Volume 70 | Issue 1 Article 4

December 1967

Abortion and the Crime-Sin Spectrum

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Abortion has rapidly become a matter of widespread public discussion in recent years. New books on the subject have come forth, magazine articles questioning the soundness of present policies towards abortion are commonplace, a widely publicized conference on the abortion issue was recently held in Washington, D. C.[1] In a matter of less than a decade, abortion has ceased to be a matter which was almost taboo and unfit for public discussion to a matter that is now pervasively examined in all the public media. Actual change of the abortion laws in three states, Colorado, North Carolina and California, demonstrates that there is more than merely talk involved.[2] A modernizing band-wagon movement is in motion. State legislatures, notorious for their propensity to imitate, are now faced with an obvious challenge to the status quo.[3] The next several years will no doubt see an increasing legislative concern for abortion laws. Clearly a change in the West Virginia criminal law in regard to abortion is needed.[4] However, I suggest that the pressure to follow the popular "liberalizing" version is not the soundest policy available. Before West Virginia rushes forward to become modern and liberal "like" California and such states, it would be wise to note the relationship between the present movement towards abortion law reform and a less notorious concurrent debate that concerns itself with the relationship between crime and sin. The arguments that have been raised in that debate suggest a sound

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* This paper is an outgrowth of a lecture originally given April 21, 1967, at West Virginia University as one of the University Centennial distinguished faculty lecture series.

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[1] *See, e.g.*, LADER, ABORTION (1966); THE CASE FOR LEGALIZED ABORTION NOW (Guttmacher ed. 1967); DICKENS, ABORTION AND THE LAW (1966); SCHUR, CRIMES WITHOUT VICTIMS (1966); WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1957); *Symposium—Abortion and the Law*, 17 W. RES L. REV. 369-568 (1965). For brief summaries of the Washington, D. C. conference proceedings see Time, Sept. 15, 1967, at 84; Newsweek, Sept. 18, 1967, at 60-61.

[2] *See* N.Y. Times, Oct. 26, 1967, at 1, col. 9, in regard to the new abortion law in England.

[3] An Associated Press report from Chicago, dated April 10, 1967, indicated attempts at abortion law reform were undertaken in approximately one-half the states in 1967.

[4] The matter of abortion law reform came before the Interim Committee of the West Virginia Legislature in July, 1967. *See* Charleston Gazette, July 17, 1967, at 2, cols. 1-2.

structure on which the movement towards abortion law reform may be evaluated.

The West Virginia statute condemning abortions is as follows:[5]

> Any person who shall administer to, or cause to be taken by, a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than three nor more than ten years; and if such woman die by reason of such abortion performed upon her, such person shall be guilty of murder. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child.

This statute came to us from the Virginia Code of 1849[6] and quite clearly is a descendant of the first English statute on abortion enacted by Parliament in 1803.[7] The common law attitude towards abortion is not altogether clear. It seems that aborting a woman after "quickening" was deemed an offense but aborting a woman prior to that time probably was not.[8] The Parliamentary act of 1803 continued to stress the importance of "quickening", treating the offense before quickening as non-capital and the offense after quickening as a capital offense.[9] It would be improper of course to conclude that abortion after quickening was equated with

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[5] W. VA. CODE ch. 61, art. 2, § 8 (Michie 1966). It is interesting to note that the West Virginia provision is included in the article dealing with offenses against the person.

[6] VIRGINIA CODE OF 1849, tit. 54, § 8. There is a marginal reference in this volume to English statutes, 1 Vict. c. 85, § 6 (1837). This was the act that eliminated the death penalty for abortion in England and abolished the distinction in the offense based upon quickening. *See* note 9 *infra*.

[7] Lord Ellenborough's Act, 43 Geo. 3, c. 58 (1803).

[8] *Compare* Miller v. Bennett, 190 Va. 162, 56 S.E.2d 217 (1949) which states that it was not an indicatable offense at common law to abort a woman before the child had quickened *with* Willis v. O'Brien, 153 S.E.2d 178 (W. Va. 1967) which says abortion generally was a misdemeanor at common law. 3 Coke's Inst. * 50 states: "If a woman be quick with childe, and by a potion or otherwise killeth in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprison, and no murder; but, if a childe be borne alive, and dieth of the potion, battery or other cause, this is murder. . . ." *See generally* Davis, *The Law of Abortion and Necessity*, 2 MOD. L. REV. 126, 133-34 (1938).

[9] *See* Anon., 3 Camp. 73, 170 Eng. Rep. 1310 (1811) concerning the application of the quickening standard.

homicide because of the imposition of the capital punishment. The offense was added to the criminal statutes of England at a time when the use of the death penalty for relatively trivial offenses was commonplace. In 1837, as a part of the reform movement eliminating the death penalty for many offenses from the criminal law of England, the death penalty was abolished for the offense of abortion and the distinction between abortion before and after quickening was abandoned.[10] The Virginia and West Virginia statutes that evolved on this topic ignored the quickening distinction. However, the Virginia, and consequently the West Virginia statute, expressly stated the defense of necessity where this was not a part of the English statute.[11]

It is noteworthy that the fundamental policy in regard to criminal abortion was formed shortly after the turn of the 19th century at a time when scientific knowledge concerning human embryology and procreation was quite primitive.[12] The cell theory had not yet been developed, the biological processes of conception were unknown. The legal policy in regard to abortion also evolved about a century before it became possible publicly to evaluate the pros and cons of family planning and birth control. In sum, the present-day abortion law is the product of an age in which knowledge of the fundamental biology of reproduction and attitudes toward the control of this phenomena by human means were markedly different than they are today.

