Daughtrey, Shanahan, Barkett & Gertner

by Terry Eastland

In September, the *New York Times* reported that President Clinton might nominate some lower court judges who disagree with *Roe* v. *Wade* and its radical teaching that the Constitution protects a woman's right to choose abortion. Political liberals immediately expressed their opposition to any judicial selection process that might deviate from their pro-abortion rights orthodoxy. As explained by White House spokespersons, the reason Clinton might pick an anti-*Roe* or even *Roe*-indifferent nominee involves the peculiar politics of judicial selection: Especially with district judgeships, the custom is for same-party senators or, if there are none of those, state and local party leaders to direct the president's choice. It is therefore possible that an anti-*Roe* Democrat in either the Senate or a state could, in effect, pick a lower-court judge not to the liking of, well, the National Organization for Women. While the political coordinates are such that this could occur in the case of Wyoming, where, both senators being Republican, a pro-life Democratic governor is promoting the candidacy of an anti-*Roe* Democratic lawyer, don't expect it to happen often, or even occasionally. Indeed, the more important story line—yet to receive A-1 notice in the *Times* or anywhere else—is the extent to which, thanks to Clinton, firebrands of the legal left are now making their way to the lower federal bench.

Consider Martha Craig Daughtrey, a justice on the Tennessee Supreme Court (and Friend of Gore) whom Clinton has nominated for the Sixth Circuit Court of Appeals. Daughtrey passes the activist pro-*Roe* litmus test (endorsed by Clinton for his Supreme Court choices), and then some. Daughtrey wrote for her court last year in the Brave New World case of *Davis* v. *Davis*, in which a divorcing couple litigated who had rights to their jointly produced "frozen embryos," on storage in a fertility clinic. The Tennessee constitution protects freedom of worship, prohibits unreasonable searches and seizures, and guarantees freedom of speech. Doing to these provisions approximately what Justice Harry Blackmun did to similar parts of the federal Constitution in *Roe*, Daughtrey found lurking therein a generalized right of privacy that includes—her words—a "right of procreational autonomy." Inasmuch as, for Daughtrey, this right encompasses the right "to avoid genetic parenthood," the party wanting to exercise this freedom and thus destroy the frozen embryos—in this case it was the father—must prevail.

Daughtrey may have been auditioning for the seat of the aging Blackmun, whom court watchers expect to retire soon. If so, it was not the first time she has played the role of the modern activist judge—almost to the point of parody. Dissenting in part in a 1992 death penalty case, Daughtrey wrote:

> Implicit in death penalty jurisprudence is the recognition that the standards of decency are not static but evolving, that society is not stale but maturing, and that the level of community morality will continue to rise until the reasoned moral response of the people of Tennessee will be, if it is not already, that the death penalty is cruel and unusual punishment.

This is sentiment worthy of Thurgood Marshall, who dissented more than 1,400 times in death penalty cases, on grounds that capital punishment is always in violation of the Eighth Amendment's ban on cruel and unusual punishment.

Clinton's early nominees also include Thomas Shanahan, a judge on the Nebraska Supreme Court now headed for a district court seat. Having recognized a variety of new causes of action, Shanahan is apparently a payback (one of many to come) to the nation's trial lawyers, among the biggest of Clinton's campaign contributors. Shanahan also has been a reliable vote, often in dissent, for positions advocated by criminal defendants that stretch beyond reasonable interpretations of relevant law. In a 1986 case, for example, his court rejected the argument that evidence obtained through a warrantless search of "open fields" (and used to convict the defendant of growing marijuana) should not have been admitted. Shanahan dissented, arguing that the Nebraska constitution's search-and-seizure provision should be read to prohibit what the Fourth Amendment to the federal Constitution—as currently interpreted by the Supreme Court in its "open fields" doctrine—allows. "When called upon to construe the Nebraska constitution," he wrote, "this court should not exhibit some Pavlovian conditioned reflex in an uncritical adoption of federal decisions." As a district judge, will Shanahan construe the Fourth Amendment more broadly than the, well, Pavlovian judges on the lower federal bench? And how will he speak of the justices above, whose rulings as a district judge he is obligated to enforce?

