

Transcript #110
Air Date: September 18, 1984

Media and Society Seminars

A PROGRAM OF
THE GRADUATE SCHOOL OF JOURNALISM
COLUMBIA UNIVERSITY

Transcripts: 204 Journalism, Columbia University, New York, N.Y. 10027

THE
CONSTITUTION
THAT DELICATE BALANCE

**The Sovereign Self:
Right to Live, Right to Die**

Executive Editor

STUART F. SUCHERMAN

Producer

JUDE DRATT

Commentators

HON. POTTER STEWART

FRED W. FRIENDLY

Moderator

ARTHUR R. MILLER

Professor, Harvard Law School

The Constitution: That Delicate Balance is a production of *Media and Society Seminars*, a program of the Columbia University Graduate School of Journalism, produced in association with WNET/Thirteen (New York) and WTTW (Chicago). Major funding was provided by The Annenberg/CPB Project, a project of the Corporation for Public Broadcasting and The Annenberg School of Communications to provide opportunities for higher education.

Copyright © 1984 by the Trustees of Columbia University in the City of New York. This transcript may not be reproduced in whole or in part by mimeograph or by any other means without permission.

TRANSCRIPT CHARGES: \$4.00 each. Be sure to indicate transcript number and subject and/or moderator. All orders must be prepaid.

All programs are available on videotape. Write for additional information.

PARTICIPANTS

Rabbi J. David Bleich, Herbert Tenzer Professor of Jewish Law & Ethics, Yeshiva University

Joseph A. Califano, Jr., Former Secretary of Health, Education and Welfare; Attorney, Dewey, Ballantine, Bushby, Palmer & Wood

Phil Donahue, Host, *Donahue*, Multi-Media Broadcasting Co.

Rev. Robert F. Drinan, S.J., Former Congressman, Massachusetts; Professor of Law, Georgetown University

Barney Frank, Congressman, Massachusetts

Willard Gaylin, M.D., President, The Hastings Center for Bioethics

Meg Greenfield, Editorial Page Editor, *The Washington Post*

Milton D. Heifetz, M.D., Chairman, Department of Neurological Surgery, Cedars-Sinai Medical Center (Los Angeles); Professor, Department of Neurosurgery, University of Southern California

James Hoge, Publisher, *The Daily News* (New York)

Henry J. Hyde, Congressman, Illinois

Mildred Fay Jefferson, M.D., Assistant Clinical Professor of Surgery, Boston University Medical School; President, Right to Life Crusade

Nancy Landon Kassebaum, U.S. Senator, Kansas

Joan Dempsey Klein, Presiding Justice, California Court of Appeal

Carol Los Mansmann, Judge, U.S. District Court, Western District of Pennsylvania

Abner J. Mikva, Judge, U.S. Court of Appeals, D.C. Circuit; Former Congressman, Illinois

Alan K. Simpson, U.S. Senator, Wyoming

Gloria Steinem, Publisher, *Ms. Magazine*

Thomas B. Stoddard, Legislative Director, New York Civil Liberties Union

CASE STUDY

Eighteen-year-old Bobby Joe, the only son of Frank and Ethel Parker, is a devoutly religious member of the Apostles of the Lord Church. A motorcycle enthusiast, Bobby Joe prides himself on his athletic prowess. Several months ago, he married. Sixteen-year-old Mary Jane Parker believes she may be pregnant.

While motorcycling from morning church services to his job as a computer programmer, Bobby Joe collides head-on with a truck. He is not wearing a helmet. Bobby Joe sustains serious injuries and loses a great deal of blood before reaching the hospital. Doctors tell him that his condition is critical: he must have a blood transfusion and undergo surgery to survive. Before he slips into a coma, Bobby Joe refuses treatment, explaining it is against his religious principles to accept blood transfusions.

MEDIA AND SOCIETY SEMINARS

Air Date: November 20, 1984

The Sovereign Self: Right To Live, Right to Die

FRED W. FRIENDLY, Columbia University School of Journalism: From the birth-place of the Constitution — "The Sovereign Self: Right to Live, Right to Die."

Dr. MILTON HEIFETZ, Neurosurgeon: Your right to do with— what you wish to do with your life does not mean you have the right to order me to kill you.

Prof. ARTHUR MILLER, Harvard Law School: If you have unanimity, what is your next step — unanimity to take Bobby Joe off the respirator?

Dr. WILLARD GAYLIN, Psychiatrist, The Hastings Center for Bioethics: I wouldn't like it, I wouldn't sleep that night, but I'd do it.

Rep. HENRY HYDE, Illinois: I think that the right to life is paramount and no one has the right to kill even themselves.

PHIL DONAHUE: If we are saying we know what's good for this patient and won't respect his views, it's giving ourselves total—it's giving the state total absolute power to decide what kind of medical intervention should take place.

Judge CAROL MANSMANN, U.S. District Court: We seek life. We move toward life. And so my concern is, first of all, if we don't have time to even talk about it, if it's immediate and irreparable harm, I say, we'll preserve the *status quo*, which means keep him at life, give him the blood, and I'll set a hearing down the line.

JOSEPH CALIFANO, JR., Former Secretary Health, Education and Welfare: This is too important for a doctor to make alone. It's too important for a judge to make alone. It's too important for a legislator, or priest or rabbi to make alone. My only point is that it will take all of us to make decisions like this.

Mr. FRIENDLY: I'm Fred Friendly at Independence Hall in Philadelphia. In a graveyard nearby, Benjamin Franklin's son, Francis, is buried, a victim of smallpox at the age of seven. In Franklin's day, when life expectancy averaged 35 years, the framers who drafted the Constitution in this chamber could hardly have envisioned the dilemmas raised by modern medical technology.

The breakthroughs have clouded not only the question of when life ends, but when it begins. Courts and legislatures have been forced to look beyond the natural boundaries of life and death to confront unsettling legal and ethical choices: When should life-support systems be stopped? When should they even be started? And who decides?

Retired Supreme Court Justice Potter Stewart will join us later for commentary. Now let's move to Congress Hall where a modern-day assembly grapples with these legal and moral uncertainties. The moderator is Harvard Law Professor, Arthur Miller.

Prof. MILLER: Dr. Gaylin, let me introduce you to a new patient. His name is Bobby Joe Parker and he's eighteen. He's a devoutly religious young man, a member of the Apostles of the Lord Church. He's also a great athlete, a fine student and a motorcycle enthusiast. Unfortunately, he rides his motorcycle without a helmet. This morning, on his way back from church services, he's been in a terrible accident, and he's brought in to you at the hospital with a very severe head injury; so severe, with a blood loss so extensive that he's going to die. He's semi-conscious; he needs blood. What do you do?

Dr. GAYLIN: Does he come in alone?

Prof. MILLER: Yes.

Dr. GAYLIN: No family there?

Prof. MILLER: No family. He's brought in by an emergency team.

Dr. GAYLIN: First, I want to know whether he has a reversible or an irreversible condition.

Prof. MILLER: He is going to die within one hour without a transfusion.

Dr. GAYLIN: The question is, is he ever going to live again as a normal human being?

Prof. MILLER: Yes.

Dr. GAYLIN: He is?

Prof. MILLER: Yes.

Dr. GAYLIN: Then, in the light of the fact that there's no one else, I have that one expression, and he's eighteen years old, which counts very heavily with me, I take my risk of being thrown in jail and I find him the blood transfusion.

Prof. MILLER: Why do you say, "Thrown in jail?"

Dr. GAYLIN: Well, he's eighteen years old, he has a right to his autonomous statements in terms of health. He is an adult according to law, although I may have some question about that. Those are things we don't trifle with casually; the right of a person to determine those things about himself; his own autonomy. Nonetheless, I'm a doctor, I have my biases, I have a directive toward life, I have that one fragile statement; I suppose if his mother, father and wife came in there and, on their knees begged me not to give him a blood transfusion, I wouldn't.

Prof. MILLER: Well, let's change it, then. Let's suppose, when he's brought in, he's conscious and he says to you, "Under the basic doctrines of the Apostles of the Lord Church, I will not take that transfusion."

Dr. GAYLIN: It's difficult for me to see getting into a wrestling match with him, but I have gotten into the equivalent of wrestling matches. If he were seventeen I'd bind him, gag him, and stick the needle into his arm. I'm presuming, of course—if he were forty-five, I'd have no argument at all. I'd turn to the next case that needed my time.

Prof. MILLER: Just let him expire right next to you.

Dr. GAYLIN: Absolutely.

Prof. MILLER: Just move him out?

Dr. GAYLIN: Absolutely.

Prof. MILLER: But he's eighteen.

Dr. GAYLIN: That's right.

Prof. MILLER: That's an interesting principle.

Dr. GAYLIN: I think it's an important one.

Prof. MILLER: Suppose his parents came in. You did contact the parents and the parents said exactly the same thing. "It's part of our church doctrine."

Dr. GAYLIN: I'd need—if I had unanimity against me, I would bow to their wishes, because I don't see an individual just as alone. This is part of his network of loving people. I wouldn't like it, I wouldn't sleep that night, but I'd do it.

Prof. MILLER: Two brothers say exactly the same thing, "No transfusion."

Dr. GAYLIN: I would go along—if I had unanimity—I want one ally. If I—

Prof. MILLER: A wife.

Dr. GAYLIN: If she says, "Please transfuse him," the back of the hand to the parents and the rest, I'll—

Prof. MILLER: This is a funny form of democracy. One out of five votes carries the day.

Dr. GAYLIN: Yes, I think, in this case, it is a funny form. I mean—yes, I'll go along with that.

Prof. MILLER: Are you just looking for cover, Doctor?

Dr. GAYLIN: No.

Prof. MILLER: Just one friend in a sea of enemies?

Dr. GAYLIN: Oh, no. If I feel it's a morally right thing, I would do it. I think it's because I don't see an individual like an amoeba, as living alone in an isolated sea; my view of the human being is that he's attached to a network and he's part of that network and the wife is an important part.

Prof. MILLER: Dr. Heifetz, how would you react?

Dr. HEIFETZ: Well, I think we have to really clarify what we're doing. Legally, ethically,

we should do nothing. But I love to break laws and I would absolutely transfuse the boy as soon as he lapsed into a semi-stupor.

Prof. MILLER: Even after the clearest statement that he didn't want it?

Dr. HEIFETZ: After the clearest statement. But I know that I'm doing wrong. Ethically and legally.

Prof. MILLER: Why are you doing wrong?

Dr. HEIFETZ: Because, ethically, this man has—he's an adult, competent—who's competent. He has the right to make a decision. It's his right to be stupid.

Prof. MILLER: Would you try to pursue this legally?

Dr. HEIFETZ: Would I try to—if I had—

Prof. MILLER: Yes. Suppose he doesn't lapse into unconsciousness—and you don't get that momentary opportunity to—

Dr. HEIFETZ: If I were to call a Superior Court judge and say, "Judge, here's an adult who's competent who refuses to accept blood. He's going to die if he doesn't get it," the judge, if he's a good judge—

Prof. MILLER: Judge Mansmann.

Dr. HEIFETZ: —is going to say—

Prof. MILLER: She's a good judge.

Dr. HEIFETZ: Well, I—may I give him blood?

Judge MANSMANN: How much time do we have, first of all?

Dr. HEIFETZ: Two minutes.

Dr. MANSMANN: Well—it seems to be obvious that we have immediate and irreparable harm which calls for my acting without hearing from the family, without hearing from this young man. Now I, frankly, on the set of the facts have some concerns about his competency. What I'm hearing is he's lost a great deal of blood. He is—

Dr. HEIFETZ: No, Judge, he is totally competent. He's wide awake, he knows exactly what's going on.

Judge MANSMANN: But he may—he may be in shock.

Dr. HEIFETZ: He's not in shock. He's perfect. Except he's going to be dead in five minutes if I don't give him blood.

Prof. MILLER: Judge, why are you trying to help him out that way?

Judge MANSMANN: Because my concern, first of all, is for this young man who, from the facts, is on the brink of death. He is choosing death in these circumstances, which seems to me not to be a very natural, normal reaction for a human being. We seek life. We move toward life. And so my concern is, first of all, if we don't have time to even talk about it, if it's immediate and irreparable harm, I say, we'll preserve the *status quo*, which means keep him at life, give him the blood, and I'll set a hearing down the line. We'll talk about it later.

