League Files Brief in Rosenberger Before High Court

The Catholic League has filed a friend of the court brief before the United States Supreme Court protesting discrimination against religious speech at a public university. The University of Virginia denied a student's request for money from a student activities fund (SAF) to support publication o f a Christian journal, even though SAF money was given to 118 student organizations that year. The school's refusal was based on a provision in the SAF guidellnes excluding "religious activities" and the League's brief in *Rosenberger v. the Rector and Visitors of the University of Virginia* argues that such religious speech is protected by the First Amendment.

The University of Virginia collects mandatory student activities fees each semester and places the money in the SAF for distribution to student organizations meeting certain eligibility requirements. Ronald Rosenberger was a student at the University of Virginia when he and other students formed an unincorporated association known as Wide Awake Productions, the purpose ofwhich was to publish a Christian journal. *Wide Awake: A Christian Perspective at the University o f Virginia* dealt with a wide array of social, philosophical and school-related issues from a Christian point of view. When the school denied Rosenberger's application for SAF money, he filed suit challenging the constitutionality of the guidelines' "religious activities" exclusion.

The United States Court of Appeals for the Fourth Circuit upheld a lower court ruling in favor of the university. The court said that although the funding guidelines "create an uneven playing field on which the advantage is tilted toward [student groups] engaged in wholly secular modes ofexpression," the university had successfully demonstrated

that its regulation was narrowly drawn to achieve a compelling governmental interest. The court ruled that funding *Wide Awake* would violate the Establishment Clause; such funding, according to the court o f appeals, would have the primary effect o f advancing religion under the second prong of the *Lemon* test and would also involve "excessive entanglement" between the university and religion, thereby violating the third prong of *Lemon.*

The League's brief argues that the protection of religious speech was a central concern motivating both the First and Fourteenth Amendments and that the court of appeals' attempt to artificially isolate religious speech from campus debate would impoverish discourse at public universities.

The brief examines the suppression of religious speech which was an element of the colonial experience and points out that the desire to protect religious speech was an important consideration prior to the adoption of the First Amendment. Although early English emigrants to America included many religious refugees seeking to escape the influence of an established church, attempts to suppress the speech o f religious dissenters occurred in the Congregationalist colonies of New England and the Anglican colonies of the South.

It is ironic, the brief notes, that while Thomas Jefferson, the founder of the University of Virginia, opposed an established church in order to protect citizens' freedom "to profess, and by argument to maintain, their opinion in matters of religion," his university now contends that allowing religious students to freely express their views with the same privileges as other students would violate the First Amendment.

The free press protections were incorporated against the states through the post-Civil War Fourteenth Amendment, and the brief reminds the Court that a significant impetus in the

framing of the Fourteenth Amendment was a history of attempts by slave states to silence the religious speech of abolitionists who based their zeal to eradicate slavery on the premise that all human persons are created by God as equals, and that to assault human dignity through enslavement was an egregious sin.

The brief states:

The abolitionist background leading up to the Fourteenth Amendment suggests that a particularly high constitutional value should be placed on the right of religious individuals to freely express their views. Just as with the history of the First Amendment, the Fourth Circuit's decision again subverts constitutional history by holding that the Religion Clause imposes special disabilities on religious expression.

The brief concludes by urging the Court to reverse the decision of the Fourth Circuit Court of Appeals, because its decision "veers from the religious pluralism of the founders toward a relentlessly secular society, where religious expression is frowned upon and religious persons are denied the privileges afforded other citizens."

The *Lemon* Test

ln *Lemon v. Kurtzman* (1971) the Supreme Court enunciated a three part test (the Lemon test) for determining whether government action violates the Establishment Clause of the Constitution. Under *Lemon,* a governmental action does not offend the Establishment Clause if: (1) it has a secular purpose: (2) its principal effect neither advances nor inhibits religion; and (3) it does not foster excessive entanglement of government with religion.

Catholic League Participates in Protest Against Human Embryo Research

On December 5, the Catholic League was one of more than 70 organizations and individuals who signed a statement prepared by the American Life League protesting the use of human embryos for research and experimentation, as well as the federal funding for such research. The statement was released at a press conference held at the National Press Club, and received coverage in the *Washington Times.*

The statement, titled *No Public Money for Unethical Human Embryo Research,* calls on lawmakers to "enact and enforce laws and policies which forbid direct support for such procedures." It also states that institutions or individuals "be made ineligible to receive any public money as long as they conduct such unethical human embryo research."

At meetings just prior to the release of the statement, a key advisory committee at the National Institutes of Health (NIH) issued final guidelines and unanimously accepted a report saying such research should be federally funded, despite public protest to the contrary. Following the decision by the committee, President Clinton announced his opposition to federal funding of the creation of human embryos for research purposes. The final decision on funding now rests with Dr. Harold Varmus, NIH Director. (Prior to the meeting Varmus claimed to have statutory authority from Congress to use federal funds for any research proposal for which he agrees.)

Because most of the guidelines remain unopposed by both the president and the ad hoc committee of the NIH, the American Life League is looking to lawmakers. Members of Congress are urged to work to insure "that every single human being, from

fertilization on, is equally protected as a human subject, not as raw material to be used, abused and discarded."