Perhaps the most interesting, and likely the most controversial, of Clinton's early judicial choices is Rosemary Barkett, a former nun turned trial lawyer (another payback) and Friend of Reno (as in Janet), now a justice on the Florida Supreme Court. Where to start in relating what evidently brought her to the attention of Clinton and his judge pickers?

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How about the amazing remark she made in a 1992 case in which her court chose from six different modifications to a state legislative redistricting plan? Barkett said she was "loath to agree to any of the convoluted plans submitted under the hurried circumstances." "If I had to choose only among those presented," she added, "I would choose the plan submitted by the NAACP simply because this is the organization that had traditionally represented and promoted the position that advances all minority interests." This is called judging on the basis of the party, not the merits—a no-no on any proper reckoning of what it means to be a judge.

As for judicial doctrine, Barkett rides the standard activist horses. Consider the Tampa street-corner case of *Wyche* v. *State*. A woman wearing little attire waved to passersby before entering a car that stopped to collect her; she was convicted under a city ordinance of loitering for the purpose of prostitution. On appeal to the Florida Supreme Court, the ordinance was struck down as unconstitutional. Barkett's plurality opinion said the law, because it could potentially punish such innocent conduct as "hailing a cab or a friend," was "overbroad," and thus in violation of the First Amendment. Putting to one side how any ordinance aimed at regulating disorderly conduct could survive under Barkett's reasoning (courts typically require a statute to be of "substantial overbreadth" before voiding it), the most striking feature of her opinion is a statement that the ordinance "violates substantive due process because . . . it may be used to punish entirely innocent activities." The sins judges have committed in the name of substantive due process are legion. If Barkett is willing to invoke substantive due process in a case like this, it would seem she might use it anywhere to reach any decision she believes is right—which, of course, is the point of having this hoary doctrine around.

Then there is Barkett's dissent in a 1993 case in which the majority upheld statutory monetary *caps* on non-economic damages in medical malpractice cases. Her reason: The caps violated the Fourteenth Amendment's equal protection clause. How Barkett reached this conclusion is too convoluted to describe here. Suffice to say, she used a standard for review that, if widely employed, would lead judges to invalidate just about any statute they might personally disagree with. Because this was a case of interest to the state's trial lawyers, it bears noting that those attorneys have created an award in Barkett's name, given annually to, presumably, lawyers like her.

Barkett cannot be accused of being insensitive to criminal defendants. Consider this 1989 case: A man breaks up with his girlfriend and two months later breaks into her home at night, bearing a knife. The former girlfriend, fearing a night like this, is gone, but her roommate, alas, is not. She screams, the defendant stabs her to death, for which act he is convicted and sentenced to death. Barkett's court affirms the sentence. She alone dissents. Why? Because the defendant was "surprised" by the presence of the soon to-be victim—the trial court found the murderer had not expected anyone to be home—the death penalty was a disproportionate sentence.

My favorite Barkett opinion is her solitary dissent in *LeCroy* v. *State* (1988), in which the majority affirmed a death sentence for two brutal first-degree murders. The defendant was 17 years and ten months old when he committed the crimes. The sentencing judge noted LeCroy's youth but found him mentally and emotionally mature, and thus proceeded, as Florida law provides in cases in which a child of any age is charged with a capital crime, to try and handle the defendant "as if he were an adult." Barkett, however, said that to impose the death sentence on a "child"—even one two months shy of 18, even one the trial court had deemed mentally and emotionally mature—was barred by both federal and state constitutions.

More nominees from the firm of Daughtrey, Shanahan & Barkett are sure to come. In line for a district judgeship in Massachusetts is Nancy Gertner, a Yale Law School classmate of Hillary Rodham Clinton's who has been recommended to Clinton by Sen. Ted Kennedy. A civil rights and criminal defense attorney, Gertner is said to often describe herself this way: "I'm not a liberal, I'm a lapsed radical." (One of her first cases saw her defending Susan Saxe, the anti-war activist who was involved with her roommate, the recently captured Katherine Anne Power, in the shooting death of a Boston policeman in 1970.)

