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# SOCIAL PERSPECTIVES: ABORTION AND FEMALE BEHAVIOR

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## INTRODUCTION

On November 20, 1968, the *Washington Post* carried a story under the heading, "Man Pleads Guilty in Abortion Death." A 25-year-old hospital orderly performed an abortion upon a married woman. The woman, the mother of two children, died shortly afterward. In addition to responsibility for the woman's death, the defendant faced a possible prison term of ten years for having performed the abortion. Two other persons were arrested in the case. An area police captain pleaded guilty to the misdemeanor of "encouraging an abortion" and was fined $100, while another person was to be tried later on a charge of criminal abortion.[1]

This report raises a number of issues which form the core of the abortion debate. The first and most obvious question is why did the woman seek to procure an abortion for herself. The answer, perhaps, is that her pregnancy was an unwanted one. Such a simplistic answer, however, merely poses further questions. Does any woman have a right not to have an unwanted child? Does the social order have the right to compel her to have an unwanted child? If society does have this right over the individual woman, should it be enforced by criminal process? Does the unborn fetus have any rights?

At present, many states have statutes that proscribe abortions, and such laws are enforceable through the normal criminal law processes. Notwithstanding, society has carved out certain excusing conditions which weaken the proscription of abortion. Moreover, social statistics bristle with instances of "illegal" abortions which society, apparently, conveniently overlooks. It is not inappropriate at this point to ask what the laws which make abortions illegal and prescribe severe penalties for performing them are meant to achieve. The answer seems to be that such laws seek to curb the incidence of abortions.[2] In practical

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1. Washington Post, Nov. 20, 1968, § —, at —, col. —. For an excellent study that focuses upon extra-legal abortions and investigates what the author terms the "social structure" of abortion, see N. LEE, THE SEARCH FOR AN ABORTIONIST (1969). Data in the book were compiled from interviews with women who had had abortions and who were relating their own experiences in seeking a person to perform the abortion.

2. [Professor Cyril C. Means] points out that in the nineteenth century, when

terms this means that a woman may not abort her pregnancy, and that no medical facilities may be used to assist a woman who feels compelled to secure a termination of her pregnancy.[3] The result, as in the instance above, is often tragic.[4] While the law has prescribed a certain pattern of behavior to be followed in the event of conception, adherence to this standard in many instances seems to be done on a level of private decision-making notwithstanding the supposed fear of criminal consequences for noncompliance. If a woman wants badly enough to abort her pregnancy and can afford the cost, she will abort the fetus by the most expeditious means regardless of the legal sanctions which might be imposed.[5]

The abortion problem raises some sensitive questions in the sphere of public and private morality. In the context of social and legal processes, the issue is raised concerning the efficacy of the law in the enforcement of the moral standards which are implicit in the abortion statutes. Indeed, this general issue in the abortion context brings into sharp focus the very fundamental question posed so felicitously by

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these laws were passed, abortion—even in hospitals—was much more dangerous than childbirth, and that the original purpose of the statutes was to compel women to adopt the safer of the two alternatives. Since hospital abortions early in pregnancy are much safer today than childbirth under the same hospital conditions, the continued enforcement in the twentieth century of these nineteenth-century laws now frustrates their original protective purpose by forcing women to accept the less safe of the alternatives.

AMERICAN FRIENDS SERVICE COMMITTEE, WHO SHALL LIVE? 26-27 (1970) [hereinafter cited as WHO SHALL LIVE?]. *See* Table I, APPENDIX *infra*.

3. Clinically obtained abortion poses less threat to a woman's life than childbirth complications or, indeed, general complications resulting from pregnancy. Statistics indicate that the death rate from childbirth and complications of pregnancy is about 10 times higher than from clinically obtained abortions. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 55 (1971). These statistics, if accurate, provide some support to those who argue that a woman's right to preserve her own life justifies abortions.

4. Even those induced abortions which do not result in death for the mother are not without their hazard. Consider the following statement of a woman who procured an abortion:

I went to two midwives, one of whom stretched me on her kitchen floor. I went to several physicians who refused me. I finally went to a man who said he was a retired gynecologist who gave me a general anesthetic, with ether, in his apartment.

I concluded the episode with nine days in a London hospital, a perforated uterus, peritonitis, and eight shots of penicillin, every day, for nine days.

D. SCHULDER & F. KENNEDY, ABORTION RAP 75 (1971) (footnote omitted) [hereinafter cited as ABORTION RAP].

5. N. LEE, THE SEARCH FOR AN ABORTIONIST (1969). Lee also asserts that it is widely conceded "that abortion is one of the most common forms of illegal activity practiced in the United States . . . ." *Id.* at 3 & n.1. It is, indeed, enigmatic that the abortion problem was so little acknowledged for so long.

H.L.A. Hart[6] and Patrick Devlin.[7] Is it the business of the criminal law to be concerned with enforcement of morals, whatever they might be? Two preliminary facts appear to have been clouded over in the dust raised by those engaged in the abortion debate. First, no one likes abortions, least of all those who find themselves candidates for the process. Secondly, the incidence of abortions in society is an historic and social fact,[8] like poverty and illness, both of which might be regarded as unpleasant, but which sooner or later the community must come to terms with.

It is interesting to note that the continuing debate over the abortion issue has produced, perhaps, two primary viewpoints. These may be termed the fetus oriented view[9] and the female perspective.[10] Other views have been presented, but these seem to be the two which best indicate the polarity between those who oppose abortion and those who advocate it.

This article will present some aspects of both views, compare and criticize them and attempt to synthesize the views into a more realistic concept.

## THE RIGHT-TO-LIFE ARGUMENT: THE FETUS-AS-PERSON

If one assumes that the fetus is a person and that it is a morally and legally accepted datum that every person has a right to life, it follows as a general proposition that the fetus has a right to life and cannot be aborted by the mother. While this line of reasoning suggests that the mother is a separate and distinct entity from the fetus, biological and psychological facts may indicate the contrary. Nevertheless, if, for the sake of argument, it is accepted that the fetus is a person distinct from the woman, then a basic antinomy is introduced into the problem, be-

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6. H. HART, LAW, LIBERTY AND MORALITY (1966).

7. P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).

8. Women have always practiced abortion or attempted it, in spite of taboos, laws, even the death penalty. The considerations that drove them to it in ancient times were probably very much the same as those motivating women today: poverty, illness, advanced age or extreme youth, the burden of too many children, the disgrace of bearing an illegitimate child, fear of discovery of infidelity, and numerous other social and psychological causes.

WHO SHALL LIVE? 18. *See also* M. SANGER, AN AUTOBIOGRAPHY (1938); Jackson, Book Review, 82 L.Q. REV. 566 (1966). Early records, however, reveal that cultural attitudes on abortion ranged from tolerance to approval to absolute prohibtion. WHO SHALL LIVE? 19.

9. *E.g.*, D. CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY (1970); G. GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS (1970); THE MORALITY OF ABORTION—LEGAL AND HISTORICAL PERSPECTIVES (J. Noonan ed. 1970).

10. *E.g.*, N. LEE, THE SEARCH FOR AN ABORTIONIST (1969); D. SCHULDER & F. KENNEDY, ABORTION RAP (1971).

cause it is also accepted that everyone has the right to some integrity over his person. Thus, it seems a natural derivative that the mother has a right to determine what will happen in and to her body.

