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HEW'S CONDUIT THEORY: TOWARD THE ABOLITION OF PRIVACY

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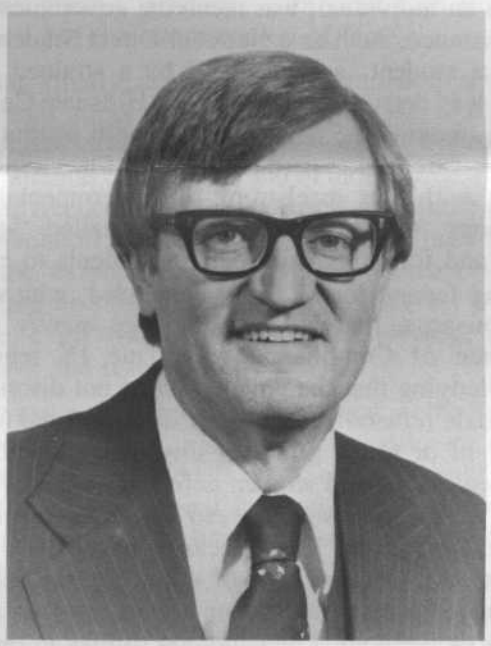
He holds a Ph.D. in English Language and Literature from the University of Michigan and has taught at the University of Michigan and Eastern Michigan University, where he was Professor of English. He was for many years Editor-in-Chief of the Michigan Academician, *the quarterly journal of the Michigan Academy of Science, Arts, and Letters. He also served two terms as an Ann Arbor City Councilman.*

Among his own works are numerous published articles on English literature, political thought, and higher education. His articles have appeared in National Review, *the* Michigan Academician, New Guard, Studies in Scottish Literature, Western Review, Imprimis, *and* Conservative Digest.

The CCA, under his directorship, has won The George Washington Honor Medal Award from the Freedoms Foundation. He is a member of The Mont Pelerin Society; the Philadelphia Society; and the Advisory Board of CEAFU (Concerned Educators Against Forced Unionism), the education division of the National Right to Work Committee.

Dr. Trowbridge recently delivered this presentation at Hillsdale during the CCA seminar, "The Law: An Erosion or Enhancement of Freedom?"



On September 22, 1980 attorneys for Hillsdale College filed its brief in the U.S. Sixth Circuit Court of Appeals against the Department of Health, Education and Welfare in an effort to preserve the college's independence and privacy. A subsequent brief naming the Department of Education, HEW's successor on Title IX matters, was filed December 31, 1980. The case is pending; contents of the brief are herein disclosed for the first time.

At stake in the case is not simply the provincial matter of one small liberal arts college seeking to remain free from governmental regulation and control: on a larger scale private education itself in any and every academic institution in the country is potentially threatened; and on the widest scale, it is no strain of the imagination at all to suggest that the generic private sector itself—in education, in the business community, in publication, in any establishment that involves the exchange of money—faces abolition via subjugation to governmental regulation and control. HEW's logic and rulings in recent administrative proceedings unmistakably suggests this extinction of privacy, and legal precedent in the Hillsdale case is being tested that could well have a wider national impact than imagined or intentioned.

im•pri•mis (im-pri-mis) adv. In the first place. Middle English, from Latin in primis, among the first (things). . .

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A little background is necessary. Hillsdale College since its founding in 1844 had never solicited nor accepted one penny of government funds for its operations, feeling free to direct its own affairs without harassment. But with the coming of Title IX of the Education Amendments of 1972, governmental attempts were subsequently made to change this. Previously, all government regulatory activities in higher education had been directed only toward those institutions that accepted government money. The Title IX regulations, however, specified that Hillsdale and all other independent colleges and universities would now be subject to government directives if they had on campus any student who, as an individual, was receiving government financial assistance, such as a National Direct Student Loan. Aid to a student, argued HEW by a strained conduit theory, was determined to be aid to Hillsdale College as a whole, making the college a "recipient institution" of "federal financial assistance," therefore required to comply with the maelstrom of governmental costs, regulations, quotas (euphemistically called "goals"), forms, and formulas. In order for students to continue receiving federal loans, HEW demanded, with seeming innocuousness, that Hillsdale College *merely* sign an Assurance of Compliance with Title IX regulations acknowledging that the college would not discriminate.

Hillsdale refused. It had never discriminated nor been accused of or found guilty of discrimination; in fact it graduated blacks and women before the Civil War. The college refused to sign not so much as a matter of abstract "principle," but because it felt that such a signature and endorsement of compliance would open the floodgates to the imposition of ancillary controls and the loss of freedom. Later judicial rulings in the Ninth Circuit Court of Appeals in the *El Camino* case proved that Hillsdale College's suspicions were entirely correct.