While public attitudes towards birth control have changed enormously and the criminal sanctions against such sins as fornication have atrophied, abortion law and policy have remained steadfast during the past century and a half. Abortion was immune to the forces that modified and reshaped attitudes towards other similar matters related to the sexual ethic of the American civilization. This inflexibility resulted in large measure from the unique impact of the abortion laws. Such laws placed great and effective pressure upon a pivotal group—the legitimate medical practitioner. With a hard won and highly valuable professional career at stake, the physician was effectively dissuaded from risking any substantial shift in abortion law policy by challenging the rigid formulation of the law

[10] 1 Vict. c. 85, § 6 (1837).
[11] Rex Bourne [1939] 1 K.B. 687, discussed in Davis, *The Law of Abortion and the Necessity*, 2 MOD. L. REV. 126 (1938).
[12] *See generally* JOSEPH NEEDHAM, A HISTORY OF EMBRYOLOGY (2d ed. 1959).

by violation.[13] The large mass of the demand for abortion flowed around legitimate medical channels and into the illicit trade.[14] The image of abortion was one of a foul, dirty and evil business, quite beyond the pale of justification. It took a dramatic event to transform the issue into one that was suitable for dispassionate public consideration. That dramatic event was the Finkbine case.

The Sherri Finkbine case propelled the abortion issue into the national spotlight. In 1962, Mrs. Finkbine, the mother of four children and the hostess of children's nursery program on local television, discovered that she had taken thalidomide during the early stages of her pregnancy. She noticed brief news items relating to the birth of malformed infants in England traced to a "tranquilizer" and became concerned because she had taken a tranquilizer that her husband had obtained in England while he was there on a business trip. She pursued the matter through her physician who found she had indeed taken the dread drug, thalidomide. He recommended an abortion. The matter was cleared with the hospital medical board and the operation was scheduled. Fearing other expectant mothers might be unaware of their similar plights, Mrs. Finkbine called the local paper and suggested a news story warning of the dangers involved. The news story appeared, but not as a somber warning. Rather it was a dramatic revelation that a local woman anticipated an abortion to avoid the birth of a thalidomide monster then common in Europe. The disclosure evoked national attention, and aroused intense local interest in the case. The inexorable dictates of journalism demanded follow-up stories that presented prosecutorial prognostications. The quiet approval originally given the abortion was now reconsidered in the intense glare of widespread public concern. Hospital authorities sought a declaratory judgment seeking some reassurance and some sharing of responsibility in light of the possible criminal consequences that were present. The local court apparently avoided the merits of the case by ruling that there was

[13] *See generally* LADER, ABORTION, ch. 4 (1966) for a vigorous criticism of the hospital-medical control of abortion policy. Shur criticizes Lader's book on this point and says the arbitrariness of abortion policy cannot be legitimately blamed upon the medical profession or hospital administrators generally. *See* Shur, Book Review, NATION, Nov. 7, 1966, at 492.

[14] Speculation on the magnitude of illegal abortion activity has produced widely varied estimates. These are collected in the comments to the Model Penal Code abortion provision with figures ranging from 333,000 to 2,000,000 illegal abortions annually occuring in the United States. MODEL PENAL CODE § 207.11 Comment (Tent. Draft No. 9, 1959).

no discernible controversy between the parties named in the suit and the case was dismissed. The suit disclosed the identity of Mrs. Finkbine as the mother involved and a torrent of national attention became focused upon her plight. She decided upon a trip to Sweden to seek an abortion there and was successful in having the operation performed.[15]

The Finkbine case dramatized several facts that have made the present open and vigorous discussion of abortion law policy possible. The character of the principals involved was significant. It emphasized that abortions might be sought by very respectable people for reasons that could win the sympathy of a broad spectrum of American society.[16] The idea that abortion was the resort of loose women seeking to avoid the consequences of vulgar, illicit trysts was punctured. Additionally, the extreme rigidity of present-day abortion law was etched in bold relief. The obvious threat of a grossly deformed child ran a shudder down the spine of many respectable, responsible parents. That such considerations were irrelevant in terms of present law struck many as incongruous. Anyone who has waited out the last anxious moments of a pregnancy, waiting for the reassuring words that the baby is normal could share the anxiety of a prospective parent faced with the very real and grave threat posed by the thalidomide disaster. The heartless dogmatism of the American law was further underscored by the resolution of the Finkbine affair in Sweden, a nation held in high esteem by many Americans. The crisp, antiseptic, scientific approach of the Swedish system held considerable appeal for a nation that prizes technology and science generally and admires scientific solutions to difficult problems. Abortion was no longer an epithet. It could now be comingled in public discussion with the term therapeutic which cleansed it in the public eye from its formerly automatic pejorative thrust.