It would be further argued that the right to life is more significant than the right to privacy. Under this analysis, a fetus may not be aborted, for this would be tantamount to killing a person.[11] While this way of stating the moral justification for the legal proscription of abortions is compelling, in this writer's view the argument is overly simplistic; indeed, this view masks even more difficult problems of moral and social import and seems to assume that the right to life is unproblematic.[12]

> [The] right to life includes having a right to be given at least the bare minimum one needs for continued life. But suppose that what in fact *is* the bare minimum a man needs for continued life is something he has no right at all to be given?[13]

For example, if one has a kidney ailment that will surely kill him if the kidney is not removed, and someone else has a kidney that could adequately replace the diseased organ, the first person surely does not have a "right" to the other's healthy kidney. Moreover, even those who believe that the fetus is a "person" have generally conceded exceptions for pregnancies caused by rape or incest. Indeed, many legal systems have allowed the termination of pregnancy in such instances. It seems, then, that only certain classes of fetus-as-persons have the right to life. Thus, the "person" conceived in rape or incest has less right to life than the "person" conceived in other circumstances. This point becomes all the more compelling when one peruses the dissenting opinion of Judge Campbell in the case of *Doe v. Scott*,[14] where the Illinois abortion statute was overturned.[15] While Judge Campbell declared that he "avoided any discussion of the sensitive subject of whether fetal life is

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11. The baby in the maternal breast has the right to life immediately from God.—Hence there is no man, no human authority, no science, no medical, eugenic, social, economic or moral "indication" which can establish or grant a valid juridical ground for a direct deliberate disposition of an innocent human life, that is a disposition which looks to its destruction either as an end or as a means to another end perhaps in itself not illicit.—The baby, still not born, is a man in the same degree and for the same reason as the mother.
Address by Pope Pius XII to Italian Catholic Society of Midwives, *quoted* in Thompson, *A Defense of Abortion*, 1 PHILOSOPHY & PUB. AFFAIRS 45, 51 n.6 (1971) [hereinafter cited as Thompson].

12. *See* Thompson 54-55.

13. *Id.* at 55.

14. 321 F. Supp. 1385 (N.D. Ill. 1971).

15. ILL. REV. STAT. ch. 38, § 23-1 (1969).

'human' life,"[16] he added that he believed there is a valid state interest in "the protection of human life or at least the protection of potential human life in the fetus."[17] This familiar argument has been characterized as the acorn-is-an-oak-tree thesis or the slippery slope position. Yet it is not a position that can or should be treated in too cavalier a fashion. Consider the following observations quoted in Judge Campbell's dissent:

> "Eleven years ago while giving an anesthetic for a ruptured ectopic pregnancy (at two months gestation) I was handed what I believe was the smallest living human being ever seen. The embryo sac was intact and transparent. Within the sac was a tiny (approx. 1 cm.) human male swimming extremely vigorously in amniotic fluid, while attached to the wall by the umbilical cord. This tiny human was perfectly developed, with long, tapering fingers, feet and toes. It was almost transparent, as regards the skin, and the delicate arteries and veins were prominent to the ends of the fingers.
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> "The baby was extremely alive and swam about the sac approximately one time per second, with a natural swimmer's stroke. This tiny human did not look at all like the photos and drawings and models of 'embryos' which I have seen, nor did it look like a few embryos I have been able to observe since then, obviously because this one was alive!
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> ". . . When the sac was opened, the tiny human immediately lost its life and took on the appearance of what is accepted as the appearance of an embryo at this age (blunt extremities, etc.).
>
> "It is my opinion that if the lawmakers and people realized that very vigorous life is present, it is possible that abortion would be found much more objectionable than euthanasia."[18]

This kind of medical evidence creates a presumption about the nature of fetal life and, in particular, suggests that the characterization of the fetus as a person may require us to value the fetus at a premium

16. 321 F. Supp. 1385, 1395 (dissenting opinion).
17. *Id.* at 1396.
18. *Id.* at 1394, *citing* Byrn, *Abortion-on-Demand: Whose Morality?*, 46 NOTRE DAME LAW. 5, 32 (1970). The event was experienced by Paul E. Rockwell, M.D., Director of Anesthesiology, Leonard Hospital, Troy, New York. One may also note that life is continuous, only its forms change. Sperm, ovum and fertilized egg are life forms in a process of development; each has the potential, under the right conditions, of becoming a viable child. For an account of the process from fertilization to the time a fetus may be considered viable, see WHO SHALL LIVE? 20-21.

in our scheme of moral and legal values if the right to life is to have meaning. Indeed, it is submitted that this characterization underscores the fundamental way in which the abortion problem confronts our value system. The importance of the value attached to the fetus-as-person is accorded almost absolute sanctity by Pope Pius XI's encyclical letter which implies that the life of the fetus is to be valued even more than that of its mother whose primary function is "the performance of the duty allotted to her by nature," even where her life is "gravely imperiled" by the pregnancy. Indeed, his Holiness describes the termination of pregnancy in such a circumstance as "direct murder of the innocent."[19] Here again, the premise that the fetus is a person creates an anomalous situation. Under this view, the fetus clearly has a right to life. However, it should not be overlooked that the mother also has a right to life. There may be at least three ways of resolving this problem. First, under the right-to-privacy thesis, a decision to terminate pregnancy would be the prerogative of the mother. The mother may have the right to make whatever decision she chooses, because she is herself a moral agent and must accept the strictures of her own conscience in her zone of privacy. Secondly, the social system might prescribe the mode of conduct and allocate moral and legal responsibility accordingly under a system of penal statutes. Under this view, Judge Campbell might hold that the state has a legitimate interest in the fetus, and that the mother's choice must be circumscribed accordingly.[20] Thirdly, organized religion could decide what is to be done.[21] If the problem of separation of church and state were to be deemed significant, the proscription of abortions could be relegated to the sphere of positive morality, with any sanctions to be social and religious rather than distinctly legal.

This much is certain—a woman who aborts her pregnancy to save her life is no less guilty of "murder" than the ordinary citizen who kills another in self-defense. But, as professor Judith Thompson has suggested:

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19. Thompson 51 n.4. The position of the Catholic Church was further explained by Pope Pius XI:

> [H]owever much we may pity the mother whose health and even life is gravely imperiled in the performance of the duty allotted to her by nature, nevertheless what could ever be a sufficient reason for excusing in any way the direct murder of the innocent? This is precisely what we are dealing with here.

*Encyclical Letter of Pope Pius XI on Christian Marriage, quoted in* Thompson 51 n.4.

20. 321 F. Supp. 1385, 1394-95 (dissenting opinion).

21. *Cf.* Morton, Book Review, 82 L.Q. Rev. 115, 117 (1966): "Religion has a well-documented claim to leadership in this field . . . ." *Id.*

> [I]t cannot seriously be thought to be murder if the mother performs an abortion on herself to save her life. It cannot seriously be said that she *must* refrain, that she *must* sit passively by and wait for her death.[22]

The problem of the right to life in this context is further complicated in cases where the life of the woman is threatened, since one cannot ascribe blameworthiness to either fetus or woman. In this situation of mutual innocence, Professor Thompson has concluded, and this writer agrees in substance, that the right to life of the unborn fetus must give way to the woman's right to defend her own life against the threat posed by the fetus.