Gertner speaks the language of a "lapsed" radical. "The fact that this claim [Anita Hill's] scuttled the nomination [Clarence Thomas's] or delayed the nomination helps the cause," she told *Newsweek* in the fall of 1991, "like nothing else." Gertner would seem to have done well by the cause; she told the *Boston Globe* last year that the number of calls she received about sexual harassment doubled after the Hill-Thomas hearing and the value of settlements she negotiated tripled. Gertner seems to have embraced the view that most consensual sex is rape; remarks she made last year at Harvard suggest she believes that sexual partners must explicitly consent to the act before engaging in it, or else the police should appear. Gertner has yet to explain what she thinks remains of the modern right of privacy, which presumably would foreclose such regulation but which she embraces in the abortion context.

And speaking of abortion, Gertner appears to believe that the abortion right should not be limited—not even in the final weeks of a pregnancy. She has opposed every attempt by the Commonwealth of Massachusetts to regulate abortion. Interestingly, one of Gertner's clients was a woman indicted for vehicular homicide in the drunken-driving death of her eight-and-a-half-month-old unborn. When these charges were dropped, Gertner, not one to pass up an opportunity for ideological comment, called it "a victory for reproductive rights." Gertner also has analogized the abortion right to the right to vote, as though both should be exercised often. Question for Gertner and other Clinton nominees: Do you believe in your president's remark that abortion should be safe and legal but rare?

When Gertner's name surfaced last summer as a likely judicial nominee, she told the *Globe* that what some see in her as an advocate may not be present when she dons the robes of a judge. If so, she might disappoint her White House sponsor(s). The odds are, however, that she won't, no more than any of the other leftward judges Clinton is promoting. A few of these nominees—Barkett could be the first—might not make it to the bench, especially if they are seen for what they are. Still, most of them will be confirmed, because Democrats control the Senate. That is why the ballot box remains the most effective recourse for those who oppose the arrival of Clinton's America in the seats of judicial power. ❐

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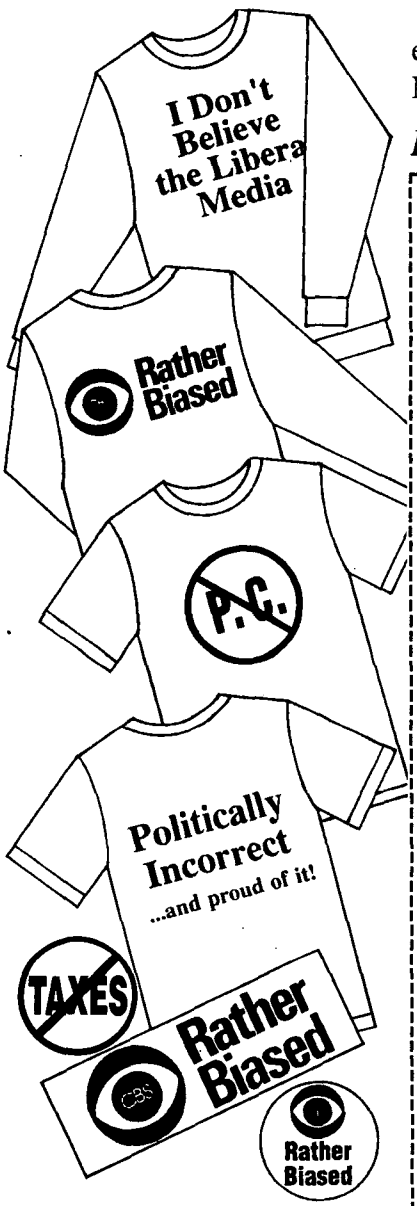

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Dreamball

by Benjamin J. Stein

Monday

A listless, quiet day. No calls to do commercials, no calls to be in movies, just lying on my couch and reading about two intensely active, bad-acting miscreants of the world of financial fraud. I had a stack of SEC filings, clippings, and trial pleadings next to me. Little by little, I plowed through them, feeling lonely and sorry for myself. Why aren't I president? Why aren't I making an offer to buy Paramount? Why aren't I host of a talk show?

K., a young woman who wants to be a star, came over to help me unpack a huge stack of boxes of books, and then we went to lunch at Hugo's. K. is a model, and there were photos of her up on the wall. They were nice, and I had a truly fine lunch, but how I wish the phone would ring with an acting gig.