The present-day abortion law reform movement is largely a product of the ripple of national attention that followed in the

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[15] *See* SHERRI FINKBINE, *The Lesser of Two Evils*, in THE CASE FOR LEGALIZED ABORTION NOW (Guttmacher ed. 1967); LADER, ABORTION, ch. 2 (1966).

[16] Williams cites a study by A. Davis in 2 BRITISH MEDICAL JOURNAL 123 (1950) that showed out of 2,665 abortions studied 88% were performed on married women. WILLIAMS, SANCTITY OF LIFE IN THE CRIMINAL LAW, ch. 6, p. 11, N. 2. (1957). Other studies show similar predominance though in less sizeable proportions. *See* BATES AND ZAWADZKI, CRIMINAL ABORTION, ch. 4 (1964); ABORTION IN THE UNITED STATES (Calderone ed. 1958); GEBHARD, PREGNANCY, BIRTH AND ABORTION, ch. 8 (1958).

wake of the Finkbine case. The model around which the reform movement has rallied was not long in being identified. It came from the American Law Institute Model Penal Code and was of such nature that it could be conveniently removed from that broader work and treated as a separate entity.[17] The Model Penal Code provision carried forward the generally accepted justification defense as it is known today which permits an abortion to be performed to "save the life" of the mother involved. Beyond this, the Model Code provision cautiously advanced certain other limited exceptions to the continued stringent criminal penalties for abortion. The new grounds advanced which would justify the abortion are: (1) that continuance of the pregnancy would gravely impair the physical or mental health of the mother, thus relaxing the generally accepted justification defense as it is now known; (2) where there is a substantial risk that the child would be born with a grave physical or mental defect, thus, encompassing specifically the type of situation that arose in the Finkbine case; (3) and where the pregnancy resulted from rape, incest, or other felonious intercourse. The comments to the Model Penal Code provision advanced telling arguments for expanding the exceptions to the general proscription of the abortion operation that emanates from existing codes. The more fascinating aspect of the Model Penal Code provision and its supporting commentary is the absence of any very telling argument for continuation of the broad restraints upon abortion that history has foisted upon us.[18]

The draftsmen of the Code were obviously aware of the close relationship between the abortion law issue and the more pervasive problem of the proper relationships between the criminal law and the moral precepts of the community. This matter was carefully considered in a lucid analysis of abortion law policy which was a part of the Carpentier Lectures delivered at Columbia University in 1956 by Glanville Williams, a leading English criminal law scholar.[19] This work was noted several times in the detailed comments which accompanied the tentative draft of the Model Penal Code provision. Indeed, the Institute had previously confronted this same issue while formulating a policy concerning such crimes

[17] MODEL PENAL CODE § 230.3 (P.O.D. 1962).
[18] MODEL PENAL CODE § 207.11, Comment (Tent. Draft No. 9, 1959).
[19] The lectures were published as THE SANCTITY OF LIFE AND THE CRIMINAL LAW. Williams is also author of CRIMINAL LAW, THE GENERAL PART (2d ed. 1961) and other important works on criminal law and its administration.

as fornication, adultery and consensual homosexual conduct.[20] In these instances the Institute opted for a secular criminal code which left a considerable range of conduct to bend to private moral decision. One of the best remembered floor debates of the Institute proceedings centered on this very issue when two federal circuit judges of renown, Learned Hand and Charles Parker, argued this very issue in 1955.[21] On that occasion, the Institute followed the utilitarian view advanced by Judge Hand and omitted from the criminal code sanctions against acts that may violate moral beliefs of the majority (private consensual homosexual conduct in private) but posed no outward threat to the peace, safety or security of the community. Nonetheless, when the Institute focused its attention on the abortion issue, the question of the relationship between the criminal law and majority morality was quite subdued and tangential.

The comments on the abortion section produce little positive argument to support the continuation of the abortion offense in the criminal code at all. About the only positive statement found in these comments that directly supports the continued restrictions on the abortion operation is that "indiscriminate abortion must be adjudged a secular evil since the procedure involves some physical and psychic hazards."[22] Stretched as far as this argument will reach, it leaves an enormous gap between the premise (a secular criminal code does not punish mere immorality) and the conclusion (abortion is an evil to be suppressed by grevious penalty with only careful and cautiously carved exceptions allowed). After all, any surgery involves risk. Why abortion is singled out from the wide range of surgical techniques employed for a variety of reasons is not explained. The alternative argument, the risk created by the psychic hazards of abortion, deserves more careful consideration than merely a superficial statement.[23] It seems quite ludicrous to assume that there is no psychic risk involved when an abortion operation is denied to a woman who seriously desires to terminate

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[20] *See generally* MODEL PENAL CODE, art. 207 (Tent. Draft No. 4, 1955): "The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it in appropriate for the government to attempt to control behavior that has no such substantial significance as to the morality of the actor. Such matters are best left to religious, educational and other social influences. . . ."

[21] The debate is recorded in TIME, May 30, 1955, at 13.

[22] MODEL PENAL CODE, § 207.11, (Tent. Draft No. 9, 1959) at 150.