The general problem of the right-to-life has been squarely confronted in other contexts by the courts. In *United States v. Holmes,*[23] for example, a ship struck an iceberg and began to sink. A number of persons managed to place themselves on board a long boat. The long boat in which Holmes, a seaman of extraordinary heroism, found himself was over-crowded. When the weather deteriorated, it was clear that unless the mate decided to cast some of the male passengers overboard, the whole company might drown. The decision was made, and Holmes assisted in throwing some of the men overboard. He was brought to trial, and the jury found him guilty of manslaughter. The court, which seemed sympathetic to the defendant in charging the jury, reasoned in part as follows:

> In such cases the law neither excuses the act nor permits it to be justified as innocent; but, although inflicting some punishment, she yet looks with a benignant eye, through the thing done, to the mind and to the heart; and when, on a view of all the circumstances connected with the act, no evil spirit is discovered, her humanity forbids the exaction of life for life. But though . . . cases of this kind are viewed with tenderness, and punished in mercy, we must yet bear in mind that man, in taking away the life of a fellow being, assumes an awful responsibility to God, and to society; and that the administrators of public justice do themselves assume that responsibility if, when called on to pass judicially upon the act, they yield to the indulgence of misapplied humanity. It is one thing to give favourable interpretation to evidence in order to

22. Thompson 52.
23. United States v. Holmes, 26 Fed. Cas. 360 (No. 15383) (C.C.E.D. Pa. 1842).

> mitigate an offence. It is a different thing, when we are asked, not to extenuate, but to justify, the act.[24]

Judge Baldwin ventured the following general proposition at another point in his instructions:

> [S]uppose that two persons who owe no duty to one another that is not mutual, should, by accident, not attributable to either, be placed in a situation where both cannot survive. Neither is bound to save the other's life by sacrificing his own, nor would either commit a crime in saving his own life in a struggle for the only means of safety. . . . And I again state that when this great "law of necessity" does apply, and is not improperly exercised, the taking of life is devested of unlawfulness.[25]

These extended quotations starkly underscore the problem in the courts of the right to life.[26] The important factor here is that the court did not view the functioning of the legal process as implying a moral judgment. That is to say, while the law might, under proper circumstances, excuse the taking of life, it would render no moral appraisal of the defendant's act. The law operates within the narrow confines of legalities, and is neither concerned with nor equipped to consider the moral overtones of the situation. Yet, pervading these words is the implicit recognition that the right to life is a complex problem and the weighing of moral considerations is important in the decisional process.

If the foregoing discussion has sufficiently demonstrated that the right-to-life concept is not free from problems, it may be possible to debate the abortion issue on a realistic and, perhaps, more humanistic level. As has been indicated, the right-to-life concept creates a dilemma for both the moral philosopher and the legal practitioner, for it involves

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24. *Id.* at 366.

25. *Id.*

26. *See also* Queen v. Dudley and Stevens, 14 Q.B.D. 273 (1884). Where four sailors were cast adrift in the open sea in a small boat, two of the sailors agreed to kill the fourth, a youth who was weak and who, it appeared, would not survive. The youth was killed, all three defendants fed upon his body and all three survived—as a result of the nourishment—to tell the tale. Lord Coleridge, finding the absolute divorce of law and morality to be a "fatal consequence," considered how to measure the comparative value of lives. He concluded that, although the defendants' crime would not be characterized as devilish, to excuse it would provide "a legal cloak for unbridled passion and atrocious crime." *Id.* at 276. Lord Coleridge declined to weigh the countervailing considerations and sentenced the defendants to death. The sentence was commutd by the Crown to six months' imprisonment. *See also* E. CAHN, THE MORAL DECISION 70 n.8 (1955); L. FULLER, THE PROBLEMS OF JURISPRUDENCE 2-27 (temp. ed. 1949); Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

not only the problem of existence, but also the question of continued existence.[27] Professor Thompson underscores this point well:

> The difficulty . . . is not peculiar to the right to life. It reappears in connection with all the other natural rights; and it is something which an adequate account of rights must deal with. For present purposes it is enough just to draw attention to it. But I would stress that I am not arguing that people do not have a right to life—quite to the contrary, it seems to me that the primary control we must place on the acceptability of an account of rights is that it should turn out in that account to be a truth that all persons have a right to life. I am arguing only that having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body—even if one needs it for life itself. So the right to life will not serve the opponents of abortion in the very simple and clear way in which they seem to have thought it would.[28]

It is interesting to note, however, that the Jewish faith takes cognizance of the right-to-life problem and makes an important distinction between fetal life, which is seen as potential life, and the mother's life, which is seen as actual life. The hypothetical person's interest carries, perhaps, less weight than that of the actual person. In Rabbi Feldman's words:

> "[I]f the woman were to say that she had taken thalidomide during pregnancy (and the chances of a risk of deformity are very great) and she wanted an abortion, because a deformed life is not very good, the Rabbi would [say]: 'Well, you don't

27. "[W]e could not consider the implications of abortion apart from our concern for the quality of life of the individual, the family, and society." *Preface* to WHO SHALL LIVE? at vii-viii. "The effect of overpopulation on the individual human spirit may be even more devastating than its physical results. In an impersonal, overcrowded world, what happens to man's dignity and self-respect, to his sense of importance and fulfillment?" *Id.* at 8. The quality of life may also be tied to the literacy rate.

> All of the countries that have illiteracy rates above 50 per cent have birth rates ranging from 35 to over 50 per thousand; in most countries where illiteracy is below 10 per cent, birth rates are under 20 per thousand. Extensive use of birth control methods appears to come with rising aspirations, which are tied to improved education and a rise in standard of living. Experience has shown that parents limit their families for economic reasons and because they want to give maximum opportunities to their children.

*Id.* at 14. *See also* R. HEILBRONER, *Ecological Armageddon* in BETWEEN CAPITALISM AND SOCIALISM 269 (1970).

28. Thompson 56.

know what's going to be, whether the child is going to be deformed and whether being deformed is worse or better than not being born. . . .'

"But if the same woman were to phrase the question differently and say that 'the possibility of deformity is driving me to anguish or distraction,' then the Rabbi would say: 'Well, now, you're talking about someone who is here and alive and real and all of Jewish tradition says . . . if a woman asks for compassion in that respect, then she is entitled to it.'

"All of the burden of the law is in her favor and the book quotes many examples in which various considerations are weighed, one against the other. One thing emerges from the writings of all Rabbis . . . that the welfare of the woman is primary, and that welfare, of course, is not limited to saving of life, but even to saving of mental health and to saving of welfare. It might even be extended to saving her the anguish of shame or embarrassment."[29]

It should be noted that Pope Pius XI's encyclical letter which speaks of a duty imposed upon the woman by "nature"[30] masks a concern that transcends the temporal. The idea of original sin would seem to imply a deeper concern than that ascribed to "nature." For example, Rabbi Feldman says that:

". . . There is the concept of original sin which is basic to Catholic theology and which is entirely absent from Jewish theology.

"The Catholic idea of original sin is that Adam and Eve's sin was a sexual one and that it was hereditary, and that every child is born with that taint, a taint which cannot be removed except through the waters of baptism, which symbolizes the blood of the cross. For those who accept that Jesus died for them, his death is the redemption for this sin and thus the waters of baptism cleanse them of that sin. But without the act of Baptism, the taint remains, no matter how many righteous acts you perform, you can't remove that taint.

