TOWARD A NEW ANALYSIS OF THE ABORTION DEBATE

Karen L. Bell*

The decision in the *Webster* case[1] and the resulting re-ignition of the abortion debate led pollsters and pundits to an unsettling conclusion: the American people are mushy-headed. In polls spanning the last three decades, when asked whether abortion should be legal, the vast majority of Americans respond with some variation on "it depends." The press has reacted to this fact with a slew of articles and analyses charging that people are simply incapable of intellectual consistency on this difficult issue.

This is not a surprising notion. Commentators as far back as Alexis de Tocqueville[2] have noted the propensity of the American people to hold opinions that are mutually contradictory when subjected to any sort of rigorous analysis. In the particular case of abortion, however, I believe that the specific positions which people hold, depending on the facts of the particular situation, are not as inherently contradictory as they first appear. Rather, the fine line-drawing that most of us do when faced with this difficult issue indicates that the debate, as it is usually structured, is inherently flawed.

I propose an alternative to the traditional American analyses of the abortion debate, one which better fits the way that people actually think about the issue. This alternative leads to an analysis based on the criminal law categories of justification and excuse. The law in these categories states that an act is generally impermissible, while at the same time either making an exception in the particular case (justification doctrine) or refusing to punish the action because of the circumstances (excuse doctrine).

In Part One, I will present and analyze poll data in order to determine what the American public actually thinks about abortion. In Part Two, I will examine briefly the traditional frameworks in which abortion policy is discussed, and show why they are inadequate, based both on their inherent flaws and inconsistencies, and their inability to explain the data presented in Part One. In Part Three, I will argue that the doctrines of justification and excuse provide a better explanation of the data and a more productive way of structuring the debate. I will look at specific areas of contemporary criminal law doctrine in order to determine to what extent they might take account of the concerns in

---

* B.A. (Harvard College, 1987); J.D. (Harvard Law School, 1990); Candidate for the LL.M., Harvard. Executive Director, Israel Academy of Liberal Arts, Jerusalem. The Author would like to thank Richard Parker and Mary Anne Glendon for their assistance and support.

1. Webster v. Reproductive Health Serv., 492 U.S. 490 (1989).

2. *See generally* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (G. Lawrence trans. 1966).

this area. Finally, in Part Four, I will note briefly how similar modes of analysis are expressed in the abortion policies of a number of Western European nations, in order to highlight how such a structure might be expressed in American law.

To conceptualize the debate in terms of language stating that a "wrong" act is "permitted" in a certain case under a doctrine of "justification" or "excuse," does not presuppose any particular outcome. This concept approaches the problem as one of balancing interests and line-drawing, but it in no way solves the problem of where to strike the balance or where to draw the lines. This conceptualization may appear weak because it does not "solve" the problem of abortion in the way that more simplistic and absolutist conceptualizations do.

Recasting the debate into language that captures the way that we actually feel about the issues, and which does not lead to any particular outcome, is the strength of this approach. It makes it possible for people who disagree vehemently about the circumstances under which abortion should be permitted to have a meaningful discussion about that question. This is not possible when the debate is cast in terms of a woman's "right" to choose or a fetus's "right" to life. Both of these formulations suggest an absolutism that does not capture our true feelings, and do so in language which, by its very nature, precludes the compromise positions which most people in fact take. The first step toward a solution to this difficult and emotional issue is to realize where the real disagreement lies. By redefining the debate in terms of under what circumstances abortion should be permitted, rather than as one about whether the mother and the fetus each have "rights," we can at least reach a point where we are all disagreeing about the same thing.

This mode of analysis does assume that abortion is a morally troubling issue. It assumes that the fetus has some moral status, whatever words we may use to describe that status, and that such status has some claim against the free choice of the pregnant woman. This presupposition is based on the fact that the vast majority of the American people believe it to be the case, rather than on any particular moral or metaphysical argument. It is also based on the assertion that most women who choose to undergo an abortion nevertheless see it as a moral choice. They decide that, in their particular case, other circumstances outweigh any claim that the fetus may have. The fact that even women who choose to abort see it as a moral choice demonstrates that they see the fetus as having some moral claim. Some women, undoubtedly, believe that abortion is truly the equivalent of an appendectomy, a purely surgical procedure with no moral component. This paper is not addressed to those people. For them, compromise is impossible. But for most of us, and for the American polity as a whole, compromise is essential.

One caveat is in order. The changes in abortion policy which might result from such an analysis may be precluded by current American constitutional law. While the full implications of the *Webster* decision are not yet clear, the current doctrine would appear to be that of Justice O'Connor's opinion. Justice O'Connor holds that state regulation of abortion is permissible so long as such regulations do not place an "undue burden" on the pregnant

woman.[3] The rigid trimester system, under which states could not regulate abortion at all during the first trimester, and could regulate only to protect the health of the pregnant woman during the second trimester, appears to be a thing of the past. It is not clear, however, that the Court would allow a state to prohibit a certain class of abortions entirely, even at the earliest stage of pregnancy, based on an examination of the woman's reasons for seeking the abortion. Such an outcome would probably be possible only if and when the Court overturns *Roe v. Wade*[4] and returns the issue to the state legislatures. Nevertheless, even if the actual state of abortion law does not and cannot change to accommodate this new analysis, it is a useful tool with which to evaluate our own views and to discuss the issue with those who disagree. Indeed, it is the only meaningful way to do so.

I. BEHIND THE SLOGANS: WHAT DO PEOPLE ACTUALLY THINK ABOUT THE ISSUE?

While the percentage of Americans in any survey who would permit abortion in any particular situation varies slightly according to the political climate and the exact manner in which the question is asked, it is the similarities rather than the differences which are striking. The story usually goes like this.[5] Only a small minority, usually less than ten percent, would prohibit all abortions. A somewhat higher number, about one-fourth of those surveyed, would allow abortion in all situations. The remainder splits based on the reason offered by the woman seeking the abortion. A significant minority would limit availability to cases where the woman's life is threatened. Still more would draw the line at cases of rape or incest. About the same number who would allow abortion in cases of rape or incest would also permit it if there is a serious defect in the fetus. When economic factors are cited, or the woman simply "does not want" another child, less than half of the sample would permit abortion, but still a higher number than would permit it for "any reason."

Numbers like these lead to expressions of frustration from confused pollsters. As Ethan Bronner wrote in the *Boston Globe* while the country awaited the *Webster* decision:

> So many contradictions occur both between different polls and within individual polls that many who watch abortion surveys closely conclude that most Americans hold within themselves mutually irreconcilable beliefs on the question.
>
> Firm minorities exist on both sides, with more people solidly in favor of abortion rights than solidly opposed. But at least half of the country has no consistent attitude toward abortion law and morality.[6]

---

3. *Webster*, 492 U.S. at 530 (O'Connor, J., concurring).
4. 410 U.S. 113 (1973).
5. In addition to the data presented below, other polls are summarized in M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 40-42 (1987); R. TATALOVICH & B. DAYNES, THE POLITICS OF ABORTION: A STUDY OF COMMUNITY CONFLICT IN PUBLIC POLICY MAKING 116-37 (1981).
6. Bronner, *Polls Indicate Most Are of Two Minds on Abortion*, Boston Globe, April 19, 1989, Nat'l/Foreign Section, at 3.

But Americans do have a consistent position.[7] They are consistent in believing that the interests of the pregnant woman and of the fetus should be balanced in each situation. The fact that the vast majority consider the reasons why a woman wants an abortion, refusing to allow it in "all circumstances,"[8] indicates that they see the fetus as having some interests that should be protected. But the extent to which those interests are protected, and the question of when they are overcome, depends on the pressures which the pregnancy places on the woman.[9]

Let us examine how these issues played out in several surveys. The *Boston Globe* asked approximately 1,000 Americans for their opinions on abortion in particular situations in March and again in December 1989.[10] The questions asked were identical. The percentages who said that abortion should be legal in each case are shown below:[11]

7. This is not to say that they do not make mistakes. As will be discussed below, a large number of Americans appear to be seriously misinformed as to the current status of abortion law in the United States. This misinformation explains what would otherwise be a baffling inconsistency in the data.

8. Bronner, *Poll Shows Shift Toward Support of Abortion Rights*, Boston Globe, December 17, 1989, Nat'l/Foreign Section, at 1.

9. Of course, different people draw the lines in different places. These differences indicate what cannot be disputed: that the question of how great the fetus's interests are is itself highly controversial. Differences *between* people in the poll data can be seen as dependent on their feelings on that issue. But the thesis of this argument is that differences *within* the same person's views in different situations are not the result of confusion or inconsistency, but instead, of the different interests which the situation places on the other side of the scale. Simply stated, the question that we ask ourselves in each situation is, "Is the pressure on this woman severe enough to justify ending her pregnancy, given [what I see to be] the interests that the fetus has in being born?"

10. Bronner, *supra* note 8, at 1. This comparison is important becuase it shows the effect on opinion of the *Webster* decision. While the fact that the availability of abortion is now less certain did influence attitudes somewhat, it is important to note that the basic gradations among reasons are the same. In other words, when we graph the reasons for which people believe abortion should be allowed, the shape of the curve is the same, but it shifts slightly toward a greater allowance of abortion.

Thomas W. Smith of the University of Chicago's National Opinion Research Center, which has surveyed abortion attitudes every year since 1965, asking identical questions each time, noted that support for abortion has increased about 3% in most categories since *Webster* — a modest but statistically significant change. *See* Bronner, *Poll Finds Opposition to State's Abortion Curbs*, Boston Globe, July 11, 1989, Metro/Region Section, at 1.