[23] *See generally* SCHUR, CRIMES WITHOUT VICTIMS 32-45 (1965); LADER, ABORTION, ch. 3 (1966).

her pregnancy. The psychic risk is there because of the pregnancy. It is not uniquely created by the abortion operation. To justify continuance of the criminal penalty for abortion on this basis is to pretend that problems will go away if they are simply ignored.

The lack of a clearly articulated rationale for perpetuating criminal penalties for abortion leaves a puzzling gap in the Model Penal Code. At this point, the Code may be a model statement of what is deemed politically feasible, but it is hardly a model of consistent adherence to basic principles.[24] The faint hearted justifications of the abortion provisions proceed from quite a different premise than the more rigorously examined rationales that lie behind provisions affecting sexual conduct generally. With such offenses, the drafters assumed the burden of demonstrating a harm before they felt justified in proposing a criminal charge. In regard to abortion, the process was reversed, the harm was assumed and the drafters undertook the burden of justifying the cautious exceptions posed. The relationship between abortion and the concept of sin and objective, secular harm as it was viewed in the general sex offense provisions was left terribly vague.

A most fruitful dialogue on the proper relationship between crime and sin rather, has proceeded quite apart from the abortion law reform movement, sparked by a statement in the Wolfenden Report.[25] This report was a study by leading English citizens recommending policies for English law in regard to homosexual offenses and prostitution. At one point the committee succinctly stated: "Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate this sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[26]

This crisply British epigram triggered a debate that has continued to the present day. The Wolfenden Committee was given a specific

[24] *See* Schwartz, *Abortion and 19th Century Laws*, TRIAL, June-July 1967 at 41, 45. Schwartz, a co-reporter of the Model Penal Code concludes this brief argument for the American Law Institute position thus: "Many feel that morality and proper limits on governmental interference with personal choice called for a broader justification than those (advanced in the Model Penal Code). . . in recommending a moderate liberalization, the American Law Institute simply took realistic account of the intensity of feeling on this issue."

[25] REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (CMD 247) 1957.

[26] *Id.* at par. 61.

charge regarding homosexual offenses and prostitution and sought to formulate a principle as to the proper role of the criminal law in regard to such concerns. The principle that was adopted however has provoked a broader concern and the ensuing debate contributes much towards a productive basis for consideration of the current abortion law issues. In fairness to the Wolfenden Committee it should be noted that it sought to speak in regard to the relatively narrow area of interest that was committed to its study. In setting forth its approach, the Committee posed the question: "What acts ought to be punished by the State?" and then reached its "own formulation of the function of the criminal law so far as it concerns the subjects of this inquiry." The proper role of the criminal law, the Committee concluded, was stated in the following terms:

> In this field, its function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.[27]

When these statements are considered in the light of the recommendations of the Committee to abolish criminal penalties for private acts of homosexual conduct by adults committed in private, it becomes quite clear that a significant challenge had been made to the criminal law. The wider implications of that challenge could hardly escape examination. Lord Devlin sought to seek out the implications of the Wolfenden position by a broad examination of its impact upon the criminal law of England. When this raised many difficult problems, Lord Devlin abandoned the principle promoted by the Wolfenden Report and instead offered a counter-principle in the Maccabaean lecture in jurisprudence delivered in 1959.[28] Lord Devlin was lead to this position because he could not see, for example, how the law could properly continue to aim

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[27] *Id.* at par. 13.

[28] DEVLIN, THE ENFORCEMENT OF MORALS (1965). "The Enforcement of Morals" is the title both of the book published in 1965 and the lecture which gave rise to the book. The lecture was delivered in 1959 as the Maccabaean lecture in jurisprudence of the British Academy and is reprinted as chapter one of the 1965 book under the new chapter title, "Morals and the Criminal Law." The book includes a number of other papers by Lord Devlin prepared subsequent to the 1959 lecture. All references to Devlin in this paper are to the 1965 book.

its preventative forces against polygamy or euthanasia without ultimately justifying such policies on essentially moral grounds. The fact that Lord Devlin was unconvinced by the Wolfenden argument is not as important as his emphatic statement of a counter-principle which tenders at least a vigorous theoretical support for the status quo. He seeks to affirmatively justify the use of criminal sanction to enforce standards that may be supported only by reference to the moral consensus of the community on the basis of society's right to preserve its own existence:

> Society is entitled by means of its laws to protect itself from dangers, whether from within or without . . . . The law of treason is directed against aiding the king's enemies and against sedition from within. The justification for this is that established government is necessary for the existence of society and therefore its safety against a violent overthrow must be secured. But an established morality is as necessary as good government for the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions . . . .[29]

Lord Devlin's position looms important not only because it is a strong, vigorous, articulate statement by a man of considerable repute, but also because it grandly justifies the law that is. It gains tremendous strength from the service it performs in reassuring and comforting society that it has been right all along. The statement legitimates, it relieves doubts that arise because some in our midst insist that society should not confuse the common with the necessary. Lord Devlin in large measure reassures us that which is common is indeed very necessary.