"The point here is that the sixth-century Saint Fulgentius, said that that applies also to the fetus in the womb; that the fetus in the womb is born with original sin, with the conse-

29. ABORTION RAP 108.

30. *See* note 19 *supra* and accompanying text. Judaism apparently takes issue with this characterization, at least in the case of rape. ABORTION RAP 111.

quence, a very logical consequence, that if you have a mother and a child locked in combat, so to speak, and it is a question of whether this difficult pregnancy should continue, the classic Catholic position has been to let the child be born and let the mother die.

"That position is more logical and less cruel than it seems. It's very consistent with this theology, because the assumption is that the woman, twenty, twenty-five years old, was baptized at birth and is going to heaven, whereas the fetus itself is not baptized, will go to hell, go to eternal perdition or at least to limbo."[31]

### Dependence and the Right to Privacy[32]

Implicit in the foregoing analysis is the assumption that the fetus and the mother are two persons. Under this assumption, abortion would appear to sacrifice the right to life to which the fetus is entitled. The arguments have partially ignored the fact that the fetus is *dependent* upon the mother during most of gestation. It is perhaps on this point that the issues revolving around the right to privacy clearly clash with Pope Pius' encyclical. The Pope's statement indicates that the mother has a moral duty ascribed by nature to succour the fetus at least until it is viable, *i.e.,* the mother bears a special responsibility for the fetus and the fetus has rights against the mother "which are not possessed by any independent person."[33] This poses the further problem of defining the moral and legal character of those rights.

It is perhaps this dependency factor that raises the most important ground for attacks upon the constitutional basis of abortion statutes. Under one view, the fetus is dependent upon the woman and therefore, in a sense, intrudes upon the primacy she might otherwise have

31. *Id.* at 109-10. Rabbi Feldman also spoke of the baptismal syringe, a device which was developed in the eighteenth century in order to baptize a fetus still within the mother's body in cases of possible miscarriage.

32. The fetus has heretofore been assumed to be a person. In the *Holmes* case, Circuit Justice Baldwin took judicial notice of the passengers' dependency upon the sailors and held that "[t]he sailors and passengers, in fact, cannot be regarded as in equal positions. The sailor . . . owes more benevolence to another than to himself. He is bound to set a greater value on the life of others than on his own." United States v. Holmes, 26 Fed. Cas. 360, 367 (No. 15383) (C.C.E.D. Pa. 1842). By analogy to this dictum, the right of a fetus-as-person assumes more importance because of the dependency factor. Justice Baldwin distinguished dependency situations from those involving equality of rights, *e.g.,* where two sailors may both lawfully struggle for possession of a plank which would support only one of them. *Id.* Both situations are replete with moral implications.

33. Thompson 58.

over her person. Secondly, the fetus' posture of dependence is elevated by abortion statutes to that of a right, the correlative of which is a duty on the part of the mother not to disestablish this right of dependence. On the other hand, some urge that in regard to the fetus, the mother has "the legal ability by doing certain acts to alter legal relations."[34] Therefore, the fetus-as-person would be subject to having his legal relationship of dependency changed at the instance of the mother. If this view were to be accepted, the fetus' "right" would, in the general sense, become a mere "privilege" with no corresponding duty on the part of the mother to endure the pregnancy. This legal power of the woman, Chief Judge Swygert says in *Doe v. Scott*,[35] encompasses "constitutionally protected areas" that include "women's rights to life, to control over their own bodies, and to freedom and privacy in matters relating to sex and procreation."[36] The reasoning of the majority in *Doe v. Scott* makes it clear that the basic purpose of the Illinois abortion statute was to establish and protect what was considered to be a compelling state interest in fetal life. The court, therefore, attempted to place the fetal life value against the broader scheme of values that embraces our constitutional system. It chose to characterize the issue within the umbrella of "a fundamental, constitutionally protected right to privacy and freedom in certain personal and intimate matters, especially those pertaining to the home and family."[37] In addition, the court posed the question whether in the event of conception a prospective mother has a "right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals."[38] Judge Swygert then construed *Griswold v. Connecticut*[39] and related cases as establishing a zone of privacy around matters of "procreation . . . marriage, the family, and sex" which protects such matters from "unjustifiable governmental intrusion."[40] The court reasoned that within this zone of privacy, it was a woman's "fundamental interest in choosing to terminate a pregnancy,"[41] and concluded that the woman's interest in privacy and in control over her body is "seriously interfered with by a law which prohibits abortions . . . ."[42] The court may have

34. W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 7 (1966).
35. 321 F. Supp. 1385 (N.D. Ill. 1971).
36. *Id.* at 1389.
37. *Id.*
38. *Id., quoting* Roe v. Wade, 314 F. Supp. 1217, 1221 (N.D. Tex. 1970).
39. 381 U.S. 479 (1965).
40. 321 F. Supp. at 1389-90.
41. *Id.* at 1390.
42. *Id.*

been led to this position by either of two divergent concepts. First, it may be thought that the fetus does not acquire its status as a person until after the first trimester following conception. Secondly, biological and moral considerations may confer upon society an interest in the well-being of the fetus that transcends the mother's freedom of choice or legal power after the first trimester. The court in *Doe v. Scott* reasoned that if fetal life is to be protected by social legislation, this legislation falls within a class of laws that must be carefully examined because of the preferred character of rights which protect *actual* citizens from state interference in intimate matters. This right of choice is a vitally important right, for it attaches to the woman a right to determine under what conditions she will bear children or allow a fetus to have an usufruct over her body during the period of dependency. On this matter Judge Swygert did not believe that "the state has a compelling interest in preserving all fetal life which justifies the gross intrusion on a woman's privacy which is involved in forcing her to bear an unwanted child."[43]

Professor Thompson grappled with the nature of the woman's duty vis-à-vis the dependent nature of the fetus during gestation and concluded that, if partial moral responsibility is ascribed to the woman for her pregnant condition, the most this line of argument can establish is that

> there are *some* cases in which the unborn person has a right to the use of its mother's body, and therefore *some* cases in which abortion is unjust killing. . . . [T]he argument certainly does not establish that all abortion is unjust killing.[44]

Judge Swygert's reasoning in *Doe v. Scott*[45] seems to imply that it is impossible to judicially determine whether, at the instant of conception, a woman "intended" to become pregant. Consequently, once pregnancy has gone beyond the first trimester and nothing has been done to terminate it, the fetus acquires a right to be housed in that woman's body until it becomes viable. In effect, the relationship between mother and fetus has accrued with the implied consent of the woman, and she is estopped from terminating the consociation.[46] Professor Thompson's philosophic position seems to support the implication of Judge Swygert's reasoning:

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43. *Id.* at 1391.
44. Thompson 59.
45. 321 F. Supp. 1385 (N.D. Ill. 1971).
46. Thompson 65.