Prof. MILLER: That's a cheap out, isn't it?

Judge MANSMANN: No, it isn't. No, it isn't.

Prof. MILLER: I mean, you're affecting the total result by saying, "Oh, I'm not doing anything other than preserving the *status quo*." And in fact, that's giving him two pints of blood he's clearly indicated to the doctor he doesn't want.

Judge MANSMANN: But that's a medical judgement that this physician is making. I have to make a legal judgment whether he is competent.

Prof. MILLER: Judge Klein, what would you do, when the doctor calls you?

JOAN DEMPSEY KLEIN, Presiding Justice, California Court of Appeal: Well, I first of all make the assumption that I'm in a position to call this shot. And I assume I am—and I start looking around and I say, "Well, where's the authority for me to be in a position here of making this kind of determination?" And I look around and somebody says, "Well, you've got the Constitution here." And I say, "Well, where in the Constitution does it say somebody has a right to say 'I want to die'?" And somebody says, "Well, your honor, that's

a right of privacy." And so I say, "Well, okay, it's a right. It's a freedom — in a society that calls for individual freedoms. And then I think a little bit about, well, okay, in this constitutional evaluation, we are talking about a balancing, and there is always a balancing factor, versus the individual, versus the interests of the state, and so I take a look at factors. I'm starting, now to look at all of the factors that are before me. And it's a toughie.

Prof. MILLER: And Bobby Joe is losing blood right as we speak.

Justice KLEIN: Oh, yes. Okay. It's a tough decision and, there's another thing that I might want to know — does he say he wants to die, or does he say he doesn't want the transfusion?

Prof. MILLER: He says he doesn't want the transfusion, and he does say, "Under the tenets of the Apostles of the Lord Church, I cannot take it."

Justice KLEIN: He can't make the decision, right? Well, you know, I might be able to say, "Well he can't make that decision for himself, pursuant to his religion, but that religion doesn't bind me," and I might be able to make that decision for him. And that might let him off the hook. That might be one of my rationalizations for the determination that I make. Well, you know, okay.

Prof. MILLER: And he points his finger at you when he recovers and he says, "Judge, you sentenced my soul to eternal damnation."

Justice KLEIN: Well, you know, I have been called a lot of things in court — never the Devil, by the way — and a lot of things have been said about me as a judge. But, nonetheless, I do have to make the hard decisions, and if I'm going to come down on this one, I'm going to come down considering all the factors that I have, that have been indicated to me, thus far, I'm going to say, "Go ahead, Doctor."

Prof. MILLER: Can we get a third opinion?

Judge ABNER MIKVA, U.S. Court of Appeals: I think that this question of the man's inalienable right to refuse blood and to insist on dying in the hospital is not that clear at all.

Prof. MILLER: He doesn't have a right to choose?

Judge MIKVA: I'm not sure he has a right to choose.

Prof. MILLER: He doesn't have a right to exercise his religion?

Judge MIKVA: Yes, but he doesn't have the right to exercise his religion in all places, at all times in all ways.

Prof. MILLER: We're back to you, Judge Mansmann. Here's what is shown on this application: got Bobby Joe, got his wife, got his parents.

Judge MANSMANN: How old is she?

Prof. MILLER: The wife is sixteen?

Judge MANSMANN: Any children?

Prof. MILLER: No children. No children, a spouse, two parents, they all say no transfusion.

Judge MANSMANN: Then there's no question in my mind — no transfusion. His right to practice his religion, which calls for him to deny medical treatment in these circumstances, balanced against the interests of society — we have no compelling interest on the part of the state that overrides —

Prof. MILLER: Other than Bobby Joe's life —

Judge MANSMANN: That overrides his right to privacy, to make that decision about himself.

Prof. MILLER: You find that right in the Constitution? We have two judges down here who either have an edited text —

Judge MANSMANN: Well — no, there isn't any —

Prof. MILLER: — or read the word differently.

Judge MANSMANN: There isn't any question but we are struggling with it, but I think our Supreme Court has spoken, and many times, and I think in those circumstances where we have first of all an exercise in freedom of religion, which is very clear, and secondly the privacy rights involved here, I frankly would far prefer to go on the freedom of religion, that

this is an exercise of his — of his religious beliefs, firmly held —

Prof. MILLER: Suppose there's no religious basis: he says, "I guess I just want to die. Life in mid-twentieth century America is more burden than benefit. I might as well go now rather than experience the horrors of the inevitable thermonuclear war."

Judge MANSMANN: And there I am to the right of privacy. I have no freedom of religious expression, and I am faced solely and exclusively with that. And I think in the face of that, given the present status of the law, I would permit him to refuse the medical treatment.

Prof. MILLER: Purely and simply in terms of his constitutional right of self-determination?

Judge MANSMANN: There being no compelling state interest to force a different result.

Prof. MILLER: If Mary Jane is pregnant?

Judge MANSMANN: And sixteen, it may make a big difference. He has the responsibility of a husband and father — under those circumstances I think if I — then we have a countervailing interest of the state. We have his family, and we have a very young woman in need of a husband's support, and we have a child whom he's fathered; I think under those circumstances I — I think — that there are compelling interests.

Prof. MILLER: So this constitutional right isn't quite absolute.

Judge MANSMANN: It never is. It never is — we balance all the time.

Prof. MILLER: When Bobby Joe is brought in, Dr. Gaylin, he is unconscious. He, in fact, has slipped into a coma; he, in fact, has sustained brain damage. It's your medical judgment that the coma is irreversible and that the brain damage is permanent. The issue in your head is, "Do I put this person on a respirator or do I walk to the next room?"

Dr. GAYLIN: In the real case, I'd put him on the respirator until I found out where we were, because you can't be too arrogant about whether it's irreversible or not, particularly eighteen.

Prof. MILLER: So as a practical matter, you need to put him on a respirator in order to make the medical judgment.

Dr. GAYLIN: Oh, absolutely, and that's where you start your troubles —

Prof. MILLER: Now we have him on the respirator and you've made the medical judgment, and your judgment is it's irreversible. What do you do now?

Dr. GAYLIN: Now I turn to the family. And I am a great — I have a great feeling for negotiation with family.

Prof. MILLER: Let me give you a family. Ms. Steinem is Bobby Joe's sister. Mr. Donahue is Bobby Joe's spiritual advisor, Rabbi Bleich is Bobby Joe's father, and Ms. Greenfield is Bobby Joe's mother. That's the family.

Dr. GAYLIN: I would sit down, explain the situation, give them the best — medical attention, call in neurosurgeons, have the electroencephalography, tell them that all of the evidence is that he has irreversible damage. I suspect they might want to wait a couple of weeks — I would if it were my child.

Prof. MILLER: We have now reassembled after two weeks. What do you say to them now?

Dr. GAYLIN: I try to explain what the — what life will be with the assumption that we are correct medically, and that's all I can for, and I'm going to assume it's correct, that this boy will never recover, we have a sense that he has no consciousness — you may deceive yourself in fact that he's hearing you, you may pick up, because you want to feel it, that he's doing this and that, but he's irreversibly for the rest of his life, this is the definition of his state. Do you want to call that living as a person, and what do you want me to do about it?

Prof. MILLER: We'll start with the parents. How do you react?

MEG GREENFIELD, Editorial Page Editor, The Washington Post: I guess I would finally want to make that slippery slope decision, that if the end of what seemed a reasonable, agonizing period of inquiry and found that this boy was in fact going to remain, as the phase goes, a vegetable in a coma, kept alive only by the machine, then I would say, disconnect the machine, or that would be my argument both within the family and to the doctors.

Prof. MILLER: Rabbi Bleich?

Rabbi J. DAVID BLEICH, Yeshiva University: It's a painful decision for a parent to

make, because of the agony, primarily for the family rather than for the patient himself — in this case the patient is beyond pain — but we are confronted with preservation of life without any conflicting moral claim, and my decision would be unequivocally in terms of prolonging the life of the patient.

Prof. MILLER: But let's suppose that you and your son used to hold long philosophical dialogues, and he simply disagreed. He literally told you on more than one occasion, "Dad, if I ever become a vegetable, I don't want to continue."

Rabbi BLEICH: From my perspective, I would argue that the duty to preserve life is a transcendental value, takes precedence over a right to privacy. I would hope that society would have sufficiently high regard for the duty to preserve life that it would become a compelling state interest in one form or another. It seems to me that from the perspective of my moral framework, the obligation to preserve life takes precedence over a right to privacy.

Prof. MILLER: You would communicate to the doctor who is seeking your guidance that your value is life, even though your son had articulated a choice to die.

Rabbi BLEICH: That is correct.

Prof. MILLER: Spiritual advisor Donahue?

Mr. DONAHUE: Well, begging the rabbi's pardon, I cannot concur with his position. I think that we already have too many people in this society and in most who presume to know what's good for us. I feel that, painful as it is, and difficult emotionally as it might be, it's extremely important that we respect the rights of the patient, especially if they're rooted in religious tradition. Let's examine the consequence of deciding that we know what's good for this patient, where pretty soon we're going to be so sophisticated in saving lives that we'll have all kinds of decisions to make, and what we are doing here if we — if we are saying we know what's good for this patient and won't respect his views, is giving ourselves total — giving the state absolute power to decide what kind of medical intervention should take place, despite the wishes of the patient.

Prof. MILLER: Let's suppose Bobby Joe never articulated the view — so now you are being asked as part of this extended family by the doctor, "What do you think I — I should do?" without the backup of Bobby Joe having said, "Pull the plug."

Mr. DONAHUE: I think his wife should definitely be the first person to be consulted, and the facts would have to be examined at the time.

Prof. MILLER: Well, let's put a wife into the pattern. Senator Kassebaum, you're the wife, you're Mary Jane Parker.

Sen. NANCY KASSEBAUM, Kansas: I would have to believe that in this particular instance, pulling together as much of the medical evidence, different doctors' opinions, that — my judgment would rest in the doctor's determination. And on the belief that — prolonging a life which at this particular point in time with all the medical evidence available would never really be a life as such, my choice would be that it would have to be ended.

Prof. MILLER: Sis?

GLORIA STEINEM, Editor, Ms. Magazine: It seems to me the point we may be losing here is empathy. I mean, I would want to make the decision the way I think he would want the decision made. And in that case I think clearly that he would not want to continue in this vegetable state.

Prof. MILLER: Doctor, you've now had guidance.

Dr. GAYLIN: First of all, I ignore Father Donahue. I mean I don't think that the spiritual advisor — all he can give me is advice. I would stick with the family, that's part of my system here. If I had — again, I said the wife in this case is transcendent — if she wants her husband alive. If she wanted it I would go with it, if she wants the plug pulled, I think she is the chief partner.

I do not feel that I am upholding the banner of medicine, society, the Bill of Rights, the Constitution, to step — and I do feel that there is something called family integrity. I suspect it might destroy the family, I've seen it destroy the family — but they must come to some accommodation for me, it's their job.

Prof. MILLER: If you have unanimity, what is your next step — unanimity to take Bobby

Joe off the respirator?

Dr. GAYLIN: We have the agony of a mother who cares, a father who cares, a wife who's concerned, a sister who cares and a spiritual advisor who presumably knows this man; we are indeed in a kind of dialogue that is worthy of a death scene, it is worthy and it gives respect to the life. And we have all — or they have all decided contrary to me, and of course I will go with them.

Prof. MILLER: Let me change the facts now. Bobby Joe is competent but he's terminal. For whatever reason, he is terminal. He's also in very great pain. He says to you, "I don't wish to prolong this. Can you simply do something for me?"

Dr. HEIFETZ: What do you mean by terminal — how terminal is terminal, four years or four days?

Prof. MILLER: Somewhere between the two.

Dr. HEIFETZ: Well, then you're not talking terminal. Let's — let's be precise medically. If this man — if this boy has four years to go and he's in pain, then let's — let's counteract his pain, let's negate his pain, let's control it.

Prof. MILLER: And if he has forty days to go?

