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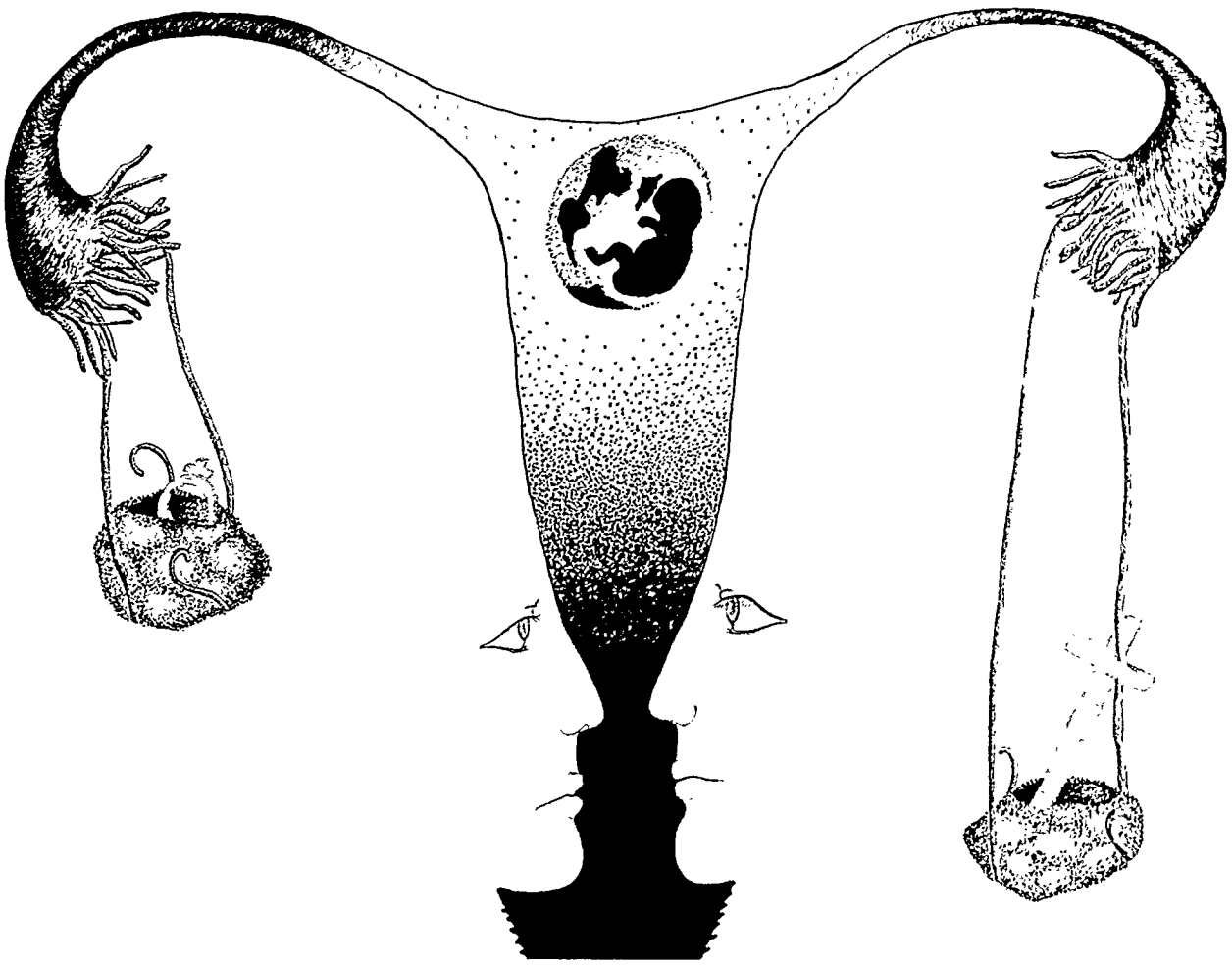

Carol Janufka

ABORTION, SOCIAL VALUES AND THE LIMITS OF LEGAL ANALYSIS: TOWARDS A SUBSTANTIVE RHETORIC OF LAW

Timothy W. Reinig*

I. A HOUSE DIVIDED

Every Kingdom divided against itself is
laid waste, and a divided household falls.
- Luke 11:17 -

There have been few instances in American history when the public has been more deeply divided over an issue as the American people are today over the issue of abortion. Encamped in opposition on either side of a legal dividing line established in *Roe v. Wade*,[1] the republic is experiencing something akin to the profound moral and legal angst which was at the root of the nation's battle over slavery during the Civil War. On the one hand, the fervor of moral sentiment held by the combatants on either side of the question is at a fever pitch, while on the other, the legal framework upon which the entire issue hangs is under siege. Both sides are willing to fight and sacrifice for their convictions, and both are willing to resort to acts of protest, confrontation and civil disobedience.

This polarization, and the depth of the division, has been markedly intensified since the United States Supreme Court in *Webster v. Reproductive Health Services*,[2] relinquished sole federal custody of the issue by submitting the debate to the legislatures of the several states. Since *Webster*, the politicians have finally come to acknowledge what the American public has known for some time: there is no safe middle-ground position on the issue of abortion rights. This epiphany on the part of the politicians has resulted in some rather amazing, if not altogether amusing, public policy gymnastics, as many elected officials attempt to avoid choosing sides in the abortion controversy. As one commentator has noted: "Abortion is a fine test of a politician's skill. Because it is a question of conscience with two clear, opposing positions, there's hardly a hedge to hide behind. Basically, you're on one side or the other."[3]

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1 410 U.S. 113 (1973) (finding that the right to privacy, as a penumbra of the guarantees of the Bill of Rights, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy).

2 492 U.S. ___, 109 S. Ct. 3020 (1989) (upholding the right of states to legislate a requirement that before performing an abortion on a woman twenty or more weeks pregnant, the physician must first determine whether the unborn fetus is viable; state legislatures now appear to have some degree of power to control the incidents of abortion rights).

3 Weisberg, *Abortion Olympics*, THE NEW REPUBLIC 12-13 (Feb. 12, 1990) (humorous account of politician's attempts to avoid picking a side in the abortion debate). The experience in the United States recently emerged in Germany, where politicians and lawyers negotiating for unification were unable to find an acceptable compromise between the restrictiveness of West German abortion law and the legal access in East Germany. *See* Simons, *A Divisive Issue of German Unity: How to Reconcile Abortion Laws*, N.Y. Times, July 19, 1990, at 1 (nat. ed.).

Legal scholars also have demonstrated a remarkable ability to assume some rather contorted positions in an effort to resolve the abortion problem. Both "pro-life" and "pro-choice" lawyers alike have reached back into our common law past in an attempt to force a resolution of the abortion question. This approach, no doubt, is due to the fact that lawyers feel themselves constrained to operate in the narrow fields of "precedent" and "stare decisis." The results, however, are not unlike trying to screw a round peg into a square hole.

II. NEW WINE INTO OLD WINESKINS

No one puts new wine into old wineskins;
if he does, the wine will burst the skins, and the
wine is lost, and so are the skins; but new wine
is for fresh skins.
- Mark 2:22 -

The United States Supreme Court's decision in *Roe v. Wade* precipitated a national value conflict of the first order over the nature and meaning of human existence. Specifically, *Roe* raised questions concerning the value of fetal life. For those opposed to abortion, fetal life is "human" life, i.e., an individual human person with rights co-extensive with, or superior to, those of the pregnant woman, such that the woman should be morally and legally obliged to carry the fetus to term. For those who support abortion, however, fetal life is not "human" life in the sense that the fetus is a "person." The fully-realized human personhood of the woman is a value superior to that of the dependent and merely potential personhood of the fetus, such that the realization of that potentiality should not be required of a woman who chooses otherwise.[4]

With these philosophical positions rather well-entrenched, the legal question for the advocates of each perspective became not one of how do we as a society reach an understanding of what "human" life and "personhood" means, but rather one of how law can be used to pursue and impose a particular view of the issue on society. In order to

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[4] There are a number of exemplary sources which the reader may consult for a fuller exposition of these two positions. For a "pro-life" moral treatment of the subject see J.T. NOONAN, THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES (1970); *see also* C.C. GRISEZ, ABORTION: THE MYTHS, REALITIES, AND THE ARGUMENTS (1969); ABORTION: CATHOLIC PERSPECTIVES (J. Garvey & F. Morris eds. 1979); NEW PERSPECTIVES ON HUMAN ABORTION (T.W. Hilgers, D.J. Horan & D. Mall eds. 1981); Noonan, *Deciding Who is Human*, 13 NATURAL LAW FORUM 135 (1968).