> If a set of parents do not try to prevent pregnancy, do not obtain an abortion, and then at the time of birth of the child do not put it out for adoption, but rather take it home with them, then they have assumed responsibility for it, they have given it rights, and they cannot *now* withdraw support from it at the cost of its life because they now find it difficult to go on providing for it. But if they have taken all reasonable precautions against having a child, they do not simply by virtue of their biological relationship to the child who comes into existence have a special responsbility for it. They may wish to assume responsibility for it, or they may not wish to. And I am suggesting that if assuming responsibility for it would require large sacrifices, then they may refuse. A Good Samaritan would not refuse—or anyway, a splendid Samaritan, if the sacrifices that had to be made were enormous.[47]

The majority opinion in *Doe v. Scott* can be described as courageous because it is a brave attempt to grapple pragmatically with a seemingly irreconcilable value conflict. On the one hand, it has attempted to vindicate our veneration for the right-to-life value. On the other hand, it has tried gallantly to be sensitive to the rights of women in their zone of privacy. This right encompasses more than just freedom from governmental intrusion. It affects the whole quality-of-life argument that has been characterized as the search for human dignity for actual human beings. To be sure, the point at which the "interest" of the fetus becomes the business of society—after the first trimester—is an arbitrary one. However, the line has to be drawn somewhere if society is going to be sensitive to other competing values.

## Law, Abortion and Common Morality

In the preceding sections an attempt has been made to illustrate that in the abortion context the moral, legal and social issues merge at a level which makes it exceedingly difficult to speak of abortion laws as being the quintessence of the "moral structure of society."[48] This seems to import that society has a paramount interest in enforcing compliance to patterns of behavior consistent with its notions of "public morality" and has at its disposal to secure "appropriate" conduct the full violence inherent in state power. One of the chief defenders of the pro-

47. *Id.*

48. P. Devlin, The Enforcement of Morals 9-11 (1965). *See also* Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. Chi. L. Rev. 1 (1967).

position that society should proscribe abortions through the criminal law process is Professor Robert Byrn.[49] Professor Byrn argues that if the abortion laws are abandoned,

> then the whole community value of life is in danger of breaking down. And the next step is probably euthanasia, or the idea that only those who contribute to society have a right to live.[50]

This is merely another version of the slippery slope position. The argument holds that the criminal law may be used to preserve anything essential to society's existence. Lord Devlin argues that because we punish treason against the state or support the theory that "established government is necessary for the existence of society and therefore its safety against overthrow must be secured," we might also punish immoral conduct because

> an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the suppression of subversive activities . . . .[51]

It is possible to impute this thesis to Professor Byrn inasmuch as he feels that legalized abortions threaten the "value of life" in society, and that ultimately society will "disintegrate" because it has denied "life" as a standard of common morality essential for social solidarity. Professor Ronald Dworkin has shown effectively that the "disintegration" thesis often degenerates into a "conservative" thesis, *i.e.*, that the majority has a right to "enforce its morality by law because the majority have the right to follow their own moral convictions that their moral environment is a thing of value to be defended from change."[52] The American political culture has always professed that "governments are instituted among men, deriving their just powers from the consent of

49. *See* Klemesrud, *For the Fetuses About to Be Aborted, He's the Legal Guardian,* N.Y. Times, Dec. 17, 1971, § C, at 48, col. 1.

50. *Id.*

51. P. DEVLIN, *supra* note 46, at 13-14 (footnote omitted).

52. Hart, *supra* note 48, at 2; Dworkin, *Lord Devlin and the Enforcement of Morals,* 75 YALE L.J. 986 (1966).

the governed." The problem with this formulation is that it assumes "consent," whereas practice would indicate the converse. Indeed, the "consent of all" proposition very often dissolves into the idea of a "sovereign majority" which is what Professor Dworkin seems to imply. The idea of majority rule or sovereign majority sounds very democratic, but it is fraught with complexity. This will be discussed later in the light of at least one major political theorist.

There are a few other features of the disintegration thesis that deserve attention. In the first instance, no historical evidence is given to demonstrate that social disintegration occurs because of a change in the moral posture of a society. On the other hand, Professor Hart has attempted to demonstrate that there is, perhaps, a moral minimum for the existence or continued existence of community life.

> Hobbes and Hume have supplied us with general characterisations of this moral minimum essential for social life: they include rules restraining the free use of violence and minimal forms of rules regarding honesty, promise keeping, fair dealing, and property.[53]

This moral minimum, however, is far from the proposition that pluralistic variations in intimate sexual matters will necessarily result in society's "disintegration" or "men drifting apart."[54] The further question is whether the abortion problem can be fairly placed within the category of a moral pluralism in the sexual sense implied by Professor Hart, or whether it imports considerations of a broader hue. The abortion problem, it is submitted, is neither purely a matter of sexual morality nor entirely outside the arena of societal interest relating to the right to life, inasmuch as that value is to be weighed at a high premium in our scale of moral values.

## Moral and Political Pluralism: Legal Values and Social Process

One feature of the law-morals debate has been the very theoretical emphasis which invokes a consideration of several general questions. Does law enforce morality as such? If so, to what extent does law enforce morality? If law does not enforce morality, should it be used to enforce morality as such? How can we justify the enforcement or non-enforcement of morality?[55] The emphasis of these general propositions can be

53. Hart, *supra* note 48, at 9-10.
54. *Id.* at 9.
55. Professor Hart identified several questions, the answers to which might explain,

modified if the abortion problem is considered to be a matter that can fairly be characterized as falling within the ambit of both law and morals.

There is a point that should be clarified about the law-morals-abortion relational compass. It has been implied by this writer that the common morality held by a given community—or sovereign majority within a community structure—is or can be an accepted empirical datum. This proposition must be further examined because we are concerned with the nature of human values. This is especially relevant to the law-morals debate, the question reflecting the choice of values to be institutionalized or formalized and the inevitable sliding scale of pre-eminence with which these values are realized—a question obviously related to the situational context of events.

In terms of the nature or definition of a human value, Professor Gerber has felicitously posed the question:

> [I]s humanity determined by structure or function? By genetic code or by social interaction? By an a priori deduction or by an inference from social activity? . . . [I]s human value a metaphysical conclusion of an abstract system such as natural law, or is it attested only in the pragmatic, social interests emphasized by sociological jurisprudence?[56]

This aspect of the law-morals problem has also been identified by Professor Morton, who argues that the crucial question concerns the "identification of values which ought to be held in a given society." This question might be answered by reference to "religion, *i.e.*, natural law; secular philosophy, *e.g.*, facist political theory or utilitarianism; . . . sociological field-work; or mere idiosyncrasy" and perhaps superstitution and anthropology like the Clapham omnibus passengers' "deep and ungovernable feelings of disgust."[57] It is, therefore, important to adumbrate how values are "identified," "selected" and "applied," and what the "substance" of those values includes. The value debate must of necessity take

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to some degree, the interplay between law and morality.

> Has the development of the law been influenced by morals? . . . Has the development of morality been influenced by law? . . .
>
> . . . Must some reference to morality enter into an adequate definition of law or legal system? . . .
>
> . . . Is the law open to moral criticism? . . .
>
> . . . .
>
> . . . Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law?

H. HART, *supra* note 6, at 1-4.

56. Gerber, *Abortion: Parameters for Decision*, 82 ETHICS 137, 138 (1972).

57. Morton, *supra* note 21, at 116.

place in what Holmes called the "market place of ideas."