11. This does not indicate that the remainder thought that abortion should not be legal in that situation. The number of "don't know" answers in the surveys tends to be significant, further demonstrating people's uncertainties about the issue.

Abortion should be legal:	December	March
in all circumstances	37%	25%
in some circumstances	53	55
in no circumstances	10	20
For those who said "some circumstances":		
where tests show a genetic deformity	70	70
where the pregnancy resulted from rape or incest or the mother's life is in danger	85	85
where the woman cannot afford another child	50	34
where the father will not help with the child	41	31

Support for the availability of abortion in "some circumstances" is the most popular opinion, with the strongest support for situations where the mother's life is endangered or the pregnancy resulted from rape or incest. As is true generally, while economic reasons were seen as sufficient by many people, these "soft" reasons received significantly less support than the "hard" reasons cited above.

A *New York Times*-CBS News Poll, taken in April of 1989, had the following results:[12]

Abortion should not be restricted in a case where:	
Pregnancy resulted from rape	80%[13]
Pregnancy resulted from incest	80%
Pregnancy threatens mother's life	87%
Woman cannot afford child	43%
Father unwilling to help with child	49%

The emphasis on the desire for available abortion for these "hard" reasons is also evident in the level of support for a bill passed by the Idaho legislature limiting abortion to cases of rape, incest, or threat to the woman's life. In a nationwide survey, half of those having an opinion favored such an ap-

12. *Poll on Abortion Finds the Nation is Sharply Divided*, N.Y. Times, April 26, 1989, at A1, col. 6. This poll also surveyed 1,412 adults, with a margin of error of ±3%. The questions were asked in terms of "state restriction." Such language tends to result in greater support for abortion than does language that does not mention the government. The viability of an abortion scheme based on state neutrality is discussed, *infra*, in Part Two.

13. Unfortunately, the exact numbers in the first three categories are not available.

proach.[14] By contrast, when asked about Guam's new law, which limits abortion to cases where the woman's life is endangered, a majority opposed it.[15]

Interestingly, despite the vastly different political climate and the fact that abortion-on-demand is now taken for granted as a political right in the United States, the basic division of public opinion is almost identical to that found nearly thirty years ago.[16] Prompted by the *Finkbine* case, researchers began surveying public attitudes about abortion in 1962.[17] The National Opinion Research Center has been surveying public opinion every year since 1965. The questions asked every year are identical.[18] The 1965 poll produced the following results:[19]

A woman should be allowed to have a legal abortion if:		
	Yes	No
her health is seriously endangered	71%	26%
the pregnancy resulted from rape	56	38
strong chance of fetal defect	55	41
cannot afford more children	21	77
is not married/does not want child	18	80

The results of this poll, and some of the later polls, are summarized in the following table.[20] Despite the significant increase in support for abortion rights between 1965 and 1972, the basic division of public opinion according to the reason given, and the weight accorded these reasons, remains the same.

14. Robinson, *Abortion Curbs Backed in Poll*, Boston Globe, March 29, 1990, Nat'l/Foreign Section, at 18. The significance of support for an exception in cases of rape and incest will be discussed, *infra*, in Part Three.

15. *See* Robinson, *supra* note 14, at 118.

16. *See* R. TATALOVICH & B. DAYNES, *supra* note 5.

17. *See id.* at 116. The Finkbine case is discussed, *infra*, at note 101.

18. This is important. Despite the overall similarities, it is not surprising that the number of people approving of abortion is higher when questions are framed in terms of choice or freedom from government interference than when they are asked generally about "abortion."

19. R. TATALOVICH & B. DAYNES, *supra* note 5, at 117.

20. The data and format are taken from R. TATALOVICH & B. DAYNES, *supra* note 5, at 118.

Public Approval of Abortion for Specific Reasons: 1962-80 (percentage approving)

	Year	Maternal Health	Fetal Deformity	Rape	Unmarried	No More Children	Poor
NORC	1965	73	57	59	18	16	22
	1972	87	79	79	43	40	49
	1973	92	84	83	49	48	53
	1975	91	83	84	48	46	53
	1980	90	83	83	83	47	52
Gallup	1962	77	31				15
	1965	77	54				18
	1969	80	63				23
National							
Fertility	1965	87	50	52	13	8	11
Studies	1970	88	65	67	30	21	25

Whether the American public supports abortion depends on the specific reason given. The so-called "hard" reasons (life of mother endangered, rape, incest) generally gain significantly more support than the "soft" reasons (woman is unmarried, does not want more children). The way these results relate to the justification and excuse doctrines will be discussed in Part Three. First, let us examine how the abortion debate is traditionally characterized, in light of our knowledge of how people actually think about the issue.

II. TRADITIONAL CONCEPTUALIZATIONS OF THE DEBATE

Before we go on to examine the implications of the poll data in formulating abortion policy, it may be useful to see how our traditional conceptualizations fail to take account of the way that people actually think about the abortion issue. The debate in this country has traditionally been framed in three ways, none of which adequately explains the fine distinctions among particular situations that we observed in analyzing the poll data in Part One.

The first traditional approach asks whether the fetus is a "person," is "human," or is a "human being." Some have asked whether the fetus should be protected because it is "potential life." The question of the moral, metaphysical, and ontological status of the fetus is intriguing from a philosophical point of view. Unfortunately, such inquiries are not the least bit productive in answering the question of what to do about abortion. In order to decide whether the fetus is "human," we would first have to answer the difficult philo-

sophical question of what makes a person human.[21] Even if we could agree on that answer, it would necessitate a scientific inquiry into the fetus's abilities and physical nature of a sort that, with current technology, is impossible.

But the impossibility of a definitive conclusion about the status of the fetus is only part of the problem. Answering whether the fetus is a "person" or is "human" does not accord with any but a rigid, absolutist view about abortion. The moral status of the fetus does not change because it was conceived of rape or incest, because its existence threatens its mother's life or health, or because its mother does not want more children. Whatever the fetus is — a human being, a mass of cells, a "potential life" — it is regardless of the circumstances which surround its current existence. This, then, cannot be the true source of our moral dilemma as we sort through varying sets of circumstances.

A second way in which the debate is often framed is in terms of whether a woman should have "control" over her "own body."[22] By phrasing the issue this way, proponents of abortion rights have answered their own question — it is difficult to argue that someone other than the woman should decide what is going to be done with "her" body. But like the first mode of analysis, this too begs the question; it assumes that the fetus has no independent moral worth, and no claims separate from those of the woman carrying it.[23] If this were the case, then the state would have no more right to tell a woman that she cannot have an abortion than it has to tell her that she cannot remove her own gallbladder. It is only because, given time and nourishment and the protection of the womb, a fetus will eventually become a human being capable of living separately from the mother and having undisputed moral claims — something that has never been accomplished by a gallbladder — that the abortion debate is problematic.

---

21. In the first instance, we can ask whether a creature is human because it looks like a normal human being. If so, is a person who is severely deformed physically still human? If we answer this question in the affirmative (as I think we would), then the inquiry must extend beyond physical form to questions of intelligence, creativity or imagination. But if we frame our answer in those terms, it would exclude the comatose, the severely retarded, and perhaps even the dull. Yet, if we look to a third possibility, that of defining humanity in terms of the potential to develop such creativity or imagination, then it seems that the fetus would have to be included. In fact, it is not difficult to frame an answer based on potential for creative thought, which would exclude a large number of mentally disabled people while including the fetus. Such a conclusion, while prohibiting abortion (or at least making it tantamount to murder), would at the same time allow the elimination of these mentally deficient "masses of cells."

We might reply to this argument that there is an important difference between actual intelligence or imagination and the potential to develop such attributes. But if the present ability to create and imagine is our criterion, then a newborn baby, and even a small child as yet incapable of abstract thought, would be as "inhuman" as the fetus. If we are unwilling to live with the conclusion that a person who lacks the highest human faculties — a toddler, a retarded person, an unconscious person — is not entitled to have his life protected as against the claims of those to whom he causes inconvenience, then we are faced with two options. Either we must conclude that the requirements of "humanity" are more minimal than we had supposed and might thus include the fetus, or that there is some life which, although not "human" according to our definition, is nevertheless entitled to protection.

22. This is often the most facile and superficial level of argument, as typified by the "Get your laws off my body" bumper sticker.

23. If there were no such second being involved here, then the only arguments against abortion would be purely paternalistic ones, based on the moral harm to the woman of the act. These are the sorts of arguments made for state involvement in other "victimless" crimes. Moreover, it is difficult to see how the paternalistic argument could be made in such a case; if the fetus truly had no moral status, how could it be said to be wrong to abort it?

This purely physical fact raises the question whether the fetus, the thing that will become a human being, has, by virtue of that potentiality, moral claims that must be recognized and, to some degree at least, protected. That question, as we have seen in Part One, has been answered affirmatively by a vast majority of the American people. To ask whether a woman should have the right to control her own body when nobody else's interests are at stake is, therefore, in this context, to ask a meaningless question.

How, then, are we to respond to the fact, shown by the poll data, that many people, though they feel that abortion is wrong in certain circumstances, nevertheless feel that it should not be illegal? Is this not exactly the libertarian position which the above argument holds to be meaningless? Or is this in fact a true inconsistency in the average person's views? In the end, it appears, the American people believe that this is a choice that every woman must make for herself. How, then, can we argue that a policy of state regulation based on the reasons given for an abortion — whatever else the arguments for such a system might be — gains its strength from the fact that it in fact reflects the views of a vast majority of Americans?