Professor H. L. A. Hart has provided a most criptic counter to this position. In his book *Law, Liberty and Morality,* Hart responds:

> For he [Lord Devlin] appears to move from the acceptable proposition that *some* shared morality is essential to the ex-

[29] DEVLIN, THE ENFORCEMENT OF MORALS 13 (1965).

> istence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society . . . . [T]he latter proposition is absurd. Taken strictly, it would prevent us seeing that the morality of a given society had changed, and would compel us to instead say that one society has disappeared and another taken its place . . . .[30]

When the original Devlin paper was republished following the publication of Hart's book, a lengthy footnote was employed to respond to criticism offered by Professor Hart. Devlin explained that he did not state that a society ended every time a moral principle changed, but rather he was seeking primarily to demonstrate that the principle espoused by the Wolfenden Committee was invalid. Devlin asserts that his point was that the Wolfenden view was unsound because every society has the right of self-preservation and in certain instances the enforcement of certain moral principles may be necessary to insure the continuation of the society. In a telling illustration, Lord Devlin stressed in his original text that while it might be difficult to discern a threat to society created by a single man getting privately and quietly drunk in his residence at night, a threat would nonetheless arise if half a nation would follow such a practice regularly. Consequently, he asserted, private moral decisions may indeed threaten the viability of a society and therefore the Wolfenden position cannot be viewed as an absolute or a principle. It is false, in his mind, to assert that government *never* has the right to intrude into matters of private moral decision.[31]

But Devlin deems too much proven by suggesting that there may be instances in which the cumulative effect of private conduct in moral matters poses a threat to the society. In seeking to illustrate those instances in which society is justified in using criminal sanctions to regulate private moral conduct, he pays little heed to the consequences of the self-preservation argument. Rather than tailor society's power to intrude in such affairs to those instances which do in fact pose some cognizable threat, he seeks a different basis for identifying those moral principles meriting legal sanction. Acknowledging that mere majority preference is an

[30] H. L. A. HART, LAW, LIBERTY AND THE MORALITY 51 (1966).
[31] *See* DEVLIN, THE ENFORCEMENT OF MORALS 13 n. 1 (1965).

inadequate standard, he turns instead to the common bond of morality embraced by all right thinking Englishmen that would demonstrate certain conduct as not only bad, but intolerable. The English terminology refers to views of the man who rides the Clapham Bus. In America, we would adopt the values of the John Q. Public who has a sizeable mortgage on a suburban home. The fault in adopting such moral principles as worthy of the succor by criminal sanctions lies in the fact that there is no showing that their support has anything at all to do with the safety of society. Rather, as Professor Dworkin of Yale has pointed out, Lord Devlin's proposition tends to justify prosecution of conduct merely because certain kinds of people hate it enough.[32] Glanville Williams notes this argument tends to reward intolerance.[33]

Professor Dworkin has taken the Devlin argument a step further. While he does not concede the basic position of Lord Devlin that a society is justified in seeking to control private moral decisions, he puts that issue to the side in order to reach to another fundamental problem. Assuming then that society is justified in "following its own lights" as Professor Dworkin concedes *arguendo*, a consequent issue arises as to how we identify those moral principles which the law is justified in enforcing. Here Professor Dworkin challenges Devlin's identification of a moral position. The term "moral position" may convey two quite different meanings. On the one hand it may describe a position which is worthy of respect. On the other hand it may be used in a merely descriptive sense as, for example, we could say the moral position of Nazi Germany or a bitterly racist community represents the moral position of that particular community. In the latter instances the moral position of the community may not deserve respect when tested by ground rules of reasoning and argumentation in such affairs. Thus Professor Dworkin cautions, merely to label a position as a moral one does not of itself justify the use of governmental force to perpetuate it. To justify support that position should be a legitimate and defensible one. Positions that are buttressed by prejudice, emotion, parotting, misconception of the facts, etc. cannot justifiably claim the support of the lawmaker in his decision to invoke or continue the sanctions of the criminal law. To bring

[32] Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966).
[33] Williams, *Authoritarian Morals and the Criminal Law*, 1966 CRIM. L. REV. (Eng.) 132.

this general line of analysis to bear upon the abortion issue, we should properly ask whether, even conceding the right of the government to intrude into areas of private moral decision, whether the moral attitude of the community towards the issue is legitimate or not.[34]

The first major argument against reducing the existing criminal law restrictions upon abortion falls outside the crime-sin spectrum that I have been discussing above. There are elements of this argument however that closely relate to this range of discussion. This threshhold argument is that abortion should be a crime because it involves the taking of a human life, and therefore is a form of homicide. We need not labor long to demonstrate that the protection of human life is a proper goal of a purely secular code. The difficulty with this argument in regard to the abortion issue is that it so grieviously begs the question. The question, of course, is when does human life begin. By pointing to conception or to the time when the fertilized ovum attaches to the womb, this crucial fact may be established literally at the onset of the pregnancy.[35] We cannot expect biologists, embryologists, or medical men or men from any other branch of science to tell us when human life begins in the context that we must deal with that term here. The issue is one of policy, not of science. There are quite a number of indications that bear rationally upon this policy decision which indicate that the "taking of human life" argument is unsound. First and quite obviously the traditional legal policy of our society is quite to the contrary. Abortion has always been recognized as an offense separate from homicide. To equate it with homicide is to ignore this rather substantial distinction that has persisted in our law. The deliberate taking of human life as life is recognized under the law of homicide has always been viewed as a crime

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[34] Dworkin, *supra* n. 32. The article by Prof. Dworkin is rich in thought and precisely written. Only a very modest hint of the quality of analysis presented in Dworkin's paper is disclosed in the text above.

