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ESSAY

RENDER UNTO CAESAR: AN ESSAY ON PRIVATE MORALS AND PUBLIC LAW

*W. Christopher Barrier**

I. INTRODUCTION

A. *Context*

Growing up in Little Rock in the 1950s, it would not have occurred to me to separate religion and morality from political and legal issues. When my father, in those days an Eisenhower Republican and businessman, gave lectures on the philosophical roots of communism, he gave them primarily to church groups. And it was at our church several years later that a group of young people met to call for the integrated reopening of Little Rock's high schools, which had been closed by a Faubus-sponsored referendum.

Certainly, as the McCarthy and Faubus eras proved, ethical considerations should be on any agenda for the discussion of public policy. However, it is one thing to seek to structure government and politics upon rather broad, generalized moral principles. It is quite another to imbed into the law specific religious dogma, dealing with personal behavior or belief.¹

B. *The General Issue*

At issue is the appropriate function of the law in regulating private behavior, an issue brought sharply into focus by current debates in the political arena. Congress, state legislatures, and city councils have to grapple regularly with the recurring phenomena of pornography (adult and child), strip joints, dirty movies, and drug abuse.² Such public issues have to be confronted and legislative

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1. See, e.g., 1981 Ark. Acts 590; interview with Senator Jim Holsted, sponsor of Act 590, Arkansas Gazette, Mar. 22, 1981, at 1, col. 1.

2. See 1981 Ark. Acts 887 (revising Arkansas' obscenity law and increasing penalties)

bodies must make judgments which inevitably reflect their collective moral attitudes.

However, there are also presently circulating proposals for reversing (directly or indirectly) the substance of the United States Supreme Court's decisions on abortion, school prayer, and related issues dealing with behavior that is essentially personal.³ It has been said in some quarters that these changes, particularly the proposed constitutional amendments, represent a radical departure from American tradition.⁴ In reply, it is argued that social legislation, plainly on the upswing since the New Deal, is in fact a type of "moral" legislation and that current trends simply substitute one view of "morality" for another.⁵

C. *The Ultimate Questions*

This controversy raises significant questions, both legal and political, several of which may be disposed of before proceeding to the central issues. The following questions frame the ultimate issues to be addressed by this essay:

1. *Has there been a trend toward "moral legislation" which is more closely identifiable with liberal political thought, especially legislation mandating transfer payments of various sorts and increased government regulation of economic activity? If so, is such a trend a departure from the traditional American functions of the law?*
2. *Do current proposals seeking to alter court decisions on such matters as abortion, school prayer, and sexual behavior represent a departure from the traditional American functions of the law?*
3. *Are there fundamental, non-political differences between the types of enactments contemplated by the first question and those contemplated by the second question?*
4. *Are there objective tools with which legislation in either category may be analyzed to determine whether it conforms to the traditional American functions of the law?*

and 1981 Ark. Acts 870 (defining obscene materials, prohibiting their distribution, and prescribing penalties for violations).

3. See *Efforts to Restrain Federal Courts in Controversial Matters Continue*, Vol. 17, No. 10 ABA Wash. Letter 4 (Oct. 1, 1981) and Kalb, *The Proposed Human Life Statute: Abortion as Murder?* 67 A.B.A.J. 1123 (1981).

4. See *Abortion, Politics and Tolerance*, N.Y. Times, July 6, 1980, § E (The Week in Review) at 16.

5. See *Batesville Guard*, Jan. 30, 1981, at 1, col. 1, (interview with the Rev. Jim Brown, an incorporator of the Arkansas chapter of Moral Majority).

D. *Politics as Usual?*

As noted, it will be argued that these are simply political issues, but, while partially political, these issues are not exclusively a matter of political judgment. Reasonable people may certainly disagree, for example, on public policy concerning the strictness of environmental controls (or even on whether there should be such controls); on regulation of nuclear power; and on similar issues.⁶ These four questions ask whether there have been any basic changes in our view of the *structure* of policy making and the *process* by which we deal with these issues, through the law.

With regard to the first of the four questions, it would appear beyond serious argument that there *has* been an increasing trend toward certain types of transfer payments (that is, funds collected by government from one segment of the population and awarded by it to another segment), and a higher degree of business regulation. Such transfer payments, however, do not ordinarily involve compulsion with reference to personal behavior, and they are indeed an established feature of the American political system, as this essay will attempt to establish. Similarly, business regulation only peripherally touches personal behavior.

Legislation which regulates strictly personal behavior likewise is not new to the American political/legal system, although it appears to have been on the decline until recently. Its reintroduction, would, hence, represent a departure from the trend of American law. This element of personal compulsion would appear to distinguish the first two types of legislation (transfer payments and economic behavior legislation) from the third (personal behavior legislation).

It is this distinction which provides the major focus of this discussion; which establishes a fundamental, non-political difference between these contrasting types of legislation; and which provides the principal analytical tool for judging *both* categories.

Again, the issues may be primarily political and philosophical, and perhaps only secondarily legal. But since our central focus is the proper function of the law itself, a clearer examination of the *legal* aspects of moral legislation may make the political and philosophical issues more susceptible to reasoned debate.

6. For a succinct listing of especially non-traditional positions on some of these issues, put forth by Ed Clark, Libertarian candidate for President in 1980, see *The Candidate Who Promises To Sell Dulles Airport*, 102 FORTUNE 111 (October 6, 1980).

E. *Historical Perspectives*

The question of the appropriate function of the law in regulating personal behavior is hardly new. Dean Roscoe Pound observed the inherent conflict early in this century:

[W]hen men demand little of law and enforcement of law is but enforcement of the ethical minimum necessary for the orderly conduct of society, enforcement of law involves few difficulties. All but the inevitable antisocial residue can understand the simple program and obvious purposes of such a legal system, and enforcement requires nothing more than a strong and reasonably stable political organization. On the other hand, when men demand much of law, when they seek to make it do the work of the home and of the church, enforcement of law comes to involve many difficulties⁷

The phenomenon, according to Pound, also touches lawyers:

The purposes of the legal system are not all upon the surface, and it may be that many whose nature is by no means antisocial are out of accord with some or even with many of these purposes. Hence today, in the wake of ambitious social programs calling for more and more interference with every relation of life, dissatisfaction with law, criticism of legal and judicial institutions, and suspicion as to the purposes of the lawyer become universal.⁸

Dean Pound's observations give a broad outline of the general distinction contemplated by this essay.

II. BASIC PREMISES

In framing the issues, this essay proceeds on two basic, interrelated premises about the nature and traditional American function of the law:

1. *The purpose of the law is not to insure universal morality (however perceived) or even universal justice in a substantive sense, but rather to identify and enhance mechanisms for allowing society to function in a manner which is satisfactory to its members.*⁹

2. *Even at Dean Pound's "ethical minimum," the law restricts some individual freedom to structure our behavior as we please, but*

7. Pound, *The Limits of Effective Legal Action*, 3 A.B.A.J. 55 (1917).

8. *Id.* at 55-56.

9. See L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* (1981). Mr. Fuller uses the term "economics," a coined term meaning "the study of good order and workable social arrangements."

our system presupposes a bias in favor of maximum personal freedom, consistent with the purpose set forth in the first premise.