For a "pro-choice" moral perspective see Warren, *On the Moral and Legal Status of Abortion*, 57 THE MONIST 1 (1973); *see also* Thomson, *A Defense of Abortion*, in THE PROBLEM OF ABORTION (J. Feinberg ed. 1984); *cf.* Finnis, *The Rights and Wrongs of Abortion: A Reply to Professor Thomson*, in PHILOSOPHY AND PUBLIC AFFAIRS (1973). For analysis of actual versus potential "human" life see Feinberg, *Potentiality, Development, and Rights*, in THE PROBLEM OF ABORTION (J. Feinberg ed. 1984). *See generally* P. SINGER, PRACTICAL ETHICS (1979) (especially ch. 6); M. TOOLEY, ABORTION AND INFANTICIDE (1983); Feinberg, *Abortion*, in MATTERS OF LIFE AND DEATH, (T. Regan 2d ed. 1985).

accomplish this goal of advocacy, both sides have attempted to use common law doctrinal formulations as logical and legitimate ways of funneling the law in the direction of their particular value choice. The analytical maneuvering required to make these old legal formulations accommodate new legal problems both strain the doctrines to the breaking point and fail to address the social value conflict underlying the issue.

A. Justification

After *Roe* was decided, "pro-life" activists took to the streets. In order to combat what they saw as an immoral activity, "pro-life" legal scholars launched a two-prong attack on *Roe*. The first assault was to directly challenge the Court's finding that the text of the Constitution provided any right to an abortion.[5] This position was argued for by the lawyers using philosophical appeals to the "original intent" of the Framers, coupled with an ideological denunciation of "activist" liberal jurists.[6] The second was to craft a common law

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[5] *See, e.g., Roe*, 410 U.S. at 221-22 (White, J., dissenting) in which Justice White criticized the result in *Roe* stating:

> I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

Id. See also R.H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 111-16 (1990). In commenting on the majority opinion of Justice Blackmun in *Roe*, Bork states that, "in the entire opinion not one sentence qualifies as legal argument. [T]he right to abort, whatever one thinks of it, is not to be found in the Constitution." *Id.* at 112.

[6] *See, e.g.*, R.H. BORK, *supra* note 5. Bork fervently denounces what he sees as a major "heresy [that] has entered the American constitutional system," *id.* at 4, a belief that "the ratifiers' original understanding of what the Constitution means is no longer of controlling, or perhaps of any, importance. *Id.* at 6. This is the fault, according to Bork, of an uncontrolled activist (read "liberal") judiciary. Quoting Justice Story, Bork argues that "[t]he first and fundamental rule in the interpretation of all instruments is to construe them according to the sense of the terms, and the intentions of the parties." *Id.* Bork concludes that, "[o]nly by following that rule can our unelected guardians save us from themselves. Only in that way can the foundation of our freedoms, the separation of powers, be kept intact. Only so can judicial supremacy be democratically legitimate." *Id.*

Bork follows Professor Henry Monaghan of Columbia University who has written that "the relevant inquiry must focus on the public understanding of the language when the constitution was developed." *See* Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725-27 (1988). *See also* Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853 (1989). Thus, Bork argues:

> Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would

legal defense of the attempts by "pro-life" activists to forcibly prevent women's health facilities from providing abortions and, thereby, promulgate the social values of the anti-abortion position. An exemplary case from the State of Pennsylvania provides an excellent illustration of the limits of this approach to law for resolving social value conflicts.

i. Commonwealth v. Markum

In *Commonwealth v. Markum*,[7] the appellant-defendants had been convicted of defiant trespass for forcible entry into an abortion clinic as part of an anti-abortion demonstration.[8] Abortion protests, as a national phenomenon, became evident during the 1970s and had since become highly organized and visible.[9] Having pushed their way into the Northeast Women's Center in Philadelphia, the defendants occupied several rooms, damaged two aspirators and other medical instruments, and threw equipment out of a third

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> have understood the words to mean. It is important to be clear about this. The search is not for a subjective intention. If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest. Nor would the subjective intentions of all the members of a ratifying convention alter anything.

R.H. BORK, *supra* at 144.

The belief that a text will yield its inherent and objective truth through application of a quasi-scientific hermeneutical method of inquiry, such as original intentionalism, has been forcefully critiqued. *See* H.G. GADAMER, TRUTH AND METHOD 173-242 (J. Weinsheimer & D. Marshall trans. 2d rev. ed. 1989). For other important works on this topic by Gadamer see DIALOGUE AND DIALECTIC (P.C. Smith trans. 1980); PHILOSOPHICAL HERMENEUTICS (D. Linge ed. trans. 1976); THE RELEVANCE OF THE BEAUTIFUL AND OTHER ESSAYS (R. Bernasconi ed., N. Walker trans. 1986); *The Problem of Historical Consciousness*, 5 GRADUATE FAC. PHIL. J. 1 (Fall 1975)(J. Close trans.); *The Continuity of History and the Existential Moment*, 16 PHIL. TODAY 230 (1972)(T. Wren trans.). As one theorist has commented:

> A fundamental hermeneutical tenent is that there is no such thing as the "text-in-itself," independent of any particular reading or interpretation. As a result, hermeneutics does not have the same problem as epistemology with the question whether there are mind-independent "things-in-themselves." A text only comes to be in reading, that is, in an act of understanding and interpretation.

D. HOY, THE CRITICAL CIRCLE: LITERATURE, HISTORY, AND PHILOSOPHICAL HERMENEUTICS 143 (1978); *see also* Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 199 (1985); S. FISH, IS THERE A TEXT IN THIS CLASS? 347-54 (1980) ("Strictly speaking, getting back-to-the-text is not a move one can perform, because the text one gets back to will be the text demanded by some other interpretation and that interpretation will be presiding over its production.").

For further sources on this topic see Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Bennett, *Objectivity in Constitutional Law*, 132 in U. PA. L. REV. 445 (1984); Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U. L. REV. 204 (1980); McIntosh, *Legal Hermeneutics: A Philosophical Critique*, 35 OKLA. L. REV. 1 (1982).

[7] 541 A.2d 347 (Pa. Super. 1988).

[8] *Id.* at 347. Sentences consisted of a one day to three months term of imprisonment. Appeals were consolidated pursuant to court orders. *Id.* at n.1.

[9] *See* Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 CIN. L. REV. 501-02 (1979).

floor window. They placed "pro-life" stickers on the doors, walls and ceilings, and after refusing several requests by the center's staff to leave, the defendants were finally arrested and carried away from the center by the police.

At a hearing on preliminary motions, the defendants' attorneys sought to make an offer of proof in support of a claim that they be allowed to present a common law defense of justification. Ruling against their motion, the judge certified the issue for interlocutory appeal. The Superior Court denied the appellants' petition and remanded the case for trial. At trial, the jury returned guilty verdicts for the defendants, who were then sentenced and paroled.[10] Following a denial of post-trial motions, the appellants filed an appeal with the Superior Court of Pennsylvania. The sole issue raised on appeal was whether the trial judge erred in not permitting the appellants to present to the jury the defense of justification.