Following Hillsdale's refusal, Secretary Joseph Califano subsequently announced that he was moving against certain school districts and schools, mentioning Hillsdale by name, by withdrawing federal loans from any and all individual students attending those institutions. Hillsdale never felt it was any of its business to pass judgment on the source of money that any student brought to its door, but when Califano announced his misanthropic intent to deny many individual students their ability even to attend the college of their choice, Hillsdale took the matter to court. The college's legal counsel advised that the college exhaust all legal remedies and begin at step one with an administrative hearing within HEW itself.

In August, 1978 HEW administrative judge Herbert Perlman ruled that HEW did not have the authority to require the execution of the Assurance of Compliance, stating:

> It would be an abuse of discretion and arbitrary and capricious to terminate the pertinent programs listed above by reason of Respondent Institution's failure and refusal to sign the Assurance of Compliance under these circumstances.

Hillsdale College had won round one.

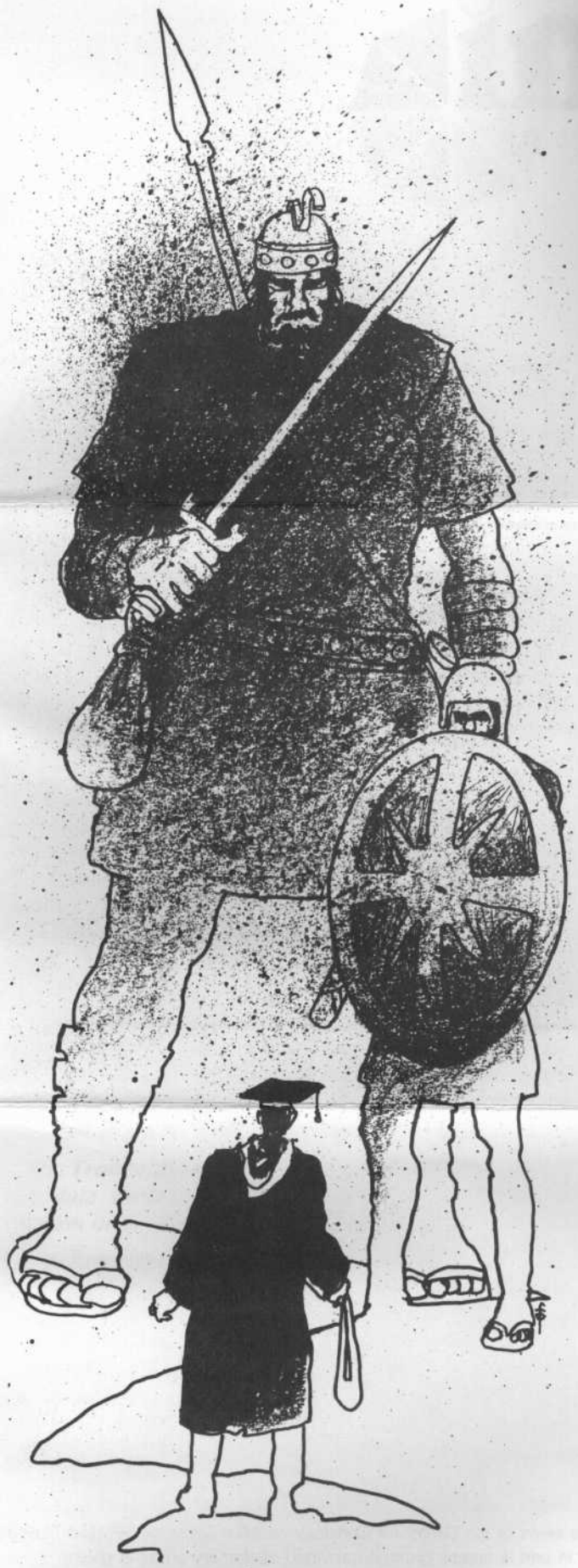
Round two the college lost. On October 25, 1979 the three-member Reviewing Authority of HEW unanimously reversed the earlier ruling by Judge Perlman—no surprise to anyone as it was HEW ruling on HEW. The Reviewing Authority argued speciously, in an administrative proceeding here disclosed by Hillsdale College for the first time, that student "costs of tuition, books, room and board, and other expenses," if not defrayed by federal loans, "would otherwise have to be provided by the Respondent [Hillsdale College] itself" (*sic*) and that federal "payments under those student grant and loan programs are clearly federal financial assistance to the Respondent" (*sic*).