[35] Fertilization normally occurs while the ovum moves down the Fallopian tubes towards the uterus, but successful pregnancy depends upon the connection of that fertilized ovum to the lining of the uterus. This process, called implantation, usually occurs six to ten days after fertilization. *See* 5 LAWYERS MEDICAL ENCLYCLOPEDIA § 37.1 (1960) for a simplified description of this phenomenon. *See* Note, 46 ORE. L. REV. 211 (1967) which speculates about the so-called "morning after pill," and abortion law policy. The "morning after pill" operates on a principal of altering body chemistry so that the lining of the uterus repels fertilized ovum and thus prevents the normal pregnancy through prior intercourse may have lead to the fertilization of the ovum.

more heinous than the deliberate destruction of the fetus.[36] Moreover, the different treatment accorded the defense of necessity under the law of abortion and the law of homicide emphasizes the breadth of this distinction. It is commonly a defense to abortion that the operation was performed to save the life of the mother.[37] The law of homicide, on the other hand, does not recognize it as a defense that one innocent human life is taken in order to preserve another.[38] There is another revealing factor to be considered—the common reaction to spontaneous abortion early in pregnancy. This phenonema is not treated in our society as the loss of human life. The laws of the various states overwhelmingly regard the loss of the fetus early in pregnancy as an event other than death. Health codes commonly require the report of a stillbirth only when the pregnancy has proceeded to about the fifth month.[39] When pregnancy terminates prior to that time, there is no birth nor death recorded. The remains of the "product of conception"[40] are disposed of as anatomical waste and not as a human corpse. The common response is not one of mourning the death of a child but of disappointment over the loss of an opportunity to have a child. It seems quite unsound to argue at this date that the tradition of all legal policy which has viewed abortion as an offense distinct from homicide should be moved within the homicide category. Stripped of the emotional fervor that surrounds the *decision* to abort, our society does not treat this phenonema as the loss of human life.

A variant on this line of argument that puts the matter less ardently pushes our attention closer to the Devlin, Hart, Dworkin concern for the proper role of the criminal law. This variation

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[36] During the priod when aborting a quickened woman was a capital offense, 1803 to 1837 in England, there was a rough equating of abortion and homicide. *See* notes 8 and 9 *supra*. *See also* DICKENS, ABORTION AND THE LAW 20-22 (1966).

[37] *See* summary in George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371, 375-80 (1965).

[38] The classic case is Regina v. Dudley and Stephens, [1884] 14 Q.B.D. 273, holding it to be no offense to murder or to slay a dying cabin boy to provide food and drink for others starving in a life boat.

[39] W. VA. CODE ch. 16, art. 5, § 6 (Michie 1966). Other statutes follow similar patterns. *See, e.g.*, ARIZ. REV. STATS., ch. 3, art. 2, § 36-335 (1956); DEL. CODE ANN., §§ 3124, 125 (supp. 1967); MICH. STATS. ANN. § 14.235 (Rev. Vol. 1956).

[40] The term "Product of Conception" is used in some statutes. It seems rather clearly aimed at avoiding the anguish of dealing with labels in this regard that might imply human life. The debate about abortion may be giving rise to another euphanism—the "a disease of unwanted pregnancy." *See* TIME, Sept. 15, 1967 at 84 for a report on the Washington, D.C. conference on abortion at which such terminology was employed.

suggests that though we cannot assert that the abortion operation is the taking of human life, and admitting that it may be shown that in other respects we do not view this phenonema as the loss of human life, nonetheless we do not know that the operation does *not* involve the taking of human life; therefore, the better policy is not to reduce the restrictions presently imposed upon the operation.[41] This position gains a greater part of its strength from traditional conservative values and the historic accident that we presently have very stringent restrictions placed upon the abortion operation. Such a position deftly links an admirable concern for human life with a neat shifting of the burden of proof to the proponents of change. The shifting of the burden of proof is the crucial element here. As Glanville Williams has said, "The view that human personality mystically begins with the fertilization of the microscopic ovum cannot be refuted any more than it can be proved."[42] Thus, whoever bears the burden of proving when human life begins automatically looses the argument. The cautionary-principle advanced here tends to become a corollary of the ultimate conservative principle that we should never risk any action for the first time. But, adject surrender to fate and to the accidents of history do not resolve problems. The challenges of life, no more than the inevitability of death cannot be put off until a more convenient time—a time when, presumably, ultimate wisdom may somehow force its way upon our admittedly imperfect perception. The steady advance of science brings more and more under the control of mankind and persistently pushes back the perimeter of inevitability. To shrug off the human responsibility of deciding what to do with this power, to pretend we still may rely upon the unknown forces to command these choices for us, is to shun responsibility, not to exercise caution.

