
C O R R E S P O N D E N C E

Setting the Record Straight

I think if Mr. Kenner was trying to say in your November issue that higher education, and I have the impression that he was, had a higher degree of sustainment under other administrations or that mine was not keenly aware of what Mr. Kenner seems to think in terms of intellectual attainment, then he was wrong.

What he did not address himself to, as any faculty man with the possible resources should consider, is that at Columbia University under my guidance there had been and I think the record proves that it was a move in the directions indicated by those who like Mr. Kenner see as a genuine educational impulse.

Your magazine has done a disservice in the sense that the truth is or up to now has been prevented from fostering the principles of democracy as it sustains its own intellectual community.

Your retraction, should it be construed in the spirit of what I have always contrived, may be sent to my library here where the disposition of it among my papers may be appropriately filed.

Dwight D. Eisenhower
Abilene, Kansas

Mr. Kenner replies:

Since no literate nor quasi-literate reader will have trouble ascertaining the drift, if not the thrust, of the communication purporting to be from the late President D.D. Eisenhower; since for that matter the entire first paragraph yields parsable if not elegant syntax provided only that the clause between commas be moved forward nine words, I have no hesitation in dismissing it as a forgery.

It may be suggested that this document illustrates the phenomenon of rhetorical enhancement attendant on residence in the post-mortem world, as reported by P.V. Maro, D. Alighieri, and others. But no thinking person will fail to object that these were naive pre-scientific observations, conducted in the total absence of controls. Surely decisive in this connection were the NIH-funded experiments of Schlumpf, Scherz, and Kapow (1969), who repeatedly observed that when experimental animals were dispatched into the world in question with the aid of cyanide, they manifested a marked diminution of their already limited ability to frame English sentences. No exceptions were noted in repeated trials.

I trust this disposes of the matter.

Overwhelming Cynicism

I am not renewing my subscription, but I thought I would try to send some constructive criticism. I really do like articles by

James Q. Wilson, Irving Kristol, Robert Asahina. I really do not like the "Continuing Crisis" and "Current Wisdom." I honestly find these sickening in much the same way that the *Realist* bothered me when I saw it ten years ago.

I'm known as a cynical person by all my friends and my students—freshmen are especially disturbed by it. But I just cannot take the cynicism of those two departments in your magazine. They are simply gross. What I am trying to say is that even a person of relatively coarse sensibilities finds those sections too coarse. To top it off, the February issue had really offensive remarks about Bella Abzug—a person I would happily cross the street to avoid—in the "Bootblack Stand."

You do a valuable job in most of the magazine, but your overwhelming cynicism and your anti-feminist stance have finally gotten to me. I can't support you any longer in a direct way, though I do wish you continued publication.

Charles A. Lave
University of California
Irvine, California

The Constitution and Moral Philosophy

In "Bakke: The Legal Profession in Crisis" (February 1978), Hadley Arkes justly objects to reducing the "ends of the law...to the measure of material outcomes" and properly insists that "the question of material outcomes can never override a question of principle." But he swims upstream, against the current attachment to a result-oriented jurisprudence, the product of the Warren Court's revolutionary innovations, itself an offshoot of Pragmatism: a conception is to be measured by its consequences. In the realm of constitutional law, however, Chief Justice Marshall cautioned that because a given result is more or less desirable does not mean that it is more or less constitutional.

For his "moral principles" Arkes looks to "propositions that are true as a matter of necessity, now and for all time," among them the proposition that racial discrimination is immoral, a conviction that I share. There is no general philosophic consensus about what is moral. Of the moral one may say what Justice James Iredell said of natural justice: "the ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject." Said Justice Holmes, "Nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law." Then too there is John Stuart Mill's disquieting admonition:

The disposition of mankind...to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power.

One need only recall how the Holy Inquisition burned men at the stake because heresy threatened the souls of the faithful.

It is surprising that in an article about a major constitutional issue by a teacher of constitutional law there is not a single reference to the Constitution. The Founders were not promulgating a system of morals but were erecting a structure of government that would curb greed for ever more power. In Jefferson's words, they sought to bind down their delegates from mischief "by the chains of the Constitution." That they did not look to their delegates as preceptors of morals may be gathered from the ban on meddling with religion. By Arkes' test the Constitution was profoundly immoral, for it sanctioned the institution of slavery. And when the framers of the Fourteenth Amendment grappled with the problem of the emancipated blacks, they did not go beyond securing to them the barest minimum of rights essential to protection from violence and oppression, unmistakably excluding suffrage and segregation.* Arkes left unanswered how to engraft his "moral principle" upon a Constitution from which it was excluded.