The idea that laws are not expected to guarantee morality in a religious sense is not new. One of the basic thrusts of St. Augustine's *The City of God* is that man cannot hope to structure earthly governance in imitation of the celestial order. Rather, St. Augustine argued, man is presumptuous in trying, and he should structure government so as not to interfere with the relationship between the individual and God.¹⁰

Similarly, our constitutional system of government grew out of the same intellectual climate that produced John Locke and his theory of the social contract. Locke saw no divine order in the lives and governments of men, but merely a system whereby the affected individuals mutually agreed upon a system for furthering their own common temporal interests.¹¹ This same element of agreement is reflected in historical definitions of the state.¹²

As Pound noted, once a society progresses past simple anarchy, restrictions on individual freedom are in large part matters of degree since government of *any* sort restricts individual freedom. However, as he also contemplates, matters of degree are important. Obviously, there are fundamental differences between the daily lives of citizens living under a system of regulated capitalism and those living under democratic socialism; there are even more profound differences between either of these two systems and both communism as it exists today and military dictatorships.

Further, our basic governmental documents have concentrated both on prohibitions against governmental interference with individual rights and the affirmative granting of rights. The first fifteen amendments to the United States Constitution either grant affirmative rights or prohibit the government from doing certain things. Only the thirteenth amendment contains a limitation on individual freedom, but the restriction on owning slaves is in essence an affirmative grant of freedom from slavery.

The remaining amendments are by and large housekeeping or mechanical enactments. The single amendment which represented

10. ST. AUGUSTINE, *THE CITY OF GOD* 427-82 (1958).

11. J. GARRATY & P. GAY, *THE COLUMBIA HISTORY OF THE WORLD* 595-96 (1972).

12. For example, Cicero stated, "A people is a gathering of those united by agreement on the right and by shared interests." To St. Augustine, "A people is a gathering of many rational individuals united by accord on loved things held in common." Both are quoted in G. WILLS, *CONFESSIONS OF A CONSERVATIVE* 194 (1980).

a restriction of personal freedom, the eighteenth amendment mandating prohibition with reference to intoxicating liquors, had to be rescinded.

Viewed from this perspective, voting rights legislation and the proposed Equal Rights Amendment, both of which arose in a context of moral reform, appear to be consistent with these basic premises, and hence, should not be considered as "moral" legislation. Voting rights legislation specifically relates to a basic right of citizenship, the very essence of representative government. Similarly, the Equal Rights Amendment has a limited focus: *Governmental* action, or *legislation* enacted and enforced by government. Personal behavior is simply outside its scope. Its proponents may hope that it would also affect attitudes in a symbolic manner, but such a result involves no governmental compulsion.

What these basic premises require, then, is the disassociation of legislation from both its political trappings and social preconceptions so that the basic structure and function of the law can be evaluated.

III. THE STRUCTURE OF THE LAW

Within the present American legal structure, legislation tends to fall into identifiable categories. (For the purposes of this essay, the terms "legislation" and "law" comprehend legislative acts, regulations, constitutional provisions and even court decisions—in short, all types of governmental dictates of whatever source.)

The categories suggested here are very rough and perhaps arbitrary. Obviously, some legislation will fall into more than one category, and some categories will overlap. The categories were devised simply to provide some conceptual framework for the task at hand.

Our major purpose is to isolate the areas which have generated those clashes over the appropriate functions of the law with which this essay is concerned—first, to identify classes of legislation where there has been no significant departure from traditional uses of the law and hence no conflict concerning the functions of the law; and, second, to identify those areas where this conflict exists or may arise.

For these purposes, five types of laws can be identified:

1. INDIVIDUAL HARM—*Laws which regulate or proscribe certain behavior which is apt to cause harm to an identifiable victim in a medically or economically recognizable manner.* This category includes, among others, criminal laws prohibiting interference with the person; laws which define and proscribe offenses

against property; laws which regulate economic activity deemed harmful; and laws prohibiting actions with a potential for harm, such as speeding and careless driving.

2. **GROUP HARM**—*Laws which regulate or proscribe certain behavior with regard to an identifiable group of individual victims of medically or economically recognizable harms.* Representative laws in this category include pollution control laws; food and drug laws; land use control laws; prohibitions against theft of public funds; and prohibitions against engaging in certain occupations and professions without a governmental certification.

3. **SOCIETAL BENEFIT**—*Laws which promote, subsidize, or directly benefit individuals or groups.* This category encompasses transfer payments of all types, including welfare benefits, social security, GI education benefits, and government loan guarantees. This category could also include tax deductions for churches or charities; governmental decisions to provide sex education in the schools; warnings on cigarette packages; compulsory school integration; and the allowance of systems for private taxation such as improvement districts.

4. **SOCIETAL HARM**—*Laws which regulate or proscribe certain behavior to protect society as a whole, remote individual victims, or even the perpetrator of the action.* These laws encompass regulation of the use of alcohol and drugs, gambling, sexual behavior, abortions, flag salutation, and school prayer. These types of enactments should perhaps be considered in conjunction with their counterparts such as laws prohibiting discrimination against homosexuals or other groups in employment.

5. **HOUSEKEEPING**—*Laws defining rights or procedures without significant governmental sanctions.* Included are the Uniform Commercial Code, the statute of frauds, the Uniform Partnership Act, the Corporation Code and other business legislation, and many of the laws dealing with marriage and divorce.

Within these categories, the delineation between areas of conflict and non-conflict concerning the functions of law is less than razor-sharp, but the distinction is useable. Its utility requires a thorough examination of areas where there are no fundamental disputes about the proper function of the law, even when appearances indicate otherwise. Specifically, it is necessary to distinguish conflicts which are the result of unexceptional differences over policy or which occur in areas which require continuing debate, reevaluation and revision on the one hand from basic conflicts on the other hand.

By way of illustration, consider that the political decision about

whether capital punishment should be retained is not in itself regarded by this essay as a question of moral legislation at all, although collateral issues associated with it may be instructive.

IV. AREAS WITHOUT FUNDAMENTAL CONFLICT

A. *Individual Harm Legislation*

In the area of physical or economic harm to individuals, controversy has remained within a fairly narrow range. Changes have been more in the nature of adjustments, rather than fundamental changes of direction. For example, the comprehensive revision of the Arkansas Criminal Code in 1975 was essentially a clean-up procedure, with no significant changes, additions, or deletions when a victim was actually involved. Later amendments have also tended to be adjustments rather than drastic alterations.¹³ There has been very little criminalization of behavior which was not previously classified as criminal.

If anything, there have been some minor adjustments in the opposite direction. Heterosexual behavior of all types between consenting adults basically has been decriminalized, although homosexual behavior remains a misdemeanor.¹⁴ While chapter 24 of the Code sets forth a number of "offenses against the family," adultery and fornication are no longer criminal offenses.¹⁵ Similarly, possession of marijuana for personal use has been differentiated from possession for resale, the distinction turning on the amount possessed.¹⁶

The process is one the electorate seems to prefer—that is, whether it seems right that a certain act should be considered criminal, and whether people are generally comfortable with the punishment dictated for that particular infraction.¹⁷

13. *See, e.g.*, 1981 Ark. Acts 816 (increasing penalty for engaging in prostitution).

14. ARK. STAT. ANN. § 41-1813 (1977).

15. ARK. STAT. ANN. §§ 41-2401 to -2471 (1977).

16. ARK. STAT. ANN. § 82-2617(1)(d) (1976).

17. This process may also manifest itself through the system of setting sentences by jury rather than through the trial judge (although the vast majority of defendants in Arkansas are sentenced from the bench). A retired judge who had previously served as a deputy prosecutor recalled in a private interview in April, 1981, that his office had had extreme difficulty with a particular sexual offense. Juries simply would not convict persons charged because of the relatively substantial prison term. When the legislature reduced the term, the number of convictions rose significantly on substantially similar evidence. He also noted that juries, during their deliberations, would frequently ask the court what the penalties were for a particular crime, which theoretically has nothing to do with the defendant's guilt or innocence.