Dr. HEIFETZ: If he has forty days to go and fourteen consultants all agree that that's his time limit, then you've got a horse of another color — then you have to think in terms of whether or not you can give him some joy out of those remaining forty days, with psychotherapy, with sedation, with medication to control pain. If you cannot then he has a right not to be treated.

Prof. MILLER: I don't want these forty days, Doctor.

Dr. HEIFETZ: Pardon?

Prof. MILLER: I don't want these forty days.

Dr. HEIFETZ: Then that's your prerogative. I will stop the treatment.

Prof. MILLER: But won't you help me?

Dr. HEIFETZ: Oh, yes, I'll give you enough medication to control all of your pain.

Prof. MILLER: And you'll let me lie there for forty days with my family staring down at me?

Dr. HEIFETZ: No, you won't lie there for forty days, because if I control your pain fast enough, you will go out in a week.

Prof. MILLER: So you're willing to accelerate forty days to a week?

Dr. HEIFETZ: Yes.

Prof. MILLER: I don't want a week, doctor. I want forty minutes.

Dr. HEIFETZ: No, then — then — let me put it this way: under those circumstances I wish there was a law that allowed us to do it, but there's no law that would allow us to give him only forty minutes. There are times when I have done something almost akin to it, but when I knew that I could not be scrutinized. The point is that we do sometimes things like that, we don't like it. We're frightened to do it. Unfortunately, there's no law that gives us the right to do that. Under those circumstances you punt, you compromise. So you sedate heavily, and he now goes into a semi-sleep or a sleep for the next week, and you do not treat the pneumonia that develops, you do not maybe give him adequate hydration and he becomes dehydrated —

Prof. MILLER: But you're not willing to honor my choice —

Dr. HEIFETZ: No —

Prof. MILLER: — my right of self-determination to go in forty minutes.

Dr. HEIFETZ: Your right — your right of self-determination is not the same as imposing upon me the — the commandment to kill. Your right to do with what you wish to do with your life does not mean you have the right to order me to kill you.

Prof. MILLER: Dr. Heifetz, will you at least instruct my wife?

Dr. HEIFETZ: Let me put it this way: I would if I could if I'd get away with it. But I would

be afraid I couldn't get away with it, and therefore I wouldn't.

Dr. MILDRED JEFFERSON, Surgeon; President, Right to Life Crusade: That's why I do not want the door open to enable you to have the law. If our profession, which has a standing and respect in society, is to maintain it, this is in part based on the fact that they could expect that we would not deliberately kill, so that if the law and the Constitution are going to protect the patient who is in our care, who has this covenant with us, then it is going to have to respect that paramount right to life which does not assign to us, again, a killing function.

Prof. MILLER: Congressman Frank, suppose there's a statute that would say something like, "If a patient who is in a painful condition is medically certified to be terminal, within sixty days, his life or her life may be ended upon request of that patient." Would you support legislation like that?

Rep. BARNEY FRANK, Massachusetts: I would support legislation along those general lines. Yes, I think that individual autonomy ought to carry in that case. Obviously, you've got to be very careful that you protect against coercion, that you really do have it be the individual. I think you reach a point where it is unbearable and the individual ought to have that right. Now, who has to participate or who's involved in that, obviously, has to be worked out. But I think to force some mature individual who's made a decision that I think most of us would make for ourselves, that "I am going to die within a very short period of time and my life between now and then will be an unendurable horror," I do not think it is reverence for life to deny that individual the free choice to get out early.

Prof. MILLER: Father Drinan, would you support that?

Rev. ROBERT DRINAN, Former Congressman, Massachusetts: I'd be very reluctant to support it for many reasons. From my point of view, that people are never vegetables. They always have a dignity as human beings — and that, after all, this is something entirely new in American life. We've never given the power to the state to decree that this man or this person may die.

Prof. MILLER: If there's testimony before your subcommittee from the medical profession saying, "We need this law; otherwise, we will always fear — in jeopardy of prosecution for euthenasia,"

Rev. DRINAN: Well, they need this law, why? I mean, they need to meet the needs of some individuals. It's not that the pain is there; the pain can be quieted to some extent, and it's that some people are asserting what, from my point of view, is God's right alone, that I want to terminate my life. And I'm not certain that we should be in this business; that is, the state. And that if the physicians want to make a code and get that adopted in part at the local level, I think that that might be acceptable.

Prof. MILLER: Let's hear from the third member of this state subcommittee. Congressman Hyde, how would you vote on this bill?

Rep. Hyde: Well, I think the law's already spoken. We have laws against murder in every state in the union. And what the medical profession would be seeking in such a law would be an exemption. The circumstances surrounding the exemption would be the patient himself or herself in acute pain and distress saying, "End it now." And the doctor wants to be immunized from the laws against homicide. I agree with Father Drinan — first time in my life, I think — that it's too dangerous to give that power to anybody, including the medical profession.

Dr. HEIFETZ: If there is no doubt, if the man is terminal, does he have a right to commit suicide?

Rep. HYDE: No.

Dr. HEIFETZ: Not —

Rep. HYDE: No.

Dr. HEIFETZ: On whose basis?

Rep. HYDE: Because I think that the right to life is paramount and no one has a right to kill even themselves.

Rep. FRANK: Henry, what's the right to life? A right belongs to someone; whose right is it.

the right to life? I know if you're talking about a handicapped person, it's his right and no one should interfere with it. But if I am a desperately ill person in terrible pain, you say there is a right to life. If it isn't my right, who else has got a right to my life?

Rep. HYDE: Well, as a practical matter —

Rep. FRANK: The insurance company?

Rep. HYDE: As far as I'm concerned, no one can stop you from committing suicide — as a practical matter, if you want to commit suicide, you know how to do it —

Rep. FRANK: Would you change the law?

Rep. HYDE: —but I refuse to assign legal legitimacy to that and say you have —

Rep. FRANK: Why?

Rep. HYDE: —a right to take any life, even your own.

Rep. FRANK: Well, I don't understand. What have you accomplished? You want to have a law on the books that we propose to ignore —

Rep. HYDE: I have not legitimated the act of killing. That's what I've accomplished.

Rep. FRANK: But you've got a law on the book, but you don't expect anyone to pay any attention to it? I don't think that promotes respect for the law.

Rep. HYDE: Well, there are some people who do, and I certainly don't want doctors to have the power to kill. The power to cure, yes, but not the power to kill.

Rep. FRANK: Oh, but there are other ways to do it than with doctors.

Prof. MILLER: I'm recommending this bill to committee at this point. All right? Now, Dr. Gaylin, I'm bringing Bobby Joe to you one last time. This time, he a quadriplegic. This young athlete is absolutely immobilized from the neck down. He's competent, he's as intelligent as he ever was. And he says to you, "This is not life. This is not life. I'd like to go. I can do nothing. I want to go. Please help me."

Dr. GAYLIN: Bobby Joe has lost what to an eighteen-year-old is what life is all about; maybe sexual function, mobility, activity, fun and games, as he sees it. I do have time here — and I will use the time and I will talk to Bobby Joe and I will —

Prof. MILLER: Bobby Joe is now twenty and you've been talking to him for two years and he still says, "I would like to go."

Dr. GAYLIN: Oh, two years is such a short time in the psychiatric community. Let's make it five years, may we? Again, we're faced with the decision — Bobby Joe has a peculiar request of me. And I would begin to question why he doesn't do it himself. Why is he asking me?

Prof. MILLER: It seems so much neater and quicker and less —

Dr. GAYLIN: I'm a physician. I'm not prepared to terminate life for aesthetic, neatness and tidiness reasons.

Prof. MILLER: Brother Hoge, your brother Bobby Joe says, "I've learned how to handle this Second stuff, Jim. Could you please give me enough pills tonight so that I'm not a bother to anyone tomorrow morning?"

JAMES HOGGE, Publisher, The New York Daily News: It seems to me that the Doctor has phrased it rather well. We're not — whether we're a doctor or whether we're a brother or whatever our relationship is, we're not in the business of helping people end their lives because their lives become less tidy, painful, difficult. I always thought that part of living was learning how to cope with those kinds of things.

Prof. MILLER: This is your brother.

Mr. HOGGE: I understand. My message to my brother would be, "Look, I know this isn't easy and I don't want to ever sound like I think it is, but if I can be of help in teaching you how to live through your mind and heart, please call on me, but if it's drugs you want, to end it all, find somebody else."

Dr. GAYLIN: I'm not at all in the same position. I'm not averse if, at that point, the conviction is there, we've argued it for five years. Then that fact that it's no longer the tidy, aesthetic thing, but he simply is so handicapped and I'm aware of his pain and all. I do respect his autonomy, even to the point of taking his life.

* * *

Mr. FRIENDLY: Justice Stewart, we've heard some judges say that the right to reject life-saving medical care is part of the fundamental constitutional right of privacy. Do we have a right to die?

Hon. POTTER STEWART, Retired Justice, U.S. Supreme Court: No, I don't think the Supreme Court of the United States or any court has ever held that there's a constitutional right to die. To be sure, the Griswold case — which involved a Connecticut law which made it a criminal offense to use contraceptives, even married people to use them, or to advise their use — talked about their right to privacy as emanations from the Constitution of the United States, or from the Bill of Rights; and the case of, the later case of Roe against Wade, which involved abortion, and held that there was a constitutional right of privacy. And yet, that constitutional right of privacy was confined to the marital relationship, I think, in both those cases, and the Court has never held that such a right embraces the right to die, so there's no constitutional right to die.

Mr. FRIENDLY: There's nothing about the right to privacy in our system of constitutional law?

Justice STEWART: No, those two cases talked about a limited right of privacy, limited to the marital relationship, I think, and there's no generalized right of privacy recognized in the Constitution or even by, to date, by the Supreme Court of the United States or by any other court.

Mr. FRIENDLY: Thank you Justice Stewart. Now let's turn to one of the most explosive issues of our time — abortion and the right to live.

* * *

Prof. MILLER: Let's turn our attention to Mary Jane. Mary Jane is, in fact, pregnant. Mary Jane, finding either that her husband is in a vegetative state or is dead at this point, has decided to have an abortion. Bobby Joe's parents object. They have expressed their willingness to assume all responsibility for bringing up the offspring. Bobby Joe's parents are in the office, Mr. Califano, what can you do for them?

JOSEPH CALIFANO, Jr., Former Secretary of Health, Education and Welfare: They've got a hard case to make, to make it impossible for Mary Jane to get an abortion. Now, personally, all my sympathies are with the parents. What you think about abortion, I think is a function of when you believe life begins. That's why it's been so difficult to resolve it in this country. People have different beliefs about that. But their chances in court, I think I'd have to say, are slim.

Prof. MILLER: Why is that?

Mr. CALIFANO: Well, because the Supreme Court has fairly clearly provided that in pluralistic America, an individual woman has the right to have an abortion.

Prof. MILLER: Well, we heard a great deal before, when we were talking about Bobby Joe's right of privacy, particularly when he was brought in and needed the transfusion, that there were countervailing state considerations under some circumstances. Why don't those apply in the case of Mary Jane and that fetus?

Mr. CALIFANO: Well, because our Court — our Constitution, if you will, as interpreted by the Court — does not regard that fetus as a human life.

Prof. MILLER: Suppose we resurrect Bobby Joe. Bobby Joe, the father, the putative father, doesn't want that abortion, and he comes to you for legal assistance.

Mr. CALIFANO: I would represent him if he wanted to be represented but only, I think, after telling him that I thought his chances were slim.

Prof. MILLER: Mr. Stoddard, would you take the case for Mary Jane?

THOMAS STODDARD, New York Civil Liberties Union: I certainly would.

Prof. MILLER: Would you like to argue it to Judge Mansmann?

Mr. STODDARD: Yes. The interest that Mary Jane has in this child is far greater than any interest the husband would have. Mary Jane has given her body to the child. Therefore, the husband cannot be given a veto power over Mary Jane. It is as simple as that. The right belongs to the woman, and the Supreme Court has stated so again and again and again. This father, under the precedents established by the Supreme Court, has a zero chance of prevailing and that's the way it should be.