Ours is a government "by consent of the governed." As Iredell, a leader in the struggle for adoption of the Constitution, declared, "The people have chosen to be governed under such and such principles. They have not chosen to be governed or promised to submit upon any other." No principle, moral or otherwise, not drawn from the Constitution, can alter the terms of that consent.

Those whom Arkes repudiates are well content to leave to the Supreme Court the imposition of moral goals that range beyond the Constitution. But no such power was conferred on the Court; and though usurpation may have a benign purpose, it spells, as Cardozo stated, "the end of the rule of law."

Raoul Berger
Concord, Massachusetts

Mr. Arkes replies:

I esteem that sense of engagement which leads Raoul Berger to write, but I fear that he has merely borne out, with his own, celebrated example, that "distance" (as I said in my article) which "now

* R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977).

separates jurisprudence from the tradition of moral and political philosophy that formed its foundation." Mr. Berger's own distance from that tradition is marked, first, by his evident remoteness from any understanding of what is meant, in the strictest sense, by a "moral" proposition. Despite my own effort to supply that understanding, Mr. Berger simply absorbs the spirit of the age and confounds "morals" with matters of subjective feeling or religious belief. So when he argues that the Founders were emancipated from any sense of moral ends when they conceived the nature and ends of this government, he apparently thinks he has "clinched" his case when he observes that the Founders sought to bar the government from "meddling with religion."

But, as Walter Berns reminds us, the Founders could be neutral in regard to religious sects because they understood that the regime was not founded on a religious principle. They were not neutral, however, in regard to the principles that were necessary to "legitimate" government, for the government they founded was based on a self-evident moral and political truth—the central truth (not "opinion" or "belief") that was mentioned in the Declaration of Independence. That truth, of course, was grounded in nature, in the things that separated human beings from animals; and it gave rise to the inference that creatures which were capable of giving and understanding reasons over matters of right and wrong did not deserve to be ruled in the way that one ruled creatures which were incapable of giving and understanding reasons. It was the truth of "natural equality" (in this limited but momentous sense) that made government by consent necessary. To deny that understanding, as Jefferson said, was to suggest that "the mass of mankind" had been "born with saddles on their backs," while a favored few had been born "booted and spurred, ready to ride them legitimately, by the grace of God."

Mr. Berger would seem to suggest that this understanding is news to him: that in his study of the Founders and the statesmen of the Civil War he has never seen any mention of the distinction that was commonly made between "rights that derive from nature" and "rights that derive from government." (In the debate over the Civil Rights Act of 1866 this distinction was played upon even by men who favored the most restrictive reading of the Constitution. See, for example, the remarks of Senator Saulsbury of Delaware in *Congressional Globe*, 1865-66, Part 1, January 29, 1866, p. 477.) In any event Mr. Berger has persuaded himself that he can give an adequate account of the Founders and the men who preserved this Republic without taking seriously the understanding that lay behind these distinctions between natural and civil rights. Perhaps he leaves out this part of our tradition because he has never himself

been fully clear on what the original understanding was. For that reason he may be disposed simply to doubt the existence of those self-evident truths from which that understanding began. Like the opponents of Lincoln he seems more disposed to say (if he had to make it explicit) that the self-evident truth of the Declaration must have been really a self-evident lie. On this point his state of mind is unmistakable, and he offers a number of intimations. He tells us, for example, that "there is no general philosophic consensus of what is moral." But anyone who understood the meaning of "morals" or "principles" in the strictest sense could not have assumed for a moment that the validity of a moral principle could be affected in any way by the question of whether that principle commands a "consensus" of opinion. And of course it was precisely because the truth of the Declaration was grounded in nature that it did not depend for its validity on the approval or disapproval of majorities. That is why Lincoln had to reject Stephen Douglas' policy of solving the problem of slavery through the device of "popular sovereignty"—i.e., by allowing majorities in the separate states and territories to decide whether slavery should be voted up or down.

For his own part, Douglas could hold to his position because he professed to recognize no rights grounded in nature: His argument essentially was that all rights emanated from *positive* law—from the law that was created by men in particular societies. That is to say, his teaching virtually accorded with the understanding conveyed by Mr. Berger: that "no principle, moral or otherwise, not drawn from the Constitution, can alter the terms" on which a people consents to be governed. Douglas was more explicit, however, than Mr. Berger in drawing the inference from that position: that when the Declaration said "all men are created equal," it could not really have meant "all" men, but all white men or, more exactly, all British subjects. Since there is no basis for "rights" (in this view) apart from the rights that are created by law, the Declaration could not have recognized rights existing outside the body of domestic law, in cultures and societies other than our own. But as Lincoln understood, the consequence of this argument was to cut the ground out from under constitutional government itself: For if the only source of right and wrong was to be found in the opinions that were dominant in the society, there could be no basis on which one could ever call into question any policy that was enacted by a majority.