The relative morality of the death penalty has aroused substantial controversy.¹⁸ The most important discussion has centered upon the efficiency of capital punishment and whether it actually works as a deterrent. Studies indicate that there is no discernible relationship between capital punishment and deterrence.¹⁹

The imposition of the sentence is usually so far removed from the actual commission of the crime as to vastly blunt its impact. Moreover, the public is reluctant to impose such a sentence perfunctorially. As in *Furman v. Georgia*,²⁰ the United States Supreme Court has insisted upon strict procedural guidelines, a view which probably corresponds to public attitudes. The Court has even flirted with the notion that capital punishment constitutes cruel and unusual punishment²¹ which is prohibited by the United States Constitution—a conclusion already reached by the Massachusetts Supreme Court.²²

Capital punishment itself, however, is, strictly speaking, irrelevant to the present discussion. It comes into play only *after* behavior has occurred and concerns *how* that behavior is punished, not whether the behavior being punished is proscribed by the law. Yet, an examination of capital punishment does serve to bring into focus the differences between the functional and the “moral” approach to the law.

Unquestionably, one of the purposes of punishment is to mete out retribution which satisfies an apparent emotional need of the public.²³ No functional system can totally ignore such needs. And we do seem to believe collectively that certain acts are so reprehensible that only the ultimate punishment is appropriate. Yet we are so uncomfortable with carrying out the sentence that we hem its use with safeguards that render it virtually meaningless as a deterrent (aside from the obvious elimination of the condemned as a possible future perpetrator of crimes).

Although prosecutors may publicly call for an extension of the death penalty to cover more situations, some have privately admit-

18. Most recently, see Mailer, *Until Dead: Thoughts on Capital Punishment*, PARADE February 8, 1981, at 6.

19. See, e.g., Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703, 706 (1967); Schwartz & Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 275, 278 (1967).

20. 408 U.S. 238 (1972).

21. *Id.* at 257 (Brennan, J., concurring).

22. *District Attorney v. Watson*, 411 N.E.2d 1274 (Mass. 1980).

23. Mailer, *supra* note 18.

ted that the enormous procedural safeguards which necessarily attend the imposition of the death sentence actually have a negative impact. Pursuing the appeals, retrials, and other procedures consumes an enormous amount of prosecutorial time which could be applied elsewhere more productively to reduce crime.²⁴

Thus, though capital punishment does not appear to fulfill its purpose, we cling to it for reasons unrelated to its efficacy as a deterrent. Although a general view of the Arkansas Criminal Code reveals a functional, common-sense approach to crime, any serious observer would have to conclude that in the area of capital punishment, the law has never become completely functional.

It is in straying from a strictly functional approach that moral legislation causes the most problems.

B. *Group Harm Legislation*

There also appears to be no radical societal schism on legislation pertaining to group harm such as pollution control laws. The differences seem to be primarily in degree. Public awareness has grown as our exposure to pollution has increased. For example, pollution control efforts began primarily with the control of water pollution as the use of sewage facilities became more universal in the late 1940s and the industrial pollution of water resources became more visible.

Air pollution received attention in the 1960s, and was perhaps the primary motivating force behind the creation of the Environmental Protection Agency by executive order of the President in 1970.²⁵ The Clean Air Act²⁶ has been the focus of much environmental debate for the last ten years, and is presently before Congress for renewal.

As America became increasingly urbanized in the 1970s, the need for adequate disposal of solid wastes resulted in solid waste legislation. The overwhelming majority of municipalities apparently recognize their responsibility in this regard, even if resources for dealing with the problem have varied widely from community to community.

Finally, incidents such as the Love Canal disaster have heightened our awareness of the dangers of hazardous waste. The chemi-

24. Private interview with former chief deputy prosecuting attorney, Pulaski County, Arkansas, September, 1975.

25. Plan No. 3 of 1970, 3 C.F.R. 1972 (1970).

26. 42 U.S.C. §§ 1857 to -1858(a) (1976).

cal industry may disagree about the seriousness of the problem, but virtually everyone agrees that something must be done.²⁷

Other societies have experimented with emission fees and charges, but American government and even industry have embraced the regulatory approach. For example, the regulatory approach to air pollution involves a value judgment that pollution is improper and should be limited or prohibited. This contrasts to the Japanese view that the pollution problem is essentially a matter of economics and cost shifting.²⁸ Even American industry has been unwilling to adopt this value-neutral approach.

Hence, the controversy over the environment has largely remained one of degree and mechanics rather than differences in basic values, despite the fact that the regulatory approach to emission controls plainly involves limitations on behavior and elements of economic compulsion.

With some notable exceptions, virtually every major American municipality exercises land use controls, primarily through zoning. Such controls limit individual freedom to use land in order to provide for the greater good. Sign ordinances are perhaps an extreme example since their ostensible purpose is to promote the economic well-being of their communities.²⁹ However, it is possible to conclude that a substantial factor in their enactment has been simple esthetics—not even mild moral preferences—rather than economics.³⁰

It is easy enough to argue that Americans, collectively and individually, are over-regulated. However, the idea of regulation itself is widely accepted even in the business community where some sectors insist that it is essential.³¹

Minimum wage laws and antitrust laws have been attacked as unnecessary and economically counter-productive.³² They do, however, impact almost exclusively on an *economic* basis and do not impinge on *personal* behavior. This distinction is critical.

27. Alexander, *The Hazardous-Waste Nightmare*, 101 FORTUNE 52 (April 21, 1980).

28. Gresser, *The 1973 Japanese Law for the Compensation of Pollution—Related Health Damage: An Introductory Assessment*, 8 L. IN JAPAN 92 (1975).

29. See, e.g., Little Rock, Ark., Code § 44-1 (1961).

30. See, e.g., *Osage Oil & Transp., Inc. v. City of Fayetteville*, 260 Ark. 448, 541 S.W.2d 922 (1976).

31. Alexander, *Day of Reckoning for Oil Refiners*, 103 FORTUNE 38 (January 12, 1981); Loving, *The Railroads' Bad Trip to Deregulation*, 102 FORTUNE 44 (August 25, 1980).

32. E.g., Guzzardi, *The Right Way to Strive for Equality*, 103 FORTUNE 98 (March 9, 1981).

C. *Societal Benefit Legislation*

Laws prohibiting racial and sexual discrimination in employment and in housing are closer questions in that, to a large degree, they are intended to overcome personal prejudices. (Even in an economic context individuals have been known to act in ways that are counter to their own self interests. Contrary to traditional Marxist dogma, human beings are not solely economic entities but are rather complex combinations of judgments concerning not only economic matters, but moral, esthetic, and other intricate emotional configurations.)

Yet, the basic focus of such legislation is *not personal*, but *economic*, a distinction recognized in the legislation itself. Specifically, when employment units are so small as to be personal endeavors, equal employment strictures do not apply.³³ When a rental unit is so small that its occupancy by the owner makes it more personal than commercial, the hypothetical Mrs. Murphy may be more choosy as to her renters.³⁴

Part of the justification for this approach may be that the exclusions do not significantly dilute the remedy. Certainly, the exclusions were part of a political compromise to gain passage of the legislation. The essence of the compromise, however, was to distinguish economic behavior, thought to be a proper subject for governmental supervision,³⁵ from personal behavior, regulation of which requires greater circumspection.