The answer to that question is threefold. First of all, the fear of state regulation apparent in the responses can be separated from people's feelings about abortion in particular. The feeling that government is too involved in our private lives, particularly in our sexual lives, goes far beyond the abortion issue. It may lead to a feeling that, whatever else the issue entails, it is simply too dangerous to let the government tell women what they can and cannot do in an area of their lives that remains, in one sense, deeply private and personal. That sentiment may also spring from concerns about the fact that abortion policy, whatever it may be, will impact women disproportionately. But if we decide that fetuses have some interests worth protecting (and it seems that we have), then the question arises as to who should protect those interests. One possibility is the pregnant woman. The fetus is, after all, inside her womb and is genetically her child. Of course, in this context, we are faced with a woman who would prefer not to be carrying that fetus. To leave it to her to establish to what extent the rights of the fetus are to be recognized and protected is a little bit like leaving the fox in charge of the chicken coop.[24]

The only other possible source of protection for the fetus is the state. While fears about prying eyes in our bedrooms are legitimate, even the most minimalist conception of state power encompasses the ability to protect those who are less able to protect themselves. Certainly, a fetus must fall into that category. The fact that a fetus resides, for the time being, inside the body of an otherwise autonomous adult places limits on the means we may use to ensure its protection.[25] In a nutshell, if the fetus deserves protection, then the state may

---

24. Nevertheless, one possible policy outcome would recognize the fetus's interests while making the pregnant woman the final arbiter of the choice whether to abort. Such a system is used, for example, in France. The question of how a system that recognizes both maternal and fetal interests should be administered will be discussed, *infra*, in Part Four.

25. The concerns about state regulation of pregnant women, and the trend toward criminalization of certain behaviors during pregnancy which lead to injury in the fetus, are rooted in this dilemma. In that context, few dispute that there is a state interest in ensuring that the baby that is, in fact, going to be born is born without serious mental and physical defects that will make it a lifelong burden on the state. The question is how to balance that interest with the

have to get involved in order to ensure that protection. While this analogy is of limited usefulness,[26] the situation is not all that different from the child abuse context, where, despite our reluctance to have the government tell us how to raise our children, we recognize that having the government look over our shoulders, to a certain extent, may be the only way to guarantee the safety of all children.

The statement that, "Even though I think it's wrong (or even, I think it's murder), I think every woman ought to be able to choose for herself," has another source besides fear of state intervention. It is also rooted in moral relativism. American culture is based strongly on the idea of individualism and free choice, of not imposing one's own value choices on others. This idea is so strong that we are reluctant to ever condemn or prohibit another person's conduct — even conduct that we characterize as murder. That reluctance to judge may well be the best way to run a free society, as long as the conduct "doesn't hurt anyone else." But when other interests are at stake, that reluctance to interfere is based, not in respect for freedom, but in fear of asserting and defending our own values. Viewed in this way, that aspect of the poll data does reflect an intellectual inconsistency, or at least a conflict between our intellectual conceptualization of the problem and our aesthetic reluctance to put that intellectual conceptualization into practice. The fact that many people say that they think the choice ought to be left to the woman does not mean that a policy which, in certain cases, refuses to let a woman carry out her own choice does not accurately reflect their true views on the correct outcome in a particular set of circumstances.

Finally, the position that says, "I think it's wrong, but I think a woman ought to be able to choose to do it," or "I think it ought to be legal" (which is the same thing), is an argument for the concept of the excuse doctrine. People are actually saying, "I disapprove of this action, but, in these circumstances, I don't think that people should be punished for doing it." This overall answer is perfectly consistent with the sliding scale of reasons and its implications for such a doctrine regarding specific fact situations. Two sets of justifications/excuses are being presented simultaneously. The first is, "in this particular case, it ought to be legal because the circumstances are such that the balance of interests favors the woman." The second is, "in this case, I would not make it legal because I think that the balance favors the fetus. I would, nevertheless, take account of the pressures on the woman who struck that balance differently from the way I do." The second set of arguments might lead us to the conclusion that the woman ought to be the ultimate arbiter. Part Four posits that such an outcome is possible and consistent with the conceptualization of the debate in this way. Such an outcome, moreover, would be an improvement, for both philosophical and practical reasons, over our current conceptualization.

---

pregnant woman's right to autonomy. In the abortion context, that concern is lessened, though not eliminated. The woman might be required to not abort the fetus — a restriction on her autonomy, to be sure, but not nearly so severe as monitoring what she eats, where she goes, what drugs she takes, and whether she has sex with her husband or lifts her other children against a doctor's orders.

26. We do not want to get bogged down in questions about whether the fetus is a "child," which present the same problems, and are similarly not useful for our purposes, as the closely related question of whether it is a "person."

The third common conceptualization of the abortion debate, that of state neutrality, is related to this problem. Given that the American people are so deeply divided over this issue, the only proper role for the state in a neutral society is to stay out of it. Once again, as a general proposition, this argument has a great deal of appeal. In this context, however, like the others, it gets us nowhere.

First of all, the empirical basis for this argument is, as we have seen, factually untrue. The American people have actually achieved remarkable consensus on the broad parameters of the debate. They believe that the fetus has some moral claims, but that in certain circumstances, the interests of the pregnant woman may override those claims. For the state to follow a policy that does not fit with that broad consensus is therefore decidedly non-neutral in that it imposes an external value choice which is not shared by those affected. Once the debate is seen in those terms, a state policy that continues to define the problem in terms of "rights" — and which places all the interests on one side of the scale — is seriously out of sync with the polity over which it is legislating.

The second problem with the state neutrality argument is discussed above — it only applies to personal choices, where there is no need for the state to step in and protect the otherwise powerless. That, of course, is precisely the question here.

Moreover, even if we did wish to advocate state neutrality in the abortion context, it is by no means clear what policy choices that would entail. In this area, as in so many others, not to choose is to choose. To say that each woman must choose for herself is for the state to decide that the fetus has no interests that need protection. Instead, state neutrality in this case may require protecting the fetus as fully as possible, because the neutral state must err on the side of life. To decide that some people (or some potential people) are not "human" is decidedly non-neutral. Both of these arguments are subject to counter-arguments, and it may be that neither of them fully captures the concept of neutrality. What they show, however, is that saying that the state should be "neutral" in this context is meaningless and gets us nowhere in deciding what the state should actually do.

III. RECONCEPTUALIZATION: JUSTIFICATION AND EXCUSE DOCTRINE AND ABORTION

We have seen that the three most common ways of analyzing the abortion debate do not help us to formulate policy. We have also found that Americans actually think about abortion in a way that is consistent with the justification and excuse doctrine. We must now examine how a conceptualization of abortion policy based on such doctrine might be put into practice. In this section, I examine the traditional criminal law doctrines of duress, necessity and self-defense in order to see how they might respond to the abortion question. The common law treatment of justification and excuse is instructive because it reveals both the strengths and shortcomings of viewing the abortion debate in this way. A fixed governmental policy allowing particular abortions, expressed

by statute, however, may be preferable to a system where a woman must first seek an abortion and then defend her actions via the commonlaw defenses.[27]

Duress

The defense of duress is created when an individual believes that the only way to avoid death or serious bodily injury to himself[28] is to perform an act which violates the terms of the criminal law, because he is being threatened unlawfully by another person.[29] The rationale for the defense is that it is better, as a matter of social policy, for the defendant to do the lesser of two evils[30] and violate the literal terms of the criminal law, rather than to follow the law and suffer the greater harm threatened by the other person. Duress differs from self-defense. In a case where self-defense applies, the force is used against the threatening party; the duress defense applies where the defendant saves himself by following the threatening person's orders and harming another.[31]

Because of the lesser-of-two-evils nature of the rationale, the traditional doctrine of duress held that the intentional killing of an innocent third person could never be justified.[32] In fact, duress instructions have been given in murder cases.[33] If the courts strictly adhered to this doctrine, a duress defense would clearly be of no assistance in the abortion context, unless the fetus is not considered a "person." Abortion thus could be the lesser of two evils even if murder could not. That would be a plausible way around the dilemma, since, if we were to view abortion as the equivalent of murder, we would be far less likely to allow it in the wide variety of circumstances which were discussed in

---

27. Some of the nations we shall examine appear to take a different view, as we shall see in Part Four. The certainty and repose that result from a system where a woman obtains permission in advance, however, are preferable to one that forces her to defend her actions in court after the fact, hoping that the jury will apply the law correctly. If it does not, she may be convicted of murder, even though her actions were legal under the statute. The question of proactive versus retroactive statutes will be discussed further, *infra*, in Part Four.

28. The defense sometimes extends to threats against others. For our purposes, such an extension would be relevant only as it would apply to the individuals who assisted a woman in obtaining an abortion. If the abortion were otherwise legal, however, the only sensible system would also absolve from liability those who assisted her. For example, if we refuse to hold a woman liable for having an abortion if her life is in danger (or for any other particular reason), we would simultaneously refuse to hold liable any person who performed that abortion or assisted the woman in obtaining it. While there might be reasons for having a legislative scheme that punished only doctors who perform illegal abortions, for example, without punishing the pregnant woman, that is a different issue from punishing doctors for performing abortions which we hold to be justified or excusable.