Beyond these arguments that fall within the secular spectrum, lies a considerable reluctance to reduce the public control of the abortion operation. This is the right-thinking morality that Lord Devlin recognized as worthy of support through criminal sanctions. And here lies our final concerns.

If we are to take Lord Devlin's thesis to mean that society has

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[41] Address by Rev. Father Robert Scott, C. S. P. "Legalized Abortion" at *Jus et Factum* conference on legalized abortion, Sept. 21, 1967, W. Va. Univ. College of Law.

[42] WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 225 (1957).

a right to protect itself, continuation of the present extremely restrictive approach to abortion is difficult, if not impossible, to justify. Can it really be rationally maintained that liberalization of abortion law policy threatens in any meaningful sense the continued vitality of the society. Certainly the impact upon gross population changes that would result from such a change in policy is hardly any noteworthy factor. The very liberal attitudes of our society towards birth control and family planning bear much more directly on this issue and argue that the assumption of parental responsibilities may, at the option of the individual, not the community, be made a matter of choice and not of chance.[43] Indeed, any threat to our social fabric that is premised upon the threat to the size of the population is belied by the attitude of our society in regard to much less drastic, yet more pervasive, birth control measures. The point of departure, where a unique argument can be raised in regard to abortion as opposed to methods that prevent conception, can be maintained only when we concede that there is a taking of human life in some manner involved in the abortion operation. By extending this generalized threat to human security through extreme projections it may be argued that abortion is only a first step towards eugenic infanticide, genocide or euthanasia that might lead to the rational dispatch of the senile when they become a burden upon society and other similarly ghoulish consequences. But not every tree that is planted must grow up to puncture the sky. We seem to be able to distinguish between levying taxes upon property and confiscating the property *in toto* without compensation; we have recognized divorce without abolishing marriage; we acknowledged the right of self-defense without obliterating the law of homicide. The abortion problem is unique enough to be considered on its own merits. It does not follow that shifting the difficult decision about abortion from the automatic dogmatism of the criminal code to the arena of private choice would pose any significant threat to the value of human life generally as we now recognize it in our society. Only precarious speculation can close the gap between the societal risk involved in diverting the abortion decision to the private realm and Lord Devlin's admittedly legitimate concern for society's right to protect and perpetuate itself.

[43] Certainly a most dramatic exemplification of our society's attitude towards birth control is found in the Supreme Court decision in Griswold v. Connecticut, 381 U.S. 479 (1965).

Nonetheless, it is a fact that the moral sense of the community remains no doubt quite antagonistic towards abortion. If the community is to "follow its own lights," to borrow Professor Dworkin's term, certainly we must realistically recognize that there is a great store of feeling that supports the present-day abortion law policy. Professor Dworkin properly raised the point that the lawmaker has a responsibility to use his best judgment to distinguish between a moral sense of the community that just happens to exist and a moral sense that is legitimate, rational and deserving of respect. I suspect that much of the lingering anguish over the abortion problem is not rationally founded and in my mind there is considerable doubt as to whether this moral sense is deserving of such formidable recognition as the law now accords it.

One interesting sideline on the public discussion of the abortion issue has been the repeated reference to polls taken among physicians and medical men as to their attitudes towards abortion law reform. That the collective positions of medical men on such issues is deemed relevant might indicate a revealing anxiety and desire for "expert" guidance.[44] The appropriate contribution which medical men can make is rarely examined. The gross reaction of the group surveyed is usually all that is reported. What leads the medical men to these particular conclusions is apparently deemed largely irrelevant in such surveys. The lingering doubts of physicians may be provoked by the same kinds of uncertainties that trouble the public generally. At a recent panel discussion on abortion law,[45] a gynecologist stated that though he favored some modification of the law he nonetheless harbored certain doubts and retained a reluctance towards the abortion operation. When driven to articulate his reason for this, he forthrightly explained that these doubts lingered from "lessons I learned at my mother's knee." The remark is quite revealing. It suggests that much of the animosity towards the abortion operation is the product of an inherited value system that is difficult to balance against objective argument. When the rational arguments have been put aside, there still lingers this doubt. Why? Perhaps these are some of the reasons.

[44] *See* TIME, May 5, 1967, at 69, noting that a last minute letter campaign by physicians directed to Gov. John Love of Colorado helped to avoid a veto of the Colorado abortion reform law. In the same article the magazine notes a survey of U.S. Physicians indicated 87% favored liberalizing abortion laws.

[45] *Jus et Factum* (W. Va. Student Bar Association Newspaper) forum on legalized abortion, Sept. 21, 1967, W. Va. Univ. College of Law, Morgantown, W. Va.