It is useless then to quote Justice Iredell, as Berger does, and suggest that a democratic people may simply stipulate the terms on which it will consent to be governed—and that it may stipulate virtually any conditions it may choose. As Lincoln sought to teach us, there are certain substantive things, such as slavery,

that a democratic people may not choose, because those substantive ends would be inconsistent with the fundamental premises that give majorities their right to decide. Our own Founders could make judgments about the kinds of constitutions that were better or worse—indeed, they themselves discarded a worse one for a better one—because their understanding was informed by principles that existed independent of the constitutions they were creating. Berger, too, presumably, would make judgments of this kind, but it is a mark of the peculiar defect in his argument that he cannot account for the bases of these judgments: He cannot explain the principle that enjoins us to create a regime of law in the first place. As far as Berger can say, a regime of law exists only because a majority in any place has willed it into being; but why a majority should be obliged to establish constitutional government is quite another question: Just why a regime of this kind is preferable to a regime unconstrained by law is a matter that can be explained only by appealing, as I say, to standards of judgment that exist independent of any constitution. The explanation would lead us back to an understanding of why it is in principle good for rulers to be bound by rules apart from their own self-interest, or of what there is in the nature of human beings that makes it fitting and necessary that they be ruled only with justifications grounded in principles.

But Berger's writing contains no recognition of the principles that exist *antecedent* to constitutional government. It is only for that reason that he can think it pertinent (and even decisive) to point out that, in a discussion of racial discrimination, I make no reference to the Constitution (by which he apparently means no reference to a particular section of the Constitution). The matter would have been different had I been discussing, say, the treaties on the Panama Canal. If Mr. Carter proposed to put those treaties into effect without the concurrence of two-thirds of the Senate, I could hardly have avoided mentioning a specific passage in the Constitution (*viz.*, Art. I, Section 2). But in the case of discrimination based on race we deal with commitments that arise out of the idea of republican government itself. It was of course the argument in my article that the case against racial discrimination finds its firmest ground in those premises that underlie the very idea of law and constitutions, and which arise out of the concept of morals itself. It is those premises that explain why Britain may have laws banning discrimination on the basis of race even though Britain has no written constitution; and they explain also why these laws would be valid in our own country even if the Fourteenth Amendment had not been invented (a similar argument in this vein may be found in

(continued on page 43)

The Progressive

What ensues when the Marxist-Socialist-Leninist canon falls into the hands of a librarian with an apparent anal fixation, Mr. Sidney Lens:

One hundred thirty years after Marx and Engels published their historic manifesto about the "specter" that was haunting capitalist Europe (and America), more than half of humanity lives under governments that call themselves socialist—in Britain, Germany, India, China, Albania, Yugoslavia, the Soviet Union, and eleven other communist states, as well as in Algeria, Somalia, Iraq, Ethiopia, Guyana, Syria, Jamaica, Tanzania, Angola, Mozambique, and more. Socialism is clearly an idea whose time has come. Marx's grand vision of a united international community liberated from war and exploitation should be at hand....

Marx saved the utopian socialist movement of the 1840s by giving it a scientific basis—a rational ideology. Lenin saved it in 1917 by brushing aside the cobwebs of dogma. Today's socialist movement awaits a program of true internationalism—one that can not only reunite the various socialist, communist, and dissident movements of the Left, but can fashion a program for socialist integration and, above all, for peace. The regurgitation of old slogans, the recourse to Lenin, Trotsky, Mao, and Ché Guevara, are no substitute for a modern concept of socialist internationalism. Conditions demand, as the perceptive Rumanian sociologist Silviu Brucan puts it, a *dissolution* of power and especially of national power. The force of nationalism will probably remain with us forever, emphasizing valued cultural and historical differences, but the essence of internationalism lies in mechanisms to dilute the power of the nation-state.

[February 1978]

The Progressive

Concomitant with their recent fund-raising campaign, the *Progressive* publishes a dithyramb from another of the crybabies who keep it afloat:

This has been a lousy day, and all for ten dollars, enclosed. When my wife sees the checkbook she won't say anything, although we did talk today about the difficulty we're going to have this month meeting our obligations.

There are some books I would like to buy. I'd like to spend an evening in Orchestra Hall in Minneapolis. I'd like to be able to phone my sons and am embarrassed that they are always the ones who phone us and delight us with their extravagance, carrying on for sometimes an hour about their adventures.

You're having difficulty!

It's easy to make money. You have to be stupid, illiterate, or stubbornly infatuated with something that has nothing to do with making money in order to be poor. We are voluntarily poor. That can be pretty frustrating. It can be dreadfully limiting. It means, among other things, that we can't help *The Progressive* as much as we'd like. As much as we should?

