ABORTION: A CASE STUDY IN DISTINGUISHING ETHICS, POLITICS, AND LAW

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The preface to *Law, Language, and Ethics,* by Bishin and Stone starts with the observation that:

> Every legal problem has its roots and perhaps its analog in traditionally "philosophical" realms. Strip away the technical terms, plumb the debate's assumptions, and a host of implicit philosophical positions will be found. Some of these will be inarticulate conclusions about the nature of reality, of knowledge, and of language. Others will be about the requisites of morality, the meaning of "the good life", the ends of social organization, the nature of man.[1]

This claim is certainly borne out by a variety of examples. Thus, the differentiation in the law of premeditated acts from others done spontaneously or out of impulse is undergirded by a host of complex philosophical theories about freedom, action, and responsibility. But philosophical theories do not come into being *ex nihilc*. It is widely held by philosophers that philosophy arises out of conflicts in our common-sense view of the world. The pre-socratics, for example, were motivated to a great extent by the apparent, conflict between our everyday ideas of an object on the one hand and change on the other.

Combining the two points made above, one might surmise that the aetiology of at least some legal issues is to be found in conflicts in our common-sense view of reality which give rise to philosophical or moral theorizing which itself becomes the basis for legal reasoning. Such a view is not without merit. We may, for instance, theorize that early societies formed their concept of man in an entirely ethnocentric fashion. When these societies were confronted by persons of other races, confusion would be introduced into their conceptual scheme and philosophizing would begin. Such philosophizing would eventually lead to some resolution about how we should treat people of other

[1] Bishin, W.R. and Stone, C.D., *Law, Language, and Ethics,* The Foundation Press, Inc., 1972.

races, and this would eventually find its way into the law. And that different theories would produce different laws can hardly be disputed. All one need do is examine the Mississippi Black Code of 1865 and the Civil Rights Act of a century later in order to see the profound change in moral belief reflected it the law.

The progression from conflict in common-sense to philosphy to law also seems to hold in the case of the abortion issue. Insofar as we can identify an archetypal common-sense view, it would seem to be that a human being begins to exist at or near conception. The evidence that this is the vunerable view is found in myth, language, custom, art, and numerous other sources. To mention only two cases, there is the English phrase "with child" which implies that the unborn is a child, and there is the Chinese practice of reckoning a person's age beginning at one year old at the time of birth. It is not my purpose to argue here that this view is philosophically correct, but only that it is embedded in the history of human thought.

Presumably, philosphical theorizing about when human life begins did not get started in earnest until advances in biology and medicine began to conflict, or appeared to conflict, with the implicit common-sense view. Incidentally, it should be noted in passing that the official doctrine of the Roman Catholic Church is not, contrary to popular opinion, the source of the common-sense view. Rather, it is the other way around. The Church merely embraced and codified in theological terms a view which had been implicit since, to borrow a phrase, "time immemorial". The philosophical dispute is far from over, of course, but the law will not wait for a philosophical solution. The present legal furor over abortion is not so much derived from philosophical debate as it is parallel to it. The decision of the United States Supreme Court in the case of *Roe v. Wade* makes this quite explicit. Wiriting for the majority, Associate Justice Harry Blackmun states:

> We need not resolve the difficult question of when human life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

But despite this disclaimer, the Court did in fact decide. By ruling that the state may proscribe abortion only after viability, the Court in effect decided that life begins at that point. Here we have a case where a decision in law does not, contrary to the claim of Bishin and Stone, have a philosophical theory as its basis. Instead, the Court

seems to be creating philosophical theory, although somewhat reluctantly. What other choice did the Court have? For an answer, we might turn to the minority opinion in the same case. That opinion, authored by Justice Byron White and concurred in by Justice William Rehnquist, introduces a new consideration into our topic. It states that:

> In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

The new consideration introduced by Justice White's opinion is the political process. In White's view, there simply is no legal issue to be decided. This is so because abortion is not treated, even implicitly, in the Constitution, and since, in cases such as *Roe v. Wade,* the Constitution is the law for purposes of the Supreme Court, there is no issue to be decided. It is easy to conjecture that had White had his way, the Court would simply have refused to hear the case on appeal. Since the Court did hear the case and since White did not agree with its decision, the opportunity arose for him to record his own theory by means of a minority opinion. Let us examine his theory.