No doubt there is some connection between the abhorence for abortion and the general warm and positive feelings that our society holds toward the status of motherhood. Giving birth to a child and assuming the role of mother is one of the positive fulfillments of the woman's role in our society. Indeed, for women in a large segment of our society, achieving motherhood as the single most important accomplishment of the entire life span.[46] The fact that we have a national holiday set aside to pay respect to mothers is a further indication of the reverence paid the status of mother. It is quite consistent with this warm and positive attitude that abortion should provoke very opposite feelings and emotions. Abortion is a dramatic and specific rejection of motherhood. While this reaction is understandable, the question of whether it is rational remains to be examined. The thrust of this antagonistic feeling exceeds the legitimate range. Rationally viewed, abortion is not a rejection of motherhood generally, but rather a rejection of a specific child-bearing opportunity. The number of potential opportunities for child-bearing reaches well over three hundred for the normal, healthy woman. To terminate one pregnancy which consumes only a fractional portion of this fertility span obviously is not a total rejection of motherhood. Moreover, in some instances, the desire for abortion is motivated by the desire to sustain the capacity to perform adequately as a mother for children already present in the family. In whatever degree the lingering abhorence of the abortion operation is promoted by its seeming automatic rejection of motherhood, that abhorence is largely emotional and not rational.

There is yet another source of animosity in our society that grows from essentially retributive feelings. There exists, no doubt, some sense that those who become involved in unwanted pregnancies "got caught" cheating on society's rules in regard to sexual conduct. From this view then, abortion is an act which cheats fate of its just rewards.[47] The suppression of natural sexual desires and channeling of these into socially accepted patterns of conduct have long been fortified by the fear of unwanted pregnancy. Indeed there is considerable consternation today that the increasingly simple means of birth control that reduces the risk of unwanted pregnancies may reek havoc with our sexual mores. The anguish

[46] RAINWATER, AND THE POOR GET CHILDREN 82-86 (1960).
[47] *Cf.* Andenaes, *General Prevention—Illusion or Reality,* 43 J. CRIM. L.C. & P.S. 73 (1964).

caused by such suppression of sexual desire is somewhat ameliorated, rewarded negatively in a sense, when others are seen as "paying the price" for overstepping the ground rules that society has laid down about sexual conduct. This feeling of rightness, that the punishment fits the crime, is no doubt reinforced by the fact that in an American culture that admires achievement, conquest and acquisition, there is a natural feeling in the male—sometimes strongly expressed in groups of young men—that status and success are achieved by a wide range of sexual conquests and achievements. The young man who has no record of achievement in this field of endeavor may feel quite ambivalent about himself. He may view his lack of success as failure, or as the product of mature restraint. When others are observed in difficulties because of unwanted pregnancies, there is a natural tendency to feel relief that these are wrongful consequences properly avoided by sexual abstinence. Doubts as to personal failure are more easily downed. A self-image of rectitude is supported. The naturalness of pregnancy trouble is perpetuated and the attitudes towards abortion as an unfair escape contributes to the general concept of abortion as inherently evil.

Surveys of public opinion that have measured attitudes towards modification of abortion laws have sought to measure the variety of feeling conditioned upon the circumstances surrounding the conception. These surveys indicate quite clearly that when the intercourse resulting in pregnancy fell beyond the limits of tolerable sexual conduct in our society, the support for allowing abortion to terminate such pregnancies fell off sharply.[48] This difference of attitude is most readily explained by the prevalence of the feeling that a pregnancy is just punishment for those who violate society's

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[48] *See* Rossi, *Abortion Laws and Their Victims,* TRANS-ACTION Sept.-Oct. 1966 at 7. Reporting on a survey of general adult opinion responses showed that 71% would approve of abortion where a woman's health was in danger; 56% would approve where pregnancy resulted from rape, but only 18% would approve where the woman was unmarried and did not want to marry the man who conceived her child. Another opinion pole reported in NEWSWEEK, Mar. 20, 1967 at 72-73 dealt with a nationwide survey of Catholic opinion. As a part of this survey attitudes towards abortion law reform were solicited and 58% of the laymen surveyed supported the church's general opposition to reducing criminal law prohibitions upon abortion, 28% opposed this position, and 14% were found indifferent. Attitude toward abortion in particular cases varied considerably. Of those interviewed only 10% would deem abortion justified where a girl became pregnant on a weekend visit to an army camp, while 46% would deem it justifiable following rape, and 58% would deem it justifiable to save the life of the mother.

ground rules in regard to sexual conduct. The point will not be pressed here at length, but it is quite unsound to adopt as a matter of rational public policy the position that the proper punishment for violating the sexual ethics is to bear unwanted children. Parenthood should not be deemed a form of punishment.

What I have sought to show here briefly is that the reservoir of ill feeling towards abortion is probably the product of emotional forces and not a rational, deliberate thinking through of the problems involved. I would suggest that it is the duty of the lawmaker seriously to question whether a general policy antagonistic towards remitting abortion decisions to the perogatives of private decision is justified on such bases.

A society that seeks to promote morality should not strip its citizens of the power to make moral decisions. A man wearing mittens can hardly learn to play a piano. A mature mind, similarly incumbered, cannot develop the strength and moral fibre necessary in a free society. A sound policy in regard to abortion would allow this decision to be made by the private judgment of the persons most directly involved. If the state is seriously concerned that this operations is so unique that it demands particularly cautious and mature consideration, a range of simple procedures may be prescribed to insure this. Such procedures might involve a simply verification presented to the physician and placed upon file that the patient concerned has counselled with a clergyman or other moral advisor before undertaking the operation. More elaborate review procedures patterned after the laws of the Scandinavian countries where there is considerable review by medical and social welfare personnel could provide a more cumbersome alternative.