The common law doctrine of justification concerns a defense of conduct, which would otherwise lead to civil or criminal liability, as being "justified" because it is desirable in circumstances where a situation forces an individual to choose between obeying the law or breaking it in order to avoid a greater harm.[11] The appellants argued that the defense should be available to them in as much as abortion constitutes a public disaster,[12] that the disaster was imminent and their actions were effective in averting it,[13] and that there were no legal alternatives to their actions.[14] The Superior Court split three ways, but held that the appellants' offer of proof was insufficient to satisfy a four-part test for the determination of whether a defense of justification will lie, and consequently affirmed the judgment below.[15]

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[10] *Markum*, 541 A.2d at 348. Defendants were put on parole following sentencing conditional on each serving 50 hours of community service, none of which was to be served in a "pro-life" agency. Each was to refrain from future trespass on medical facilities that perform abortions.

[11] *See generally* Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289 (1974). Although the defense is subjective as to the facts, it is objective as to values. The action chosen must be the lesser evil. *See* G. WILLIAMS, THE CRIMINAL LAW § 229, at 722 (2d ed. 1961); *infra* note 16.

Many anti-abortion protesters claim that under the justification defense they are not liable for their acts of trespass. Although a majority of courts have rejected the defense as a matter of law, a number have permitted it. Many local courts have faced the issue but, because most of these cases happen at the county level, they usually go unreported. Thus, the rationales in deciding them remain for the most part unknown, and it is difficult to generalize concerning any legal consensus. Many of the cases seem to be decided on a case by case basis. *See* Note, *Necessity as a Defense*, *supra* note 9, at 502.

[12] *Markum*, 541 A.2d at 350.

[13] *Id.*

[14] *Id.* at 351.

[15] *Id.* at 352.

a. The Majority Opinion

The majority for the court cited that in Pennsylvania the common law doctrine of justification has been codified in statute[16] and interpreted by the Pennsylvania Supreme Court. In order for a defendant to successfully invoke justification, the offer of proof for the defense must come within the ambit of a four-part test enunciated by the state's Supreme Court in *Commonwealth v. Capitolo* [17] and elucidated in *Commonwealth v. Berrigan.*[18] The *Capitolo-Berrigan* test mandates that a defendant must meet a minimum standard for each element of the defense. If evidentiary support is deficient for even one element, the trial court has the right to deny use of the defense.[19]

The test requires an offer of proof which establishes: (1) that the actor was faced with a public disaster that was clear and imminent, not one which is debatable or speculative; (2) that the actor could reasonably expect that the actor's actions would be effective in avoiding the immediate public disaster; (3) there is no legal alternative which will be effective in abating the immediate public disaster; and (4) that no legislative purpose exists to exclude the justification from the particular situation faced by the actor.[20]

In applying the *Capitolo-Berrigan* test, the majority held that the appellants' offer of proof was insufficient as a matter of law for each element of the defense. As to the first, since pre-viability[21] abortions are lawful under applicable state[22] and federal laws,[23] the majority failed to see how a legally permissible activity could be termed a "public disaster." Consequently, the appellants' contention that a disaster was "imminent" was rejected. Secondly, the appellants were not "reasonable" in their belief that their brief occupation of the center would end the practice of abortion in Pennsylvania, or that their activity was effective in averting it. Thirdly, the majority refused to be persuaded that the appellants had no legal alternative to their actions since they were free to demonstrate peaceably outside the center.

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[16] 18 PA. CONS. STAT. ANN. §§ 501-510 (Purdon 1983). Pennsylvania's codification of the justification defense has been influenced by MODEL PENAL CODE § 3.02 to the extent that no restrictions are put on the source of the threatened harm. This is contrary to the common law requirement that the harm must come from non-human forces. However, the statute does adhere to the common law principles that the defense arises only in extraordinary circumstances and that the harm avoided must outweigh the harm done. *See* Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 916 (1975); *cf.* Tiffany & Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DENVER L.J. 839, 841-42 (1975).

[17] 508 Pa. 372, 498 A.2d 806 (1985).

[18] 509 Pa. 118, 501 A.2d 226 (1985).

[19] 508 Pa. at 378, 498 A.2d at 809.

[20] 509 Pa. at 124, 501 A.2d at 229.

[21] Viability has been defined as that point at which a fetus "is potentially able to live outside the mother's womb albeit without artificial aid." Roe v. Wade, 410 U.S. 113, 160 (1973).

[22] Pennsylvania Abortion Control Act, 18 PA. CONS. STAT. ANN. §§ 3201 *et seq.*

[23] *Roe, supra* note 21; Doe v. Bolton, 410 U.S. 179 (1973).

Finally, the majority found the appellants' offer of proof that no legislative purpose existed to exclude the defense of justification unconvincing. Based on their reading of Pennsylvania's Abortion Control Act,[24] which was legislated in response to *Roe v. Wade*,[25] the majority concluded that the appellants' contention that equal protection of the laws should be extended by the state to an unborn fetus would be legally permissible only if by doing so the Federal Constitution would not thereby be violated. Since acts which seek to prevent women from exercising their constitutional right to an abortion are violative of federal law, state law, which was legislated in order to protect and enforce that right, would also be violated. Therefore, a legislative purpose may be seen to exist which would deny the appellants a defense of justification.

The majority was impressed by the fact that the appellants were seeking to prohibit legal conduct. Even if proscribed post-viability abortions that did not fall under narrow exceptions were being performed at the center, the appellants would nevertheless be pre-empted from taking action since law enforcement personnel acting under color of state law are duly charged to intervene.[26] The majority concluded that the appellants were actually seeking status as conscientious objectors. However, they refused to give cognizance to this proposition and distinguished the appellants' violence from the nonviolent methods of historical acts of civil disobedience.[27]

b. The Concurring-Dissenting Opinion

The concurring-dissenting opinion, in applying the *Capitolo-Berrigan* test, held that the appellants' offer of proof was insufficient as a matter of law only with respect to the fourth element of the test. Noting that the state's Abortion Control Act was legislated in response to *Roe v. Wade*,[28] the opinion concurs that, under the fourth point of the test, the appellants were precluded from presenting a defense of justification. However, dissenting from the majority, the judge found that the appellants had surmounted the first three prongs of the test.

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[24] Pennsylvania Abortion Control Act, *supra* note 22, at § 3202(c).

[25] *See Roe*, 410 U.S. at 160.

[26] Pennsylvania Abortion Control Act, *supra* note 22, at § 3201.

[27] Nonviolent acts of civil disobedience have been upheld in rulings of the U.S. Supreme Court. *See, e.g.*, Garner v. Louisiana, 368 U.S. 157 (1961); Peterson v. City of Greenville, 373 U.S. 244 (1963); Bell v. Maryland, 378 U.S. 226 (1964). Generally, however, courts react unfavorably to attempts by defendants to extend the justification defense to cover civil disobedience. *See* United States v. Cullen, 454 F.2d 386, 392 (7th Cir. 1971)("One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. [Defendant's] professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate."); *see also* United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969); United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972); *cf.* Arnolds & Garland, *supra* note 11, at 299-301; Tiffany & Anderson, *supra* note 16, at 843-44.

[28] *See supra* notes 24 and 25.

Without explanation, the opinion declares that, "The disaster . . . was the abortions . . . . [which were] imminent."[29] Secondly, the appellants' actions "would have been quite effective" if they were able to prevent women from entering the center.[30] And thirdly, the opinion states, "And, of course, appellants had no legal alternatives available."[31]

The opinion notes that recent advances in medical technology are serving to undermine the trimester approach established in *Roe*. Thus, as Justice O'Connor remarked in her dissent in *Akron v. Akron Ctr. for Reproductive Health*:

> As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved farther back toward conception. . . . The *Roe* framework is inherently tied to the state of medical technology. . . . Even assuming that there is a fundamental right to terminate pregnancy . . . there is no justification in law or logic for the trimester framework adopted in Roe.[32]

Because a state "may, if it chooses, regulate or even proscribe abortion"[33] after a fetus is "viable,"[34] the concurring-dissenting opinion exhibits a tension between loyalty to the law as written in *Roe* with its underlying trimester framework, and the implications that are raised in light of the recent advances in medical technology for the valuation of fetal life. Consequently, the opinion urges that the United States Supreme Court reconsider its decision in *Roe*.[35]

c. The Dissenting Opinion

Following the reasoning of Justice O'Connor in her dissenting opinion in *Akron v. Akron Ctr. for Reproductive Health*,[36] the dissent argued that the viability of a fetus has been significantly advanced by medical technology in the years since the United States

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[29] *Markum*, 541 A.2d at 353.