Justice White seems to offer us two justifications for his contention that the abortion issue "should be left with the people and to the political processes the people have devised to govern their affairs". These are:

A. The issue cannot be settled by reference to precedent.
B. The issue is one "over which reasonable men may easily and heatedly differ".

Concerning A, we should keep in mind that the Constitution, certain surrounding documents, and previous decisions based on the Constitution are virtually the only precedents relevant to the decision at issue. Regardless of whether we agree with Justice White's analysis in this case (*i.e.,* whether we think he has misinterpreted the Constitution), we can hardly disagree with the principle. If there were binding precedent, it would follow that no political decision could or should be made, the issue already having been decided in law. Thus, A seems to be a necessary but not a sufficient condition of something's deserving to be decided in the political arena.

If Justice White's reasoning followed the norm, we could expect B to be a sufficient condition, or at least a *differentia* to go with the *genus* of A. Is this the case? Can we agree that issues "over which reasonable men may easily and heatedly differ" are always or even usually properly delegated to the political arena? I suspect there will be some disagreement on this question, but I think that if we read Justice White as supporting an affirmative answer to the question (a reading which is admittedly underdetermined by the evidence) then he is not only correct, but may have provided us with a novel way of understanding the triumvirate of ethics, politics, and law. Briefly, this novel understanding is based on the idea that insofar as law is grounded in ethical theory, said theory must be widely shared by the populace; *i.e.*, the society must be largely homogeneous. In a pluralistic society, on the other hand, the political process can be used to create law in the absence of a moral consensus. As background, I present the following thumbnail sketch, offered with apologies to my colleagues in anthropology and history.

We can speculate that the origins of civilization began when the exigencies of daily life constrained our earliest ancestors to devise (probably in a non-deliberative manner) some sort of social structure. Such a structure facilitated communal existence for a group of people, probably an extended family or clan. Anthropologists are in agreement that primitive societies are homogeneous and monolithic. Thus, there are no societal conflicts in mores. As these societies mature, their shared moral beliefs, rituals, customs, etc. are incorporated into more formal systems, culminating in some system of political governance and law. Now anyone who has studied the phenomena of ethics, politics, and law knows that in practice they are almost inextricably interwoven. We might, however, gain some analytic understanding of them by means of the following observation. Political problems become distinct from ethical and legal issues only in a pluralistic society. Thus, in a homogeneous society, no viable distinctions among the three can be drawn, all three reflecting as they do a single underlying philosophy. But in a pluralistic society, difference cannot be settled by reference to commonly shared ethical values, and the need for politics as a distinct activity arises. Let us apply this observation to a hypothetical case.

Suppose that in a certain country the indigenous population all subscribe to a religious belief which proscribes the use of alcohol. Suppose further that because this ban enjoys universal assent no conflicts have arisen and, therefore, the prescription has never become part of the law. Suppose now that there is a sudden large im-

migration into this country of persons who use alcohol as part of their religious ritual. We can well imagine that conflicts will arise. How will these conflicts be resolved? If they are to be resolved by law, then that law must emanate from either a moral or a political source. Since there is no longer a moral consensus, it is likely that a political decision will be necessary. We must recognize, of course, that such a decision might still reflect a moral view insofar as one group is able to use its political power to inject its moral view into the law.

In summary, we can now make the following observations about abortion in relation to ethics, politics, and the law. In a country where the populace shares a common moral view concerning abortion, abortion will necessarily be a moral issue, but will not necessarily be a legal issue. If it is a legal issue, the law will have its basis in the shared morality. In a country where there is no moral consensus about abortion, abortion will be a political issue, and will be incorporated into the law only as a result of political action, although such political action may have the effect of legislating the moral view of the group with the greatest political power. I conclude that law may have its basis in either ethics or politics, that the latter is distinct only in a pluralistic society, and that, even then, moral views may sometimes underlie political actions.