Judge MANSMANN: Oh, there isn't any question about the state of the law and that set of facts, and I think Mr. Califano has really conceded precisely that which Mr. Stoddard is saying and that is that rather than the Supreme Court saying there isn't a human life, it says that while there very well may be human life, it's a question of when the state may, in fact, counterbalance now the right of privacy. And the right of privacy exists to the point of viability, and we have a non-viable fetus, a child, whatever, here. In those circumstances, the point of viability, and we have a non-viable fetus, a child, whatever, here. In those circumstances, the right of privacy remains supreme. The counterbalancing interests are not there present for the state.

Prof. MILLER: Judge Mikva, who should decide this question? Should it be Congressman Mikva, or State Assemblyman Mikva, or should it be Judge Mikva?

Judge MIKVA: If you're asking where I would have preferred to have had it decided, I wish the state legislatures had decided it, but since so many of them had either ducked it, abdicated their responsibilities, or continued to try to insist on imposing a point of view on the American women and American physicians that was unacceptable, ultimately, the case was forced on the Court, and the Court can resist those cases for just so long, and then they run out of jurisprudential reasons to duck them, and they have to decide them.

Prof. MILLER: I notice that Judge Klein is shaking her head. Does it make sense to take an issue that affects everyone in the nation, loosely speaking, and remit it to a bench of nine people, none of whom are medically trained?

Justice KLEIN: Well, it's not as though this issue is a new issue. This issue has been around for literally thousands of years. It has been something that human beings have been struggling with for thousands of years — the role of women in any given patriarchal society. Should women have the right to make that determination themselves? That's a terribly threatening concept. It is going to be an issue, and it is a difficult one to cope with no matter when, where or by whom and, yes, it will be in the courts.

Prof. MILLER: Ms. Steinem, are you happy to have it in the courts?

Ms. STEINEM: No. Well, let me put it this way. I think we're moving toward a kind of cross-cultural, international consensus that says that reproductive freedom is a basic human right, like freedom of speech, like freedom of assembly. And to the extent that those basic rights are protected by our courts, then, clearly, reproductive freedom will be and should be in the courts. But to make this the only medical procedure that has such intervention by non-medical people and by trying to make laws that govern all circumstances when each case of viability is relatively individual, is a mark of, as Judge Klein says, kind of fading patriarchy. And the state should not be allowed to turn women into the most basic means of production, the means of reproduction, by saying "We will decide what goes on in your wombs. We, essentially, are going to nationalize your wombs." It ought to be — the individual citizen who makes this decision.

Prof. MILLER: Let me push you a bit. Let me take you to a Buck Rogers world which I'm not convinced is that far away. Let us assume the existence of a medical technology that will sustain the fetus almost from conception, outside the womb. Mary Jane is pregnant. Her husband, her parents, or Bobby Joe's parents say, "Don't have the abortion. Let us have this procedure performed, let us remove the fetus from Mary Jane's womb, let us sustain it at our cost, and let us bring up the child."

Ms. STEINEM: I still — I don't believe that the state has the right to reach inside Mary Jane's body to invade her private space, to breach the idea that the power of the state stops there and take out this fetus. By the same token if she wants to have an abortion and the fetus is viable after that point, then it's a separate question. She can no longer make that decision.

Prof. MILLER: Her right ends at the —

Ms. STEINEM: Right.

Prof. MILLER: —instant that the fetus is removed?

Ms. STEINEM: There are all kinds of questions and influences in the decision that the state might make or that anyone might make, and I should think that her wishes would be among those, but there is, in fact, a separate entity supportable by others, no longer entirely dependent on her, and she therefore loses her exclusive right to make this decision.

Prof. MILLER: Senator Simpson, would you support a statute that allowed the state to decide that upon removal of a fetus that could be maintained outside the woman's body, with provision that the state would support the child, that the woman would have to consent?

Sen. ALAN SIMPSON, Wyoming: I can go pretty far with what you say except when you get to the part about the support system by the state. I don't see what that is. If what is said by the various participants in this grisly debate is true, then there must be many loving, caring, attentive people who are waiting to take these children. And if that is the case, then why shouldn't after this has been done, and let's say I could, I think, support something that would take this being and nurture it but put it in the nurturing care of apparently millions of people who wish to have these children, and not even consider the role of the state in that process?

Prof. MILLER: Congressman Frank, would you support the legislation?

Rep. FRANK: I think so, if the question is that the procedure of abortion can be performed in a way that protects the ability of the fetus, yes. The abortion is, the woman's saying, it seems to me, "I don't want to have anything to do with this fetus, and I am getting rid of it." I don't think that carries with it a control over the life; in fact, it seems to me it's the signing-away of any further interest. As far as what Senator Simpson says, I think there is a grave inconsistency between saying, on the one hand, that we insist that these children be brought into the world, but that we will not accept any societal obligation to see that they are not cold and hungry and abused. I don't want to be part of a situation in which we force the kid to come into the world but he grows up thinking catsup is a vegetable.

Prof. MILLER: Congressman Hyde?

Rep. HYDE: It is my belief that the business of government is to protect the weak from the strong. If you concede some value to the unborn, then it seems to me the extermination of that does become the business of the law. If protecting the weak from the strong is what the law is all about. And that's what anti-abortion legislation seeks to do: protect the most defenseless, vulnerable of all creatures, the unborn, the pre-born. Now if you assign no value to it at all until birth or viability or some other artificial measuring stick, then it's arguable, of course, that it is expendable — exterminatable, throw-awayable, like a beer can. But if it is a human life, a member of the human family, then it is the business of the law to protect it from being killed.

Prof. MILLER: Let's go back to Mary Jane. Mary Jane decides not to terminate the pregnancy and as a result of a variety of things that needn't concern us, she gives birth, somewhat prematurely, to a baby with Down's Syndrome. The baby is severely retarded, the baby has a weak heart, the baby has a number of other physical disabilities. The baby also has a rather modest defect in the esophagus that is currently preventing the baby from taking food. That can be corrected surgically, very easily. The parents refuse to consent to the operation on the esophagus. What do you do, Dr. Gaylin?

Dr. GAYLIN: I respect the parents' wishes. There is such a thing — we talk about autonomy, we also at this stage are structured around family units. We may have other forms of family units but we do know that the utter helplessness of the child is a mandate for care. It is totally dependent for a longer period of time than any other creature on the Earth. So we must respect something we call family integrity.

Prof. MILLER: Rabbi Bleich?

Rabbi BLEICH: What we're really considering here is the value of life and what society is going to do to promote that value. Speaking of the rights of parents, vis-a-vis the determinations made with regard to the life of children, speaking of the integrity of the family, is really a societal cop-out.

Prof. MILLER:

Judge Mikva, there's a suggestion that this child has rights, independent of those that the parents might exercise on behalf of the child. Is that accurate?
Judge MIKVA: Not really. The rights are always those as against somebody's abuse of the child. Now if it's an abuse to deny this child the right to the operation —

Prof. MILLER: The right to eat.

Judge MIKVA: Pardon?

Prof. MILLER: The right to eat.

Judge MIKVA: Right to eat. Then —

Prof. MILLER: The child might want to eat. And a ten-minute surgical procedure might allow this child to eat. Who's speaking for the child?

Judge MIKVA: Nobody's speaking for the child at that point. The child's not going to speak for himself, which is one of the reasons why the law handles these so poorly.

Prof. MILLER: Mr. Stoddard, if Judge Klein called you up and said "Would you represent this ten-day-old child?" would you do it?

Mr. STODDARD: Yes.

Prof. MILLER: And what would you say to the court?

Mr. STODDARD: Children do have rights. In most cases, the law assumes the parents will act in the best interests of the child and, therefore, we're not talking here about parents' rights, we're talking about parents acting in the interest of their child. In certain circumstances, the interests of the parents diverge from that of the child and this, to me, would seem to be one of those circumstances. And therefore, the court must step in and vindicate the child's rights of autonomy and freedom and self-determination.

Prof. MILLER: Mr. Califano.

Mr. CALIFANO: I think here, the child clearly has a right to eat. This is a human being. It is — the parents' interests are clearly divergent from the child's interests. You cannot separate in human nature the selfish interests of the parents, what their life is going to be like. And that it's going to be a lot harder and more difficult for them. It really drives home to me. I mean, you know, you sit around here and everyone is trying to play God and, thank God there's a God to play God, because I wouldn't want to leave these decisions in the hands of either of these distinguished doctors.

Dr. HEIFETZ: Let me go down to the actual, practical way we do it. We're involved in it. In the tragic newborn situation, the total thrust of the physician is to preserve life, is to prolong life. Our biggest problem in medicine is not to shorten life, our biggest problem is that we overreact. We prolong too much. The total thrust of parents is to prolong life. It is very rare that a parent will not want their child to be treated.

Mr. CALIFANO: I'm simply saying that this is not a decision that our society or any rational, free society that values life — with medical technology as complicated as it is and our citizens in such pluralistic concern about life — should leave to any physician to make. This is too —

Dr. HEIFETZ: You're now giving it to the judges?

Mr. CALIFANO: —this is too important for a doctor to make alone. It's too important for a judge to make alone. It's too important for a legislator, or a priest or rabbi to make alone. My only point is that it will take all of us to make decisions like this.

* * *

Mr. FRIENDLY: Justice Stewart, what's the Supreme Court's definition of when life begins?
Justice STEWART: I don't think that the Supreme Court has ever defined that question, or ever answered that question, because it's — the case of *Roe* against *Wade*, which involved abortion, didn't talk about that. Not about the physical fact or the medical fact of when life begins.

Mr. FRIENDLY: And yet, when *Roe v. Wade* came along you voted that abortion, under

certain circumstances, was constitutional.

Justice STEWART: In the case—the abortion case, the Court held that the state has no interest in the first trimester, which means the first three months of pregnancy, and that that interest—and during that period, that interest is exclusively the woman's—the potential mother—and that the state begins to acquire an interest in the second trimester, the second three months, and has a very valid interest in the final trimester, the final three months.

Mr. FRIENDLY: Isn't that all likely to change as technology and miracles change and—

Justice STEWART: Certainly so.

Mr. FRIENDLY: Justice Stewart, does a severely deformed infant have any rights?

Justice STEWART: Well, certainly. That infant, deformed and handicapped as it may be, has the same rights as any infant, constitutional and otherwise. And maybe—maybe there are no constitutional rights against other people, but only against government.

Mr. FRIENDLY: There's nothing in the Constitution that—of the right to life for an infant who isn't going to have much of a life?

Justice STEWART: Nothing at all.

Mr. FRIENDLY: Thank you, Justice Stewart.

When life and death hang in a delicate balance, the players in this drama—the patients, their families, the physicians—often turn to the courts. And yet, these tragic choices are not easily resolved in any court of law. Each remarkable scientific advance has consequences that must be considered alongside our moral, religious and legal traditions. Of one thing we can be sure—it won't be easy.

Transcript #111
Air Date: November 27, 1984

Media and Society Seminars

A PROGRAM OF
THE GRADUATE SCHOOL OF JOURNALISM
COLUMBIA UNIVERSITY

Transcripts: 204 Journalism, Columbia University, New York, N.Y. 10027

THE
CONSTITUTION
THAT DELICATE BALANCE

Immigration Reform

Executive Editor

STUART F. SUCHERMAN

Producer

JUDE DRATT

Commentator

FRED W. FRIENDLY

Moderator

BENNO C. SCHMIDT, JR.
Dean, Columbia Law School

The Constitution: That Delicate Balance is a production of Media and Society Seminars, a program of the Columbia University Graduate School of Journalism, produced in association with WNET/Thirteen (New York) and WTTW (Chicago). Major funding was provided by The Annenberg/CPB Project, a project of the Corporation for Public Broadcasting and The Annenberg School of Communications to provide opportunities for higher education.

Copyright © 1984 by the Trustees of Columbia University in the City of New York. This transcript may not be reproduced in whole or in part by mimeograph or by any other means without permission.

TRANSCRIPT CHARGES: \$4.00 each. Be sure to indicate transcript number and subject and/or moderator. All orders must be prepaid.

All programs are available on videotape. Write for additional information.