[30] *Id.*

[31] *Id.*

[32] 462 U.S. 416, 458-59 (1983)(O'Connor, J., dissenting).

[33] After viability, a state "may, if it chooses, regulate or even proscribe abortion except where it is necessary [to preserve] the life of the mother." Roe v. Wade, 410 U.S. at 164-65.

[34] *See supra* note 21.

[35] *Roe*, 410 U.S. at 160. If the right to privacy announced in *Roe* is about the right not to be a mother, shifting viability isn't an issue. But the fact that *Roe* drew a viability line suggests that the privacy right recognized in *Roe* is about the right not to be pregnant, not the right not to be a mother. Viability, however, varies from fetus to fetus and is extremely difficult to pinpoint. Significantly, the Court has held, "[I]t is not the proper function of the legislature or the courts to place viability [at] a specific point in the gestation period. ...[T]he determination of whether a particular fetus is viable [must be] a matter for the judgment of the attending physician." Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 64 (1976); *cf.* King, *The Juridicial Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1679-81 (1976).

[36] 426 U.S. 416, 458-59 (1983)(O'Connor, J., dissenting).

Supreme Court decided *Roe v. Wade*.[37] Because the medical standards applied in *Roe* are no longer applicable for the determination of viability, a state interest in protecting fetal life may be implicated depending on medical evidence at the time the issue of viability is raised. Therefore, the defense of justification should be available to persons attempting to protect or save a fetus capable of surviving under advanced medical standards.[38]

The dissent further argued that it should not be assumed that only abortions in which the fetus could not be viable under advanced medical technology are performed at the center. In denying the appellants a right to pursue the defense of justification, the court precluded them from attempting to offer proof of viability under both the already established parameters of *Roe* as well as that in light of advanced medical technology. However, recognizing that a higher court must rule on the right to intervene under new evidence on viability, the dissent implicitly asks for a reconsideration of *Roe* by the United States Supreme Court.

ii. Evaluation of the Case

The common law doctrine of justification is subjective as to facts, but is objective as to values. A course of action chosen by a defendant must be the lesser evil.[39] The appellants in *Markum* argued that they made the correct value choice. The harm they sought to prevent, the destruction of fetal life, was greater than the harm they committed in criminal trespass. While a few courts have agreed with such assertions, a majority of courts have not.[40] *Markum* is remarkable to the extent that it reflects this tension among courts.

The majority opinion is solidly in the camp of those courts which have rejected the justification defense, while the dissenting opinion is aligned with those decisions reflecting the rationale of the minority rule. The concurring-dissenting opinion, by having a foot in each camp, reflects the tension resulting from the absence of a clear legal consensus on how to weigh the conflicting values presented in *Roe* with respect to its intent on the one hand, and its underlying viability standard on the other.

Because the United States Supreme Court has recognized that a woman has a fundamental right to decide to terminate her pregnancy,[41] the majority of courts have rejected the justification defense based on the legal status of abortion. In balancing the alleged harm of abortions against those of trespass, courts have concluded that where

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[37] *See Roe*, 410 U.S. at 160; *see also supra* note 35 for a discussion of the significance of shifting viability.

[38] The dissent dismissed the *Capitolo-Berrigan* test as inapplicable by distinguishing the facts of the case at bar from those upon which the test was erected. Whereas in those cases the danger to life was not imminent and there were no specific individuals who could be identified as being in danger, nor could the protester's actions be effective in avoiding the greater harm, abortions are entirely different if the appellants produce evidence that viable fetuses are being terminated at the center in violation of both *Roe* and state law. *Markum*, 451 A.2d at 354, 356.

[39] *See* G. WILLIAMS, *supra* note 11.

[40] *See* Note, *Necessity as a Defense*, *supra* note 9.

[41] *Roe*, 410 U.S. at 160.

trespass interferes with a fundamental constitutional right, trespass is the greater harm.[42] The doctrine of justification seeks to exonerate action which a consensus in society would find compelling.[43] Thus, a trespass which interferes with a constitutional right falls outside this domain.[44]

While courts following the minority rule concede, as do the concurring-dissenting and dissenting opinions, that a woman currently has a constitutional right to an abortion, that right is circumscribed at viability.[45] Whenever that point occurs,[46] the state has a compelling interest in protecting fetal life. The value inherent in viability is greater than any harm that results from mere trespass. Given an offer of proof as to viability under advanced medical standards, the defense of justification should lie in order to protect the higher value of fetal life.[47]

Although anti-abortion protesters are motivated by their moral sensibilities, in the legal sphere the conflict is centered on the absence of a clear legal consensus. Because steady advances in medical technology continue to result in shifting viability farther back toward conception, an objective valuation of fetal life becomes even more problematic than the trimester approach in *Roe* assumed it would be. Without a societal and legal consensus on how to value such life, especially considering that eventually a point will be reached where even medical science will be unable to provide for the separate existence of a fetus from a woman, the common law doctrine of justification simply will not work in the abortion context.

The doctrine requires that the value sought to be preserved be capable of objective analysis; it cannot be debatable or speculative. The split opinions in *Markum* mirror the extent to which American society has not reached a consensus on the value of fetal life. Thus, a reliance on the doctrine of justification by "pro-life" activists as a means for resolving the abortion conflict is misconceived, for the doctrine seeks to exonerate only those actions which a consensus in society would agree are compelling.[48] Since the value of fetal life is the central issue in the abortion controversy, the common law doctrine of justification is ultimately inapposite to a resolution of the problem.

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[42] *See* Note, *Necessity as a Defense*, *supra* note 9, at 514, 515.

[43] "The boundaries of privilege are marked out by current ideas of what will most effectively promote the general welfare." W. PROSSER, THE LAW OF TORTS § 16, at 98 (4th ed. 1971).

[44] *See* Note, *Necessity as a Defense*, *supra* note 9, at 514, 515.

[45] *See supra* note 33.

[46] Viability varies from fetus to fetus and is extremely difficult to pinpoint. Significantly, the Court has held, "[I]t is not the proper function of the legislature or the courts to place viability [at] a specific point in the gestation period. ...[T]he determination of whether a particular fetus is viable [must be] a matter for the judgment of the attending physician." Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 64 (1976); *cf.* King, *The Juridicial Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1679-81 (1976).

[47] A person may trespass to protect life. *See, e.g.*, Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908).

[48] *See supra* note 43 and accompanying text.