29. The question of whether the duress in the case of abortion is better analogized to a threat from another person, or to a physical force operating against the woman's will, will determine whether we should see the situation as analogous to duress or to necessity, which will be discussed in a separate section. While the two defenses are closely related, they differ in the circumstances in which they may be advanced. The most important difference is that, under the Model Penal Code and the modern conceptions adopted in many states, duress may justify the killing of an innocent third person in order to save oneself, but necessity cannot. This distinction obviously may have important implications in the abortion context.

30. The general choice-of-evils defense proposed under § 3.02 of the Model Penal Code is discussed, *infra*, in the separate section on necessity.

31. *See, e.g.*, Feliciano v. State, 332 A.2d. 148 (Del. 1975).

32. W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW § 5.3(c), at 437 & 434 n.13 (2d ed. 1986).

33. *See* MODEL PENAL CODE § 2.09, comment at 371 n.24 (1985).

Part One. We may see the fetus as having some interests, but, so long as those interests are not coextensive with those of living persons, a duress defense might still be possible.[34]

The Model Penal Code replaces the lesser-evil component of the defense[35] with the test that an act is excused by duress if the threat which compels the defendant to act is such that a person of "reasonable firmness" in his situation would be unable to resist it.[36] Under this alternative conception, the duress defense may apply even where the harm done by the defendant is not less than the harm he avoids by following the order. A majority of the states now follow the Model Penal Code formulation.[37] Under this formulation, the defense applies equally to the killing of innocent third persons, and so could apply to abortion as well, even if it were seen as equivalent to murder.[38]

It is generally held that, for a crime to be justified by a defense of duress, the duress must consist of threatening conduct that produces in the defendant 1) a reasonable fear of 2) imminent 3) death or serious bodily harm.[39] Threatened future death or serious bodily harm, threatened immediate, nonserious bodily harm or property damage, or an unreasonable fear of death or serious bodily harm are, therefore, not sufficient for the defense.[40]

If this conception were not broadened, a duress defense would be problematic in the abortion case. First of all, under the requirement of death or serious bodily harm, the defense would be unavailable for reasons other than risk to the life or physical health of the mother.[41] It may be argued, however, that the duress defense ought to be broadened beyond cases of death or serious bodily harm, particularly where the crime committed by the defendant to avoid the threatened harm is not a serious one; for example, where the defendant drives a few miles per hour over the speed limit in order to avoid being hit with a nondeadly weapon capable of inflicting great pain.[42]

Model Penal Code section 2.09 does not appear to require a threat of death or serious bodily harm.[43] It justifies an act if "unlawful force" was threatened, which a person of "reasonable firmness" would be unable to resist.

---

34. Even if we do see the fetus as a person, the doctrine of self-defense would still provide a possible justification for abortion where duress could not. Self-defense will be discussed, *infra*.

35. As noted above, the choice-of-evils defense is a separate defense under the Model Penal Code, available where other defenses do not apply. This defense will be discussed further, *infra*, at notes 59-81 and accompanying text. *See* MODEL PENAL CODE § 3.02.

36. *Id.* § 2.09.

37. W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.3(a), at 434.

38. As discussed above, such a conception is inconsistent with viewing abortion as justified in any case except, possibly, where the life of the mother is at stake. Nevertheless, a large minority of Americans, in fact, characterize it in that way. Many of these same people would allow abortion in a wide variety of circumstances. *See infra* Part One.

39. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.3(b), at 436.

40. *Id.*

41. It seems reasonable to equate serious damage to one's physical health with "serious bodily harm."

42. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.3(c), at 438. Such a situation is perhaps better analogized to the choice-of-evils defense in section 3.02 of the Model Penal Code, discussed, *infra*.

43. Many states extend the defense by statute to include threats of lesser bodily harm. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.3(b), at 437.

This might preclude a threat to cause only slight pain; however, it does not appear to require life-threatening injury. The question would be whether a "threat" by the fetus to cause emotional damage, economic injury, or simply exhaustion would be sufficient. Under traditional conceptions of duress, those types of threatened harms appear to be precluded.[44]

Secondly, under the requirement that the threat be "imminent" or "immediate,"[45] the question would arise whether an abortion could be performed before the moment when the mother was about to die or her health about to be seriously impaired. A woman who is diabetic and, therefore, prone to problems in late pregnancy, for example, would be unable to abort until that time. As late abortions are much more physically dangerous, emotionally difficult,[46] and morally problematic,[47] this would not be a desirable outcome.

This outcome could, however, be avoided by looking to the rationale for the requirement. Imminence is required because the defendant may be able to avoid the future harm by taking appropriate precautions. In the abortion situation, the requirement of imminence could mean that there is no realistic possibility of avoiding the harm; for example, that the current state of medical knowledge offers no way to avoid the threat to the life or health of the mother other than abortion. Once that was established to some reasonable degree of certainty,[48] an abortion before the moment when the mother was likely to actually die would be permitted.

The duress defense also traditionally includes a requirement that the defendant take advantage of a reasonable opportunity to escape, if that can be done without exposing himself to risk of death or serious bodily harm.[49] In the abortion context, such a requirement might be relevant in two situations. First, where the fetus is viable, it could lead to a requirement that all reasonable attempts be made to ensure that it is born alive, where that could be done without risking the life or health of the mother. Similarly, particularly where the fetus was nearing the time of viability, it might lead to a requirement that the pregnancy continue, where that would not pose an undue threat to the woman.

---

44. That is not to say that they would be precluded under the choice-of-evils defense, discussed, *infra*, at notes 59-81 and accompanying text.

45. While a majority of state statutes contain this requirement in some form, some do not. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.3(b), at 437. The Model Penal Code also appears to abandon this requirement. *See* MODEL PENAL CODE § 2.09.

46. Abortions after the first trimester often require a woman to go through labor and deliver a dead fetus. In addition, by this point the woman is often visibly pregnant, may have felt the fetus move, and is generally more likely to have become emotionally attached to it.

47. Many philosophical conceptions of the nature of the fetus hold that personhood attaches at some point between conception and birth; for example, at quickening, when the nervous system develops to a certain point, or at viability.

48. There are, of course, problems of uncertainty with such an analysis, but they are no greater than those generally associated with allowing abortion in cases of "risk" to the mother's health. Even where the risk is to the mother's life, it could be argued that it is not absolutely certain that her condition is life-threatening until she actually dies. The problem of probabilistic determinations and fortuitous outcomes is pervasive in criminal law. We can only make our best guesses. Some requirement of "reasonable certainty" would strike an appropriate balance between avoiding unnecessary abortions and avoiding unnecessary (and perhaps fatal) harms to pregnant women.

49. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.3(b), at 436-37.

The second, related situation is one where the threat to the mother arises not from continuing the pregnancy, but from raising the child; for example, where the woman wants an abortion because she cannot afford to raise another child, the father is unwilling to help her, her career or life plans are threatened, or she does not want another child. A requirement of escape might lead to a rule that a woman not be allowed to abort the fetus in these situations but, instead, give it up for adoption after birth. In that way, she could escape from the threatened harm without having the abortion.[50]

The duress defense is also problematic from the standpoint of abortion because one can lose the defense by recklessly getting oneself into the predicament that raises it.[51] This exception might apply in the case of a woman who had unprotected sex and became pregnant as a result, if we characterize that act as "reckless."[52] It could even conceivably apply to contraceptive failure, if the method of contraception has a high failure rate, and so choosing to rely on it might be viewed as reckless. It is harder, however, to define contraceptive failure as reckless as the act of having sex with no protection at all. In order to avoid this limitation on the defense, we would have to view the risk-taking behavior as something less than the recklessness envisioned by the statutes.[53] Alternatively, the choice-of-evils defense of Model Penal Code section 3.02 has no such exception, and is designed to cover those situations where the technical requirements of duress are not met.[54]

---

50. This is not to deny the economic costs, pain, and inconvenience of childbirth. But where the vast majority of the threatened economic harm or inconvenience would arise after the birth, an analogy to escape might be useful. Where the woman simply did not wish to go through childbirth, the lesser-evil analogy might be applicable, if duress was not. The question, then, would be whether the pain and inconvenience of childbirth outweighed the fetus's interests in being born.

The argument might then arise that the woman, while she does not wish to have a child, might also be unwilling to give it up for adoption if it were born. The question is whether the law should take account of that dichotomy in the woman's feelings; the duress defense, with the escape requirement, would appear to be unable to do so. Similarly, the argument that a child relinquished in this way might spend its life in an institution, or, if kept by the mother, might grow up under conditions such that it would be "better off never having been born," might be factors that could be balanced in a choice-of-evils defense. In either case, they do not affect the woman's ability to mitigate her own damages.

51. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.3(b), at 437 (saying that this exception to the defense is "generally recognized"). The Model Penal Code also makes the defense unavailable where "the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress." MODEL PENAL CODE § 2.09(2).

52. The response to this argument is to point out that only women must bear the brunt of a rule of this nature, while men are free to continue to act recklessly while avoiding the consequences. This is a slight overstatement, as the man would (theoretically, in a perfect world) be liable for child support, but it is undeniably true that the burden on the woman is greater. Biology being what it is, all burdens of pregnancy and of restrictions on abortion will continue to impact more seriously on women, at least in the foreseeable future.

53. Negligently getting oneself into the situation does not preclude the defense, except where negligence is sufficient to establish culpability for the underlying offense. As criminal abortion would presumably have a requirement of intent, negligence about contraception would not preclude the defense in the abortion context.

54. *See* MODEL PENAL CODE § 2.09 explanatory note to subsection (4) (the defenses are to be "independently considered, and the fact that a defense is unavailable under one section is not relevant to its availability under the other."). *See also infra* notes 62-81 and accompanying text.