The Reviewing Authority further argued that the Assurance of Compliance "puts the recipient on notice that in taking these funds there is an obligation not to discriminate and gives the government some assurance that the recipient understands these obligations and intends to abide by them." In sum, the college—any college—is guilty until proven innocent.

Elsewhere, in a passage of critical importance, the Reviewing Authority opined: "Under the GSL Program [Guaranteed Student Loan], the Government also pays interest on the loans to the lender [*sic*] on behalf of student borrowers while they are attending college. This is in effect a subsidy of federal funds from which the Respondent benefits." (I would add quickly that the government pays a *partial* interest on these loans, not the entire interest, the balance of which is left to the student to pay.) It is the logic and the precedent in this passage that is most frightening and that has the potential for widespread application in every sector of the country, including the private, that exchanges money. The logic of this Reviewing Authority position, carried to its conclusion, would mean that if *one* individual ("any entity," to quote HEW) spent a part of his Social Security check in a supermarket, then that store would be a "recipient institution" of federal funds, therefore required to comply with federal regulations and the costs and loss of freedom thereof.

Hence Hillsdale College's brief to the Circuit Court of Appeals on September 22, 1980—and to the U.S. Supreme Court if necessary. The brief contains a good deal of information whose importance is impossible to overestimate. To the argument, "What harm can there possibly be in signing a mere slip of paper acknowledging that the college does not discriminate? How could any moral institution not sign such an assurance?", the *El Camino* precedent is critical. The signature opens the door to the onslaught of ancillary federal controls. On this the brief reads:

> As an accompanying HEW document makes explicit, the execution of the Assurance by Hillsdale



results in a legally enforceable contract under which Hillsdale will, by agreeing to comply with the regulations, undertake a separable duty of compliance apart from Title IX. Any doubt as to the validity of this conclusion is quickly dispelled by the Ninth Circuit's decision in *United States* v. *El Camino Community College*. In that case, the College, having executed an Assurance of Compliance with certain regulations, was deemed by the Ninth Circuit Court of Appeals to have thereby waived a jurisdictional challenge to an HEW request for documents. The scope of the request extended to information about programs and activities not receiving federal aid. The court upheld the school's duty to supply such divergent information on the sole basis of the execution by El Camino of an Assurance of Compliance with Title VI of the Civil Rights Act of 1964 and the regulations promulgated thereunder. Indeed, the court stated:

> "On the record before us, we have no occasion to decide... the extent to which, if at all, the agency regulations go beyond the statutory authority committed to the agency."

Obviously, if Hillsdale signs the Assurance of Compliance, HEW will be doing indirectly what it cannot do directly: compelling Hillsdale to obey the invalid Title IX regulations by executing the Assurance of Compliance with them as a condition of its students' continued receipt of federal aid. The Reviewing Authority's notion that the Assurance is little more than a piece of paper, acknowledging the existence of Civil Rights Laws, is far removed from the reality of Hillsdale's situation and is contradicted by its own remarks recognizing the contractual aspect of executing the Assurance.

Moreover, the brief spells out the freedoms a college or university loses when subject to HEW's regulations: These

regulations specify at which high schools Hillsdale may recruit students for admission,[29] the literature that Hillsdale may provide that student concerning the college,[30] and the tests which Hillsdale may require the student to take as a condition of admission.[31] If the student passes the test for admission but needs financial assistance, the regulations specify how Hillsdale may use its own funds to aid the student[32] even though the funds may come from an entirely private source, such as a bequest to the college to endow a scholarship.

Once the student is admitted, the regulations specify the courses the student may take,[33] the manner in which the student is housed, whether on or off campus,[34] the health services provided the student,[35] and his or her participation in extracurricular activities[36] and sports.[37] They control the hours at which the students must return to their

dormitories, and the hours during which the male students may visit the females and vice versa[38] and the manner in which Hillsdale may treat the consequences of its students' marriages, pregnancies, and abortions.[39]

Further, the brief documents the fallacy of the HEW conduit theory that equates benefit to a student as benefit to a college. Congress, the Justice Department and Senator Birch Bayh in drawing up Title IX regulations did not intend individuals to be interpreted as a synecdoche for programs or institutions as a whole. On this I quote the brief at length because it demolishes HEW's conduit theory, the very heart of HEW's case against Hillsdale.