This area may also illustrate another distinction between the traditional liberal social agenda and current "moral" legislation. If the act of discrimination were viewed solely in an ethical or moral context, Mrs. Murphy's actions would be as reprehensible as those of a large corporate property owner, and compromise would be back-sliding. However, compromise is possible because such moral judgments are avoided. After all, there has been virtually no significant effort to remove these exclusions. Proceeding from a moral base makes difficult, if not impossible, the sort of balance and compromise which are central features of the American political experience.³⁶

33. 42 U.S.C. § 2000e(b) (1976).

34. 42 U.S.C. § 3603(b) (1976).

35. Ball & Friedman, *Legal Regulation, Business Conduct and Prevailing Morality, in The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197 (1965).

36. G. WILLS, CONFESSIONS OF A CONSERVATIVE 201-02 (1980).

This is not to say that anti-discrimination legislation has itself remained wholly functional. For example, it is entirely possible when proceeding through both the administrative and litigation phases of an EEOC case to spend a great deal more than is at issue in terms of eventual monetary benefit to the claimant.³⁷ The purpose may be to deter future discrimination, but it at least arguably involves a desire to punish the alleged perpetrator and vindicate the moral right as much as to protect the economic right.

In terms of economic needs, it may well be more functional to view discrimination simply as a tort, with attorney's fees and multiple damages as incentives, leaving the area to the private economic judgment of claimants and lawyers. Nevertheless, the existing rights and remedies are essentially economic rather than personal in nature.

D. *Housekeeping Legislation*

Some housekeeping legislation has overtones of religion and morality. Even in those instances where moral traces are evident, however, the functions of the state can be winnowed out from other values. Marriage, for example, would probably have been invented by the state even if it had no religious significance. Generally, marriage recognizes the dependency of children, the usual economic dependency of the child-bearing member of the partnership, and the need to ascribe paternity for purposes primarily relating to support.

(Arkansas law has never specifically dictated that a wife bear the name of the husband, or for that matter that the children bear the name of their father. When he was attorney general, Jim Guy Tucker issued an opinion that married and divorced women had quite a bit of latitude in their choice of names, absent a fraudulent purpose.³⁸ Arkansas statutes have long allowed divorced women without children to be restored to their maiden names,³⁹ although many have taken them back without benefit of court order. Now this right has been extended to divorced women with children.⁴⁰ However, the wife's taking a husband's name and giving that name to the children has the completely secular purpose of establishing that he is in fact the father of children borne by that woman during the term of their relationship legally recognized as marriage; hence,

37. Interviews with private EEOC defense practitioners, Little Rock, November, 1980.

38. Opinion No. 74-55, to Senator Morriss H. Henry, April 19, 1974.

39. ARK. STAT. ANN. § 34-1216 (1962).

40. ARK. STAT. ANN. § 34-1216 (Cum. Supp. 1981).

he is obligated to participate in their support. The incidence of dependency on public resources for support is thereby reduced, serving a highly functional rather than moral purpose.)

Married and unmarried persons alike complain that the tax laws and government regulations discriminate against them. However, the *Markham* case notwithstanding,⁴¹ it is difficult to say that government does much to either encourage or discourage marriage as opposed to cohabitation. One function of the law is simply to lend certainty to people's dealings with one another. The Lee Marvin case⁴² underlines the hazards of uncertainty.⁴³

Then too, if Desmond Morris' theories on pairbonding and the nurturing of human young are correct, there are identifiable societal values in preserving a long term monogamous relationship.⁴⁴ Again, these notions are generally not dependent upon giving any religious significance to marriage.

The converse is equally true: Religious institutions do not need the sanctions of the state to preserve the religious significance of marriage. For example, many young people who have purely civil marriage ceremonies feel the need to have a religious ceremony at a later time in order to feel "really married."

The point is that most of our laws have no religious or moral bias one way or another. Thus, few fundamental conflicts arise over the functions of the law as it relates to individual harm, group harm, housekeeping, and even much "social" legislation. The problems and the potential for conflict must, therefore, lie elsewhere.

V. AREAS OF CONFLICT: SOCIETAL BENEFIT AND SOCIETAL HARM LEGISLATION

A. *Societal Benefits: Transfer Payments*

Legislation promoting or subsidizing a particular activity is nothing new. The United States has utilized transfer payments for stated social purposes almost since the inception of the republic.

41. *Markham v. Colonial Mortgage Serv. Co.*, 605 F.2d 566 (D.C. Cir. 1979), holding that the Equal Credit Opportunity Act grants unmarried couples the right to demand that their incomes be aggregated when a lender determines their credit worthiness in a joint mortgage application, as opposed to being considered separately—in other words, the right to avoid discrimination in favor of married couples similarly situated.

42. *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

43. A bill was introduced in the 73rd General Assembly of the State of Arkansas, 1981, which would have prescribed guidelines for written contracts in contemplation of cohabitation. It was referred to an interim committee.

44. D. MORRIS, *THE NAKED APE* (1967). See especially chapters 2 and 3.

The railroads were given every other section abutting the path of the right-of-way to induce them to bind the country together by rails. The millions of acres awarded in this manner were the property of the collective citizenry of the United States (or of the Indians, depending upon how you look at it).

The motivation for the GI bill and other veterans benefit legislation⁴⁵ may have been in part to reward men who had sacrificed for their country. The overriding social purpose of the educational grants, however, was to provide a means for integrating these people back into the American economic system, allowing them to make up for lost time. Additionally, this approach singled out for college education a group of persons (albeit exclusively male) which could be expected to be more highly motivated and mature in their attitudes toward school.

Low interest rate loans are available to colleges of all sorts, including church-related colleges,⁴⁶ in part to strengthen private education. Hill-Burton and similiar funds have been made available to build or expand hospitals, many of which have religious ties.⁴⁷

Tax deductions for church donations are also a form of transfer payment. Depending on the tax bracket of the contributor, the federal treasury foregoes collection of a percentage of every dollar donated to a church or charity.⁴⁸ The loss in funds must be made up somewhere, resulting in at least slightly higher overall tax rates and thus spreading a part of each donation over the entire citizenry.

The justification has been that churches perform essential functions which would otherwise have to be performed by government.⁴⁹ Also, in a more general sense, institutions such as churches are presumed to lend stability to society, thereby making the job of government easier and less expensive. Thus, according to theory, the mass of taxpayers whose rates are raised slightly because of charitable deductions are actually preventing their taxes from being substantially higher still.

In a sense, transfer payments to indigents involve the same rationale. For example, aid for dependent children and food stamps are intended to reduce the incidence of malnutrition, with its result-

45. *See generally* Title 38, specifically educational benefits at 38 U.S.C. §§ 1601-1799 (1976).

46. 20 U.S.C. § 1132(a) (1976).

47. 42 U.S.C. § 291 (1976).

48. 26 U.S.C. § 501(c)(3) (1976).

49. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

ing brain damage and other harmful effects.⁵⁰ Thus, the theory goes, children benefited by these programs will not become permanent wards of the state.⁵¹

Of course, many persons would applaud the entire range of transfer payments to the poor as morally justified, wholly apart from the functional aspects of such a system. Others would condemn the system as encouraging shiftlessness and promiscuity, particularly with reference to aid to unwed mothers. More serious critics of the system suggest that an approach which discourages initiative and encourages dependency, without addressing the causes of the conditions necessitating the payments, is in itself harmful.⁵²

It may also be argued that such a system in fact *compels* its constituents to accept a state of dependency by penalizing those who choose to leave the system and by making work only marginally more rewarding.⁵³

Legislative drafters and executives cannot ignore such criticism. If this is compulsion, however, many governmental activities adopt the same approach. For example, an import duty on Japanese automobiles which raises their price to an American purchaser essentially penalizes that buyer if he chooses to purchase such an automobile.