This is the second time the League has registered a complaint with the NIH over this issue. In April, 1994, Dr. Donohue wrote to Dr. Varmus urging the NIH not to pursue federal funding, comparing the current proposals to the endorsement in the not too distant past of "risky medical experimentation on African Americans." Donohue highlighted the irony of the NIH's acceptance of embryonic research when society today condemns even animal experimentation. He added that "Even those who are undecided on the status of the human embryo ought to have learned by now that doubt is sufficient grounds for saying no to another round ofquestionable medical research."

The most recent statement, which was signed by the Catholic League, is scheduled to be reprinted in a full-page ad in the January 19, 1995 *Washington Times.* Other groups which signed the statement included the Christian Coalition, Focus on the Family, the Family Research Council, American Center for Law and Justice, Priests lor Life, Daughters of St. Paul, Women for Faith & Family, Concerned Women of America, Eagle Forum, and the Ethics and Public Policy Center.

League Hails Massachusetts High Court Decision on Pro-life Priest

The Catholic League on Nov. 11 hailed the decision of the Massachusetts Supreme Judicial Court in the case of Father Thomas Carleton, an Operation Rescue priest convicted for blockading an abortion clinic. The court upheld a Feb. 28

decision by the Massachusetts Court of Appeals overturning Father Carleton's conviction due to improper jury selection. The appeals court found that the Massachusetts attorney general's office, which prosecuted the case, had excluded jurors based on the irish ethnicity of their surnames.

The Catholic League called the Supreme Judicial Court's decision "A victory for fair play," and "a repudiation of the bigoted and unethical tactics employed by the attorney general's office in this case."

Catholic League Operations Director C.J. Doyle stated:

"Attorney General L. Scott Harshbarger's office engaged in ethnic and religious discrimination against Catholics to secure a favorable verdict in a controversial case. Such conduct, which creates a religious test for jury service, is illegal and unconstitutional.

"The exclusion of Irish-American jurors, which followed attempts to prevent Father Carleton from wearing clerical garb or being addressed as 'Father' in court, suggests both anti-Catholic bias and hostility to the civil rights of Catholics by the attorney general's office."

Mere Creatures of the State

Mere Creatures of the State
Education, Religion and the Courts
by William Bentley Ball
Preface by Richard John Neuhaus
Crisis Books, 1994. Paperback, 132 pp.

Reviewed by Karen Lynn Krugh

Are we, or are our children, mere creatures of the state? Has the right to instruct our children in the richness of our faith, and the right to publicly profess and practice that faith, been usurped by the state? Perhaps not entirely, and perhaps not explicitly. But to the extent that the prayer of a young school child is considered unconstitutional, yes, they have. William Bentley Ball knows this, having argued ten cases before the Supreme Court and twenty-two cases before state courts. It is from this background that *Mere Creatures o fthe State?* emanates.

When the nation was founded, the founding fathers recognized the importance of protecting the citizens of the state from a religion imposed by the state. With this in mind, they set down the following words in the First Amendment to the Constitution: *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof… "* And for the first century-and-a-half after those words were penned, less than a dozen cases involving religion were brought before the Supreme Court. Yet in the 1993 term alone, 36 cases involving religion were brought before the court.

In the past fifty-or-so years, we have witnessed a gradual reversal of the use of that"first freedom." This same right has come to be used as the basis for the removal of practices previously taken for granted: the offering of a blessing at commencement, a moment of silence for prayer or meditation before the beginning of a school day, public assistance money for the education, transportation or supplies of school children enrolled in private or parochial schools, the display of a creche or menorah during the holidays. Fr. Richard John Neuhaus explains in the preface that "no establishment is now taken to mean that any cooperative relationship between government and religion is suspect as a forbidden establishment of religion."

William Bentley Ball knows this better than most, and is

therefore one of the few people who could write this book, having been personally involved in several ofthe key cases which are now used as a basis for deciding cases dealing with religion and the establishment clause. For cases he himself argued *(Lemon, Yoder,* and *Zobrest,* to name a few), he builds them from the ground up, introducing the reader to the real people involved. From the Amish farm of Jonas Yoder in Wisconsin to the state capital building in Harrisburg, Pennsylvania, to the counsel table of the nation's highest court, Ball's account provides a rare glimpse inside some ofthe most well-known Supreme Court cases of the twentieth century.

How did he feel the arguments went in *Yoder?* What was the origin of the now-famous *Lemon* test? Upon completing his arguments, which way did he see the judgment going? Providing a perspective unique to only those most closely involved in such cases, Ball's is a work rich, not just in scholarly information, but in American history. And Ball is deeply entrenched in that history.

If the aim is to find a book heavy with lawyerese and legalistic entanglements, explaining statutes, precedents and the like, this is *not* the book. lf the aim is to find an immensely readable, thoroughly enjoyable mix of personal anecdotes and legal history, this *is* the book. Do not misunderstand – this book is not light reading. Combining the personal with the historical, *Mere Creatures of the State?* provides a tangible look over the past fifty years at the key decisions dealing with religion and education that affect the way all Americans profess and practice their faith today. And coming from Ball's own pen, this is the most informed book on the subject to have appeared in quite some time.