PARTICIPANTS

Arlin Adams, Judge, U.S. Court of Appeals, Third Circuit
Arthur L. Alarcon, Judge, U.S. Court of Appeals, Ninth Circuit
Peter Ailstrom, Director of Research and Communications, Food and Beverages Trades Department, AFL-CIO
David Carliner, Attorney, Carline & Gordon; Immigration Committee, American Bar Association
Roger Conner, Executive Director, Federation for American Immigration Reform

Rudolph W. Giuliani, U.S. Attorney for the Southern District of New York; Former U.S. Associate Attorney General
Antonia Hernandez, Associate Counsel, Mexican American Legal Defense and Educational Fund
Rev. Theodore M. Hesburgh, C.S.C., President, University of Notre Dame; Select Commission on Immigration and Refugee Policy

Jacquelyne Johnson Jackson, Associate Professor of Medical Sociology, Duke University Medical Center

Guillermo Martinez, Columnist, *The Miami Herald*

Doris M. Meissner, Executive Associate Commissioner, U.S. Immigration and Naturalization Service, Department of Justice

Michael Posner, Executive Director, Lawyers' Committee for International Rights

William Raspberry, Columnist, *The Washington Post*

Jack Rosenthal, Deputy Editorial Page Editor, *The New York Times*

Steven R. Shapiro, Staff Counsel, New York Civil Liberties Union

Marvin H. Shooob, Judge, U.S. District Court, Northern District of Georgia
Alan K. Simpson, U.S. Senator, Wyoming

Mina K. Solarz, Executive Director, Citizens' Committee for Immigration Reform

Monsignor Bryan O. Walsh, Director of Catholic Charities, Archdiocese of Miami

CASE STUDY

(A)

Southeast of Key West, a Coast Guard cutter sights five small, makeshift sailboats crammed with refugees. Meanwhile, three more overloaded wooden vessels have landed on south Florida shores. Two hundred refugees disembark, claiming they fled persecution in their repressive Caribbean homeland.

(B)

The Ortegas live with their seven children in a two-room shanty in an impoverished Mexican village. Their oldest son, Carlos, age 25, decides to leave Mexico via Juarez and enter the United States in search of work to improve his family's economic plight. Carlos wades across the knee-deep narrows of the Rio Grande and slips into El Paso, Texas, illegally.

Hoping to find a better life, Maria Ortega wants to join her older brother in the United States. Maria, who has an eight-year-old child, is seven months pregnant.

MEDIA AND SOCIETY SEMINARS

Air Date: November 27, 1984

Immigration Reform

FRED W. FRIENDLY, Columbia University School of Journalism: From the birthplace of the Constitution — can this nation of immigrants deny opportunity to the latest newcomers? How many aliens can we absorb?

ANTONIA HERNANDEZ, Mexican American Legal Defense and Educational Fund: In the Southwest right now you talk about, "Let me see your visa," the joke is, "I only carry MasterCard," because when they say, "I want to see your visa," they're talking about your immigration visa.

RUDOLPH GIULIANI, U.S. Attorney, New York, former U.S. Associate Attorney General: You have to be able to control the numbers and even the types of people that come into your country. You can't have an open border.

Rev. THEODORE M. HESBURGH, President, University of Notre Dame: We have as many people guarding that border as they have guarding the Capitol in Washington, D.C. That's why. Now you could string five divisions across there, military, armed, but we're not that kind of a country, and we don't want to be.

Dean BENNO SCHMIDT, Jr., Columbia Law School: It's inconsistent with our tradition: a Berlin Wall along the Mexican border.

JACK ROSENTHAL, deputy editorial page editor, *The New York Times*: It would be a Berlin Wall with a critical difference: they try to keep their people in; ours would be to try to keep people out.

Sen. ALAN SIMPSON, Wyoming: No fair quoting the Statue of Liberty, because every one of us in this room is a child of immigrants, but every one of us is a child of legal immigrants.

Judge MARVIN SHOOB, U.S. District Court: Once you start diminishing our constitutional rights, and chiseling away because it's an effective, good way of accomplishing your objective, you are — you are hurting all of us.

* * *

Mr. FRIENDLY: In 1934, when President Franklin Roosevelt stood before the Daughters of the American Revolution at their convention in Washington, he greeted them with "My fellow immigrants—"

Indeed, we cherish our immigrant tradition. Almost every one of us who isn't an immigrant is certainly descended from one. And yet, that hallowed phrase inscribed on the Statue of Liberty — "Give me your tired, your poor, your huddled masses—" — may now be more poetic than practical.

Far beyond any country in the world, America has become a magnet attracting refugees and legal immigrants. But can we afford to let the rising tide of illegal aliens flowing across our borders continue? Let's move now to Congress Hall where a modern-day assembly wrestles with the outmoded policies that once helped settle an empty continent. Our moderator is the Dean of the Columbia Law School, Benno Schmidt, Jr.

* * *

Dean SCHMIDT: Ms. Meissner, 40 or 50 miles off the southern coast of Florida, a Coast Guard vessel sights a ramshackle-looking wooden boat crammed to the gunwales with about — it looks like about a hundred black people. All ages — men, women, children, infants, old people. What happens?

DORIS MEISSNER, U.S. Immigration & Naturalization Service: The Coast Guard would stop that boat to determine whether it was flying under — to determine what flag it was

flying under. And the Coast Guard would then inquire where it was going and for what purpose; and if the purpose was to come to the United States, for people to enter the United States, it would ask whether the people had documents to enter the United States.

Dean SCHMIDT: Okay, hold on. They have no visas. No documents. They don't know what that is.

Ms. MEISSNER: Those people would be brought onto the Coast Guard cutter and we would then take, depending on how many people, usually from eight to ten hours to question each of those people individually, to determine whether they have any reason to fear returning to their home country. And if we decide that any of them seems to have a reason to fear returning to his home country because of a likelihood of persecution, then we would bring those people to the United States, because they would perhaps have a claim to asylum.

Dean SCHMIDT: I'm on this boat because my family and I are starving. And the reason I'm starving is that the secret police took away my farm and they won't give it back.

Ms. MEISSNER: We would ask some questions about whether the secret police were in fact acting with a political motive against that particular person, or whether that person was simply—was suffering from the problems that the vast majority of people in the countryside are suffering from.

Dean SCHMIDT: So if the secret police sort of take away people's land and belongings—capacity to make a living—randomly, even in a very widespread way, that's not good enough.

Ms. MEISSNER: That generally is not viewed as persecution under the Refugee Act.

Dean SCHMIDT: So if I say on the ship, "I got up in the village the other day and I made a speech accusing the government of Haiti of being corrupt and violent and ruthless, and after I made that speech, the local—some local official said I better get out of there, I was going to get my throat cut—"

Ms. MEISSNER: Was there anybody there who observed you at that time?

Dean SCHMIDT: Well, nobody on the boat.

Ms. MEISSNER: Was it reported in the press?

Dean SCHMIDT: I'm not under the impression that much of that is reported in the press.

Ms. MEISSNER: Well, in that case I think we'll take you on to the United States and file a claim.

Dean SCHMIDT: Mr. Posner, it sounds to me as if those Haitians on the boat could use a lawyer. It sounds to me like it's important to say the right thing. What's your impression of what happens on those boats? You have represented some Haitian refugees.

MICHAEL POSNER, Lawyers' Committee for International Rights: Well, the problem is that they'll never know about our asylum laws. They'll never know about a lawyer—they'll never see the shore. These procedures that we're discussing are not a serious effort to evaluate information and to decide whether or not somebody has a fear of persecution.

Dean SCHMIDT: Are they unconstitutional—

Mr. POSNER: Absolutely.

Dean SCHMIDT:—procedures?

Mr. POSNER: I think so.

Dean SCHMIDT: Mr. Giuliani, does the Constitution apply out there?

RUDOLPH GIULIANI, U.S. Attorney, New York; Former U.S. Associate Attorney General: Not in the sense that they have a constitutional right to counsel, or that kind of thing. You're outside of the United States and these people are not citizens of the United States. To say that the United States Constitution applied would mean that the United States Constitution applies to the entire world. It would be a very, very large stretch of the Constitution to say that it would apply to people who—who have no connection to the United States of any kind.

Dean SCHMIDT: Mr. Carliner, we've heard the people on the boat are trying to enter the United States illegally, and, I guess, in a sense that's true. What's wrong with taking care of

the problem before it reaches our borders?

DAVID CARLINER, Immigration Committee, American Bar Association: What the Immigration Service is trying to do is to cut these people off at the pass so they can't even apply within the Immigration Service procedures for getting the benefits. We remember what happened to the Vietnamese who sailed out of Vietnam in leaky boats and they came to Malaysia and various other places; they were turned back into the oceans there and many of them drowned. We regard that as a barbaric procedure when the Thais and the Malaysians and the other countries did it. That's just as barbaric for the United States to do it.

Dean SCHMIDT: Senator Simpson, Mr. Carliner has recalled that the United States did argue in the Seventies that interdicting the boat people from Vietnam was violation of international law. Do you think interdicting this boat from Haiti is the proper way to proceed with this?

Sen. ALAN SIMPSON, Wyoming: Well, let me tell you, I have been dabbling in the mystic arts of this business for about four and a half years. The toughest part of it is already evident right here, and that is that the people of America do not understand the difference between an immigrant, a refugee, a permanent resident alien; they make no distinction about those persons whatsoever. And every one of those is a key distinction. But let me tell you that if a person who thought he was a refugee in any country of the world went to the American consulate, he could have his application stamped "No" and that's the end of it. I don't hear anybody saying that. That's what happens to a person who seeks refugee status. But if you load up as a refugee and start toward the United States, even though you're an economic migrant, you will be picked up in the process where you'll have more due process than an American citizen will have in the process. Layer after layer of proceeding to apply for asylum. And the only difference between an asylee and a refugee is the refugee is over there, and the asylee is here, but it's the same person.

Dean SCHMIDT: Mr. Martinez, why has this interdiction policy been developed at this point for the Haitians, when hundreds of thousands of Cubans were permitted to get in their boats and make it to Florida?

GUILLERMO MARTINEZ, columnist, The Miami Herald: What we're looking at is an evolution of a policy. In 1980, with the arrival of 125,000 people from Mariel within a six-month period of time, the United States was shocked—the people of Florida were shocked—at seeing thousands of people land in a day, a hundred thousand in six weeks. This was unacceptable, and because this was unacceptable, the policy is "We're going to stop them. Cuba has stopped the migration so nobody's leaving Cuba. The Haitians kept trying. We don't want to allow them to get here, and if we made our policy hard enough, they would stop coming."

Dean SCHMIDT: Mr. Posner, what's your sense of why this interdiction policy developed for the Haitians?

Mr. POSNER: It's a political response to a problem and, I think, in an unfortunate way the Haitians have become a symbol. They look different, they speak a different language, they're a different color and they're physically isolated. It's easier to stop them as a group and show them up as an example of some kind of progress. They've suffered a great deal and I think it's unfortunate.

Dean SCHMIDT: Mr. Giuliani, is that—

Mr. GIULIANI: No, that isn't correct at all, and it's very unfair. The reason that the interdiction program ended up being directed against Haitians is simply because it was Haitians who were coming in in large numbers during that period of time. You have to be able to control the numbers and even the types of people that come into your country. You can't have an open border.

Dean SCHMIDT: So it's numbers?

Mr. GIULIANI: Of course, it is. It's impact. There is no other nation in the world that would permit that kind of invasion of its borders, and we can't tolerate it. We have to have orderly, sensible procedures to control that.

Dean SCHMIDT: Mr. Conner?

ROGER CONNER, Federation for American Immigration Reform: If I could inter-

ject, this whole conversation has been going on without any sort of connection to the reality — the detention of Haitians or the stopping of Haitian boats is a sort of visible manifestation of the collapse of American immigration policy. What happened was, first, a few people came over from Haiti illegally. Their lawyers couldn't find a way to keep them in the United States, and so they said these people should claim political asylum because American law permits this. Then their — when they filed claims for asylum, there was a brief hearing and most of the claims were routinely denied. Their lawyers didn't like that. The lawyers said, "We need more elaborate procedures." In comes the judge. The judge says, "You're absolutely right. We need more elaborate procedures." By the time they got done, to decide an asylum claim took two or three years, and believe me, American immigration law is very well understood in Haiti. So what happened was, a group of entrepreneurs began going to Haiti and saying, "Give — sell all your land. Go and hook every possession your family has and get me \$1500. I will get you in a boat and I will take you to the United States, where the American laws will assure you of the right to stay and live and work at least two or three years until your political asylum claim is decided, and probably forever."