This is a far different matter from *prohibiting* the purchase altogether, or *compelling* the purchase of a domestic automotive product in some manner. These are the types of compulsion which this essay addresses, particularly when backed by a criminal sanction or tangible penalty.

Even without aspects of compulsion, transfer payments obviously can have significant social and economic side effects which reach beyond their impact on indigent individuals. Social security payments which substantially exceed amounts paid in by the recipients during their working years may shift buying power dramatically. They may also encourage early retirement, which may in turn accelerate upward mobility of younger workers. Food stamps may actually increase the purchase of agricultural products.

Nevertheless, although transfer payments can have a profound

50. Private interview with Little Rock physician researching malnutrition on NIH grant.

51. The same point of simple cost effectiveness was applied to childhood immunization programs in a speech by U.S. Senator Dale Bumpers to the state convention of the Arkansas League of Women Voters, Conway, Arkansas, April 11, 1981.

52. *See, e.g.*, N. FRIEDMAN & D. ROSE, FREE TO CHOOSE 96 (1980).

53. *Id.* at 107.

social and economic impact, and obviously generate substantial differences in political opinion, they do not represent a significant departure from past practice. Transfer payments by and large simply do not involve any significant element of *compulsion* beyond the extraction of the tax and perhaps some minor features such as requiring merchants to accept food stamps.

B. *Societal Benefits: Compulsion and Compromise*

“Societal benefit” legislation takes on an entirely different hue when the element of genuine compulsion is added to it. For example, compulsory school attendance has been justified judicially.⁵⁴ However, it unquestionably involves a significant narrowing of the freedom of choice for parents and students, especially with regard to curriculum and teaching methods.⁵⁵ *Brown v. Board of Education*⁵⁶ and subsequent cases involve restoring a constitutional right and redressing a wrong. However, unless one accepts some notion of inherited guilt, transportation to achieve integration obviously involves persons only remotely connected to the original decisions which created segregated housing patterns and non-unitary school systems, many of which decisions were not wholly governmental.

Transportation of students simply emphasizes the fact that participation in compulsory education itself involves compulsion for larger social purposes. One of these purposes may reflect a decision that social, economic and racial heterogeneity is a desirable educational experience, whether or not constitutional remedies are involved.

Similarly, although it is difficult to argue with the need for sex education in a state having the nation’s highest venereal disease and teenage pregnancy rates, sex is obviously not like trigonometry or industrial arts. Algebra involves no personal judgments. Sex education as a part of compulsory school attendance plainly involves a collective judgment that such training is a value to society; hence, the compulsion is deemed justified.

The reasoning of *Griswold v. Connecticut*⁵⁷ could very easily be utilized to support the proposition that children, through their par-

54. See generally *Goodwin v. Cross County School Dist. No. 7*, 394 F. Supp. 417 (E.D. Ark. 1973).

55. See *Pegale v. Levison*, 404 Ill. 574, 90 N.E.2d 213 (1950), which required a curriculum substantially equivalent to that of the public schools in order for attendance at a private school to satisfy the Illinois compulsory school attendance law.

56. 347 U.S. 483 (1954).

57. 381 U.S. 479 (1965).

ents, should be able to opt out of such classes. The temptation is to analogize the situation to school prayer. However, the "chilling" effect in the school prayer cases⁵⁸ involves the specific constitutional prohibition against establishment of religion, whereas the extended right to privacy is a generalized right that could be more easily protected.

It is also possible to argue that, as with marriage, the purposes of the state and of the church can be separated with reference to sex education. The state can teach on a purely mechanical basis, instructing children how to avoid disease and pregnancy. The response, of course, is that abstinence avoids both problems.⁵⁹ In this area, separability without an opt-out provision would seem almost impossible to achieve.

Perhaps reversing the situation, blue laws have been justified by a societal need for a "day of rest."⁶⁰ However, the "day of rest" is imposed on buyers and sellers whether they want it or not. The element of compulsion is obvious to anyone who has ever tried to purchase a screwdriver in Arkansas on Sunday afternoon. The separability is also obvious. Those who wish to observe a day of rest (whether it is Saturday or Sunday) may do so on a voluntary basis, without the state imposing the choice of that day on society generally. Certainly no serious religious practitioner would claim that the sabbath is any less holy because others carry on some limited commercial activity.

C. *Societal Harm: Historical Precedents*

We have in the past undertaken to regulate private behavior on a vast scale. The most obvious historical example is the prohibition against the manufacture and consumption of alcoholic beverages.⁶¹ Prohibition may seem so distant in time and such an obvious failure that there is nothing to be gained from reconsidering it.

However, one lesson from the prohibition experience is very plain: Attempting to impose a control on personal behavior which lacks or fails to maintain widespread popular support is highly cost-ineffective. It takes a substantial amount of time, effort, and other

58. *Zorach v. Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

59. Brochure distributed by F.L.A.G.

60. *Broad-Grace Arcade Corp. v. Bright*, 284 U.S. 588 (1931).

61. U.S. CONST. amend. XVIII.

resources to police such legislation. As law enforcement resources are necessarily finite, one must question this type of effort.

In terms of popular support, it is also well to remember that even persons who are abstemious apparently vote in substantial numbers to legalize the public sale of liquor, even by the drink, presumably because they are reluctant to impose their own personal habits on others.

Of course, there are substantial legal controls over the sale and consumption of alcoholic beverages, principally laws prohibiting sales to minors, laws against driving while intoxicated, and laws against public drunkenness.⁶² Laws relating to minority are so widespread and have such obvious purposes that there is no real need to devote much discussion to them. The latter two categories, however, are significant because they deal with the *misuse* of alcohol as it poses a danger of injury to *third persons*.

In some ways laws relating to public drunkenness and alcohol addiction retain vestiges of the prohibition mentality.⁶³ Obviously, few of us are anxious to run across drunks in public, but there is a substantial difference between being offended by a person's condition and being injured by his automobile. One who spends a morning in a municipal courtroom observing the parade of derelicts stumbling through a succession of drying out sessions in jail and desperate periods of freedom must question the efficacy of the whole system, particularly in terms of deterrence.

In short, we retain a certain ambivalence. On the one hand, we do not wish to impose a complete prohibition on consumption or even make passive abuse a very serious crime. On the other hand, we still insist on making public drunkenness a criminal offense, perhaps because we object to the display of moral weakness.

Other forms of nonconstructive behavior also create similar feelings of ambivalence. Some of the reasons for controlling gambling are obvious and straightforward. Casino gambling is frequently linked with the activities of organized crime.⁶⁴ Yet wagering on horse or dog races is no less gambling than black jack or faro. Perhaps some emotional distinctions may be that the former activities are carried out in daylight (most of the time), outside

62. See, e.g., ARK. STAT. ANN. §§ 48-902.1, -903.1, -943 (1977); § 75-1027 (1979). It is also illegal to sell alcoholic beverages on Sundays, ARK. STAT. ANN. § 48-904 (1977), and on Christmas, ARK. STAT. ANN. § 48-950 (1977), but not on days of other religious observances which fall on other days of the week or year.

63. See generally *Powell v. Texas*, 392 U.S. 514 (1968).

64. Smith, *Showdown in Atlantic City*, 102 FORTUNE 72 (December 29, 1980).

(sort of), and have more of the trappings of a sport (as opposed to a game).

