. The principal protections outlined in *The Federalist No. 10* involve the advantages of a republic, specifically the theory of representation and, in the case of the United States, large size, making oppression by a minority less likely. *THE FEDERALIST NO. 10*, *supra* note 49, at 51-60 (J. Madison).

64. The principal protections articulated in *The Federalist No. 51* involve, of course, the advantages of division of power, breaking up official authority, and checks and balances. *THE FEDERALIST NO. 51*, *supra* note 49, at 322-27 (J. Madison).

65. *Id.* at 323.

and defender of the Constitution,⁶⁶ noted in the Virginia Convention: "To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea."⁶⁷ *The Federalist's* defense of the Constitution against specific objections also reflects this consistent dependence on citizen virtue. In replying to fears of an oppressive majoritarian faction, *The Federalist* assumes that principles of "justice and the general good," which no written document could ensure, must form the protection against this danger.⁶⁸ More directly, when asked what would prevent the legislative branch from discriminating in its own favor, the author of *The Federalist No. 57* looks primarily to the republican virtue of the people:

I answer: the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it.

If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty.⁶⁹

On a more general level, the same author argues that ultimate and proper responsibility for achieving the "aim of every political constitution"—to obtain wise and virtuous rulers who will pursue the common good and to keep them virtuous while they hold the public trust—rests with the citizenry.⁷⁰

The authors of *The Federalist*, in short, were explicit in asserting that the business of forging and maintaining republican government, while it depends in part on a good constitution and proper institutions, is primarily the work of virtue. These framers anticipated no institutional solutions to the problems of men living together;⁷¹ rules and arrange-

66. There is no more eloquent tribute to Madison, the father of the Constitution, than that paid by John Quincy Adams after Madison's death: "Is it not in a pre-eminent degree by emanations from his mind, that we are assembled here as the representatives of people and the states of this Union? Is it not transcendently by his exertions that we address each other here by the endearing appellations of country-men and fellow-citizens?" Speech by John Quincy Adams in the House of Representatives, June 30, 1836, in MADISON'S "ADVICE," *supra* note 61, at 158.

67. Speech in the Virginia Convention, June 20, 1788, in PADOVER, *supra* note 17, at 339.

68. THE FEDERALIST NO. 51, *supra* note 49, at 27 (J. Madison).

69. THE FEDERALIST NO. 57, *supra* note 49, at 358 (J. Madison).

70. *Id.* at 356.

71. The convention rejected, for example, one proposal that would have made the chief justice a kind of "custos morum," with responsibility to propose amendments to the laws to "inculcate sound morality throughout the Union." GOEBEL, *supra* note 44, at 237.

ments, including those of the Constitution whose adoption they were urging, would not themselves be sufficient. To be sure, *The Federalist* viewed the Constitution's choice of rules and arrangements as important, and was vigorous in defending it. But as *Federalist No. 55* attests, its authors were no less emphatic about the fundamental presupposition on which the success of the Constitution would depend:

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.⁷²

The Constitution as a legal document may be, as Catherine Drinker Bowen has suggested, a "code for reference,"⁷³ what in medieval days had been called "*jus civile*."⁷⁴ But neither was it in 1787 nor is it today the place where one looks to discover how the rights of men are faring; nor does it tell how these rights can be achieved. Statement is not creation; incantation is not nurture. The legal order cannot by its mere existence in code, law, and document nourish the values upon which it rests and depends.

III. Constitution and Conscience: Hurst and Thoreau

Professor J. Willard Hurst has pointed out that it is incorrect to view the constitutional order as a mere code of expediency that embodies no moral values.⁷⁵ Taking as his point of departure the popular fascination with the notion that morality is exclusively the domain of individual conscience, which was exemplified by Henry David Thoreau and his many present-day heirs, Hurst emphasizes that the Constitution's broad principles of social ordering have a moral character themselves.⁷⁶ In Thoreau's view, matters of expediency belong to the law,

72. THE FEDERALIST No. 55, *supra* note 49, at 350.

73. BOWEN, *supra* note 48, at 246.

74. *Id.* "*Jus civile*" is "the body of Roman law relating to private rights, the Civil Law." HARPER'S LATIN DICTIONARY 346 (C. Lewis & C. Short eds. 1907).