We are tired. We work hard to earn our independence. We pay a price in limitations. Ten dollars is one of the limitations. Spend it well. It may just be that our need for *The Progressive* is just a little bit special....It would be lonely without you.

[December 1977]

The Washington Star

Miss Betty Beale, reporter and Washington, D.C., booster, sheds light on the arcane ways of her fellow Washingtonians in an alarming report on the Carter administration's ignorance of the higher politics of the cocktail party:

Washington is the most professional city in the world, and taking a stand against it is the mark of an amateur. The very essence of the city is its social life, where the political doings of the day are nightly questioned, commented on and assessed in the tolerant air enforced by politeness. Society here is no aggregate of wealthy blue bloods. It's a highly concentrated group of red-blooded achievers....Moving in it is broadening.

[December 18, 1977]

The Washington Star

Senator Richard Stone, the lion of the Senate, defends the Washington cocktail party against the philistines:

It's the most informative, educational experience you can get....

[December 18, 1977]

Rolling Stone

Artistic and philosophical eruptions from Mr. Mel Brooks, an American Voltaire:

"It [*Blazing Saddles*] was my first surreal movie," says Brooks. "What I did when the gunfight spilled over onto the Busby Berkeley set with fifty dancers was what Picasso did when he painted two eyes on the same side of the head...."

"We are by nature selfish. It's part of our survival equipment—until certain situations arise and the word 'noble' comes in. We are capable of giving of ourselves, but it has to be worth it. World War II was worth it. Vietnam was not. Well, World War II was worth it up to the bomb. That was in questionable taste."

[February 9, 1978]

The Nation

Midst an otherwise tranquil review of Roger Starr's new book, *America's Housing Challenge*, a Mr. Chester Hartman, urban planner, suffers an unexpected seizure for the amusement of all of us who read the *Nation* purely for recreational purposes:

A central theme of Starr's approach to urban problems is the distinction between the "working" and "nonworking" poor (working class vs. *lumpen*). Like many of his conservative colleagues, Starr has written the latter off, and is determined to frame social policy toward the containment of what he regards as hopeless elements: "For the hard truth is that some people are incapable of meeting minimum standards of housekeeping or neighborly behavior...." And in a more frightening version, which truly evokes possibilities of Buchenwald to me, he remarks, "In short, until society has found a way to make its members live within what might be called a code of tolerable urban behavior, large cities can provide a measure of safety for the majority of their residents only by including a semi-permanent slum within their boundaries."

[January 28, 1978]

Commonweal

Devoted as we are to the spiritual growth of our readers and, of course, to the life of the mind, we rejoice in the opportunity to lift from the incomparable *Commonweal* colloquy between a moss-backed rabbi and the suavely sophisticated Bishop of Memphis whose final retort is a monument to sheer intellectual brawn:

The Bishop of Memphis lived up to his reputation as a provocative prelate on a local television talk show, condemning property as a major cause of human-rights denials; allowing it was "conceivable" that women will one day be ordained into the Catholic priesthood; and backing the civil rights of homosexuals.

On the latter issue, Bishop Carroll T. Dozier said: "It's a human rights problem and it's on that the community at large must face. All that the gay community, as I understand it, is asking are the things we recognize as people—they (gays) have a personality, a humanhood that is necessary to be recognized in the community. And I see nothing that is wrong in the position."

"They have a right to the dignity of a human person."

Rabbi Marc Tannenbaum of the American Jewish Committee, sitting on the same pane said that he shared "the bishop's conviction about the obligation to assure the civil rights of homosexuals as well as all other people."

However, he noted that "in authentic normative Jewish tradition, homosexuality frowned upon and in fact the Bible itself calls an abomination." He expressed an opposition to the possibility that homosexuality "would become a norm for society and you can look forward to the end of family life."

Bishop Dozier countered: "You're real over-playing what is the ordinary sense of sense into a more general right and that therefore does cause confusion."

[February 17, 1978]

Mother Jones

A perspicacious revision of the Marxist Leninist Gospel, brought forth by *Mother Jones*, revolutionary organ of the suburban proletariat:

Gardening is an enterprise whose product has use value rather than an exchange one. It has no role in a capitalist system, except a subversive one. It provides a vision of human activity untouched by imperialism, classism, sexism, racism, agism, careerism and all the other demented ways in which people have devastated themselves and their environment. Throughout the country, community gardens are sprouting....The whole thing will make the corporations tremble. It is a model of how a revolution will come, as gently, relentlessly and inevitably as a spring rain.

[February/March 1978]

The New York Times

Impressive evidence of our President's mastery of the oratorical arts:

We are homesick for Amy. She happens to be Colorado now, skiing for the first time. I don't have any snow in Georgia and this is her first experience; but our own country is so great and strong and, I hope, in its attitudes, enlightened, progressive and also beneficial

[January 26, 1978]