These are perhaps valid distinctions. But why are we uneasy about gambling at all? Who is the victim? Perhaps in some instances we wish to protect the individual from the professional gambler. Largely, however, as with alcohol, we are primarily seeking to protect the individual from his own indiscretions, from losing the weekly paycheck at the crap table. Nevertheless, it may be our ambivalence in both areas which allows the system to work.

As with discrimination, if we chose to deal with gambling in a legal way solely because it was morally offensive, the remedy would be complete prohibition. Because we approach it functionally, the result is compromise. After all, some gambling actually takes place in churches as the 1981 bill attempting to make church bingo legal recognized.⁶⁵

Prostitution bears certain resemblances to prohibition and gambling. As with drunkenness and compulsive gambling, the institution is unmistakably degrading in the eyes of most people; yet it is not universally criminal, either as to prostitute or to customer. There are some specific dangers posed by both the prostitute and the customer, primarily the transmittal of venereal diseases. The other supposed dangers are largely conjectural. While prostitution supposedly undermines marriage and the home, the argument may be made that it reduces the pressure on virtuous females to engage in premarital sex, forcibly or otherwise. Nevada is currently experimenting with legalized prostitution.⁶⁶ Apparently it is the only state in the union to do so, although elsewhere there exists the same official ambivalence toward prostitution as toward gambling and alcohol.⁶⁷

The use of marijuana and other "recreational" drugs poses still other problems. Marijuana in particular has been analogized to alcohol, with attempts to distinguish responsible and irresponsible use.⁶⁸ Nevertheless, it is difficult to draw many parallels between the use of marijuana and alcohol.

For example, although the medical effects of alcohol are fairly

65. S.B. 540, introduced in the 73rd General Assembly of the State of Arkansas, 1981, was passed by both houses, but vetoed by Governor White.

66. NEV. REV. STAT. §§ 201.380, .390, .410, .430, .440, 244.345 and 269.175 (1975).

67. L. KING, OF OUTLAWS, CON MEN, WHORES, POLITICIANS & OTHER ARTISTS (1980). See especially "The Best Little Whorehouse in Texas," at 86-109.

68. Platform of the Libertarian Party, 1980. See also R. Raico, Civil Liberties, Libertarian Party Position Paper No. 3 (1980).

well known, particularly at low levels of consumption, we do not yet know all there is to know about marijuana and chromosome damage, or for that matter, about hallucinogenic drugs and personality disorders.⁶⁹ We do know that marijuana has some legitimate medical uses, and its use in this regard may produce sufficient evidence to make intelligent legislative decisions.⁷⁰

We also know that addiction to hard drugs is debilitating and can be directly linked to violent crime, and that the traffic in hard drugs is a major mainstay of organized crime in the United States. We know that society has to deal with the victims of addictive drugs, although our experience with alcohol tells us that it does not do this very well, even if injuries to third persons caused by an intoxicated person fit relatively well within our traditional structures.

There may still be some room to argue that the use of marijuana is largely personal behavior in which the state has no substantial or direct interest. It may even have less potential to create a physical addiction than alcohol. However, it is difficult to make a serious argument in this regard with reference to the use of hard drugs and exotic hallucinogenics, which cannot be viewed as strictly personal behavior, because of the strong link to criminal behavior and dependency produced by physical debilitation.

Pornography perhaps poses more severe philosophical problems. It is degrading like prostitution, prone to criminal involvement like gambling, and yet controlling it poses problems similar to the prohibition of alcohol. Regulating pornography, like the control of alcohol, requires distinctions between responsible use and misuse.⁷¹

Of course, the central conflict in the area of pornography stems from the fact that self-expression is constitutionally protected under the first amendment. This has led to some rather absolutist positions. Mr. Justice Douglas, for example, believed that the courts are simply incapable of making any intellectually responsible distinction between pornographic works and those in which sex is incidental to the author's major purpose.⁷²

The real question is who is the victim. The continued high ratings of the "Dallas" television show to the contrary, a substantial number of people find pornography tedious, repetitive, and offen-

69. *Marijuana Today*, American Council on Marijuana (1980).

70. 1981 Ark. Acts 8.

71. ARK. STAT. ANN. § 41-3502 (1977).

72. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN*, 194-95 (1979).

sive. They feel victimized by having to look at dirty movie ads in the morning newspaper and listen to them on the radio, even though they do not attend the movies. The mere presence of pornographic material in the community causes them some discomfort. However, this is a fairly remote and intangible injury and one that is rather dangerous to deal with since a number of non-sexual ideas are also offensive to some people. The viewer or reader may arguably have his or her taste or moral sensibilities abraded, but our legal system tends to deal rather poorly with this sort of harm.

The problem is accentuated by the fact that public funds are expended on many levels to purchase books. Choices must be made, not only about which books should be bought, but about who should make those decisions. The future problems may not yet be fully appreciated. For years, libraries have not only checked out printed volumes, but also phonograph records and more recently tapes. With the advent of video cassettes and cassette players, the day is not far off when libraries will maintain significant motion picture libraries. The arguments over Henry Miller's *Tropic of Cancer* may pale by comparison.

But even with the printed word, our courts have historically had to try obscenity issues case by case in order to make decisions,⁷³ which in itself suggests a high degree of cost-ineffectiveness. Society may decide that the ends are worth the cost. In some instances, such as protection of minors and restraint of public displays to unwilling viewers, transaction costs may be relatively low. However, when the harm is remote and the victim is the customer, the benefits are questionable.

D. *Specific Issues—Deviant Sexual Behavior*

Sexual behavior is so undeniably personal and private that, as the *Griswold*⁷⁴ case points out, it has been an extremely difficult subject for a public instrument such as the law to deal with at all. This has been especially true with deviant sexual behavior. There is a general reluctance on the part of prosecutors and police officers to spend very much time and effort hassling homosexuals.⁷⁵

The original comprehensive Arkansas Criminal Code revision in 1975 dropped the subject almost entirely, and it is significant that the state's prosecuting attorneys had a very strong influence in draft-

73. See, e.g., *Redrup v. New York*, 384 U.S. 916 (1966).

74. 381 U.S. 479 (1965).

75. Skolnick, *Coercion to Virtue*, 41 SO. CAL. L. REV. 593 (1968).

ing the Code. The prohibition against homosexual behavior was placed back in the Code by action of the General Assembly, not the original drafters.⁷⁶ Again, if the activity is viewed as criminal, the question becomes one of identifying harms and victims.

It is simply not possible to generalize by saying that the law has always attached criminal penalties to behavior which offended prevailing moral standards, even if no victim or identifiable harm were involved. In this century, and in this state, the trend has certainly been away from governmental compulsion based on such standards, even in areas of high popular distaste.