75. Hurst, *supra* note 14, at 31.

76. *Id.*

while morality is found in the conscience of the individual.⁷⁷ His exaltation of conscience is well known. "[A]ny man more right than his neighbors," he informs us, "constitutes a majority of one"⁷⁸ The moral bankruptcy of the social order is assumed: "Government," he claims, "is at best but an expedient,"⁷⁹ and Thoreau is even "desirous . . . of being a bad subject."⁸⁰ In believing that law is limited to matters of nonmoral relations, Thoreau goes far beyond the idea that law cannot create values, to the position that the legal and moral domains are mutually exclusive.

Hurst convincingly refutes the theory of the moral insignificance of the legal order explicit in Thoreau's categorical, simplistic dichotomy. "[T]he main current of our political tradition," he notes, "was to try to use law to hold socially responsible the bursting energies of associated effort."⁸¹ The Constitution's role in the maintenance of a moral order is to provide access to and for those who do not otherwise possess independent power; conversely, it precludes overweening influence for those who do possess such power.⁸² When the legal order accomplishes this and does so in a self-executing manner, it should be given its moral due; and as Professor Hurst points out, the legal processes of the United States have been sufficiently successful in the task of creating a certain equality to justify viewing America's constitutional order as a normative pillar of its moral order.⁸³ Specific examples abound of law working in aid of constructive general interests, against the specious rationality of narrow, self-interested calculations. Under this heading Hurst places such developments as the Homestead Acts,⁸⁴ the Sherman Antitrust Act,⁸⁵ the Federal Reserve Acts,⁸⁶ and the Social Security Acts.⁸⁷ Similarly, law and Constitution have served as an effective check on the immorality of official arrogance from the time of the Alien and Sedition

77. See H. THOREAU, *Essay on Civil Disobedience*, in WALDEN AND OTHER WRITINGS BY HENRY DAVID THOREAU 635-59 (B. Atkinson ed. 1950).

78. *Id.* at 645.

79. *Id.* at 635.

80. *Id.* at 654.

81. Hurst, *supra* note 14, at 7.

82. *Id.* at 19-26, 37.

83. *Id.* at 8-9, 37.

84. *E.g.*, Act of March 3, 1891, ch. 561, 26 Stat. 1097 (codified in scattered sections of 43 U.S.C.).

85. 15 U.S.C. §§ 1-7 (1970).

86. *E.g.*, Act of June 21, 1917, ch. 32, 40 Stat. 232 (codified in scattered sections of 12 U.S.C.); Act of Dec. 23, 1913, ch. 6, 38 Stat. 251 (codified in scattered sections of 12 U.S.C.).

87. *E.g.*, Act of Aug. 14, 1935, ch. 531, 49 Stat. 620 (codified in scattered sections of 42 U.S.C.). Hurst, *supra* note 14, at 8-10, 13 & n. 31.

Acts⁸⁸ to the era of Watergate.⁸⁹ Hurst emphasizes, in short, that this constitutional legal order acts toward the achievement of a moral order by ensuring "that all organized public or private power should exist within procedures external to the powerholders by which others might have reasonable fighting opportunity to demand an accounting as to the ends and means of power."⁹⁰ Put more simply, the rule of law has served as a necessary context for the growth of moral order in the United States. Moreover, within this context judicial and legislative action can fulfill a morally educative function; to borrow a phrase from Justice Frankfurter, courts can "release contagious consequences."⁹¹ Thus, Hurst concludes that Thoreau's denigration of social process to mere expediency is "doctrinaire" in ignoring "the amount of humane rationality embodied in this constitutional legal order."⁹²

Hurst is correct; my position, for all its emphasis on the moral lives of citizens as a fundamental condition of a healthy society, cannot accept Thoreau's denuded Constitution. My point is simply that the humane rationality such an order possesses is neither *sui generis* nor self-executing. The law is certainly, as Holmes put it, "the witness and external deposit of our moral life."⁹³ The constitutional order embodies values it does not generate; but the problems of generation and the problems of nurture remain.

88. *E.g.*, Act of June 25, 1798, ch. 58, 1 Stat. 570; Act of June 25, 1798, ch. 73, 1 Stat. 596. *See* Hurst, *supra* note 14, at 9.

89. In this connection, Archibald Cox's assessment even before the resignation of President Nixon is instructive. Referring to the events following the so-called "Saturday Night Massacre" of late October, 1973, such as the appointment of an independent prosecutor and the promise of production of tapes and documents, Cox writes: "This sequence of events demonstrates better than any other occurrence within memory the extent of this country's dedication to the principle that ours is a government of laws and not of men. It gave proof of the people's determination and ability to compel their highest officials to meet their obligations under the law as fully and faithfully as others." Cox, *Reflections on a Firestorm*, SATURDAY REVIEW WORLD, Mar. 9, 1974, at 12.