B. The Good Samaritan

The most recent "pro-choice" use of a common law doctrine in defense of abortion rights is offered by Professor Laurence H. Tribe[49] in his latest book, *Abortion: The Clash of Absolutes*.[50] Tribe begins his argument by pointing out that even if the right to an abortion is not to be found in the literal text of the Constitution, if any unenumerated liberty interests are protected by the 14th Amendment as fundamental ones, a woman's bodily integrity, and thereby the right to abort, involves a fundamental liberty that the state cannot infringe upon without a compelling reason.[51] He supports this position with an equal protection analysis, an argument not applied in *Roe*, grounded in the fact that laws restricting abortion directly burden only women.[52]

Tribe then goes on to address the question of whether or not laws against abortion would be justified based on a compelling state interest in the protection of fetal life.[53] He argues that, *even if* the fetus is a "person," women's autonomy interests require abortion rights.[54] The "even if" argument which Tribe employs opens the door to a possible understanding of the fetus as a legal "person." However, although Tribe uses this rationale, he dismisses the argument that the fetus could be a "person" as that word is used in the Federal Constitution because that would carry with it "consequences for which no one seems willing to argue,"[55] such as that fetuses cannot be treated differently from any other child under the 14th Amendment's equal protection clause[56] or that fetuses must be treated as equivalent to the pregnant woman in balancing whether or not a woman may abort when the pregnancy presents a high risk of causing her death.[57]

In order to effectuate this balance between the woman's autonomy and the fetus' potential status as a "person," Tribe defends abortion rights by reaching back into Anglo-American common law for the "Good Samaritan" doctrine.[58] The Good Samaritan doctrine provides that there is no general duty to give of yourself in order to rescue another person. Thus, "even if" the fetus is a "person," this no-duty-to-help rationale overrides any state interest in fetal life because that interest does not justify compelling the profound

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[49] Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School.

[50] L.H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).

[51] *Id.* at 104.

[52] *Id.* at 105.

[53] *Id.* at 114.

[54] *Id.* at 129-35.

[55] *Id.* at 125.

[56] *Id.* at 124. *See also* Tribe, *Foreward: Toward a Model of Roles in the Due Process Of Life and Law*, 87 HARV. L. REV. 1, 32-33 n.144 (1973) (in which Tribe proposed that there is a justification for treating non-viable fetuses, whether or not they are considered "persons," differently than infants, because "their destruction can be prevented only at the cost of a vastly greater imposition on other persons (*i.e.*, the women who carry them) than is required for the protection of infants" *Id.*).

[57] L.H. TRIBE, *supra* note 50, at 122.

[58] *Id.* at 130-33.

connection and physical risks associated with pregnancy and childbirth.[59] As an example to illustrate the extent of the no-duty-to-help doctrine, Tribe points out that a father cannot be legally compelled to give a part of his liver or one kidney to his child, even if the father is the only potential donor with compatible tissue.[60] Tribe sees no reason for treating the relationship between a pregnant woman and a fetus any differently.

There are serious problems with employing the Good Samaritan doctrine in the abortion context, problems of which Tribe himself is fully aware. In his constitutional law treatise,[61] although not in this book, Tribe refers to two difficulties with legal analogies drawn between the law of abortion and no-duty-to-help principles in tort law, difficulties which have been fully explored by other legal scholars.[62] The first is that the common law made a distinction between acts and omissions.[63] In order to use the Good Samaritan doctrine in the abortion context, common law would require that an abortion be characterized as an omission, a refusal to help or sustain the fetus, rather than as an affirmative act causing harm in its termination.[64]

The second, and perhaps most serious flaw in the no-duty-to-help argument, is that the common law developed numerous exceptions to the general rule, actually creating a duty to help in certain circumstances, wherever there existed: (1) a relationship of dependence and power; (2) a breach of a duty undertaken; or (3) a "special relationship," including that of a parent and child.[65] All of these situations, which give rise to an exception to the Good Samaritan doctrine, are arguably analogous to that of a pregnant woman and a fetus.

Lastly, a third difficulty with the no-duty-to-help rationale under common law is that it has been increasingly and repeatedly criticized as questionable social policy,[66] in particular by "pro-choice" feminists who point out that such a perspective fails to incorporate relational morality and an ethic of care.[67]

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[59] *Id.* at 103, 129-130.

[60] *Id.* at 133, 210.

[61] L.H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1354-57 (2d ed. 1988).

[62] *See, e.g.*, Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1617 (1979).

[63] *See* L.H. TRIBE, *supra* note 61, at 1573; *see also* L.H. TRIBE, CONSTITUTIONAL CHOICES 244-45 (1985) (in which Tribe refers to the problems of the act-omission distinction).

[64] *See* Regan, *supra* note 62, at 1573-79.

[65] *See* W. PROSSER & W. KEETON, THE LAW OF TORTS 373-77 (5th ed. 1984). However, one can argue that even when there is a duty to help, ordinarily the duty only requires that persons take actions which do not involve the threat of serious inconvenience or the possibility of harm to themselves and that thereby the Good Samaritan doctrine might be arguably applicable to the abortion context. *See* M. SHAPO, THE DUTY TO ACT: TORT LAW, POWER AND PUBLIC POLICY 69 (1977).

[66] *See, e.g.*, M. Shapo, *supra* note 65, at xii-xiii, 70-73 (analyzing failures to act in terms of power to give aid); Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769, 790-93 (arguing that distinguishing "harm" from "failure to help" depends on "political attitudes and empirical guesses," and that deciding when there should be a duty to help depends on where one stands on the libertarian-to-communitarian spectrum).

[67] *See, e.g.*, Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. L. ED. 3, 33-36 (1988). Many feminists argue that women's cooperative morality is superior to men's rule-governed morality, which is based on personal autonomy and notions of individuality. *See, e.g.*, C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) ("While an ethic of justice proceeds from the

C. The Limits of Legal Analysis

Legal analogies to common law doctrines do little more than attempt to advance the explicit public positions adhered to by each side in the abortion controversy. Instead of addressing and resolving the underlying and broader social conflict of deeply felt values which each side is fighting for,[68] the old common law formulations merely point out the degree to which obligations in law reflect, and are part of, the social construction of those obligations under various circumstances in which the shared collective values of a community are at issue. Because the underlying social values concerning abortion are in conflict, legal analogies drawn to or within a tradition-regimented and deductivist approach to jurisprudence will not resolve the question of whether a pregnant woman should have a legal obligation to continue a pregnancy to sustain a fetus.

Law in our society has been effectively reduced to two features: policy choices and techniques for their implementation. Thus, our questions have become: "What do we want?" and "How do we get it?" Law so conceived is dependent upon a bureaucratic model, a set of rules set within a larger set of institutions and processes, with "[t]he overriding metaphor . . . that of the machine; the overriding value . . . that of efficiency, conceived of as the attainment of certain ends with the smallest possible costs."[69] However, because the practice of law takes place in a specific cultural and social context, lawyers must constantly respond to the actual, and often novel, problems of others in society, problems which are frequently fraught with conflict and division. By using the law and the legal system as an intervention between litigants, lawyers consequently enter into both the cultural and social context, as well as the dispute between the parties.

If law is going to provide any relevant and meaningful function for people in society, it cannot pursue a bureaucratic model; it must employ processes which are both responsive and creative. To achieve this end, law cannot simply be an analytical technique of deduction from, or analogy to, established legal doctrines in a determinate procedure, as if the practice of law is purely a matter of discovering pre-existing, ready-made answers "out there" somewhere in our recent or common law past. This type of approach to law presumes a "yes or no," "either/or" solution for every legal dilemma, with the result that all too often the answers neither adequately nor justly respond to the problems.

In order for the law and lawyers to credibly address contemporary legal problems in a responsive and authoritative fashion, they must foster and mediate a creative dialogue or dialectic between adversarial parties by clarifying and establishing the norms of shared relationships and collective values in the community. This is what lawyers and the law are ideally all about and, at the deepest level, involves both persuasion and education, both

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premise of equality -- that everyone should be treated the same -- an ethic of care rests on the premise of nonviolence -- that no one should be hurt." *Id.* at 174.); *see also* Matsuda, *Liberal Jurisprudence and Abstract Visions of Human Nature: A Feminist Critique of Rawls' A Theory of Justice*, 16 N.M.L. Rev. 613 (1986).

[68] *See, e.g.*, K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 158-91 (1984) (examining the point that the great majority of activists on either side of the abortion debate are fighting for deeply-held values).

[69] J.B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW 30-31 (1985).

functions of a substantive rhetoric of law.