In any event, it is difficult to view homosexuality as analogous to heterosexual infidelity; people who are genuinely heterosexual simply are not tempted to engage in homosexual activities merely because they think they can get away with it. It may be practiced in prison by persons who do not have a genuine homosexual orientation, but that is not a matter of choice.⁷⁷

Recent research indicates that circumstances resulting in a homosexual orientation either occur or do not occur in a person's development, and that the incidence of homosexuality is relatively constant from generation to generation.⁷⁸

Despite fears that the practice of homosexuality is rising, in all probability what is happening is that a larger number of persons who are in fact homosexual are taking less pains to conceal it than before. The result is increased visibility of a higher number of non-heterosexuals, rather than any actual numerical increase. In fact, present public tolerance (acceptance is too strong a word) of homosexuality appears feeble indeed when one considers the virtual glorification of the condition during certain periods of history, notably ancient Greece.⁷⁹

Yet, homosexuality causes stresses in the legal system apart from whether to treat it as criminal behavior. Should sexual orientation be a suspect category, such as gender or race, with reference to outlawing discrimination by government or by private parties? In part, the theory behind the prohibitions on gender and race-based discrimination is that these are conditions about which a person can do absolutely nothing, and hence, discrimination is particularly in-

76. ARK. STAT. ANN. § 41-1813 (1977).

77. See J. CHEEVER, FALCONER (1977).

78. See generally Durden-Smith, *Male and Female—Why?*, QUEST/80, 5 (October, 1980).

79. R. JENKYN, THE VICTORIANS AND ANCIENT GREECE (1980).

sidious.⁸⁰ Religious discrimination is prohibited by the first amendment and, perhaps more important, deals in matters of the spirit. Denying a person a job based on his religious convictions essentially gives economic considerations precedence over spiritual matters.

However, as basic as sexual behavior may be, it is neither a permanent condition, such as gender or race, nor a spiritual matter. It does not relate directly to constitutionally protected activities, such as freedom of speech and political thought. Protecting behavior which has no direct constitutional protection does represent a departure from the traditional legal approach and does intrude into personal preferences, although protective legislation in this regard is rare and probably can be expected to remain so.

On the other hand, if the research is correct and sexual orientation is essentially developmental, regulating homosexual behavior may simply be dealing with an outward manifestation of a condition which is virtually as permanent as gender or race. Nevertheless, until there is a showing that discrimination against non-heterosexuals in private housing, public accommodations, and employment is a significant economic problem for a substantial minority of the population, protecting *behavior* which is not constitutionally recognized in a positive sense, as opposed to status, would appear to be an unwise precedent. Such protection necessarily involves making a value judgment concerning the *behavior itself*, rather than the individual involved.

E. *Specific Issues—Abortion*

Moral legislation itself then tends to fall into three broad categories: (a) encouragement of desired behavior, such as the blue laws and flag-salutation situations, (b) regulation of self-destructive activities, such as gambling, drinking, and drug use, and (c) sex.

As noted, prostitution does not produce significant social conflicts because there is a general attitude of disapproval, combined with a certain ambivalence and tolerance which allows participation by those who favor the practice. State-regulated gambling and alcohol consumption provide similar outlets. Drug use may be an enormous problem, but not because of any conflict in basic values within society as a whole. Even homosexuality is tolerated within limits, perhaps because of an instinctive knowledge that it is not likely to become widespread for simple biological reasons.

80. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

However, abortion deals not only with sexuality, but with the beginnings of life itself. It was certainly inevitable that it would become the focus for much of the controversy concerning personal morality and the legitimate interests of the state.

*Roe v. Wade*⁸¹ attempted to fashion a compromise in line with American legislative and judicial tradition. Starting with the rationale of *Griswold v. Connecticut*, it reasoned that the first trimester of pregnancy was so wholly private that substantive due process would prohibit state interference. The second trimester warranted some limited state overview. However, reviving some of the notions of "viability," the Court viewed the third trimester as a period when the fetus could conceivably live without its mother, hence justifying its protection by the state.

However, *Roe v. Wade*, while striking a solution that seems relatively practical, does not dispose of the basic issues. In fact, its use of the concept of "potential" for life, as a corollary to its conclusion that a fetus is not a "person" under the law, created a problem in defining the state's interest in protecting that potentiality. In the Hyde amendment cases,⁸² Mr. Justice Stewart found "protecting potential human life" to be a legitimate governmental concern,⁸³ although the fetus has historically not been regarded as "alive" or as a "person" for other purposes. Causing a miscarriage may be a tort, but the gravamen is not ordinarily wrongful death. Inducing abortion may be criminal, but it is treated separately from murder in the ordinary sense.⁸⁴

The "potential" life approach may beg the question, an uneasy compromise between two points of view. The first view, perhaps the religious one, would consider the fetus as a human being from conception. The other would consider a "potential" nothing more than that, and certainly less than a person. For example, a fetus might be thought of as a passenger on a ship immigrating to a particular country. While he may be a "potential" citizen or resident of that country who could ordinarily be expected to become such barring interference, he is not treated as such until the potential is realized. He is not protected by the laws of that country until he actually arrives. If he is attacked or murdered on a non-flag vessel, the coun-

81. 410 U.S. 113 (1973). For an excellent discussion of the analytical underpinnings of Mr. Justice Blackmun's decision in this area, see Fuqua, *Justice Harry A. Blackmun: The Abortion Decision*, 34 ARK. L. REV. 276 (1980).

82. *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980).

83. *Harris v. McRae*, 448 U.S. 297 (1980).

84. ARK. STAT. ANN. § 41-2551 (1977).

try of his destination assumes no jurisdiction based solely upon his *potential* citizenship or residency. In this view, viability may have only slight relevance. It is not critical medically anyway, because the vast majority of abortions (induced and spontaneous) occur during the first trimester, before viability.⁸⁵

Analogy to euthanasia is not very helpful. Euthanasia plainly does not involve a mere potentiality—unlike the immigrant, the passenger has “arrived.” And care of the elderly can be transferred. Under present technology, pregnancy is non-transferrable—only its mother *can* carry and keep alive a fetus. Further, although it takes two persons to conceive the fetus, only one is forced to carry it.

It is equally inescapable that (1) sexual activity without some responsibility for the procreative results is not in itself a basic legal right in an affirmative sense,⁸⁶ and that (2) the potential to become a human being is plainly there. From the moment of conception, barring interruption of the pregnancy by biological or conscious decision, the potential is there to become a specific, genetically-recognizable human being. It is difficult to suggest that there are no serious moral questions with regard to abortion, or that the area should somehow be circumscribed and any ethical discussion eliminated.

It is also difficult to suggest that those questions are not different with every single potential abortion. It may be more comfortable to adopt a single answer for every situation, but distinctions are widely accepted between abortion in connection with rape, incest, and threats to life or health and abortion for mere convenience.

It may be argued that the ethical issue is one of individual responsibility when dealing with something as serious as the potential for human life. Couples may act in an entirely responsible and cautious manner, yet still be faced with an unwanted pregnancy. Surely, there is a moral distinction between this situation and a mere unwillingness to be bothered with birth control.

Additionally, biology cannot be ignored. At least one out of every six pregnancies results in spontaneous abortion.⁸⁷ (As for public attitudes, it is difficult to imagine that any advanced country would accept an infant mortality rate that high, yet we are seemingly not disturbed at all by the other statistic.) In most instances, the body determines that it simply *should not* carry the fetus to term

85. M. FISHBEIN, *MEDICAL & HEALTH ENCYCLOPEDIA* 32 (1964).

86. 34 ARK. L. REV. 276, 289 (1980); ARK. STAT. ANN. § 41-2554 (1977).

87. M. FISHBEIN, *supra* note 85.

because it is defective, because the mother is not strong enough, or because similar medical reasons are present. Should individuals be precluded from making the same sort of decisions, on a *conscious* basis—for example, when the pregnancy is an unexpected one in a woman whose age makes brain damage to the infant highly probable? The problem becomes more acute as technology enables expectant parents to know with considerable accuracy the health prospects of their unborn child.⁸⁸

In terms of medical ethics, what are the problems with prolonging and seeking to bring to term a pregnancy which the body itself would have decided (absent medical interference) to terminate?⁸⁹ The implications of the latter question are profound and are not only far beyond the scope of this essay, but beyond the abilities of the law to resolve. Self-righteousness on either side of the issue certainly obscures this point.