In addition, even under the traditional doctrine (which did not include a general choice-of-evils defense), the fact of coercion, while insufficient to constitute a defense for one reason or another, often served to mitigate the punishment imposed.[55] Such an "imperfect" defense, for example, often reduces what would otherwise be murder to manslaughter.[56] The Model Penal Code makes it manslaughter to kill when under a reasonable and extreme mental or emotional disturbance,[57] a concept which should be broad enough to encompass extreme coercion. Some jurisdictions take an analogous view to "imperfect" self-defense, for example, when the force used was not, in fact, reasonable.[58]

Necessity and the Choice-of-Evils Defense

Necessity is closely analogous to the traditional defense of duress. While duress applies when the pressure on the defendant to commit the act was based on an order from another human being (that order being backed up by a threat of force), necessity applies when the coercion comes from natural physical forces in the defendant's environment. The rationale behind the defense of necessity is the same as that underlying the defense of duress. If the harm which would result from complying with the literal terms of the criminal law is greater than the harm which would result from violating it in a particular situation, public policy dictates that the defendant is justified in choosing to violate the law.[59]

Duress and necessity were two distinct defenses at common law. They were often held to be mutually exclusive, so that a defendant arguing a duress defense could not also argue a defense of necessity, and vice versa.[60] This exclusivity was based on the distinction between a human will, in the case of duress, and a physical hardship, in the case of necessity, as the instrument acting upon the will of the defendant. The source of the pressure had to be one or the other. Thus, only one of the defenses could be applicable in any particular case.

However, the "[m]odern cases have tended to blur the distinction between duress and necessity."[61] The Model Penal Code contains a broad choice-of-evils defense, which is not limited to any particular source of coercion.[62] Most of the modern recodifications also contain such a defense, which avoids the tradi-

---

55. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.3(d), at 439.
56. *See id.* § 7.11(c), at 666-67.
57. *See* MODEL PENAL CODE § 210.3(2).
58. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.7(i), at 463.
59. *See id.* § 5.4, at 441.
60. *See id.* at 441-42 & n.2.
61. United States v. Bailey, 444 U.S. 394, 410 (1980).
62. *See* MODEL PENAL CODE § 3.02. The Code, however, maintains a separate defense of duress when the source of coercion is the threat of force made by a human actor. *See also id.* § 2.09, discussed, *supra*, at notes 33-54 and accompanying text. That section provides a separate defense for such a threat of force which a person of "reasonable firmness" would be unable to resist. This defense would apply even if the harm done were not, in fact, less than the harm avoided. The choice-of-evils defense of § 3.02, on the other hand, is applicable without reference to the source of the pressure on the defendant, but only if the harm sought to be avoided is greater than the harm sought to be prevented. *See id.* § 3.02(1)(a).

tional distinction between duress and necessity.[63] This blurring of lines makes the application of such a defense much easier in the abortion context, since it eliminates the need to establish whether the fetus is a human actor or a natural force.[64]

In the abortion context, the necessity defense and a general choice-of-evils formulation of it, has a shortcoming similar to that of duress. Since the defendant is only justified in acting if by doing so he does a lesser evil, and since the law must see all human lives as being equal in value, the necessity defense has traditionally not been available where the defendant kills an innocent person to save himself.[65] The duress defense was also traditionally not available in this situation. The Model Penal Code's reformulation of duress, however, emphasizes the question of whether a person of reasonable firmness would have so acted,[66] and would allow the defense even in the case of intentional murder. But under the choice-of-evils rationale, such a defense would appear to be precluded.

The answer to this dilemma would have to be the same as that advanced against this limitation in traditional duress doctrine, namely, that the fetus must be seen as less than a person, so that aborting it could be seen as a lesser evil than the death of the woman.[67] The question would still remain then, whether the death of the fetus is a lesser evil than any other harm to the woman other than death. Is it a lesser harm than a threat to her health, than a loss of economic opportunity, than having a child of the "wrong" gender? This leaves the general question of line-drawing wide open. As the poll data examined in Part One shows, people would arrive at very different answers to these differ-

---

63. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.4(a), at 442.

64. The question is whether duress doctrine contemplates that the "threat" must be a direct assertion that the threatening actor will use physical force ("I will kill you if you don't obey me"), or whether the term "threat" can be construed more loosely. Under the traditional duress/necessity distinction, cases where two persons are faced with a situation where only one can survive (for example, the lifeboat cases) are characterized in terms of necessity, not duress. *See id.* § 5.4(c), at 445. Although the other person in such a situation constitutes a "threat" to the defendant's survival in that his presence and his consumption of the common stock of food make the defendant's survival less likely, this has not been viewed as the sort of threat contemplated by duress doctrine. This characterization is sensible, because the duress defense assumes that there is a coercer who can be held liable for the criminal act (*see id.* § 5.4(e), at 440), while necessity, as the result of natural forces, leaves the law with no one to be held liable. The abortion example would thus seem to fall under necessity, not duress. But, given that the necessity defense would not justify the killing of an innocent person to save oneself (discussed further, *infra*, at Part III), the necessity defense appears to be unavailable. The use of a general choice-of-evils defense, with no such limitation, may avoid this dilemma.

65. *See id.* § 5.4(c), at 445. The distinction in the case of self-defense would, therefore, seem to live not in the nature of the threat to the defendant, but in the moral culpability of the threatening individual. The implications of this distinction for the abortion situation will be discussed, *infra*, in the section on self-defense.

66. *See* MODEL PENAL CODE § 2.09. *See also supra* notes 28-33 and accompanying text (discussing the traditional duress doctrine).

67. If the fetus is seen as a person, and feticide as murder, then abortion would be an equal evil to the death of the mother under the law (keeping the law's traditional unwillingness to distinguish among the value of human lives). The Model Penal Code, in requiring that the defendant have sought the lesser evil, would appear to preclude such a choice among equal evils, as did traditional necessity doctrine. MODEL PENAL CODE § 3.02.

ent situations.[68] If some sort of choice-of-evils conceptualization is adopted, the core issue would become one of where to draw that line.

Under the traditional necessity defense, and presumably, under a choice-of-evils defense as well, there is also an advantage for the abortion example in that the harm threatened to the defendant is not limited to death or serious bodily harm, as in the duress situation. Even harm to property can give rise to a defense of necessity.[69] The question would, of course, still be whether abortion was a lesser harm than the harm avoided; in other words, whether the fetus's interests were outweighed by the potential harm in allowing the pregnancy to continue. Subject to that limitation, however, a choice-of-evils defense would appear to accommodate even purely economic harms to the woman as its justification.[70]

Some courts have explicitly ruled, however, that "economic necessity" is not sufficient to invoke the defense.[71] In these cases, courts refused to justify the acts of persons who, though not literally starving, were in great want and stole food.[72] Given that harm to property can clearly be one of the harms avoided under a defense of necessity,[73] however, perhaps these decisions are better understood as the courts' ordering of the values at stake such that the harm done was seen as greater than the harm avoided. While we may want to see economic harms as less significant than direct physical harms to persons in many (perhaps in all) cases, under a choice-of-evils rationale there is no reason to preclude all economic harms from consideration.

Like the duress defense, the choice-of-evils defense may be lost if the defendant was at fault in getting himself into the difficult situation.[74] Under the Model Penal Code, however, the degree of culpability for the underlying offense is tied to the defendant's culpability in bringing about the danger.[75] Thus, if the defendant was reckless, he can be found guilty of a crime of recklessness; if negligent, of a crime of negligence. If D, for example, drove reck-

---

68. Most modern statutes make it clear that the defendant's value choice in this regard does not govern. Rather, the court decides (apparently, as a matter of law) whether the harm sought to be avoided was greater than the harm done. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.4(d), at 447 n.40. The *Model Penal Code* also appears to call for an objective test. It states that an act is justified if "the harm or evil sought to be avoided ... *is* greater than that sought to be prevented." MODEL PENAL CODE § 3.02(1)(a) (emphasis added). No reference is made to the defendant's state of mind.

69. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.4(d), at 445.

70. However, the necessity defense does contain a requirement, analogous to that of the duress defense, that there be no other, less damaging way to avoid the threatened harm. While the necessity or choice-of-evils defense does not require that the harm be "imminent," it is lost if there is available a third course of action which will cause less harm. *See id.* at 448. Therefore, the question of whether birth and adoption should be seen as such a less-damaging course of action remains an issue under this defense as it does in the duress situation. The arguments on both sides are discussed in the duress section, *supra*, at notes 49-50 and accompanying text.

71. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.4(c), at 444 & n.27.

72. If they were starving, then their actions should have been justified. Taking another's food to save one's own life has traditionally been justified by the defense of necessity. *See id.* § 5.4(d), at 446.

73. *See id.* at 445.

74. See the discussion of duress doctrine, *supra*, at Part III, where the question of fault in the case of unprotected intercourse led to questions about the applicability of the defense.