III. TOWARDS A SUBSTANTIVE RHETORIC OF LAW

Salt is good;
but if the salt has lost its saltness,
how will you season it?
Have salt in yourselves,
and be at peace with one another.
- Mark 9:40-50 -

A. Three Aspects of a Substantive Rhetoric of Law

"Rhetoric," in contemporary society, has come to receive the most negative and pejorative connotations. It is variously conceived of as either polemics or propaganda, skillfully crafted to manipulate disingenuously individuals and society. This ignoble skill, however, is not to be confused with the art of a substantive rhetoric as it may be utilized in legal argumentation.

A substantive rhetoric of law is not a second-rate technique by which lawyers manipulate people to do that which is only in the interests of the lawyer, but a dialectical method of argumentation, an approach to enter into, and participate in, a broader cultural discourse concerning the collective values of a society.[70] Not all of a society's shared collective values may be equally compelling. However, those values which are deemed by

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[70] In addition to work done by J.B. White, *supra* note 69, there is a growing movement outside of the established legal community which is seeking to reconceptualize law as argumentation, or as a species of rhetoric, in order to more adequately address concerns regarding the relationship of law and the legal system to contemporary society. *See, e.g.*, Zarefsky & Gallagher, *From "Conflict" to "Constitutional Question": Transformations in Early American Public Discourse*, 76 Q. J. OF SPEECH 247-262 (1990); R. HARIMAN, *Performing the Laws; Popular Trials and Social Knowledge*, in POPULAR TRIALS: RHETORIC, MASS MEDIA AND THE LAW (1990); Lucaites, *Constitutional Argument in a National Theater: The Impeachment Trial of Dr. Henry Sacheverell*, in Hariman & Lucaites, *Between Rhetoric and "The Law": Power, Legitimacy and Social Change*, Q. J. OF SPEECH (forthcoming 1990); Makau, *The Supreme Court and Reasonableness*, 70 Q. J. OF SPEECH 379-396 (1984); *Rhetorical Politics*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 339-410 (S. Levinson & S. Mailloux eds. 1988); M.A. Hasian, Jr., Legal Discourse and Public Argumentation: A Case Study of the Rhetorical Creation of the Right to Privacy (Master's Thesis, University of Georgia 1990). *See also* E.H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); E. GRASSI, RHETORIC AS PHILOSOPHY: THE HUMANIST TRADITION (1980).

For earlier and varied formulations see Speech Communication Association, *Dimensions of Argument: Proceedings of the Second Summer Conference on Argumentation* (1981), as well as other editions of the proceedings; issues of the journal ARGUMENTATION AND ADVOCACY (formerly known as the J. OF THE AMERICAN FORENSIC ASSOC.); the "Project on the Rhetoric of Inquiry" as represented in a new series of publications of the University of Wisconsin Press; and the variety of conferences and publications coordinated through the "POROI" office at the University of Iowa.

a society to be fundamental to its perception of itself, and which comprise both the aspirations and standards by which it conducts its social, political and legal life, constitute the society's "motive structure." This motive structure functions as the framework within which the dialectic of a substantive rhetoric of law takes place.

In his essay, "Rhetoric and Law: The Arts of Cultural and Communal Life,"[71] Professor James Boyd White[72] explores three ways in which law can be understood as an art of rhetorical argumentation. The first aspect concerns the cultural discourse of language. In order to communicate with an audience, a lawyer must speak the language of that particular audience in such a manner that it will understand what the lawyer is attempting to persuade them of with respect to a certain position on a given topic. This will often involve the technical and professional language of cases and statutes when the audience is a court, or is made up of other legal professionals. However, when the audience is comprised of non-lawyers, then the everyday language of one's time, place and culture must be utilized if the lawyer is going to communicate effectively and persuasively.

Secondly, law consists of particular sets of materials, or "resources," which are made available to the lawyer, by the culture, for speech and argumentation. These resources include not only the legal rules, statutes and judicial opinions of the legal profession, but also the more general sociological resources found in society at large, both technical and non-technical, which a lawyer may choose from in order to construct his or her argument. To support a particular position, a lawyer will speak the language of the law in such a way as to modify the resources by drawing distinctions, fashioning new perspectives, or introducing new materials as authoritative. The ultimate acceptance and agreement as to the use, relevance and authority of these resources constitutes the rhetorical process of argumentation.

Because an opposing attorney will confront and dispute the authority, analogy or applicability of a given resource which the lawyer has employed in his or her argument, the choice, meanings, and weight of authority given that particular resource will always be subjected to continuous reformulation as the attorneys prepare and present their arguments. Consequently, a substantive rhetoric of law is not merely about obtaining the results one wishes to achieve, but also about the shape one's legal argument must take if it is to be effectively persuasive to one's audience. Thus, the lawyer is always acting upon the language he or she uses. In this sense, "legal rhetoric is always argumentatively constitutive of the language it employs."[73]

Finally, every time a lawyer speaks the language of the law in this fashion, he or she is advocating or proposing the formation of a certain type of relationship between the audience and those about whom the lawyer is speaking. Ultimately, the lawyer's speech is not only about the end results he or she is seeking for a client, but an implicit argument about the motive structure of the community. In response to his or her rhetorical argument,

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[71] J.B. WHITE, *supra* note 69, at 28-48.

[72] L. Hart Wright Professor of Law, Professor of English, and Adjunct Professor of Classical Studies, the University of Michigan.

[73] J.B. WHITE, *supra* note 69, at 34.

the lawyer is seeking an answer to the question, "What type of community should we who are speaking the language of the law establish with each other?" The lawyer thereby brings the whole of the community into the rhetorical process by directly engaging them in a cultural discourse concerning the values upon which it is structured. This dialectical constitution of a rhetorical community by the lawyer differentiates a substantive rhetoric of law from the mere utilization of rhetoric as a polemic of persuasion.

A substantive rhetoric of law is at one and the same time both a cultural and social activity. It is cultural in the sense that the lawyer must speak with a certain set of resources found in the culture of the society; it is social in the sense that it is both a way of interacting with others in the community and is constitutive of the ways in which the community views itself. Thus, a substantive rhetoric of law is an art of persuasion which "creates the objects of its persuasion, for it constitutes both the community and the culture it commends."[74]

B. Constitutional Law as the Practice of a Substantive Rhetoric

The Federal Constitution, as it is presently viewed and treated by many in the legal establishment, represents a resource of major premises or self-contained propositions from which principles of law are deduced. Law thus becomes abstracted and conceptualized, and the technique of legal analysis comes to consist in the ability of the lawyer to distinguish between the various types of rules and their sets and subsets: substantive rules from procedural rules; procedural rules from remedial rules; primary rules from secondary rules, while all the while employing an "objective," "scientific," deductivist method.[75] However, to view law as a species of rhetoric is to come to understand the Constitution in an altogether different light.

The participants at the 1787 Constitutional Convention had as their task the foundation of a new community in the young republic. Their arguments concerning the nature and function of that new community can best be understood as a search for a common language which would establish a set of relationships between the people and their government. The resulting text of the Constitution was the product of a gradual attempt by the Founding Fathers to set in motion a cultural discourse, both at the legal and social levels, concerning the shared assumptions and values upon which the new community should proceed.[76]

The Constitution's terms established a set of speakers, roles, topics and occasions for speech through which many of the document's ambiguities and uncertainties could be addressed by the community. Understood in this way, the Constitution can be best regarded as a rhetorical document: those very same ambiguities and uncertainties become comprehensible when they are understood as an attempt by the Founding Fathers to establish a national discourse, with the ambiguities as a way of attempting to both define

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[74] *Id.* at 35.
[75] *Id.* at 30.
[76] *Id.* at 39.

and leave open the topics of the conversation.[77]

As with all linguistically embodied documents, the Constitution is really a structure of motives, not a set of premises.[78] "It is a collection of values, along with characterizations of key agents, acts, scenes, agencies, and purposes, which must be worked out in terms of human living conditions."[79] Constitutional law, then, "consists of assessing the extent to which different laws and actions are consonant with that motive structure."[80]

This understanding of the Constitution as a structure of motives allows us to approach our founding document as a "weighty touchstone for our political, legal and social lives..."[81] To continue to view it as a series of closed propositions is to permit ourselves to indulge in a comfortable but now largely exposed myth that a "scientific" technique of deduction from premises is a determinate procedure.