F. *Traditional Resolutions*

The answer to the problem of preventing this sort of societal harm is private, personal education. The solution is persuasion, not public, legal compulsion. For example, we may believe that it is immoral to bring children into the world and deny them love and attention, even if their physical needs are met. Yet, the state does not prescribe minimum standards of caring. We may be appalled at persons who place parents or handicapped children in institutions to meet their physical needs, and then ignore them, yet the state does not dictate a minimum number of visits.⁹⁰ While we may attempt to enforce the Biblical injunctions against activities such as killing, the law is simply not an effective instrument for mandating honor for fathers and mothers. As Dean Pound observes, the law is limited by “the intangibility of duties which morally are of great moment but legally defy enforcement.”⁹¹

*Roe v. Wade*⁹² is a striking example of a central American legal tradition, which is also inherent in our statutory approach to alcohol, gambling, and, to some extent, drug use, and consistent with our actual treatment of prostitution and pornography. That tradition has been to avoid an absolutist position where personal judg-

88. Chedd, *Who Shall Be Born?*, SCIENCE 81, 32, January/February, 1981.

89. See *When Doctors Play God*, NEWSWEEK, August 31, 1981, at 48.

90. See G. Will, *A Trip Toward Death*, NEWSWEEK, August 31, 1981, at 72, dealing with an institutionalized child suffering from Down's syndrome.

91. Pound, *supra* note 7.

92. 410 U.S. 113 (1973).

ments are concerned, but to structure or even contrive methods on a pragmatic basis to protect third persons, while insuring individual freedom from governmental compulsion. It is a tradition to be appreciated and protected.

VI. CONCLUSION

Attitudes toward transfer payments—how much, to whom, and if at all—vary widely. Such attitudes may be influenced by the party in power, and that party obviously may make a significant difference in the answers to these types of questions. Shifts in this regard occur as an established part of our political process. Ordinarily the shifts do not result in judgments about who is “deserving” of the benefits in an individualized way (despite such terms as “truly needy” and more recently “dependent poor”). Similarly, regulation of economic activity allows wide elasticity without fundamental structural damage.

In both instances, criteria are established in light of some perceived societal purpose such as relieving hunger or promoting economic growth. The intended result is usually to improve the whole society, even if the policies themselves may be radically different. The taxing mechanism is in this regard an enormous contrivance, almost wholly artificial, with inherent powers and purposes which extend far beyond the simple collection of money.

These shifts in transfer payments and regulatory zeal, however, impinge on *personal* ethical decisions only peripherally, if at all. The law does not handle moral questions well, and our experience and case law generally tell us to leave them alone, whether we are trying to encourage patriotism through compulsory flag salutes,⁹³ to discourage profligacy by limiting opportunities for gambling, or to promote conventional morality by proscribing certain sexual practices.

We have discovered, sometimes painfully, that we are better off distinguishing subversion from indifference, public lewdness from private consent, and drunken driving from the two-martini lunch. We can distinguish *tolerating* behavior which does not involve third parties and *sanctioning* that behavior because we have learned that dealing with private behavior can be highly cost-ineffective.

We can use our experience to judge legislation of all types by a four-part test:

93. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

1. Is the *general purpose* of the legislation to achieve a specific result with reference to the functions of society as a whole (especially in terms of economics or governmental mechanics)? Or is the purpose to promote a particular moral or religious notion?

2. Does that notion or purpose allow *compromise*? Or does it assume an *absolute* position or value judgment?

3. Is the restriction on behavior aimed at protecting a *specific right of another person*? Or aimed simply at the behavior itself?

4. Is the purpose to be achieved by encouraging or discouraging particular personal behavior? Or by *compelling* or *prohibiting* certain personal behavior?

If the principal aim is to promote a particular moral notion, the legislation should be closely examined in terms of prospects for acceptance and justifiable transactional costs. If the victim is hard to identify and the restriction substantial, closer scrutiny is justified. If the only identifiable victim is the perpetrator, the legislation should be considered seriously deficient.

Further, in protecting a right granted by legislation in a non-criminal setting, our tradition has rightfully been biased in favor of private enforcement. A legislative scheme which grants rights should also provide the mechanism for vindicating those rights in a meaningful, functional sense without peripheral value judgments.

This four-part analysis seeks consistency and stability rather than preconceived ideological results. The general discussion of various categories of laws suggests certain enactments which would be at least suspect under this approach. A detailed (but not exhaustive) listing might include:

- a. Compulsory school attendance laws;
- b. Mandatory sex education without a meaningful opt-out mechanism;
- c. Sunday closing laws;
- d. Laws regulating private, adult sexual behavior of all kinds;
- e. Mandatory school prayer, with or without opt-out mechanisms—that is, a government mandate that a certain time will be set aside for the opportunity for prayer in public schools;
- f. Laws preempting personal decisions with reference to abortion, specifically recent legislation placed before the Arkan-

sas General Assembly;⁹⁴

g. Governmental enforcement of equal employment opportunity cases;

h. Laws protecting personal behavior, as opposed to condition or belief;

i. Laws requiring or prohibiting the teaching of a particular subject or theory, such as Arkansas' creation-science law, which was admitted by its author to be religiously inspired;⁹⁵

j. Group libel laws.

Instead of approaching the law with preconceived political notions, we should try to analyze just what we are seeking to accomplish and the manner in which we are molding the law to those ends. We may find the results surprising and disturbing.

The same questions may not even always produce the same answers, as when evolving technology shifts cost-effectiveness calculations radically. For example, transfer of a fertilized ovum from one cow to another, which then bears the calf, is now a technical possibility. If such a procedure with human beings were to become as simple and as safe as a medically-supervised abortion, plainly the mother contemplating an abortion would be placed in a significantly different moral context than at present. The legal context would also be shifted radically, and the situation would begin to look very much like Justice Blackmun's third trimester, perhaps even from conception. One does not have to accept the idea of "situation ethics" to conclude that functionalism in the law produces no more absolutes than moralism, but does require periodic adjustments in response to changing contexts.

As Dean Pound suggests, the law has always been an instrument for enforcing particular views of society, and this century has witnessed the stresses and tensions of strongly different visions of the function of the law. However, the genius of American jurisprudence has lain in what may be termed its Augustinian tradition—its focus on functionality rather than ideology; its assumption of compromise and flexibility; its self-restriction to the ethical minimum described by Dean Pound; and a disinclination to compel or prohibit personal behavior.

The four-part test proposed by this essay does suggest answers to the four questions posed in its introductory passages. There has

94. H.B. 472 was introduced in the 73rd General Assembly of the State of Arkansas. It was referred to an interim committee.

95. See note 1 *supra*.

indeed been a trend toward increased transfer payments and entitlements, as a part of the liberal social agenda, yet this trend (and its apparent current reversal) represent a part of our traditional political process, and neither is a departure from it. The ebbs and flows of regulation of economic activity may be similarly classified.

Whether this particular agenda was or is appropriate, it simply has not involved significant compulsion of personal behavior. The attempts to reverse the substance of *Roe v. Wade* and to otherwise permit greater governmental latitude in regulating personal behavior *do* represent a conflict with traditional American functions of the law. There *are* fundamental, non-political differences between these types of legislation, and to argue that one is simply the political opposite of the other is to ignore history and embrace superficiality.

The four-part test is intended as an objective tool for analyzing legislative proposals, past and present, to determine their compatibility with that American, Augustinian tradition, and as a guide to lead us away from legislation—whatever its ideological origin—which departs from that tradition.