75. MODEL PENAL CODE § 3.02(2).

lessly and thereby put himself in a situation where he had to choose between staying in the roadway and running down A and B, or driving onto the sidewalk and running down C, and he chooses the lesser harm and runs down C, he could still be convicted of the reckless manslaughter of C, though not of intentional murder.[76] Since abortion or feticide would be defined as an intentional (or at least knowing) act, however, this provision would not be problematic, except in a case where the pregnant woman intentionally got herself into that situation.[77]

The traditional necessity defense, and the newer choice-of-evils formulation, are both limited to situations where the legislature has not specifically precluded its application.[78] If the legislature (or the Model Penal Code[79]) has already made a determination of the values at stake, its decision governs, and the defense may not be advanced.[80] In the abortion context, then, if a law were enacted specifically stating that abortion was permitted only in certain circumstances, a woman could not advance a choice-of-evils defense if she had an abortion in a situation not provided for by statute.[81]

---

76. The example is taken from W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.4(a), at 449.

77. A separate issue of liability exists when a pregnant woman's negligent or reckless conduct results in the death of her fetus, as in the Pamela Rae Stewart case. This issue, however, is different from that of abortion. On the one hand, it can be argued that, even if a woman has no obligation to carry her fetus to term, once she chooses to do so, she incurs obligations to the fetus and to society to act reasonably in order to ensure that the fetus is born healthy. On the other hand, it raises questions of restraints on pregnant women which are far more problematic than those raised in the abortion context. In any event, the traditional definition of abortion implies that the woman (or one acting under her direction) acted intentionally to end the pregnancy. *See* Rich, *A Question of Rights: Birth and Death Decisions Put Women in the Middle of Legal Conflict*, Chicago Tribune, September 18, 1988, at 1.

78. *See* MODEL PENAL CODE § 3.02(1)(c); W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.4(a), at 442.

79. The Model Penal Code, in fact, contains a section on abortion, which was highly influential in persuading states to liberalize their abortion laws prior to Roe v. Wade, 410 U.S. 113 (1973). MODEL PENAL CODE § 230.3. That section will be discussed, *infra*, in Part Four, as one possible policy alternative. Under an adoption of the Model Penal Code, therefore, alternative defenses to abortion would be precluded.

80. This limitation has been construed broadly. For example, in State v. Dorsey, 118 N.H. 844, 395 A.2d. 855 (1978), the fact that the legislature had decided to allow nuclear power plants to operate foreclosed a necessity defense based on the alleged dangers of atomic energy.

81. In one abortion case, however, the defense was allowed, as the legislature was held to have been silent on the matter. In R. v. Bourne, 1 K.B. 687 (1939), the statute made it illegal to perform an "unlawful" abortion, but did not define that category. A doctor performed an abortion on a young girl who had been raped. The court held that continuation of the pregnancy would have made her a physical and mental wreck, and instructed the jury that the value of preserving the mother's health was higher than the value of the unborn child. The doctor, therefore, was found not guilty.

The question of how an abortion law under our conceptualization of the issue should be drafted will be examined, *infra*, in Part Four. However, if we wish to avoid circumvention of the value choices which would be made by such a law by women using a defense of necessity or choice-of-evils, it would appear that we could do so simply by making clear in the statute that all possible situations have been contemplated, and abortion will be allowed only in those enumerated. Conversely, we might wish to leave the defense open for unanticipated situations. That could also be accomplished via legislative drafting.

Self-defense

A person is generally justified in using a reasonable amount of force against his adversary in an encounter when he reasonably believes that 1) he is in immediate danger of unlawful bodily harm from his adversary and 2) the use of such force is necessary to avoid this danger.[82] The question of whether self-defense might be applicable in the abortion context is an appealing one.[83] It raises, however, a number of difficult questions.

First of all, as the above formulation indicates, self-defense applies only to cases of threatened bodily harm. This limitation does not mean that interests in property may never be defended. Rather, defense of property is a separate defense. But, as defense of property normally does not allow the use of deadly force,[84] it is inapplicable to the abortion context as a separate defense. This is not to say that economic pressures could never justify abortion under a duress or choice-of-evils defense. However, a conception of abortion policy based on self-defense would be limited to cases of potential physical harm to the mother.

Secondly, the privilege of self-defense is further limited when deadly force is used. The use of deadly force[85] is generally limited to circumstances where the defendant reasonably believes that the attacker is about to inflict death or serious bodily harm upon him.[86] If we concede that aborting a fetus is equivalent to the use of deadly force against it, then a self-defense rationale would limit abortion to cases where the life or physical health of the mother is at stake.[87] On the one hand, it is difficult to see abortion as other than deadly force. If the fetus is alive in any sense, abortion ends that life.[88] On the other hand, the idea of "deadly force" in the doctrine of self-defense could be limited to deadly force against humans, because the doctrine contemplates a human attacker. Presumably, one who kills a plant when threatened by non-deadly force would not be liable because the force used was "deadly" to something that was "alive."[89]

---

82. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.7, at 454. The Model Penal Code provides that "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." MODEL PENAL CODE § 3.04(1). The implications of some of the differences between the Code and the traditional formulation of the defense will be discussed, *infra*.

83. The doctrine of self-defense provides the theoretical underpinnings for some Catholic views which permit abortion to save the life of the mother, though it is otherwise viewed as murder.

84. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.9(a), at 466. If, however, there is a concomitant threat of death or serious bodily injury, as from a burglar, then self-defense is properly invoked.

85. Deadly force is defined as force which creates a substantial risk of death or serious bodily injury. *See id.* § 5.7(a), at 455.

86. *See id.* at 456.

87. As discussed under the duress doctrine, *supra*, at notes 48-50 and accompanying text, serious threats to physical health may be analogized to serious bodily harm.

88. The fact that the fetus is alive, at least after the very first stages of pregnancy, should be conceded even by those who do not believe that it is human life. The fetal body does things (i.e., growth, blood circulation, independent movement, etc.) which are not done by things which are not alive.

89. This analogy is somewhat flawed, however, in that the act of killing the plant may not be otherwise illegal or morally questionable. The more interesting case would be whether

Because the doctrine of self-defense generally presupposes a human attacker, part of its rationale may lie in the fact that the attacker-cum-victim is to blame for the force used against him. As noted above, under the discussion of necessity, the blameworthiness of the victim may be the basis for the distinction between self-defense and necessity in the intentional killing situation. While a person is not justified in killing an innocent third person to save himself under the traditional doctrine of necessity,[90] intentional killing in self-defense can be justified, even if the defendant was not threatened with death.[91] In the abortion situation, it is difficult to see the fetus as morally blameworthy. However, the right of self-defense should apply equally against an attack by an insane person, who, presumably, is not blameworthy in any moral sense either. He may be killed because he is the source of the threat, not because he deserves death in any moral sense. The fetus who poses a threat to its mother's life or health could be viewed in the same way.

The idea that the force used to repel the attack must be "necessary" to avoid the danger[92] leads once again to the question of escape or mitigation of harm. The self-defense doctrine has established an elaborate set of rules for the circumstances under which retreat is and is not required. The general view, and that adopted by the Model Penal Code,[93] however, is that use of force, particularly deadly force, should generally be justified only as a last resort.[94] If abortion is thus to be viewed as being available only as a last resort, then the questions of whether a woman could be required to continue the pregnancy and give up the baby at birth, which were raised by the duress and necessity defenses, are equally problematic here.[95]

---

one were justified in killing an animal who threatened a defendant with less-than-deadly force; for example, a vicious dog too small to cause a life-threatening injury. (This analogy assumes that animals have at least some moral status, and that it is considered wrong to kill them without cause.). There does not appear to be any reported case law on this issue; presumably, it would be covered under a statute related to cruelty to animals. In any event, "serious bodily harm" could be read broadly enough to encompass even a bite from a Chihuahua, which would not be life-threatening, but could be quite painful. In that case, deadly force would be justified.

90. This is because the death of the other person could not be seen as a lesser evil than the defendant's own death. A similar limitation also applied to the duress doctrine, but has been eliminated in the Model Penal Code and in some states. *See* the discussion of duress and necessity, *supra* notes 28-81 and accompanying text.

91. A threat of serious bodily harm is sufficient under the traditional rule. Threats of serious bodily injury, kidnapping, or forcible sexual intercourse are sufficient under MODEL PENAL CODE § 3.04(2)(b).

92. *Id.* § 3.04(1). *See also* the general formulation of the defense, discussed, *supra*, notes 82-86 and accompanying text.

93. *See* MODEL PENAL CODE § 3.04(2)(b)(ii). This section does not require retreat from one's own dwelling or place of work. However, it adds a proviso that self-defense will not justify the use of deadly force if the defendant can avoid the necessity of using deadly force by surrendering a thing demanded by the attacker, or complying with a demand that he refrain from an action which he has no duty to take. In other words, deadly force is generally only to be used when there is no way to placate the attacker.

94. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.7(f), at 461.

95. These issues are discussed *supra*. Once again, though, if we somehow characterize abortion as something other than deadly force (or other than deadly force against a human being, which is what the defense contemplates), then there is no duty of retreat. However, the sharp decline in the number of people who approve of abortions for the types of economic reasons implicated by this question may indicate their awareness of the adoption alternative.

Similar to the last-resort issue is the requirement that the threat be imminent.[96] As in the duress and necessity contexts, this requirement is once again designed to ensure that force — particularly deadly force — is only used where there is no way to avoid both the harm to the defendant and the use of force. The questions of mitigation of harm would therefore apply on this issue as well.

The question of the woman's level of culpability in the unwanted pregnancy, which we faced under the question of recklessness in the duress and necessity defenses, appears in a slightly different but analogous form here. The doctrine of self-defense is inapplicable to one who provokes the initial attack.[97] The question is whether negligently or recklessly becoming pregnant is analogous to provocation. On the one hand, it places some of the blame for the situation on the woman. On the other, it does not seem to be the same sort of deliberate wrongdoing which would make one blameworthy[98] as a direct attack on another person who then retaliates.[99]

Finally, traditional self-defense doctrine allows for reasonable mistakes. The defendant is permitted to use such force as he reasonably believed to be necessary to repel the attack.[100] This could be seen as loosening the requirement of imminence in the abortion case, and eliminating the problem of reconciling questions of uncertainty about the necessity of a particular abortion with the desire to perform abortions as early in the pregnancy as possible, as discussed earlier in the duress context.