Dean SCHMIDT: Ms. Meissner, a couple of these boats get through and a group of Haitians land on a beach in Florida. Now what happens?

Ms. MEISSNER: We ask them again, do they have documentation to be here. Failing that, we ask them whether they are willing to return to the country from which they came. Assuming they say no, which they do not — I mean, they have paid money to get here and don't have anything to return to in most cases, they say that they wish to stay and then they have rights which we must — and do —

Dean SCHMIDT: Why? Why don't you question them exactly the way you question them on the boat, and if the answers are the same, back they go on the boat?

Ms. MEISSNER: They have a right to the hearing once they are at — once they are in the United States.

Dean SCHMIDT: Ah! That's what I'm — why?

Ms. MEISSNER: Because that's what the law requires.

Dean SCHMIDT: But why, as a practical matter, why are they in any different posture when they get off the boat on the beach in the United States than when they are ten miles offshore, headed for the beach?

Ms. MEISSNER: Because certain due process rights attach.

Dean SCHMIDT: Mr. Shapiro, are they now protected by the Constitution?

STEVEN SHAPIRO, New York Civil Liberties Union: Under current law, they're protected by some aspects of the Constitution, not by all aspects.

Dean SCHMIDT: What will happen to them?

Mr. SHAPIRO: They will be put in jail. And they will sit in jail for what is likely to be a protracted period while they apply for political asylum.

Dean SCHMIDT: Well, what does that mean? Is that a few weeks? Is that a few months?

Mr. SHAPIRO: It is certainly a few months; maybe upwards of a year while the process slowly works its way through the asylum application.

Dean SCHMIDT: Is that right, Ms. Meissner? Will they be put in jail?

Ms. MEISSNER: The Haitians will be put in jail along with all other people who enter the United States who are in exclusion status and enter illegally.

Dean SCHMIDT: I thought that the protocol dealing with displaced persons and political refugees that we signed in common with most of the world specified that an illegal entry by a refugee or a person seeking asylum could not in itself be considered an illegal act.

Ms. MEISSNER: That's right, but it's unclear whether the person is or is not a refugee. That is an issue that has to be determined.

Dean SCHMIDT: So you punish them first and then find out later whether that — that can't be right.

Mr. GIULIANI: It really isn't punishment.

Ms. MEISSNER: It is —

Mr. GIULIANI: And that is not the basis —

Dean SCHMIDT: That's the point. I see. It's not punishment. What is it?

Mr. GIULIANI: Until a person proves his right to be in the United States, that person, according to the law, shall be detained. The obligation and the burden, unlike the criminal process, for example, is on the person seeking entry to prove their right to be here. You normally prove your right to be here by showing a visa, showing a document. If you're making a claim of political asylum, then that claim has to be adjudicated before you have a matured right to be in the United States.

Dean SCHMIDT: Roughly what percentage of people charged with crime in the United States are permitted to put up bail and are released?

Mr. GIULIANI: The vast majority of people, but it is a different system. Under that system —

Dean SCHMIDT: And the —

Mr. GIULIANI: Under that system the law says that the government must prove that you committed the crime beyond a reasonable doubt. The law here says that you have to prove your right to entry to the United States beyond any doubt. The burden is on you. As I said, usually that is easy to determine, because a person has documents. When a person doesn't have documents, the statute passed by Congress says that a person shall be detained until you demonstrate that right to be here.

Dean SCHMIDT: But this is not punishment?

Mr. GIULIANI: It is not punishment. It is detention for the purpose of adjudicating —

Dean SCHMIDT: What is this place — what is this detention —

Mr. GIULIANI: — someone's right to be here, so that that person doesn't become lost in the society. A hundred people come in, you parole one hundred, and then you find two of them and they have obtained entry into the United States without the slightest legal process. They've crashed our borders, and we've got 150,000 people waiting to come in legally, and you disserve the people who are waiting to come in legally when you encourage people to come in illegally, and you also create all sorts of dangers for our society, including the dangers of communicable diseases. We need an orderly process and detention aids the orderly process.

Dean SCHMIDT: What do these detention centers look like? Where are they?

Mr. GIULIANI: It depends on the detention center that you're talking about.

Dean SCHMIDT: Do they look like jails?

Mr. GIULIANI: They look like —

Dean SCHMIDT: Are they jails?

Mr. GIULIANI: They are not jails in the sense of —

Dean SCHMIDT: I don't mean in a technical sense. Do they look like jails?

Mr. SHAPIRO: Yes.

Mr. GIULIANI: Yes, they are places where people are held, and they are held, and if they attempt to leave, they are stopped from leaving.

Mr. SHAPIRO: Behind bars?

Dean SCHMIDT: Behind bars.

Mr. GIULIANI: There is usually a perimeter security. They are not held behind bars. They are not locked behind bars at night.

Rev. THEODORE HESBURGH, president, University of Notre Dame: We're talking about the merest tip of an iceberg when we talk about Haiti. It just happens to be a poor country, the people involved, as we said, are not white. They happen to be black, but they're not white. And they speak another language. And they live under a pretty bad government. It just happens that this country is an enormous magnet. Over against that poverty, we're the wealthiest country on earth. We have very productive land and we have people who make more money in three hours than they can make in three weeks, where they are currently. We're like an island of affluence surrounded by a sea of poverty. We're the island. And on

top of that, we've got 12,000 miles of borders, half by sea and half by land, and we are surrounded by these poor people who have an enormous hope, as I would gather all of our grandparents or great-grandparents had, to get out of a miserable situation and to get into a good situation. And that is what this country is facing. Haiti is the slightest little indication of that.

Dean SCHMIDT: Okay. Judge Shoob, I want to get back to the Haitians in the detention camp. How long will they be there, Mr. Shapiro?

Mr. SHAPIRO: The Haitians that came a couple of years ago, most of them were there up to 18 months, I would say.

Dean SCHMIDT: Judge Shoob? Is that fact in itself, in your view, a violation of the Constitution?

Judge MARVIN SHOOB, U.S. District Court: Well, I believe—I believe everyone, whether they are on a boat that's interdicted, or that lands on the shores of the United States, is entitled to a fair trial, a fair hearing, either on the issue of asylum, or on the issue as to whether or not they're going to be detained in a maximum security prison. We've got people not incarcerated for 18 months, but we have people who have been incarcerated for three years, and Mr. Giuliani says this is not punishment.

Dean SCHMIDT: Why have they been incarcerated? Are you referring to the Cuban detainees?

Judge SHOOB: Cuban detainees have been incarcerated in a maximum security prison in Atlanta, the toughest prison in the United States, for three years, and the government says this is not punishment.

Dean SCHMIDT: Have they committed a crime?

Judge SHOOB: Some have, and some have not. And the government, except for the urging of competent attorneys, never wanted to make that distinction. They didn't want to face the problem, and still to this day, they don't want to face the problem. So you really have two issues: one, do you keep people in prison—and that's what it is, in prison—while their requests for asylum are pending, if they're not dangerous; and second, what sort of hearing are they entitled to on the asylum requests? Certainly no yo-yo out on a boat pitching in the Atlantic Ocean is competent to make that decision and say you can't come to the shores of the United States and get the hearing that you are entitled to.

Dean SCHMIDT: So you think our interdiction policy is unconstitutional, even though it takes place outside the territory of the United States.

Dean SCHMIDT: Yes, sir, it's all wrong.

Dean SCHMIDT: It's all wrong.

Judge SHOOB: Yes, sir, because these people have left the shores of some country claiming that they are entitled to refuge in the United States, and that decision—and that's a very important decision, because a lot of these people will die as result of that decision—that decision cannot be made on board a ship by people, many of whom have no legal training, without apprising these people of their rights. They might not even know what they should assert to entitled them to come into the United States.

Dean SCHMIDT: Judge Alarcon?

Judge ARTHUR ALARCON, U.S. Court of Appeals: Yes, sir.

Dean SCHMIDT: What is your reaction to what Judge Shoob said?

Judge ALARCON: My understanding, from high school on, is that the Constitution of the United States follows our flag; it should follow our flag. And I think if the Coast Guard is going to act against persons wherever they are, that those persons should be entitled to all the protections of our Constitution.

Dean SCHMIDT: Judge Adams, what's your reaction?

Judge ARLIN ADAMS, U.S. Court of Appeals: The question is a much more narrow question, the constitutional issue. And although I would like to see these people have as much of a hearing as may be deemed necessary to insure their safety and well-being, I am not as convinced, I believe, as Judge Shoob, that the Constitution requires that at sea.

Dean SCHMIDT: And when they're on our shores?

Judge ADAMS: I think that's a different problem, because I think the language—

Dean SCHMIDT: Because they're on our shores—

Judge ADAMS:—of the Constitution refers to all persons in the United States, whether or not they're citizens, so we have a constitutional provision that guarantees that. But I don't believe that it extends beyond the shores.

Dean SCHMIDT: Then that's a tremendous incentive for people to try to sneak in.

Judge ADAMS: I think so.

Dean SCHMIDT: Rather than go to the—rather than to go to the embassy and seek visas in the proper way. Rather than to follow any sort of orderly procedure.

Judge ADAMS: That's right.

Dean SCHMIDT: Judge Shoob, at what point would you think the detention went on too long?

Judge SHOOB: I think within six months, the administrative process should be complete to the point where a decision could be made. If you hold a man in prison for more than six months, that's imprisonment.

Dean SCHMIDT: Well, if the Constitution protects their right to due process in this setting, mustn't it give them a right to counsel?

Judge SHOOB: Well, there's an issue as to whether they have full due process. That is in dispute at this time, as to whether—

Dean SCHMIDT: Well, whether you call it full due process or half due process, or one quarter, our immigration laws are very complicated.

Judge SHOOB: Yes.

Dean SCHMIDT: Don't you think these people need the help of an expert to work their way through—a right to counsel?

Judge SHOOB: I believe they need counsel right from the very inception. If lawyers were available on board that ship, that would be the appropriate place to start the procedure. But since they are not available in that physical setup, I believe they have to land in the United States, and some type of hearing must be conducted and I think they're entitled to counsel at that point.

Mr. GIULIANI: Shouldn't that person have a right to American counsel flown to the Soviet Union, or to Poland, or to the hundred or so other countries in the world in which people might very well walk in and ask for refugee status in the United States? That's what I mean by we would then be extending the United States Constitution all around the world.

Judge SHOOB: I think you have selected a poor example. Anybody that applies to the Russian embassy for refugee status, if he wasn't a refugee when he walked in, he became one.

Dean SCHMIDT: Mr. Rosenthal, you follow this immigration and refugee question very closely as a journalist.

JACK ROSENTHAL, Deputy Editorial Page Editor, The New York Times: There are one hell of a lot more potential refugees in the world than the United States is ever prepared to accept. And in the case of a particular group of Haitians, our heartstrings can be tugged, there may be wrongs committed, but who is to say that this Haitian is any more worthy than that Somali or that Pakistani or Afghan. There are hundreds of thousands of potential refugees around the world, and unless the United States is prepared to take them all, we have to have a standard for choice.

* * *

Mr. FRIENDLY: One thing is certain: aliens will continue to enter the United States illegally. In a time of continuing high unemployment, there is growing concern that immigrants are taking jobs from American workers—and that lax enforcement of our borders only encourages more illegal immigration.

It would be inhumane, perhaps impossible, to deport all the millions of illegal aliens who have become rooted in American society. But what civil rights should be extended to immigrants illegally in the country? Undocumented workers are now denied a host of publicly-financed health and welfare benefits granted to all citizens. But in a hotly-debated decision, the Supreme Court in 1982, expanded the constitutional rights of illegal aliens by guaranteeing their children the same free education afforded all citizens.

Writing for the five-member majority, Justice William Brennan said that the Supreme Court would not tolerate the creation of "a sub-class of illiterates within our boundaries."

In sorting out society's responsibilities for illegal immigrants, who should set the policy? Legislatures or the courts?