It is important to note that the market place that Holmes envisioned is a market place that occurs in the context of the social process. A theological posture would seem to imply that values of a non-secular character, *i.e.,* values of metaphysical origin, are formed outside the consciousness of the community and are hard to debate because such verities, as they are meant to epitomize, depend upon "faith" for their "validity." In the abortion situation, however, those wishing to make the ideas inherent in theocratic natural law a part of the "positive" law of the state are attempting to use the state—that ultimate repository of legitimate violence—to support religious beliefs. But in doing this, two matters are seemingly ignored or perhaps not fully understood. First, there seems to be a tacit admission that strongly held beliefs within the theological universe are too weak to prescribe patterns of religious conduct. Secondly, there is implicit in this posture the attempt to use instruments inherent in state power to compel "non-believers" to subscribe to the religious norms of the church, *i.e.,* an establishment of religion.[58] It is therefore proposed that, because it is difficult to deal with the moral absolutes implicit in the religious arguments about the abortion problem, and because the abortion problem is a very "social" matter, the value-forming process will be discussed from a secular-moral viewpoint.[59] As has been suggested, the emphasis to the values in society will take on an empirical-secular perspective.

*Social Process and Value Formation*

Harold Laswell has provided a succinct outline of the social process: "*Man* pursues *Values* through *Institutions* on *Resources.*"[60] The social

58. In this context compare the following: "The law of God has taught us to believe, which laws of men cannot teach us. They can exact a different conduct from those who fear them, but faith they cannot inspire." ST. AMBROSE, EPISTLE XXI 10 (Migne XVI 1005) *quoted in* A. D'ENTRÈVES, NATURAL LAW 88 (1951).

59. Gerber, *supra* note 56, at 138.

60. H. LASSWELL, POWER AND PERSONALITY 17 (Viking Compass ed. 1962) (footnote omitted).

> Values are shaped and shared in patterns that we call *institutions.* The following table gives a hint of the relation between the values . . . named and the institutions usually specialized to each in our civilization:

| VALUE | INSTITUTION |
|---|---|
| Power | Government |
| Respect | Social class distinctions |
| Affection | Family, friendship, intimacy |
| Rectitude | Church, home |
| Well-being | Hospital, clinic |
| Wealth | Business |
| Enlightenment | Research, education, information |
| Skill | Occupations |

process, therefore, provides the frame in which values might be identified. Robert A. Dahl[61] has argued that in practice the basic frame of the United States political system has moved toward a pluralistic solution. Among the core aspects inherent in pluralism is the practice of leaving many policy matters of an individual and private nature beyond the legal authority of the state, while other matters of policy are "placed in the hands of private, semi-public, and local governmental organizations such as churches, families, business firms, trade unions, towns, cities, provinces, and the like."[62] Here there are matters that are beyond the reach of the common moral convictions of a "sovereign" majority, thus securing for smaller groups of people and individuals a not inconsequential degree of legal indepedence. In addition, the majority may be further stymied by the power that non-majority groups have to obstruct, delay or veto the policies of the majority. Dahl sums up the theory and practice of American pluralism as follows:

> Instead of a single center of sovereign power there must be multiple centers of power, none of which is or can be wholly sovereign. Although the only legitimate sovereign is the people, in the perspective of American pluralism even the people ought never to be an absolute sovereign; consequently no part of the people, such as a majority, ought to be absolutely sovereign.[63]

It should be borne in mind that if one accepts Dahl's pluralistic thesis, this does not mean that it is impossible for the sovereign majority ever to eliminate the Bill of Rights as the courts have interpreted it. Ultimately, the people can, by constitutional amendment, secure that degree of consensus required for such action. It should also be remembered that the protection of minorities at the state levels of government is notoriously deficient,[64] for few of the safeguards that obtain at the national level of decision-making are present in state legislative processes. Thus, the recognition of a plurality of morality will, absent a federal question, most inevitably be at the whim of the soverign majority.

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*Id.* (footnote omitted). *See also* H. LASSWELL & A. KAPLAN, POWER AND SOCIETY 16 n.1 (1950).

61. R. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 3-4 (1967).

62. *Id.* at 23.

63. *Id.* at 24. By way of contrast, a blistering attack upon the "naturalistic" fallacies allegedly inherent in political pluralism may be found in T. LOWI, THE END OF LIBERALISM (1970).

64. This point is exemplified by various voting rights cases. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 339 (1962).

Abortion statutes are enacted under state police power and the right to regulate health and welfare.

What relation does the theory of American political pluralism have to the enforcement of the abortion laws? First, this theory at least raises the question whether the abortion problem is appropriately within the province of matters within the reach of the sovereign majority, or perhaps as Dworkin would have it, the "conservative" majority. Secondly, if the abortion problem is appropriately within this sphere of socio-political decision-making, can and should this posture give way to countervailing values? Thirdly, is the apparatus that the majority has at its disposal appropriate to secure the end sought?

It should be recognized that while the consent of all cannot be obtained in a heterogeneous society, at least there can be consent about the process. That is, while various individuals and groups which comprise the community may differ upon substantive policies, they nevertheless "agree" or "consent" to abide by those decisions because of the "legitimacy" of the decision-making process.

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[65]

It should be noted, however, that the safeguards for minorities or individuals are not so efficacious at the state level as they have proved to be at the national level. In this regard it is not difficult to envision women as a minority. Hence the "legitimacy" of the process at this level may be less than compelling to many women.

*Value Selection*

This leads us to a second tier in the value-forming process, *viz.*, the question of what values are to be institutionalized—"selected" as part of the positive law of a community. This essentially involves the choice of values which are to be "officially adopted by the state, if necessary at the expense of other values. The answer to this question will be political

65. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

and will vary according to the nature of the group holding power, *i.e.*, from anarchy through paternalism to totalitarianism."[66] The "process" envisioned here relates to the machinery by which certain values are "selected" at the expense of other values. This aspect of the social process will indelibly reflect the intensity and manner with which certain values are articulated, both of which are related to the distribution of power and influence in society. The sociological aspects of this issue might be encompassed by asking who governs;[67] and it is not without interest to note that the interplay of power and authority is neither new nor novel in the lawyers' universe. No less a personage than Justice Holmes saw life as "a clash of power, and law in the main was the rationalization of the interests of the dominant group."[68]

With this in mind, if one can make a distinction between "attitudes" and "opinions," in the sense that attitudes are the predispositions that people have and that opinions are reflective of a self-conscious position that a person assumes, it can be seen that if self-conscious positions are held by a large enough corpus of persons, there is an agglomeration of "shared subjectivities" or an approximation of the ideal of "public opinion." Opinions are formed and changed in the social context. This means that family, school, work and community life, in addition to the "opinion leaders" at various levels in the social structures including the mass media, all have a profound impact upon the shaping and sharing of dominant values in an open society at a particular time. The predominant values may, to a large degree, depend upon the nature and distribution of power in society. Here, elite theories[69] compete with theories of pluralism[70] and of class rule.[71] If legislation governing most kinds of sexual relations is deemed essential to social and legal order, or the converse, *viz.*, that social control over most forms of sexual behavior is a form of repression designed to stabilize the status quo, then the relevance of these issues seems crucial.[72] Moreover, the abortion problem as it relates to matters of sexual freedom could conceivably be seen as providing the

66. Morton, *supra* note 21, at 116.

67. The question is also the title of a book by Professor Dahl. R. DAHL, WHO GOVERNS? (1961).

68. M. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 44 (1943).

69. T. BOTTOMORE, ELITES AND SOCIETY (1964); J. LOPREATO, VILFREDO PARETO (1965); C. MILLS, THE POWER ELITE (1956); G. MOSCA, THE RULING CLASS (1939).