Professor Freund commented in much the same vein after President Nixon's resignation: "The constitutional crisis has been weathered. The institutions and procedures established by the Constitution have worked, and worked magnificently." Freund, *The Greatest Office: Citizen*, Boston Globe, Aug. 10, 1974, at 1, col. 8 [hereinafter cited as *The Greatest Office*].

90. Hurst, *supra* note 14, at 37.

91. Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 238 (1955).

92. Hurst, *supra* note 14, at 31.

93. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

IV. The Myth of Rights or Moral Order

In our times these moral problems are largely ignored. Perhaps nothing is more indicative of this disregard than the current fascination with and belief in the supposed political efficacy and ethical sufficiency of law, which may be characterized as "the myth of rights."⁹⁴

Broadly speaking, this irresponsible dependency on law attempts to reduce problems that are moral in character to mere insufficiencies of law that can be solved by legislative draftsmanship or judicial interpretation.⁹⁵ Legislation and litigation are thus pressed to take the place of moral attentiveness. Awareness of the Constitution, particularly the Bill of Rights and the Fourteenth Amendment, grows; but the focus is legalistic, centering on court and legislature as the primary and even exclusive means of fostering decency and civility.⁹⁶ Thus, rather than encouraging popular reflection on the requirements of responsible citizenship in a constitutional order, the myth of rights instead speeds the march to court to set the world aright.⁹⁷ "Good laws" and "good decisions" are at the heart of this overly legalistic conception of the eunomic republic, as if these things could, by themselves, yield good men and a good society. Under the myth of rights, law serves as moral principle and religious precept, and it is called upon to replace parent, teacher, and rabbi as moral mentor. The Constitution is the Bible of this developing secular dogma, the Bill of Rights its Decalogue; "due process" stands as the principle doctrinal vehicle for reinterpretation of

94. S. SCHEINGOLD, *THE POLITICS OF RIGHTS* 17 (1974) [hereinafter cited as SCHEINGOLD]. Although I am indebted to Professor Scheingold for the phrase "myth of rights" and for some of the textual elaboration of that idea which follows, I am unable to agree with many of his conclusions. Scheingold's thesis is that "rights are most sensibly thought of as agents of political mobilization rather than as ends in themselves." *Id.* at 148. Thus, Scheingold proposes that we should rely on the political process rather than the courts for the formulation and preservation of fundamental values. In the end, then, I would argue that Scheingold substitutes an equally insufficient "myth of politics" for the "myth of rights" whose shortcomings he demonstrates so well.

95. *See id.* at 17. The myth of rights "encourages us to break down social problems into the responsibilities and entitlements established under law . . ." *Id.*

96. *See id.* at 39-40. *See generally id.* at 39-61.

97. The march can be personified by Giles Corey, a character in Arthur Miller's *The Crucible*, who was extremely proud of the fact that he litigated all his rights, as the following bit of dialogue reveals:

"DANFORTH: . . . You have no legal training, Mr. Corey?

"GILES, *very pleased*: I have the best, sir—I am thirty-three times in court in my life. And always plaintiff, too.

"DANFORTH: Oh, then you're much put-upon.

"GILES: I am never put-upon; I know my rights, sir, and I will have them." A. MILLER, *THE CRUCIBLE* 95 (1964).

the orders of faith; Supreme Court decisions become formal *ex cathedra* pronouncements on matters of faith and morals, and constitutional amendments serve as the catechetical revisions required by a continuing reformation.⁹⁸

In all of this, believers in the myth of rights worship a false god. The reason is not that our laws are deficient, or that our Constitution has failed; rather, law and the Constitution cannot supply the resolution of issues that believers expect. Certainly, as Professor Freund has pointed out, law does provide invitations to citizens to act in ways that affirm and bolster the values of a healthy society.⁹⁹ Law can instruct us about moral responsibility and afford us opportunities to become instruments of our own best will. But law cannot itself create the values in which that instruction and those opportunities are rooted. Civility cannot be litigated into being; nor are decency and responsibility the products of legislation. The myth of rights intends to be moral but ignores the need for moral foundation.