Overall, it appears that each of these doctrines — duress, choice-of-evils, and self-defense — can be applied by analogy to the abortion context. The analogy to duress is applicable particularly in the situation of a pregnancy resulting from rape or incest. It explains why so many people are willing to allow abortion in that situation while avoiding the problem of characterizing the fetus, and the person so conceived, as somehow less worthy or less human than others.

The duress analogy sees the fetus conceived of rape or incest as just as valuable as any other. In that situation, however, more than in the general one of an unwanted pregnancy, we are unwilling to ask the woman to carry that fetus for nine months, reliving the memory of the act which created it. This may also explain many people's willingness to allow abortion when the fetus suffers from a serious defect. We might see that as a judgment about the value

---

96. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.7(d), at 458. Model Penal Code § 3.04(1) requires that the use of force be "immediately necessary" to protect oneself.

97. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.7(e), at 459; MODEL PENAL CODE § 3.04(2)(b)(i).

98. As noted above, some notion of the blameworthiness of the victim seems to provide a large part of the rationale for self-defense.

99. Under Model Penal Code § 3.04(2)(b)(i), provocation eliminates the privilege of self-defense only where the defendant — the original aggressor — had the purpose of causing death or serious bodily harm. That formulation is clearly inapplicable here.

100. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 32, § 5.7(c), at 457. The Model Penal Code eliminates any reasonableness requirement, and allows self-defense as long as the defendant actually believed the amount of force used to be necessary. *See* MODEL PENAL CODE § 3.04(1) & explanatory note (1985). Under this section, if the belief is reckless or negligent, the defendant can be convicted only of an offense of recklessness or negligence. As discussed, *supra*, at notes 74-77 and accompanying text, as abortion would be defined as an intentional or knowing termination of a pregnancy, this provision would not apply.

of such a fetus (or as a judgment that the resulting life would not be worth living); but we can also see it as encompassing the pressures placed on a woman forced to carry and perhaps to raise a seriously deformed child.[101]

An analogy to the choice-of-evils defense explains our willingness to allow abortion when the pregnancy threatens the life or health of the mother, and our lessened willingness to excuse it when the mother fears economic harm or damage to her career. We see the fetus as less than a human life, but as having some moral value. For some of us this value cannot be outweighed by economic factors or inconvenience, but for most of us it can be outweighed by the mother's most important interests.

Finally, the self-defense analogy is helpful, particularly where the pregnancy threatens the mother's life. Even those who see the fetus as a person and abortion as murder often make the sole exception of an abortion to save the mother's life. American abortion statutes, even before liberalization, allowed abortion in that situation. Self-defense still provides a useful analysis for those who do not subscribe to the duress and choice-of-evils options.

We can, therefore, characterize the issue as one of either 1) duress, where we ask what degree of duress we expect the pregnant woman to bear (something like the Model Penal Code's question of whether a person of "reasonable firmness"[102] could be expected to resist it); 2) a choice of evils, where the evil of feticide is presumably held constant and the question is the evil on the other side of the scale; or 3) of self-defense, where the question is whether the threat posed by the fetus is sufficient to allow for the use of deadly force against it. However we characterize the issue, the question will essentially boil down to whether the pressure on the woman is of such a type and degree that we cannot realistically and reasonably expect her to continue the pregnancy. This formulation borrows from each of the three doctrines discussed above, without being tied to the technical limitations of any of them.

There are strong arguments for a policy formulated and articulated in advance, and known before the fact, rather than a regime that requires a woman to abort first and defend herself later via these doctrines or some amalgamation of them.[103] In the next and last part of this paper, I examine a number of national abortion policies grounded in a characterization of the issue as one of justification and excuse. These statutes demonstrate a variety of options

---

101. This analysis is supported by the public reaction to Sherri Finkbine's plight, considered by many to have been instrumental in leading to the liberalization of many states' abortion laws. Mrs. Finkbine took some thalidomide tablets while on vacation outside the U.S. before the drug's potential to cause serious birth defects was discovered. After the link between thalidomide and severely deformed children became clear, Mrs. Finkbine attempted to obtain an abortion in both New York and Arizona. The case was highly publicized. Finally, Mrs. Finkbine went to Sweden. The fetus turned out to have been affected by the drug. *See* M. GLENDON, *supra* note 5, at 12.

102. MODEL PENAL CODE § 2.09(1).

103. Perhaps the strongest argument for a proactive system is that it allows the woman a sense of repose; she can know at the time of the abortion that her action is legal, rather than having to wait, perhaps for years, to see if she will be convicted of murder. It is important to note that the justification and excuse doctrines are normally invoked in emergency situations where there is no time for legal consultation before the defendant must act to protect herself. In the abortion situation, while there are time pressures, they can be measured in weeks, rather than minutes, and thus allow for relevant authorities to be consulted.

for how such a conceptualization of the abortion debate might be expressed in American law.

IV. CONCEPTUALIZATION AND PRACTICE

Viewing the abortion debate as essentially one about which pressures on a pregnant woman will suffice to justify or excuse what we see as an otherwise morally questionable act leads logically to an abortion policy which in some way examines the reasons for which a woman is seeking an abortion.[104] This formulation leaves open two questions which a policy must resolve. The first, is which reasons will suffice? The second, is who decides whether those reasons are present?[105] How we answer these questions will have a profound impact on the actual system which results.[106] I will now examine some of the ways in which those questions have been answered under different statutes which look to the woman's reasons in justifying an abortion.[107]

Prior to the drafting of the Model Penal Code in the 1950's, almost all American jurisdictions limited the availability of abortion to those cases where it was necessary to save the life of the pregnant woman. A few states went

---

104. This analysis of the relationship between attitudes and policy assumes that what people think should be done about abortion should be relevant to the determination of that question in the United States. It assumes, therefore, that the characterization of abortion as a "right" enjoyed by the pregnant woman, which is to be protected from the legislative process, is flawed. But any debate about abortion policy in this country now proceeds from the assumption that the characterization of abortion as a "right" is questionable.

As for the related question of whether judges should be influenced by public opinion in deciding questions of this nature, the issue is clearly a complicated one. Much has been written on the subject, and it will not be resolved here. Perhaps Paul Freund summed it up best when he said that "[j]udges should not be influenced by the weather of the day, but they are necessarily influenced by the climate of the age." Paul Freund, *quoted in*, Bronner, *Abortion: An American Divide; Politics pounds on court's door*, Boston Globe, April 22, 1989, Nat'l/Foreign Section, at 1. As we saw, *supra*, in Part One, America's opinion that the abortion debate is really one about which reasons are appropriate has been clear from the earliest polls on the subject nearly thirty years ago, and is not a passing fancy.

105. In examining the laws of other countries, we must remember that the United States would face a particularly serious problem of the least-common-denominator variety. While so-called "abortion tourism" is not unknown in and between other nations, the geographical proximity and lack of travel barriers between the American states would result in the least restrictive law on either of these criteria, in the nation or at least in a particular region, in effect governing the entire area. Therefore, wide disparities in policy should be avoided. First of all, the more restrictive policies would be fruitless. Secondly, to the extent that they do have an effect, they will impact disproportionately on women who are too young, too poor or too uneducated to take advantage of the less restrictive policy next door.

106. Witness the contrast between the French law which allows abortion in the first ten weeks of pregnancy if the woman is in "distress," and makes her the sole arbiter of that question (M. GLENDON, *supra* note 5 (citing French Law No. 79-1204 (31 December 1979)), and the Canadian law which allows abortion only in case of danger to the life or health of the woman, and requires certification by a therapeutic abortion committee of three doctors in an approved hospital (M. GLENDON, *supra* note 5, at 145 (citing CANADIAN CRIM. CODE § 251, R.S.C. (as amended in 1969)). Both of these policies will be discussed further, *infra*. This juxtaposition is designed to further emphasize the fact that conceptualizing the abortion debate in terms of justification and excuse does not necessarily lead to either a liberal or a restrictive abortion policy.