> The accuracy of this conclusion [that aid to an individual is not aid to a program or college] is confirmed by the pertinent legislative history of Title IX and of the legislation upon which Title IX was based, Title VI of the Civil Rights Act of 1964.[40] The legislative history and the interpretation of the executive branch at the time the "program or activity" language in Title VI was drafted confirm that there is, indeed, a distinction between aid "to a person" and aid "to a program or activity." In a letter written to the Chairman of the House Judiciary Committee when Title VI was pending, the Justice Department interpreted the latter words:
>
> Dear Mr. Celler:
>
> "This is in response to your request for a list of programs and activities which involve Federal financial assistance within the scope of Title VI..."[41]
>
> The Justice Department's letter then described certain programs which would *not* be considered to be covered by the statute, including:
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> "[a] number of programs administered by federal agencies [which] involve direct payment *to individuals possessing a certain status* ...[T]o the extent that there is financial assistance..., the assistance is *to an individual and not to a 'program or activity'* as required by Title VI."[42]
>
> Similarly, a principal Senate sponsor of Title VI assured his colleagues that "[d]irect payments [to individuals] are not covered in any way by Title VI."[43]
>
> When Title IX was pending in Congress, this question arose again. Senator Bayh, the sponsor of the Senate version of Title IX, was asked what kind of aid HEW could terminate for violation of the to-be-promulgated sex discrimination regulations. Bayh confirmed that Congress did not intend a denial of aid to students as a sanction under Title IX:
>
> "It is unquestionable, in my judgment, that this termination power would not be directed at specific assistance that was being received by individual students, but would be directed at the institution..."[44]
>
> It is equally unquestionable that aid to a student is not aid to an activity or program, that receipt of federal financial assistance is one thing, and benefitting from its existence, another. HEW's obliteration of those critical distinctions renders nugatory Congress' careful use of the words, "program or activity receiving federal financial assistance" to define the scope of Title IX's coverage and resurrects the very institution-wide coverage which Congress rejected.
>
> If the Congress had wanted to cover the "entire operation" of recipients, it surely knew how to do so. Indeed, the administration's own version of Title IX, which was rejected, would have given HEW the very institution-wide authority it now purports to have.[45] Similarly, the original Senate version of Title IX provided:
>
> "No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of or be subject to discrimination under any program or activity *conducted by a public institution*..., which is a *recipient* of Federal financial assistance for any education program or activity,..." (emphasis added).[46]
>
> By prohibiting sex discrimination in every program or activity "conducted by" recipients of federal aid, these alternative versions would have authorized HEW to promulgate regulations covering every program operated by aid recipients. But the version that was enacted authorized federal jurisdiction only over those *programs* which *receive* federal aid. And, of course, not even these broad "institutional eligibility" versions of Title IX would have transformed Hillsdale into a "recipient" because Hillsdale maintains no such programs.
>
> The Reviewing Authority, ignoring the considerable authority to the contrary, nevertheless found the regulation under which Hillsdale is deemed a "recipient" to be valid.[47]

The conduit theory, if upheld, could have a ravaging effect nationwide. If a government subsidy to an individual is a subsidy to a larger private whole, then will an A&P store or Chrysler dealership or physician or nonprofit charity have to comply with government regulations and the costs and losses of freedom thereof if it accepts one individual's ("any entity") Social Security payment?

If an individual donates to a seminary money that in any way and in any small amount comes from or passes

through the government or necessitates a government expense to process, is that a subsidy to religion or violation of the separation of church and state?

Or take the matter of tuition tax credits for private education, which both President Reagan and Secretary Bell endorse and will likely attempt to push through Congress. If a tax credit is defined as equivalent to a government subsidy and if that credit/subsidy to an individual family is by the conduit process defined as a credit/subsidy to the private school that the family's child attends, will not tuition tax credits for private education ironically render *public* that private educational option the government wishes to preserve? Tuition tax credits and the conduit precedent could spell the demise of the privacy of all private schools and subject these institutions to governmental control. Particularly troublesome is the fact that this governmental control of one party—the private school—would result if the *parents*—a second party *outside* the control of the private school—took tax credits. I can see the letter of the Registrar of a private school to the parents now: "Dear Parents: Please do not take advantage of tuition tax credits for your child to attend_____; by doing so *you* will make *us* public." Such is the perversion of logic on trial in the Hillsdale case.

Or take *Policy Review,* or *Commentary,* or any number of other magazines. To mail ½ ounce costs me 18 cents postage, while *Policy Review* can mail a heavier journal at a lower class and lesser rate. Suppose some federal bureaucrat or some court system determines that this amounts to a federal subsidy to *Policy Review* or the Heritage Foundation, which must then comply with a multitude of expensive and freedom-restrictive edicts?