The dangers of the myth are evident. Its tendency to make society more litigious, its emphasis on a compulsory morality rather than a voluntary one, encourages a morality of threats, which is in fact no morality at all.¹⁰⁰ Recourse to law and courts occurs most often because private settlement and ordering have failed.¹⁰¹ When this failure is admitted wholesale, which is the end result when the myth of rights predominates, the stage is set for widespread social pathology, a condition of collective moral asthenia. The moral high ground is abandoned in favor of the moral low ground, the ground where prudence before the sanctions of the law is primary, the overriding motive for proper conduct.¹⁰² Ironically, the myth of rights also undermines the law's legitimate role in the moral sphere. Knowledge of law and legal experience do not make men good, as evidence in every generation of men and lawyers attests.¹⁰³ Such is not the task of the law. According-

98. The choice of religious metaphor is not accidental. As Professor Corwin has noted, Americans have long had an aptitude for "documentary exegesis," which may have had its origin in "theological disquisition." Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 521 (1925).

99. FREUND, *supra* note 2, at 89.

100. See generally THUCYDIDES, *THE PELOPONNESIAN WAR*, ch. V, §§ 84-117 (Livingston ed. 1959); *The Republic*, PLATO, *supra* note 19, 576-630.

101. See H. HART, JR. & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 2-4 (1958).

102. See I. KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 100-03 (H. Paton trans. 1964) (distinction between morality and prudence).

103. One of the classic illustrations of this truth is found in Dickens' famed

ly, in its insistence that courts and legislatures should and *must* make men good, the myth of rights sows among the citizenry the seeds of inevitable disillusionment. The relationship between good men *and* good laws—a collaboration prerequisite to a healthy society¹⁰⁴—is necessarily obscured.

What finally lies beneath the myth of rights is the mistaken belief that considerations of law and policy are somehow clearer and more tangible than considerations of moral factors. Thus, the myth professes to have firm footing in a hard-headed, concrete set of concerns, while eschewing the supposedly abstract and ineffable realm of traditional moral discourse.¹⁰⁵ But as Professor A. I. Melden has shown, such seemingly hard-headed, utilitarian considerations rest and depend upon an understood and assumed moral network of persons, to and for whom certain things have value.¹⁰⁶ Thus, a view of what is just, of what is appropriate for men, always precedes and underlies notions of utility.¹⁰⁷ In the kind of constitutional government we have created, we must face the conclusion, and its implications, that the ethics of persons is central. If Justice Frankfurter was correct in holding that the "ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law,"¹⁰⁸ I would submit that such ultimate reliance rests on the citizenry in its daily activity. In the words of Lincoln: "As a nation of freemen, we must live through all time, or die by suicide."¹⁰⁹ This moral dependence of the people to which so much reference has been made, and upon which so much rests, is not a dependence on something vague and ethereal. It is not reliance on the vagaries of opinion and feeling, on half-conceived and barely articulable notions of moral right and wrong.¹¹⁰ It is dependence neither on social

description of the Court of Chancery in chapter one of *Bleak House*. Interestingly, even as the myth of rights preaches that the solution to our moral ills lies in litigation and legislation, the legal profession is self-consciously seeking to promote greater awareness of ethics in both students and practitioners. See Fellers, *State of the Legal Profession: Annual Report of the President of the American Bar Association*, 61 A.B.A.J. 1053, 1056-58 (1975).

104. See *Crito*, PLATO, *supra* note 19, at 27.

105. See SCHEINGOLD, *supra* note 94, at 46-47.

106. Melden, *Utility and Moral Reasoning*, in *ETHICS AND SOCIETY* 173, 175, 195-96 (R.T. DeGeorge ed. 1966).

107. *Id.*

108. *Dennis v. United States*, 341 U.S. 494, 555 (1951) (Frankfurter, J., concurring).

109. Address of Abraham Lincoln before the Young Men's Lyceum of Springfield, Illinois, Jan. 27, 1838, in *THE LIFE AND WRITINGS OF ABRAHAM LINCOLN* 231, 232 (P. Van D. Stern ed. 1940).

110. Since the eunomic society is distinguished both by the presence of certain

code or law on the one hand, nor on mere conscience or moral idiosyncrasy on the other. It is instead a reliance on lived principles of the type outlined earlier in this article,¹¹¹ on what Madison, Jefferson, and Hamilton called virtue.¹¹² When the framers spoke of virtue, they believed neither that character could be forged by law, nor that a citizenry worthy of its name would adopt a cavalier ethic.¹¹³

Professor Alasdair MacIntyre has commented that one of the awful conditions of life for modern man is that he tends not to have goals

values and by a concern to foster, nurture, and defend them, public recognition of and belief in objective values must undercut any notion of moral subjectivity or relativism as a precondition to survival of a moral order.