* * *

Dean SCHMIDT: I want to move our discussion to the southern border of the United States and I want you to assume that I am a 24-year-old Mexican laborer. I am very poor, I have no work in Mexico, I think I must go to the United States so that I do not starve. And so, Ms. Meissner, in the middle of the night, one night, near El Paso, I wade across the river. And here I stand on American soil. Now what's going to happen to me?

Ms. MEISSNER: You will most likely—you will most likely have gotten some information ahead of time from others that you have known, and your chances are very good—

Dean SCHMIDT: Where the best—

Ms. MEISSNER: Where the best crossing points are.

Dean SCHMIDT: How are my chances of getting through?

Ms. MEISSNER: And your chances are quite good of getting through, particularly in El Paso, because all you really have to do there is get across the border and melt into the city, and—and it would be very difficult for the government to—

Dean SCHMIDT: Well, aren't there—

Ms. MEISSNER: —for the Border Patrol to find you.

Dean SCHMIDT: What happens to me when I'm caught?

Ms. MEISSNER: A Border Patrol person would see you, stop you and he will say, "Who are you, where are you from, do you have any papers?" — standard list of questions. He will fill out a form—

Dean SCHMIDT: My name is Carlos, I have no papers.

Ms. MEISSNER: —and then he will say, "Would you like to return to Mexico?"

Dean SCHMIDT: Well, no, obviously not. I just came across.

Ms. MEISSNER: Or would you like to have a hearing to determine whether or not you have a right to be here? And almost everybody, in answer to that question, says, "I'd rather return to Mexico," because they know that then they will have a chance the next night to try again.

Dean SCHMIDT: What happens if they request the hearing?

Ms. MEISSNER: Then they get a hearing.

Dean SCHMIDT: When?

Ms. MEISSNER: Within a week.

Dean SCHMIDT: And what— where are they while they're waiting for the hearing?

Ms. MEISSNER: In a detention center.

Dean SCHMIDT: You don't let them loose.

Ms. MEISSNER: That's right.

Dean SCHMIDT: It's the melt-away problem again. You'll hang on to them.

Ms. MEISSNER: Yes.

Dean SCHMIDT: All right, so it sounds to me as if I would elect to go back. I mean, you're saying I can either have a hearing, which I have no chance of— of success in, and in— and sit in a detention center. Now, can I just go back and just keep coming across?

— 9 —

Ms. MEISSNER: We take you—

Dean SCHMIDT: Night after night?

Ms. MEISSNER: We take you to a port of entry and we turn you over to a Mexican official on the other side.

Dean SCHMIDT: Do they punish me?

Ms. MEISSNER: No.

Dean SCHMIDT: So there's really no— there's really no inhibition on my trying to come across over and over and over until I get through.

Ms. MEISSNER: Except to the extent that you become weary of the enterprise. It's a very frightening thing—I don't want to make light of what it is like to cross the border, either at El Paso or anywhere else. Many, many people come as you describe, of their own will; many, many others come with the aid of smugglers.

Dean SCHMIDT: May I ask why is it dangerous?

Ms. MEISSNER: It is dangerous because it generally occurs at night. You are dealing with a law-enforcement situation. But the most dangerous element of it is the smuggling trade, and is the organized traffic that characterizes entry from Mexico into the United States. And smuggling is a terrible activity, and death of people coming across who are in the hands of smugglers is not an uncommon situation.

Dean SCHMIDT: How about death at the hands of the Border Patrol?

Ms. MEISSNER: That is a very uncommon situation.

Dean SCHMIDT: Yeah, so I'm not really in any serious danger from the Border Patrol, am I?

Ms. MEISSNER: You're not in much danger from the Border Patrol.

Dean SCHMIDT: I can just go back and keep trying the next night and the next night until I make it through.

Ms. MEISSNER: That's correct.

Dean SCHMIDT: So if you are persistent, the chances are—

Ms. MEISSNER: I would say that the chances are likely that you will be effective.

Dean SCHMIDT: Mr. Conner, what's your sense of the numbers coming across?

Mr. CONNER: Nobody knows. The census certainly doesn't, and a careful reading of the study says that they think they counted two million illegals in the census, and they really haven't the vaguest idea how many illegals are here. I think that what's relevant for purposes of public policy is that the number is very large by anybody's— by any acceptable definition, and that the numbers are growing, and that the things that create the illegal migration, the pressures for the illegal migration, are all growing.

Dean SCHMIDT: Father Hesburgh, what can we do along this southern border to try to bring order, bring control to it? It's porous now, or fairly porous, it sounds like.

Rev. HESBURGH: I don't think any Americans want to see a military solution. At a time when we have 10 million unemployed in this country, we have many people coming across taking jobs. There's lots of arguing about whether they're taking jobs that Americans won't take, and I won't go into that. Now if you assume that most people come for economic opportunity — and that is the main magnet drawing them in, legally, illegally, or any other way — the only way you're going to stop it, practically, is to demagnetize that magnet. And for that reason, I think there simply has to be a law that says that it's illegal to employ undocumented people in the United States.

Dean SCHMIDT: Why can't you stop me at the border? Why do you—

Rev. HESBURGH: Let me answer that—

Dean SCHMIDT: Why do you have to—

Rev. HESBURGH: —very directly. There are— we have a border, as I mentioned earlier, that's 12,000 miles around; a southern border of almost 3,000 miles. We have as many people guarding that border as they have guarding the Capitol in Washington, D.C. That's

— 10 —

why. Now you could string five divisions across there, military, armed, but we're not that kind of a country, and we don't want to be.

Dean SCHMIDT: So an open society has open borders—

Rev. HESBURGH: Pretty much. With the normal places you can cross—

Dean SCHMIDT: Not in a legal sense, but—

Rev. HESBURGH: No, in a— but there are legal ways of coming in and out and every country, every civilized country on earth protects its borders. But let me just add the rest of this. I think that it's a curious thing that it's illegal for someone to come in the country and to work, but it's not illegal for someone to hire them; that's the dilemma. If you're going to face this, and look for a solution, you ask me what's the solution—the only solution I have found that makes any sense is to put on employer sanctions, and some way of identification that will make that possible. We have employer sanctions in 12 states; I think we've had one case brought up.

Dean SCHMIDT: Ms. Hernandez, do you agree? Employer sanctions, keep me from going to work if I come across the river?

ANTONIA HERNANDEZ, Mexican American Legal Defense and Educational Fund: Employer sanctions is a concept that we have been talking about since '73. However, employer sanctions will not work.

Dean SCHMIDT: Why not?

Ms. HERNANDEZ: They're unenforceable. Employer sanctions will discriminate. They will discriminate against mainly Hispanics, and other individuals with linguistic or physical characteristics—

Dean SCHMIDT: Well, let's see how it would work, let's— Senator Simpson, do you think employer sanctions— do you agree with Father Hesburgh? Employer sanctions are the only way, are the key to asserting control over the border? And what do you say to Ms. Hernandez, that as a practical matter, those will discriminate against Hispanics— Hispanic-appearing people?

Sen. SIMPSON: I'm going to say to Antonia just exactly what I say to her every time. And that is this extraordinary situation where we have the law now read—I would love very much to enforce the laws that are on the books; I would deeply love to do that. But we can never do that again as long as it is legal to hire an illegal, and illegal for the illegal to work. They will never work as long as they are simply a cost of doing business, and that's what they are right now. You have to have employer sanctions against those who knowingly hire illegal, undocumented workers—and that means penalties.

Dean SCHMIDT: How can you have employer sanctions work without a national identification system? That will identify every worker and that worker's legal or illegal presence?

Sen. SIMPSON: We are not talking about a national I.D. card.

Dean SCHMIDT: Well, what's the matter with a national I.D. card?

Sen. SIMPSON: Well, I don't want it. You can have it.

Dean SCHMIDT: What's the matter with it?

Sen. SIMPSON: Well, I think it's offensive—to me, it's offensive. I don't want to be walking around downtown in Philadelphia or Cody, Wyoming, and ask— be asked for a card.

Dean SCHMIDT: Judge Alarcon?

Judge ALARCON: Yes, I'd like to speak for a moment not as a federal judge, but as an American whose grandfather crossed that border at Juarez which you were talking about earlier, 60 years ago—and I never asked—

Dean SCHMIDT: Illegally.

Judge ALARCON: —to see—to see his papers. And I'm glad he did, 'cause I'm sitting here today because he did. What bothers me tremendously about the kind of concept that the Senator is talking about—and I'm glad he is suffering because of the concerns about national identity—I am old enough to have been in Germany during World War II, and traveled across Europe, where people had to show cards to go from city to city. One of the reasons

that people came to this country is that we do not have to show identification. But worse than that, I think, if we have a law which makes it illegal to employ undocumented persons, there are going to be employers who will not want to hire or even talk to a Martinez or an Hernandez, or as my name is properly pronounced, Alarcon. They would rather hire a Schmidt or an O'Connor, or a Walsh, so they don't get into legal troubles with the federal government. And I agree with the Senator, I think it's demeaning for any American to have to show an identity card.

Mr. ROSENTHAL: Could I mix it up a little with the judge on that subject? And I guess I'd better state some credentials at the outset, also. I'm an immigrant, I'm a refugee. I know about Hitler and I know about seeing the Statue of Liberty at age three when my father woke me up at six o'clock in the morning. I have all the reasons to revile internal passports or that kind of police state that Judge Alarcon talks about. But I also have a Social Security card, and I also have an American Express card, and I think we're in the grip of a kind of romantic view of the past here on the subject of national I.D. I want my American Express number; they've assigned it to me. I want to be able to call up and get those theater tickets without having to go down to the theater to get them, and charge them—to charge it.

Ms. HERNANDEZ: Jack used a perfect example, he said, you know, "I have my American Express, my Gold Card; I want to get those theater tickets." Well, how many poor Mexican-Americans have that? To Jack, that American Express—to me, Antonia, that American Express, it is a symbol of status. When—in the Southwest right now, you talk about "Let me see your visa," the joke is, "I only carry MasterCharge," because when they say, "I want to see your visa," they're talking about your immigration visa.

Dean SCHMIDT: But Senator Simpson's talking about a card or some form of identification that he would have to have when he applies for a job; Mr. Rosenthal would have to have, everyone would have to have—

Ms. HERNANDEZ: But that's not reality.

Dean SCHMIDT: How is that discrimination?

Ms. HERNANDEZ: That's not the reality.

Dean SCHMIDT: Well, what's the reality?

Ms. HERNANDEZ: The reality is that if Alan Simpson gives his Social Security card it is accepted—the validity of that document is accepted. If someone comes in and doesn't speak English, has the name of Hernandez, and says, "*Aqui esta*— here is my Social Security card," they're going to say, "How do I know it's not fraud?" because anyone can buy a Social Security card for \$25.

Dean SCHMIDT: I want to ask Mr. Allstrom, what's the position of organized labor on this question? Is it— is it your sense that the presence here of some number, that no one seems to know, of undocumented aliens, working in the economy, is that—is that presence—are they taking jobs away from American workers?

PETER ALLSTROM, Food and Beverage Trades Dept., AFL-CIO: Yeah, plainly they're not coming here to watch football games. It's not so much the numbers we're worried about. We're worried because these workers, when they come here— these people who cross the border illegally come across with no rights whatsoever. They don't have the right to complain about being paid less than the minimum wage. They don't have the right to complain about safety and health conditions, whether or not those conditions affect only them or everybody else. And, yes, there's a displacement impact in certain areas of the economy, but I think our problem principally, just in terms of the job market, is that it depresses the wage rates of everybody else.

Dean SCHMIDT: Do you agree with Father Hesburgh and Senator Simpson that the key to an orderly system, to a controlled system is to make employment illegal?

Mr. ALLSTROM: Employment of illegal aliens, yes.

Sen. SIMPSON: In messing around in this stuff for four and a half years, I have had to deal with guilt, the Statue of Liberty, fear, racism, and emotionalism, and it's all real—but we tried to put it out on the table top early, so that we wouldn't get all gummed up in it later. But no fair— no fair quoting the Statue of Liberty, because everyone of us in this room is a child of immigrants, but everyone of us is a child of legal immigrants.