70. R. DAHL, *supra* note 67.

71. K. MARX, SELECTED WRITINGS IN SOCIOLOGY AND SOCIAL PHILOSOPHY (T. Bottomore & M. Rubel eds. 1956).

72. For a full discussion see P. ROBINSON, THE FREUDIAN LEFT (1969). A tabulation of the predisposition of various societal groups toward sexual activity may be found in Table II of the APPENDIX, *infra*.

state with a powerful instrument of a repressive character with which to reinforce social control.[78] That subject, however, must be left to a more appropriate forum.

*Value Application*

Assuming that the process has indeed crystallized the goal to be pursued, the question then arises how this goal is to be realized. If it is further assumed that the goal encapsulated in legislative form is a statute proscribing abortions, a selection of the appropriate machinery to ensure effective compliance with the end sought must be made, thereby engendering what might be characterized as the means-ends problem. It is important that the character of the particular mean be "suitable" to secure the social efficacy of the prescription couched in legislative form. It is almost a banal truism, as is illustrated by the experience of Prohibition, that some means are simply inefficacious to secure patterns of social behavior even remotely approximating conformity to the value-goal deemed desirable.

This can be examined more closely by means of an example. Society *X* has just enacted a law that prohibits the performance and procuration of abortions except in the most extenuating circumstances. Assume that the law is predicated upon the general community sentiment that abortion is tantamount to murder, and that abortions have played a role in drastically reducing the population of a country which is experiencing population depression.[74] The law is aimed at controlling the behavior of 1) pregnant females, 2) medical practitioners, 3) hospitals and 4) private "agents" who might do acts which contravene the legislative intent. In addition, assume that penal sanctions for noncompliance inhere in the statute, and that the ordinary criminal law process is to be the chief means of enforcement. The appropriateness of this social instrument to realize the values the society esteems may well be questioned. How well equipped, it may be asked, is the police force to handle this kind of

73. Interestingly, Professor Hart says that

> [t]he use of legal punishment to freeze into immobility the morality dominant at a particular time in a society's existence may possibly succeed, but even where it does it contributes nothing to the survival of the animating spirit and formal values of social morality and may do much harm.

H. HART, *supra* note 6, at 72. *See also* Jackson, Book Review, 82 L.Q. REV. 566 (1966).

74. It is interesting to note that when its population was being depleted because of World War II, the government of the Soviet Union issued a decree prohibiting abortions. This was later supplemented by another decree encouraging the raising of children and awarding material incentives and honorific payments. Soviet mothers apparently produced enough children, and the Praesidium issued a later decree repealing the prohibition. The principal reason given for this last decree was "to give women the possibility of deciding by themselves the question of motherhood." G. GRISEZ, *supra* note 9, at 200.

socially "unacceptable" or "deviant" behavior? Could it not be urged today that the police are not the ideal instruments to reinforce this kind of moral code? Perhaps in such situations as characterize the abortion problem,[75] where the impact upon social equilibrium is not immediate and where the range of persons affected is not widespread, the compass of functional attributes of policemen is incongenial to this type of instrumental activity. If the goal remains constant, a certain range of choices is open to the authoritative decision-makers. The most popular choice seems to have been to continue ineffectually.

A second alternative is to realize that the value inherent in the goal is simply not clear. Solutions to problems incorporating such ideas as the right to life, the right to privacy and the right to existence are not self-evident, and general propositions require sophisticated analysis if they are to be useful in solving concrete problems. If this statement is correct, it may be that the "selected" value serves the purpose of furthering or reinforcing what Austin called "positive morality." However, the difficulty with this proposition is that mobilizing the criminal law to reinforce moral standards of behavior when its role is mainly symbolic may subvert the very essence of a moral system by atrophying those aspects of the system which are intrinsic and peculiar to it and which cause people to want to observe moral standards. Nevertheless, in the abortion debate the divergence between the goals of society and actual behavioral standards could be subject to some notion of benign neglect or a policy of prosecuting only the most obvious and blatant violations. This, of course, is prosecutorial discretion.[76]

The third alternative, if we are not to be dismayed by an unfavorable behavioral response, is to pursue the goal by other means. What practical means are available to a community to accomplish the desired result? In the first instance, it may be possible to show that there is an empirical correlation between sex education and unwanted or untimely pregnancies. The society might increase sex education through its schools, churches and other civic and governmental organizations. This might increase the number of pregnancies that are planned, reduce the incidence of those that are unplanned and also diminish the number of possible candidates for the abortion process.

Furthermore, the society may also discover an empirical correlation

75. Lord Devlin admits that abortions fall within that class of acts "which can be done in private and without offense to others and need not involve the corruption or exploitation of others." P. DEVLIN, *supra* note 7, at 7.

76. For a discussion in the sphere of civil disobedience, see Dworkin, *On Not Prosecuting Civil Disobedience,* N.Y. REV. OF BOOKS, June 6, 1968, at 14.

between poverty, access to sex information and unplanned pregnancy, and, therefore, make contraceptives and related medical services available to all citizens, in particular to those most likely to impregnate or to become pregnant. Moreover, society might broaden its concern to include a more vital interest in the children who are born by providing an adequate level of living. Finally, many women seek abortions because of the stigma which society attaches to both the unwed mother and her child. The social system might encourage mothers to have their unplanned babies if the Social Security system and the moral climate could further the principle of human dignity instead of stigmatizing both parent and child.

Thus far, the means-ends argument has proceeded upon the assumption that the goal society has reflected in its statutes proscribing abortions is a matter of "shared morality," a kind of Kantian categorical imperative. It would be inaccurate, however, to assume that *any* value judgment is accepted by all, or even a sizeable segment, of society merely because the means is effective to secure the end result.[77] Mere submission in many instances, *e.g.*, to apartheid in South Africa or segregation in the United States, clearly cannot be construed in terms of moral categorical imperatives. It follows in regard to abortion statutes, therefore, that to characterize the loathing of abortions as "common morality" is to make an assumption about the value consensus. Such an attitude assumes that most people will act in accordance with that value without "rational debate, internal or external."[78] The issue becomes a matter of "conscience."[79] The point perhaps comes close to the neo-Kantian idea

77. This point, of course, reinforces the pluralistic thesis.

78. Morton, *supra* note 21, at 116.

79. Kant, whose influence upon the analytical jurists was remarked in the preceding lecture, began by saying that man, in endeavoring to bring his animal self and his rational self into harmony, was presented to himself in two aspects, an inner and an outer. Hence his acts have a twofold aspect. On the one hand, they are external manifestations of his will. On the other hand, they are determinations of his will by motives. On the one hand, he is in relation to other beings like himself and to things external. On the other hand he is, as it were, alone with himself. The law has to do with his acts in the one aspect. Morals have to do with them in the other aspect. The problem of the law is to keep conscious free-willing beings from interference with each other. It is so to order them that each shall exercise his freedom in a way consistent with the freedom of all others, since all others are to be regarded equally as ends in themselves. But law has to do with outward acts. Hence it reaches no further than the possibility of outward compulsion. In a legal sense there is a right only to the extent that others may be compelled to respect it.

To quote Kant's own words: "When it is said that a creditor has the right to exact payment from his debtor, it does not mean that he may put it to the debtor's conscience that the latter ought to pay. It means that in such a case

that the nature of law is social or objective, while morals are individual and subjective. In short, "[m]oral experience is essentially a matter for the individual. Legal experience is tied to the notion of a community."[80] The danger of excluding internal (moral) debate by the assumption of value consensus is to elevate mere opinion to a form of absolutism distinct from judgments formed by an internal rational debate about value choices. The matter is thereby reduced to a matter of conscience.