It is important to realize as well that we do not need a philosophy of moral relativism to preserve those aspects of our public life which that philosophy purports to protect. We do not need to be relativists in order to advocate and respect the values of tolerance and individual difference. Nor must we be relativists to know and remember that reasonable people of good will can disagree. The best of our deliberations do not lead us to final answers. But the fact that our answers are subject to further consideration is cause for neither despair, intolerance, nor abandonment of the inquiry with the shrugged shoulders of the relativist. If, adopting the posture of moral relativism, we come to believe that responsibility and argument about values is appropriate only in a court and only with respect to laws, but not in day-to-day affairs and problems where, supposedly, "opinion must reign," we may face the abandonment of dialogue about values and the augment of a moral vacuum. This in turn may vitiate a central and necessary predicate for the effective operation of our republican form of government. The existence of a eunomic moral order presupposes that the citizenry possesses a "hard-headed," judgmentally defensible sense of what is appropriate, of what is right. This does not refer to any liting quixoticism about "good and evil" or "being a good citizen." Rather, it involves a commitment to judgment, a willingness to take and assign responsibility on the basis of that judgment, and a belief that individuals (including oneself) must be held accountable in public matters by publicly acceptable standards of the type described earlier in this essay. See text accompanying notes 10-20 *supra*. If we are to be citizens as Aristotle defined that term—those who govern and obey as free men (see ARISTOTLE, *supra* note 11, at 101-06)—we must be able to look for and to recognize the moral quality of our actions; the moral vacuum of relativism will not suffice.

111. See text accompanying notes 10-20 *supra*.

112. See, e.g., T. JEFFERSON, *Preamble to a Bill for the More General Diffusion of Knowledge*, in PADOVER, *supra* note 17, at 42.

113. The following quote from Pennsylvania's James Wilson illustrates precisely how far the founders were from contemplating such an ethic: "A good constitution is the greatest blessing, which a society can enjoy. Need I infer, that it is the duty of every citizen to use his best and most unremitting endeavours for preserving it pure, healthful, and vigorous? For the accomplishment of this great purpose, the exertions of no one citizen are unimportant. Let no one, therefore, harbour, for a moment, the mean idea, that he is and can be of no value to his country; let the contrary manly impression animate his soul. Every one can, at many times, perform, to the state, useful services; and he, who steadily pursues the road of patriotism, has the most inviting prospect of being able, at some times, to perform eminent ones." 2 THE WORKS OF JAMES WILSON 773, 778 (R. McCloskey ed. 1967) (address by James Wilson, July 4, 1788).

beyond the scope of his personal appetites and desires.¹¹⁴ Professor MacIntyre thus has highlighted our impulses toward a self-destructive hedonism. Although law cannot provide satisfactory alternative grounds for self-realization, the values, the lived principles on which the vitality of law depends, should prove more successful. What we need now, more than anything else, is to renew those convictions from which our public morality springs.

Between the myth of rights and Thoreau lies a large middle ground of social interaction where civility must be forged, or it is forged nowhere. That ground, I would submit, is presently not occupied. In this bicentennial period, however, the future remains open and as Walter Lippman said: "The acquired culture is not transmitted in our genes and so the issue is always in doubt."¹¹⁵ In the end, if we are to achieve *eunomia* we are left with the task of being attentive to those spirits of moderation and of other values that Judge Hand feared could not be thrust upon the courts. I believe that such nurture will take place as exemplary individuals and moral agents are living, working, and admired in homes, schools, churches, and other institutions, or it will not take place at all. Ultimately, the critical factor will continue to be how we come to conceive of ourselves and our proper ends.¹¹⁶ How we deal with each other day to day will bode much for the future of our constitutional moral order.¹¹⁷

114. Address of Alasdair MacIntyre at the National Humanities Faculty Summer Workshop in Durham, New Hampshire, July 23, 1974.

115. LIPPMAN, *The Renewal of the Public Philosophy*, THE PUBLIC PHILOSOPHY 75 (1955).

116. *See id.* at 135-38.

117. As Professor Freund put it in commenting on the Watergate affair: "What is more problematic, and in the long run more basic, is whether a moral crisis of America as a people has been recognized and surmounted. For the events of Watergate reflect, in caricature to be sure, some of the strains in the national character.

. . . .
"The quality of our government, of our public life, will reflect the attitudes, the culture, of the nation at large. We have experienced an orderly, if painful, transition in our highest public office. More important will be the question whether we will be moved by the whole experience to a clearer appreciation of the values we profess, and a more active insistence upon them in public and private relationships. For it remains true that in a democracy the most important office is that of citizen." *The Greatest Office*, *supra* note 89, at 8, col. 8.