After lunch, I took a short nap, lying on my hard working couch, listening to Mozart's Waisenhausemesse, bathing in the greatness of the sound like a courtesan bathing in champagne, or maybe just like bathing in something better than water, something that bathes the soul.

Then, redemption. I drove over to see my son, little Mr. Delicious Perfect, who had just gotten home from school. "Daddy," he said, "will you throw this ball to me?" He produced from his toy box—a chest the size of a Lincoln Continental—a battered yellow tennis ball. Mommy's house doesn't have a backyard except for a swimming pool, so we went out into the street, which is little used. Except for the rock star across the way, hardly anyone comes down this road. It's great for throwing a ball.

It was a hot and smoggy day. We both stood outside in the soup and tossed the ball back and forth. Now, Daddy—that's me—is not much of an athlete. But I still managed—at 48—to throw him the ball, and he made as if to catch it. At first he'd drop it most of the time, but then, little by little, he started to catch it.

"Great," I said. "Great catch."

For the first ten minutes, Tommy made a big effort to throw the ball over my head, past me, along the pavement, anything to keep me from catching it. Finally, I said, "Any time you purposely throw it past me, I'm going to make you go chase it."

After a few chases by him, he pulled himself together. With a look of intense concentration, he rotated his arm around like an old-time pitcher, squinted in my direction, and then took a step forward and hurled—not threw—the ball at me like Walter Johnson in old newsreels. The ball literally zinged through the smog right at my face.

I caught it, said, "Great, fantastic throw," and tossed it back. He threw it at me again, a high, hard one that would have hurt like hell if I hadn't caught it inches in front of my nose.

Then, for about five minutes, he threw ball after ball at me, always zingers, always right in the strike zone or just above.

This little angel, I thought, is a six-year-old Nolan Ryan, the next Whitey Ford.

Then he threw one past me, and scampered off after it. He said he was thirsty, so we went inside so he could have a ginger ale. He drank it in loud, incessant gulps, and then said, "More ball throwing, Daddy. Was I great?"

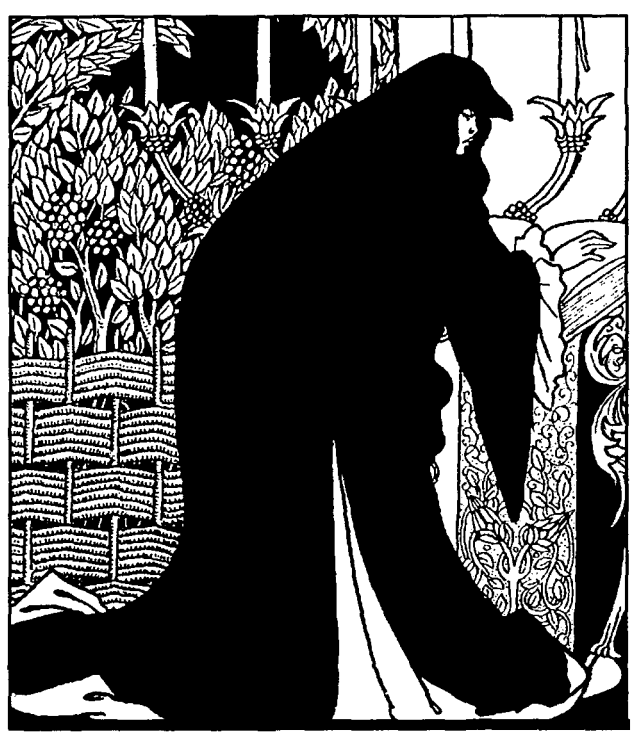
"You were great," I said. "Really, really great."

He threw the first few past me, more or less on purpose, but then I did something very out of character. I leapt up in the air and by a miracle of luck, caught one. I tossed it back to him, and from then on, every time I caught it, he threw it back high and hard and true. It was imitation or a pact or something deeper, but when I caught what he was throwing, showed the example of straight, decent play, he did the same.

Zing, zing, zing, one after another, the ball came racing toward me at frightening speed, and the thought came through my mind, "This kid is a star."

All sorts of other thoughts came through my head as well.

Damn the disintegration of public schools, I thought. Why



Benjamin J. Stein is a writer, lawyer, economist, and actor living in Malibu, California.