> That myth has been made laughable by reverses such as those in the line of cases from *Dred Scott* to *Plessy* to *Brown*, by the restrictive constructionists' notable willingness to make an exception to stare decisis in the case of *Roe*, and by the routinely split decisions of appellate courts.
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> The myth of judicial deductivism is, however, worse than laughable; it is destructive. The myth requires that we treat our constitution of ourselves as a fait accompli. That is dangerous in a time of great technological change. It is morally evil in a time where collective moral progress is possible, because it prevents that progress. It is time to stop treating precedent as a near-sufficient set of decision-making criteria. As Bishop Whately noted, precedent grants one presumption in an argument, but it does not grant one fiat.[82]

C. Constitutional Motive Structure and a Substantive Rhetoric of Abortion Law

When the Constitution is viewed as a "touchstone" for our national motive structure, instead of as a set of premises from which law is determinatively deduced, the employment and practice of a substantive rhetoric of law allows for the community's re-examination and

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[77] *Id.* at 41.

[78] *See, e.g.*, K. BURKE, A GRAMMAR OF MOTIVES (especially 323-401) (1969)(discussing the implication of viewing the Constitution as a structure of motives). For further discussions of motive structure as a way of reading social discourse see K. BURKE, PERMANENCE AND CHANGE: AN ANATOMY OF PURPOSE (1984); K. BURKE, LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD (1966); K. BURKE, A RHETORIC OF MOTIVES (1969); W.R. FISHER, HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE AND ACTION (1987).

[79] *See* Condit, *Within the Confines of the Law: Abortion and a Substantive Rhetoric of Liberty*, 38 BUFFALO L. REV. 903, 916 (1990). *See also* Condit, *Crafting Virtue: The Rhetorical Foundations of Public Morality*, 73 Q. J. OF SPEECH 79-97 (1987).

[80] Condit, *Within the Confines of the Law*, *supra* note 79, at 916.

[81] *Id.*

[82] *Id.* (quoting R. WHATELY, ELEMENTS OF RHETORIC part I, ch.3, § 2 (1872)); *see also supra* note 6 and accompanying text discussing textual interpretation and hermeneutical methodology.

application of those fundamental collective values which both form and inform the national motive structure. One of those fundamental values is the concept of individual liberty.

A substantive rhetoric of abortion law should be centered on the extent to which women's fundamental liberty interests under the Constitution are a value so central to our national motive structure that abortion rights might be required to effectuate that value. If it is successfully argued that women's liberty interests require abortion rights, then the value of women's liberty would be a value superior to that of any inherent value in fetal life. Thus, if women's liberty is a value superior to the value of fetal life, it follows that it must be the pregnant woman who assigns it value. By virtue of her claim to the superior social value, she is consequently put in the position of having to make a choice between her liberty interests and any potential value in fetal life. If she is not free to choose, she does not have liberty equal to that of men under the Constitution.

i. The Value of Women's Liberty

Traditionally, men in the United States have been accorded a full measure of individual liberty to make whatever personal choices for themselves they might decide upon, no matter how foolish, irresponsible or immoral the rest of society might judge those choices. Thus, as Professor Tribe has pointed out, a father may refuse to extend a life-saving transplant to his child, and no one may compel him to do otherwise. Although it is unlikely that one would find a jurist in the United States willing to argue that women do not have a claim to liberty under our form of government equal to that of men, it would be wrong to think that women, given their not too distant social and political history in this country, are accorded liberty in measure equal to that of their male compatriots.[83]

Value terms, such as "liberty," have meanings only in relation to their prior usages, and to other linguistic components of our public vocabulary.[84] Because it has only been in the twentieth century that American society has begun to accept the idea that women are autonomous and self-actualizing individuals who should be afforded liberty and rights equal to that of men, the concept of women's liberty is relatively new in our political vocabulary. Consequently, "there are few of these prior and related usages to call upon in making the link between abortion and Liberty."[85] However, abortion rights may be crucial to the recognition and establishment of women's liberty because the right to an abortion is currently central to our society's struggle over the definition and understanding of female personhood.

It may be argued that since pregnancy and childbirth have come to define women as women in our society, "they can serve, and are serving, as the fulcrum by which women can

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[83] *See* Condit, *Within The Confines of the Law, supra* note 79, for discussion of women's liberty interests with respect to the issue of abortion rights.

[84] *See* Condit, *Democracy and Civil Rights: The Universalizing Influence of Public Argumentation* 54 COMMUNICATION MONOGRAPHS 1 (1987).

[85] Condit, *Within The Confines of the Law, supra* note 79, at 906. *See also* C.M. CONDIT, DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE (1990).

be distinguished from men and thereby discriminated against on a wide array of fronts."[86] Thus, because pregnancy and childbirth are the only ways in which women are different from men in any absolute sense, it may be that, in order to bring about women's liberty, laws must be enacted which would protect the right of a woman to control her own reproduction. Those laws would help establish for women a legal status as autonomous persons, rather than as proto-mothers.

If women's liberty is a fundamental value consistent with our national motive structure as set forth in the Constitution, then it may be that abortion laws are themselves fundamental to women's liberty because "they are the ultimate guarantor that no woman will have to be a mother against her will."[87] Moreover, legally guaranteed abortion rights will affect even those women who never have an abortion because such laws will affect our society's coding of female personhood. "That coding in turn shapes women's Liberty in the workplace and in choices of leisure activities as well as financial standing and almost all other activities in which women do not now have Equality with men."[88]

ii. The Value of Fetal Life

If it is argued that women under the Constitution must be accorded liberty equal to that of men, and that to effectuate this liberty entails both the right of women to control their reproduction and the right not to be mothers against their will, then women, as individual and autonomous persons, should be the people who determine the value of fetal life as far as their own individual pregnancies are concerned. This is so because the value of fetal life cannot be discovered outside of culturally created meanings which have as their origin the sexual and social politics of the community.[89] If the community values women's

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[86] Condit, *Within The Confines of the Law*, *supra* note 79, at 910.

[87] *Id.* Professor Tribe has also noted that, "[A] ban on abortion imposes truly burdensome duties only on women. Such a ban thus places women, by accident of their biology, in a permanently and irrevocably subordinate position to men." L.H. TRIBE, *supra* note 50, at 132.

[88] Condit, *Within The Confines of the Law*, *supra* note 79, at 910.

[89] *See, e.g.*, Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 131 (1989). This fact is highlighted given historical data which reveals that even newborn infant and child life was not always valued in the manner which contemporary society presently does. *See, e.g.*, J. BOSWELL, THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE (1990). The ancient Greeks did not believe that all human life is equally valuable, or that it should be preserved at all costs. In both Athens and ancient Sparta it was not uncommon for deformed infants to be put to death. This was considered to be better than an unhappy life for the infants and their parents. *See* J. RACHELS, THE RIGHT THING TO DO: BASIC READINGS IN MORAL PHILOSOPHY 133 (1989). Roman civilization agreed with the Greek perspective, and the Stoic philosopher Seneca justified the practice noting that, "We destroy monstrous births, and drown our children if they are born weakly and unnaturally formed." J. RACHELS, *supra* at 133 (quoting Seneca).

With the rise and eventual triumph of Christianity, this attitude toward the value of life changed considerably when a shift in the culture's ideological commitments made the killing of innocent life immoral. However, even today, a recent debate has emerged among medical professionals as to whether or not doctors

liberty, then it is the pregnant woman, by virtue of her claim to the superior social value, who is consequently put in a position of having to make a choice between her liberty interests and any potential value in fetal life.