## CONCLUSION

In recent experience we have seen that the conscience of the man on an airline shuttle might not react with deep and ungovernable feelings of disgust against, for instance, Lieutenant Calley's war crimes in Vietnam when he, perhaps, was conditioned to believe that Calley's act was a necessary or desirable thing, or, indeed, did not happen at all! As Professor Morton comments: "Regrettable though it is, experience has shown that conscience may not revolt from genocide where the subject has been conditioned to believe that genocide is a good thing."[81] On the other hand, the assertion of a "common morality" of an impliedly sovereign majority, in effect, is to place the problem beyond the arena of informed debate at the external level, and, thus, in a sense to foreclose debate about those values.

On this external plane, it seems clear in the abortion context that to talk of the abhorrence of abortions as a part of our common morality is to attempt to exclude a rational debate about that issue and to say that those values cannot be subject to compromise or change. It is a rigid posture. To argue from an absolutist position about a single value inherent in the abortion problem to the exclusion of others seems to recite conformity; it is a plea for the status quo.

To be sure, the considerations engendered by the abortion trauma are serious ones. They bring up issues of a very fundamental character. The abortion problem cannot be left entirely outside the sphere of social

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payment may be compelled consistently with the freedom of everyone and hence consistently with the debtor's own freedom, according to a universal law.

R. POUND, LAW AND MORALS 97-98 (2d ed. 1926) (footnotes omitted).

80. A. D'ENTRÈVES, *supra* note 58, at 85. With this, compare the following:

> The logical function of law exerts its influence where a collision between the acts of two or more agents or an antithesis between two or more wills is possible, and tends to promote objective ordination among them. The moral criterion, on the other hand, supposes an antithesis between two or more possible acts of the same agents and tends to settle internal strife, that is to establish a subjective ethical order. From this come the diverse elementary characteristics, which delimit the proper sphere of each.

G. DEL VECCHIO, THE FORMAL BASES OF LAW 163 (1914).

81. Morton, *supra* note 21, at 116.

concern; the veneration for human life simply will not allow that luxury. No less important, however, is a concern for the quality of the human condition—a task many eminent lawyers and social scientists conceive as the promotion of human dignity. To see the abortion problem within the limited compass of the right to life without conceding that this conception is inextricably bound up with the ideas of existence and continued existence belittles the very humanistic values some theorists have purported to vindicate. Moreover, the focus of so many theorists and public policy makers in seeking to enforce abortion standards has been almost hypnotically geared to the criminal law process to the exclusion of other social mechanisms.

The focus upon the right to existence to the exclusion of the problems of continued existence is a common fallacy that philosophers, poets and artists have attempted to excoriate. Indeed, the world of "being" has no "existence" apart from the world of "becoming." These twin aspects of reality[82] must be reconciled if the human condition is to be explored in an informed, humanistic and scientific manner. The problem is, to be sure, very complex. It is perhaps ironic that at the poetic level the reconciliation has been most felicitous.

> Labour is blossoming or dancing where
> The body is not bruised to pleasure soul,
> Nor beauty born out of its own despair,
> Nor blear-eyed wisdom out of midnight oil,
> O chestnut-tree, great-rooted blossomer,
> Are you the leaf, the blossom or the bole?
> O body swayed to music, O brightening glance,
> How can we know the dancer from the dance?[83]

82. By contrast, one author indicates that space and time are characteristics of events rather than distinct, autonomous entities. Space and time are "expressions of certain extensional and cogredient properties of events." A. WHITEHEAD, *Time, Space, and Material: Are They, and if so in What Sense, the Ultimate Data of Science*, in INTERPRETATION OF SCIENCE 56, 67 (1961).

83. W. YEATS, *Among School Children*, in THE COLLECTED POEMS OF W.B. YEATS 242, 245 (1961).

## APPENDIX

The following table indicates major provisions of recently enacted statutes on abortion in California, Colorado, Georgia, Maryland, Mississippi and North Carolina. The year of passage is indicated for each statute. The statutes of Georgia and North Carolina do not distinguish between the physical and mental health of the mother.

TABLE I

| LEGAL PROVISIONS | CAL. (1967) | COLO. (1967) | GA. (1968) | MD. (1968) | MISS. (1966) | N. C. (1967) |
|---|---|---|---|---|---|---|
| GROUNDS FOR ABORTION | | | | | | |
| Preserve life of mother | | x | x | x | x | x |
| Preserve physical health of mother | x | x | x | x | | x |
| Preserve mental health of mother | x | x | x | x | | x |
| Psychiatric confirmation required | | x | | | | |
| Risk of serious physical or mental defect in child | | x | x | x | | x |
| Rape | x | x | x | x | x | x |
| Affidavit of mother required | x | | x | | | |
| Statement of district attorney or court official required | x | x | x | x | | |
| Incest | x | x | | | | x |
| Felonious intercourse | | | | | | |
| DURATION OF PREGNANCY | | | | | | |
| Less than 16 weeks in case of rape | | x | | | | |
| Not more than 20 weeks | x | | | | | |
| Not more than 26 weeks | | | | x | | |
| RESIDENCE REQUIREMENT | | | | | | |
| Resident of state | | | x | | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| Four months except in emergency | | | | | | x |
| REQUEST OR CONSENT REQUIRED<br>Woman | | x | x | | | x |
| Woman and husband if living together | | x | | | | |
| Parents of unmarried minor | | x | | | | x |
| Parents or guardian of incompetent | | | | | | x |
| APPROVAL OR AUTHORIZATION<br>Hospital review board | x | x | x | x | | |
| Certification by three doctors | | | x | | | x |

In order to qualify for abortion under the North Carolina statute, in the case of rape, the woman must have reported the rape within seven days of its occurrence. Under the Maryland statute, the maximum time within which an abortion may be performed is extended if the mother's life is in danger or if the fetus is dead. The information in this table was abstracted from AMERICAN FRIENDS SERVICE COMMITTEE, WHO SHALL LIVE? 108-109 (1970) (footnotes omitted).

The following table indicates various doctrines regarding sexual activity and the groups which would espouse those doctrines. The captions "left," "center" and "right" indicate only the spectrum of viewpoints, not any political associations.

TABLE II

| | DOCTRINE | ADVOCATES |
|---|---|---|
| Left | 1. Intercourse in all possible ways is mandatory for salvation. | Believers in all possible experience. |
| | 2. Intercourse in any way is permissible for anyone. | Strict antinomians. |
| | 3. Intercourse is permissible for anyone as long as procreation is avoided. | Dualists. |
| Center | 4. Intercourse for women is decent only in marriage; intercourse for men is permissible with wives, concubines, prostitutes. | Conventional Roman society. |
| | 5. Intercourse in marriage alone is permissible; within marriage there are no limits or specific purposes. | Much of Old Testament. |
| | 6. Intercourse in marriage alone is permissible provided it is not against nature. | A few Church Fathers. |
| Right | 7. Intercourse in marriage alone is permissible and then only for procreation. | Stoics. |
| | 8. Virginity is preferred, but intercourse in marriage, for procreation only, is permissible. | Most Church Fathers. |
| | 9. Intercourse is never permissible. | Strict ascetics. |

J. NOONAN, CONTRACEPTION 57-58 (1966).

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