Dean SCHMIDT: I want to come back to Carlos. He's in El Paso, and he's taken a job in a factory. And one day agents of the Immigration Service come to the factory, round up every worker in the factory including me, Carlos, and ask us all where we came from, when we came, and what our documents are. Mr. Carliner, suppose the only evidence they had against me in that factory is that my skin is brown and I've got on a white T-shirt and I look Mexican? And on the basis of that and no more probable cause to believe I'm guilty of being in the United States illegally, they seized me and questioned me. Now, if I were a citizen they couldn't charge me with a crime— if they found drugs on my person and I were a citizen, they couldn't charge me with a drug offense. That would be a violation of the Fourth Amendment. I think.

Mr. CARLINER: You're absolutely right. They could not arrest you, or your arrest would be held illegal and any evidence that they took from you would be suppressed by a court. Unfortunately, some courts, because they have chosen to, in my opinion, balance the problem of X-million illegal aliens in the United States, and the difficulty the Immigration and Naturalization Service has in finding people, they have used that fact to determine that it's reasonable to arrest you because you look brown, you spoke Spanish, or whatever.

Dean SCHMIDT: Do you think it was reasonable, Ms. Meissner?

Ms. MEISSNER: Yes, I think it's reasonable, it's a reasonable enforcement technique, it is—

Dean SCHMIDT: It's not a technique that the Constitution permits though, in ordinary garden-variety law enforcement.

Ms. MEISSNER: The occasion for our being there has been on the basis of some information that we've received that that employer has illegal aliens on his worksite.

Dean SCHMIDT: But nothing about me. I just look brown. Ms. Hernandez, what do you think? Are sweep searches of that kind necessary, are they reasonable? Are they constitutional?

Ms. HERNANDEZ: When they go into these sweeps, they don't stop everybody they stop everybody that looks like Carlos, like me, and then they proceed to ask and investigate and interrogate all those brown people; and me, the citizen, me the legal resident alien, is subjected to interrogation and having to prove the validity of my right to be in this country. And as a citizen, a Hispanic citizen, a Mexican-American citizen, it is a great intrusion into my constitutional rights when, because of the perception of who is an illegal, my rights are violated. So it's not just Carlos. And that's why we object not only to that but to employer sanctions, because it's going to exacerbate that.

Mr. CONNER: Somebody has finally mentioned at long last that there is another set of people whose interests need to be considered as we're trying to decide our policy, and that is American citizens and legal resident aliens. Because these are the people who happen to be in economic competition — for jobs, for housing, and social welfare services — with illegal immigrants. So, yes, there's loads of discrimination, but we haven't talked about it; it's discrimination against American citizens by employers who want to hire illegal immigrants, and the law lets them do it. So that's — that's the reason that most of the complaints to the Immigration Service — where do they come from? They come from immigrants.

Dean SCHMIDT: Let me ask you this. Granting that that's — granting that that's a serious problem, does it justify the sweep search technique?

Mr. CONNER: I think, no, wrong; it does not. Everybody — if they're going to detain — go into a building, everyone in the building should be asked the same questions; and you should have employer sanctions so that instead of getting the scared employees in a corner, you've got a scared employer in the room, with his records, to ascertain whether he has in fact checked the documents when people applied for employment. That's the way to prevent discrimination.

Dean SCHMIDT: Ms. Jackson?

JACQUELYNE JACKSON, Sociologist, Duke University: Yes, Roger is right. One must begin to think about the many American citizens, especially in the secondary labor market, who continue to lose job after job to illegal immigrants, many of whom are Mexican, but many also, down places such as Miami are Haitians. And you have a substantial number

of ordinary black citizens born in the United States, who weren't illegal immigrants, Senator, and these people are losing out, and nobody thinks about them. There is some constitutional — not necessarily constitutional, but there is some federal responsibility to balance out their interests, because — one of the funny things that happened around the mid '60s was that about the time many blacks in the United States got the civil rights they had never had, they found that they could stay in the hotel, but only as guests, because their jobs were gone.

Judge SHOOB: I'd like to respond to Mr. Conner. What you're saying when you say, "If everyone is checked in a sweep search it's all right, but you shouldn't just check the brown-skinned people or the Hispanic people," but what you're really saying is, "It's all right to violate the constitutional rights of everybody in that building, but you can't violate the constitutional rights of a small group." The Fourth Amendment says that there cannot be unreasonable searches and seizures. There's got to be probable cause. And I say that these searches are patently unconstitutional.

Dean SCHMIDT: But then, Judge, what do you say to Ms. Meissner when she says that the only effective way —

Judge SHOOB: I agree, it's a hundred percent effective. But once you start diminishing our constitutional rights, and chiseling away because it's an effective, good way of accomplishing your objective, you are — you are hurting all of us.

Dean SCHMIDT: Ms. Solarz, do you think there ought to be, constitutionally, a distinction drawn between illegal aliens and everybody else legally here, for such purposes as access to welfare, medical benefits?

NINA SOLARZ, Citizens' Committee for Immigration Reform: I think when it comes to public assistance, I probably — if you pushed me — would say that an undocumented person, in my judgment, does not necessarily have to have access to public assistance. But I have a lot of trouble when I think about undocumented people in this country not having access to health systems, because that could potentially create a public health hazard. Also, I think of pregnant mothers and unborn children who should be protected. I have a great deal of trouble thinking that, right now, undocumented persons don't report crimes because they're afraid of — of being caught, and I think that contributes to the breakdown of our judicial system. And I of course can't think of people being hungry — When it comes to public assistance, as I say, I'm not quite sure where I would come out.

Dean SCHMIDT: Mr. Martinez?

Mr. MARTINEZ: Well, I think we're — we have to draw a line between refugees and illegal immigrants. I will add to what Ms. Solarz said, I would give them an education.

Ms. SOLARZ: Yes, I'm sorry, I should have — I should have added an education.

Dean SCHMIDT: Mr. Raspberry?

WILLIAM RASPBERRY, Columnist, The Washington Post: I'm having trouble with the exception of — I grant the difficulty of the problem, but I'm having trouble accepting public assistance, since the biggest category of public assistance is Aid to Dependent Children, and it seems to me that you're willy-nilly punishing children who can't do anything about it for their parents' illegal status. And my own inclination, I think, would be that instead of placing this burden on the states — to educate and care for the children of illegal immigrants — that the burden should be on the federal government which allowed this porous border to exist in the first place. I mean, it's a federal government policy decision that creates the problem to a large extent.

Ms. SOLARZ: Professor Schmidt, people don't come here for benefits, we know that now; they come here to work. That's precisely why we've all kind of come to terms with this notion, or lots of us have, that the only way to cut down on illegal immigration is at the workplace, and sanctions against employers who knowingly hire undocumented persons, coupled with an identification system for all those eligible to work. We don't believe that there are that many undocumented persons currently in this country who are receiving public assistance benefits; they're here working.

Dean SCHMIDT: Judge Adams, suppose here I am, Carlos again, the undocumented. And I have a medical problem and I go and seek medical assistance and the state that I'm in generally makes non-emergency medical assistance available to indigent persons, but not to

illegal aliens. Is that constitutional in your judgment—is that giving equal protection of the laws?

Judge ADAMS: Under the *Plyler* case, which involved the children of undocumented aliens, the Supreme Court held that it wasn't equal protection of the laws for Texas not to educate those children.

Dean SCHMIDT: In public schools.

Judge ADAMS: In public schools. But in the course of that opinion, it indicated that public assistance, which has been mentioned — medical care and a few other of the so-called entitlements — would not be covered by that decision. Having said that, I'm worried by the result. I have a difficult time making the distinction between educating the youngster and supplying the youngster with enough food to subsist. It wouldn't do you much good to have an education if you're in—starving in the meantime, or so sick that you couldn't go to school.

Dean SCHMIDT: You mentioned you have some doubts about *Plyler*. Elaborate on that a little bit. The equal protection clause does—does grant its protection to all persons.

Judge ADAMS: That's right.

Dean SCHMIDT: It doesn't distinguish between citizens and non-citizens. It doesn't distinguish between persons legally here and persons illegally here.

Judge ADAMS: I think the real problem with *Plyler* colors many of the things we've been talking about today. Everything that we wish and every object for which we have compassion is not necessarily encompassed by the Constitution. The Constitution is a discrete document, it's a venerable document, venerated over a long time. But just because the legislature or you or I wish a particular result, doesn't constitutionalize what we wish; we always have to go back to the Constitution and decide whether that matter is covered. Now, that doesn't preclude the Congress from covering a matter, even though it's not in the Constitution. And I think in *Plyler* there could be a very legitimate argument that educating children of illegal immigrants should have been delegated to the state government or the federal government, and that the court should not have interfered in that question. It was a political question, and it was a matter particularly appropriate for the legislative process.

Dean SCHMIDT: Senator?

Sen. SIMPSON: How can you say that they're entitled to the right to an education and not entitled to food and shelter? And then you're going to dump that one on the states? That'd what's out there. What's out there in this country right now is stuff, lots of stuff down underneath. It's called—it's called, for want of a better word, "the uglies." And you won't hear it in here, it won't be dealt with up on top of the table, but let me tell you, after traveling the United States back and forth on this political no-win situation, that stuff is down there. And it will surface when you get the states fighting over limited resources, and the federals fighting over limited resources. Where does all that end? I'll tell you where it ends: in combat among groups. It's not good, and it can be solved by one thing—not the messiah returning, Simpson, all that jazz; but reducing the magnet of jobs, so that the United States of America is no longer the patsy of the earth.

Dean SCHMIDT: Mr. Rosenthal, do you think it's inconsistent with our tradition: a Berlin Wall along the Mexican border?

Mr. ROSENTHAL: It would be a Berlin Wall with a critical difference: they try to keep their people in; ours would be to try to keep people out. There's a prior question: that is, we—our immigration policy for generations has been a big wink. We say it's illegal to come in, but in fact we do so little to get in the way of illegal immigration that hundreds of thousands or millions of people come in. We tolerate them, we want them either because we need their labor or because we're too lazy or too scared to try to do something about it. Once they're here, that's having it no way, that's not having it both ways. We get their labor, we get the benefit of their presence, but we don't do anything about their needs. If we're going to tolerate them, then by all means we ought to extend benefits to them. An ignorant child is just as contagious as a sick child.

Dean SCHMIDT: Monsignor?

Monsignor BRYAN WALSH, Archdiocese of Miami: I think the biggest threat to this

country is the creation of a permanent underclass of people who are subject to exploitation, who are subject to discrimination and who—whose children do not enjoy the benefits of other children growing up here. The actual numbers in immigration, even right now, are not that serious. Even in the illegal immigration, they're not that serious; this is relatively, still, an underpopulated country, compared to many of the advanced countries of the world. And I honestly think that we will be looking for immigrants in this country, young immigrants here 20, 25 years from now, because we won't have our own population to—to maintain, the way things are going.

Rev. HESBURGH: We have to face the fact that in the world of tomorrow—and I'm thinking of the year 2000—it's not inconceivable that a hundred million people would start to march on this or some other country. I mean, we—if you had, for example, a massive famine in India, and you had, literally, tens of millions of people dying of starvation, and the population, at that point, of that country was over a billion, and they knew perfectly well there was a lot of food in Venice and Vienna and Paris and Rome and other countries in Europe; supposing a hundred million Indians put a sack of rice over their shoulders and started to walk on Europe. It could happen, it's not science fiction. Suppose things get so bad in the Caribbean that everybody that can make a boat starts heading for the U.S. Suppose things get so bad in Central America and South America and Mexico that literally millions of people start voting with their feet and walking across the border. And then think of the terrible thing that's going to happen, which I think is going to be military answers, militarize the border, sweeps that will make that factory you were talking about look like a picnic; sweeps throughout entire cities. I'd say let's solve it while we can.

* * *

Mr. FRIENDLY: Our Constitution was drafted in this chamber at a time when only four million people inhabited the entire country. A crucial question remains as to whether that document—that Constitution—can instruct us in sorting out what has become our immigration nightmare.

While courts may be forced to intervene when individual rights are violated, immigration, in the end, is a political problem, to be solved in the halls of Congress, in the White House and, ultimately, by an informed public opinion.