Taking women's liberty seriously means seriously valuing women's lives. Opponents of abortion rights argue that abortion will lead to the devaluation of human life. However, abortion proponents may argue that anti-abortion activists fail to realize that forbidding abortion is itself dehumanizing to the pregnant woman, and that "[i]n opposing abortion, one cooperates with the devaluation of women's lives and paves the way for further devaluation of life."[90] This is so because,

> the prohibitions on abortion encumber what many now reasonably regard as a highly conscientious choice by women regarding their bodies, their sexuality and gender, and the nature and place of pregnancy, birth and child rearing in their personal and ethical lives. The traditional condemnation of abortion fails, at a deep ethical level, to take seriously the moral independence of woman as free and rational persons, lending force of law to theological ideas of biological naturalness and gender hierarchy that degrade the constructive moral powers of women themselves to establish the meaning of their sexual and reproductive life histories. [91]

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should let handicapped or defective babies die, prompted by advances in medical technology that enable doctors to "save" babies which could not previously be kept alive, with the result that most of these babies are so severely malformed that they have little chance for leading a meaningful "human" life. *See* P. SINGER & H. KUHSE, SHOULD THE BABY LIVE? (1985); H. KUHSE, THE SANCTITY OF LIFE DOCTRINE IN MEDICINE: A CRITIQUE (1985); INFANTICIDE AND THE VALUE OF LIFE (M. Kohl ed. 1978). *See also* VanDeveer, *Whither Baby Doe?*, in MATTERS OF LIFE AND DEATH (T. Regan 2nd ed. 1985); *cf.* Hentoff, *The Awful Privacy of Baby Doe*, THE ATLANTIC 54 (January 1985).

[90] *See*, Olsen, *supra* note 89, at 132. For a review of materials showing that anti-abortion arguments involve discriminatory attitudes towards women see B.W. HARRISON, OUR RIGHT TO CHOOSE (1983). Professor Tribe also notes that restrictions on abortion rights involve a confrontation at the "crossroads of power and sex," L.H. TRIBE, *supra* note 50, at 228, which reflects, in part, a willingness "to enforce traditional sex roles upon women and to impose upon them an unequal and harsh sexual morality." *Id.* at 237. He also notes that laws against abortion would directly burden women alone, and thereby pose "an obvious danger of majoritarian oppression and enduring subjugation. . ." *Id.* at 105.

[91] D. RICHARDS, TOLERATION AND THE CONSTITUTION 268 (1986). Richards' implication that an anti-abortion position often results from theologic notions of what is biologically natural is borne out by recent surveys and polls. In one study, a strongly "pro-choice" position was taken by the following religious groups in the percentages indicated in parentheses: Jews (85%), those with no current religious affiliation (84%), Protestants (67%), and Roman Catholics (split almost 50/50). *See* Lerner, Nagai and Rothman, *Abortion and Social Change in America*, SOCIETY 12 (1990). Polling data from the general public also confirms a connection between religion and views on abortion. In one such poll, the percentages favoring legal abortion for any reason, according to religious persuasion, were as follows: Jews (75%), those with no current religious affiliation (69%), Protestants (35%), and Roman Catholics (21%). *Id.* at 13.

The conflict between religious beliefs about abortion and the role of law was commented on by New York's Governor Mario Cuomo, who noted that criminal laws against abortion "would be Prohibition revisited," because even those who supposedly believe abortion is a sin have abortions:

It may be further argued that it is not coincidental that both the Nazis and the totalitarian regimes which fell in Hungary and Rumania in 1989 had repressive abortion policies.[92] Only when women's liberty, and by implication their lives, is devalued by a society can fetal life be effectually valued as a fully, rather than potentially, human "person." If women's liberty and lives were not devalued, people would not conceptualize a fetus as a human "person" with interests separate from, and potentially hostile to, those of the pregnant woman.[93] If women's liberty was taken seriously, early fetal life would not be valued by society at large unless, and until, the woman carrying the fetus valued it.[94]

CONCLUSION

It is commonplace today to relate law to short-term electorial and legislative politics, rather than to long-term processes of social change. The problem of abortion has not proved to be an exception to this phenomenon.[95] This is unfortunate as it is misguided. Living together in a society requires shared values between its members if the social fabric is to hold together. Ideally, law is both the embodiment and codification of those shared fundamental social values which constitute a nation's motive structure.

Regrettably, law has been reduced to a "scientific" procedure whereby the legal profession has come to define itself solely in terms of being a technical field of knowledge.

> Despite the teaching in our homes and schools and pulpits, despite the sermons and pleadings of parents and priests and prelates, despite all the efforts at defining our opposition to the sin of abortion, collectively we Catholics apparently believe -- and perhaps act -- little differently from those who don't share our commitment.
>
> Are we asking government to make criminal what we believe to be sinful because we ourselves can't stop committing the sin?

Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, in ABORTION & CATHOLICISM 202, 212-13 (P. Jung & T. Shannon eds. 1988).

Significantly, there is a recent trend among some Roman Catholic scholars to widen the debate on when life begins. Citing new data, these scholars point out that increased knowledge of fetal development and a desire to get beyond the political stalemate over abortion are leading many ethicists and moral theologians to rethink their position on abortion. Due to a growing precision in the study of the development of an embryo's brain and nervous system, proposals for a definition of "brain birth" to mark the beginning of life are being considered in much the same way as "brain death" marks its end. *See* Steinfels, *Catholic Scholars, Citing New Data, Widen Debate on When Life Begins*, N.Y. Times, Jan. 13, 1991, § 4, at 5.

92 *See* Olsen, *supra* note 89, at 132.

93 *Id.* at 126.

94 *Id.* at 128.

95 Professor Tribe recognizes this problem, and comments:

> The debate is unending. None of its participants ever seems even mildly persuaded by the arguments of the other side. As the apparently irresistible force of the pro-life movement bears down on the seemingly immovable object of abortion rights, local politics may at times be overwhelmed by the kind of single-issue campaigning that has already distorted the face of national elections. If this happens, the losers will be the democratic process and the American people.

L.H. TRIBE, *supra* note 50, at 6-7.

Consequently, law is viewed as a collection of self-contained propositions or premises from which legal principles are deduced, rather than a collection of values to be lived out and realized in concrete human relationships. The result is that the current either/or logic of the law seems incapable of adequately responding to the value conflicts currently taking place in contemporary society concerning the novel ethical and moral questions raised by such questions as abortion, and other similar dilemmas presented by the steady advance of new scientific and medical biotechnologies.

The conflicted moral and ethical issues surrounding the abortion debate make it paradigmatic for other contemporary concerns. Genetic engineering, in vitro fertilization and frozen embryos, surrogate parenting and euthanasia, as well as other scientific and medical advances, continue to out-pace our capacity to deal effectively with them. These technologies pose perplexing questions of when and how "human" life begins, and when it may, or should, end, and are all ultimately inquiries into the ontological and existential nature of human existence. These questions cannot be answered by the narrow and technical legal-political deductivist approach to jurisprudence which has developed in American law and social policy.

The current either/or approach of traditional legal analysis has left the entire abortion question hanging between seemingly irreconcilable alternatives: either a woman has a legal right to abort, or she does not; either the decision to abort is a choice to be made by the individual woman, or it is a collective one to be determined by society and regulated by law. This is the line which *Roe* has drawn. Activists on either side have reached to the law, not as a way of clarifying our collective social values, but as a weapon to either circumvent or reinforce the line.

The advocates' tactics have been both curious and ill-suited to resolving the current immobilization of the confrontation, and their approach to law and contemporary legal problems precludes any possible progress for the emergence of social values which we as a society must examine and articulate if we are to remain a cohesive and unified nation. The only way in which law can do justice to the issues, and serve the interests of the public, is for the legal system to move away from its conception of itself as a science of logic, and move toward viewing law as a discipline of substantive rhetoric. The answers to our contemporary problems are not to be found in a dogmatic reliance on past doctrines, but in our willingness and resolve to live in community with one another. Only then will we have peace.