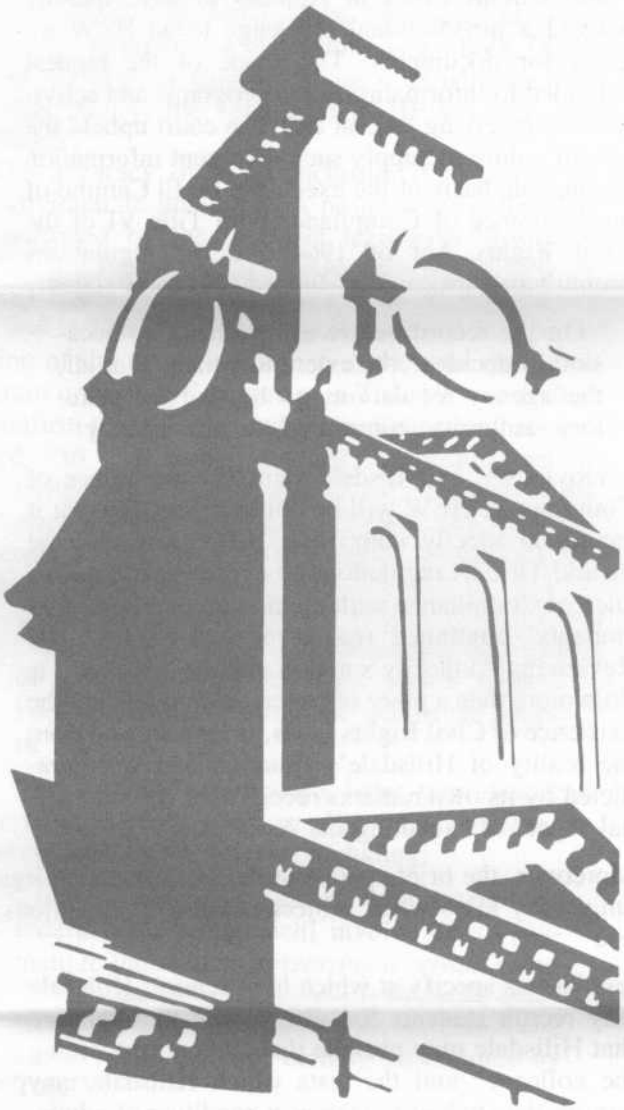
In sum, in any manifestation of the private sector, what money that it transacts does not wash through the government or share some governmental processing expense? Does not the logic of the conduit theory and the equating of the one with the many really mean that there is no such thing as a private entity?

"Readiness is all," said Hamlet. Legal precedent may be all, too. Those aloof individuals who declare that the Hillsdale example "couldn't happen to me" or "to my business," or to "our journal," display a naivete about judicial precedent, application of court decisions, and the enforceability of law. Such innocence waits unwittingly to be assaulted and to be judged guilty until proven innocent. Nor do intentions matter; results, only, count. Congress, the Justice Department, and Senator Bayh did not intend to equate individuals by some conduit process with wider entities, but that intention got lost in both the bureaucratic and judicial translations. While Congress passes laws, bureaucracy and the courts interpret them. "History," observed Carl Becker, "is not fact, but the interpretation of fact."

What, finally, are the legal consequences at work here and, more importantly, the larger impact upon society? In addition to the obvious lesser ones of higher costs for governmental compliance and of more bureaucratic regulations, freedom of the mind itself is to some extent the issue. Schools controlled by government must inevitably to some extent become government schools. Further restricted or even lost then are alternatives, freedom of choice, even availability of choice, privacy, individual initiative and responsibility.

Pervasive, uniform governmental control means a monolithic oneness, a sameness, an enslaving conformity that denies individuals the freedom to be different and that denies educational institutions the freedom to be truly liberal, that is, broad and varied.

If education and therefore society are to remain free, it is vital that competition of ideas be allowed to prevail. Even public educational policy must never be dominated by any one strain of thought. Ideas do have consequences. Hillsdale College, led by President George Roche and the Trustees, will continue to fight the battle to preserve the individual's secular and religious right to be different, to make choices, and to follow the honest and moral dictates of his or her own heart.



Hillsdale College is marked by its strong independence and its emphasis on academic excellence. It holds that the traditional values of Western civilization, especially including the free society of responsible individuals, are worthy of defense. In maintaining these values, the college has remained independent throughout its 136 years, neither soliciting nor accepting government funding for its operations.

Editor, Ronald L. Trowbridge.