107. Abortion is subjected less to regulation in the United States than in any other nation in the Western world. *See id.* at 112.

further and recognized preservation of the mother's health as well.[108] The Model Penal Code expanded the availability of legal abortion significantly, providing in pertinent part:

> A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection.[109]

A number of states expanded their laws in a similar fashion before *Roe v. Wade* in 1973.[110] Undertaking an analysis similar to that of Part One of this paper, and looking to the actual state and trend of U.S. abortion law prior to *Roe*, Mary Ann Glendon argues that, if abortion policy were returned to the states, the vast majority of them would in fact adopt a middle position such as that of the Code.[111]

A number of Western European nations use a similar approach and articulate specific reasons which will justify an abortion. Often, these reasons are combined with a time frame limiting abortion to early pregnancy, or tightening the restrictions as the pregnancy comes closer to term. The permissible reasons are fairly uniform among the different jurisdictions, and are generally similar to those set forth in the Model Penal Code.[112]

Canadian law permits abortion only where the pregnancy would likely endanger the life or health of the pregnant woman, and must be approved by a therapeutic abortion committee of three doctors in an approved hospital.[113] In a 1975 case, the Canadian Supreme Court explicitly left open the question of whether a defense of necessity could apply in a criminal prosecution for an abortion not approved by such a committee.[114] The availability of abortions throughout Canada varies greatly.[115]

Portugal's law is a bit less restrictive. Criminal penalties do not apply: 1) to an abortion performed in the first twelve weeks, if the pregnancy resulted from rape or where the pregnancy poses a risk of death or serious damage to the mental or physical health of the woman; 2) to one performed in the first

---

108. *See* MODEL PENAL CODE art. 230, explanatory Note for §§ 230.1-230.5, at 163 (1985).
109. MODEL PENAL CODE § 230.3(2).
110. *See id.* art. 230, explanatory note for §§ 230.1-230.5, at 163.
111. *See* M. GLENDON, *supra* note 5, at 49.
112. As we shall see, the greatest difference is the degree to which economic and social reasons are recognized. As noted, *supra*, in Part Three, such pressures can often be mitigated by placing the child for adoption. Perhaps for this reason, many Americans see these types of reasons for abortion as less compelling than those set forth, for example, in the Model Penal Code.
113. M. GLENDON, *supra* note 5, at 145 (citing CANADIAN CRIM. CODE § 251, R.S.C.).
114. Morgentaler v. The Queen, 53 D.L.R. 3d 161 (1975).
115. *See* M. GLENDON, *supra* note 5, at 145.

sixteen weeks, if the child would likely be born with a serious disease or defect; and 3) at any time, if it is the sole means of eliminating a risk of death or serious permanent damage to the woman's physical or emotional health. The existence of these circumstances must be certified by a physician other than the one performing the abortion.[116]

Luxembourg's statute permits abortion during the first twelve weeks, after consultation and a one-week waiting period, if the pregnancy or living conditions that would result from the birth are likely to endanger the woman's physical or mental health, or the child is likely to be born with a serious defect, or the pregnancy resulted from rape. After twelve weeks, a pregnancy may be terminated only if two physicians certify that a serious threat exists to the life or health of the woman or the unborn child.[117]

Broader still, Finland's law states that abortions "must be performed at the earliest possible stage of pregnancy." Abortion is allowed through the twelfth week where: 1) the life or health of the woman is endangered; 2) the child would likely be born with a serious disease or defect; 3) the pregnancy resulted from a duly reported criminal offense against the woman; 4) a parent's ability to take care of a child is seriously impaired; 5) the birth or care of a child would cause a serious strain on the woman in relation to her and her family's general living conditions; 6) at the time of conception, the woman is under seventeen or over forty; or 7) the woman has already given birth to four children. After the twelfth week, abortion is allowed only on grounds relating to the woman's health, except that a seriously defective fetus may be aborted up to twenty-four weeks. In most cases, the recommendation of two physicians or of the State Medical Board is required.[118]

Rather than enumerate specific reasons, a number of jurisdictions set forth the rationale of justification in broad terms, leaving specific resolution to the individual case. In Belgium and Ireland, all abortion is theoretically illegal, but subject to the defense of necessity.[119]

West Germany states the proposition in its most general form. Abortion after implantation is permitted when a doctor other than the one performing the abortion confirms that the pregnancy poses a serious danger to the woman's life or physical or mental health which cannot be averted in any other reasonable way. The doctor may consider the "present and future living conditions" of the

---

116. *Id.* at 149 (citing Portuguese Law No. 6184 (11 May 1984)).

117. *Id.* at 148 (citing Luxembourgeois Law (15 November 1978) (concerning Sex Education, Prevention of Clandestine Abortion, and Regulation of the Voluntary Interruption of Pregnancy)).

118. *Id.* at 145-46 (citing Finnish Law No. 239 (24 March 1970), as amended by Law No. 564 (14 July 1978)).

119. *See id.* at 13. Belgian case law treats abortion as justified by necessity where three doctors certify that the pregnancy constitutes an immediate, serious threat to the health of the pregnant woman. *See* M. GLENDON, *supra* note 5, at 161 n.12 (citing Belgian Penal Code §§ 350-353). Viewed in this way, Belgium's law is actually quite similar to Canada's, discussed, *supra*, at notes 106-15 and accompanying text.

The situation in Ireland is less clear. It is thought that, when the life of the pregnant woman is in immediate danger, necessity would be a defense, but no court has ruled on this point. The 1983 "pro-life" amendment to the Irish Constitution puts the mother's right to life on an equal basis with that of the fetus. *See* M. GLENDON, *supra* note 5, at 161 n.12. (citing

woman in making this determination. Additionally, abortion is allowed during the first twelve weeks if pregnancy places the woman in a position of serious hardship which cannot be avoided in any other way. Even where abortion is not otherwise exempt from punishment, a hardship clause gives the court discretion to suspend punishment if the woman was in a situation of extraordinary distress.[120]

Iceland has a similarly flexible law. Abortion is available where two physicians certify that the pregnancy poses a danger to the woman's physical or mental health, resulted from a criminal act, or that the fetus is likely to suffer from a serious defect. Since 1975, abortion has also been available for "special reasons" during the first sixteen weeks of pregnancy. They are defined as factors beyond the control of the woman, which make the pregnancy and the new child "too difficult for the woman and her close family." This situation must be certified by a physician and a social worker.[121]

These sorts of general provisions have both advantages and disadvantages. They lack the certainty and uniformity of application found in the more specific enumerations of permissible reasons, but are flexible enough to encompass unforeseen situations. As discussed above, in Part Three, a statute which lists specific reasons will be held under American common law to preclude a defense of necessity in a case not governed by the statute, unless provision for such a defense is expressly made. We therefore have three possibilities for legislative drafting of such a statute for an American jurisdiction: we could enumerate specific permissible reasons and preclude all others; we could list specific reasons but leave open a general necessity defense for the appropriate case; or we could make a more general statement like that of West Germany or Iceland.[122]

Even if we can agree on which reasons are sufficient to justify an abortion, we would still be left with the question of who is to decide whether those reasons are present. The statutes discussed above generally require that the requisite situation be attested to by a doctor, a certain number of doctors, a social worker, or the like. This requirement appears sensible if we want our limitations to have some teeth.[123] France, however, takes a very different view, both in the specific drafting of its statute and in the underlying rationale. It is a

---

Quinlan, *The Right to Life of the Unborn — An Assessment of the Eighth Amendment to the Irish Constitution*, 1984 B.Y.U. L. REV. 371.

120. In addition, the law makes specific provision for pregnancies resulting from an illegal act, and for serious defects in the fetus. M. GLENDON, *supra* note 5, at 147 (citing WEST GERMAN CRIM. CODE §§ 218-219c, as amended by Fifteenth Statute to Reform the Penal Law (May 18, 1976) (Bundesgesetzblatt I, 1213)).

121. M. GLENDON, *supra* note 5, at 147 (citing Icelandic Law No. 25/1975 (27 May 1975)).

122. Even if we drafted a general provision like these, presumably case law would develop which would interpret the statute such that, after some amount of time, the situation would be close to that of a set of permissible reasons with the possibility of an exception in the unforeseen case.

123. However, there are also disadvantages to requiring the pregnant woman to meet a rigid set of provisions. The more complex the procedures, and the more specific and restrictive the permissible reasons, the more the resulting system is subject to criticism that it impacts unfairly on the lower socioeconomic classes, who are likely to be less educated in what they must say in order to jump through its hoops.

distinction which might make a law similar to the French one more palatable to the American people.

The French abortion statute allows a woman to abort during the first ten weeks if the pregnancy "places her in a situation of distress."[124] Unlike the law in West Germany[125] or Iceland,[126] however, "distress" is not defined in the statute, and the woman is the sole arbiter of whether she meets that requirement.

At first glance, France might appear to be an abortion-on-demand jurisdiction, similar to the United States (at least with respect to the first ten weeks of pregnancy).[127] But while the outcome might be the same, the message is very different. The law tells an American woman that she is free to terminate her pregnancy if she wants to. A French woman, on the other hand, is told by the requirement of "distress" that ending a pregnancy is a serious matter and generally not permitted. If she finds herself in a particularly difficult situation, however, then her conduct may be excused. The message thus communicated by the French law appears to be much more in tune with the actual sentiments of Americans on the way the abortion issue should be handled. Yet, the current state of American constitutional law[128] would appear to preclude such a formulation by an American jurisdiction.

CONCLUSION

As explained at the beginning, the purpose of this paper never was to propose a definitive solution to the abortion problem. I, of course, have my opinions as to where the lines should be drawn; the reader, by this point, hopefully has her own.

Brigitte and Peter Berger have concluded that "[a]ny new consensus on [the abortion] issue will emerge from common reflection about uncertainties,

---

124. M. GLENDON, *supra* note 5, at 155-57 (citing French Law No. 75-17 (17 January 1975), as amended by Law No. 79-1204 (31 December 1979)).

125. *See supra* note 120 and accompanying text.

126. *See supra* note 121 and accompanying text.

127. In France, an abortion can be obtained after the first ten weeks if two physicians certify that the pregnancy is seriously endangering the woman's health or there is a strong possibility that the fetus is suffering from a serious and incurable condition. M. GLENDON, *supra* note 5, at 155-57 (citing French Law No. 75-17 (17 January 1975), as amended by Law No. 79-1204 (31 December 1979)).

128. In Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), the Supreme Court held that an informed-consent provision was an impermissible "attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Id.* at 762. It would appear that any suggestion that live birth is preferable to abortion would be precluded. However, in Maher v. Roe, 432 U.S. 464 (1977), the Court held that a state could encourage live birth over abortion by providing Medicaid benefits for the former but not the latter. The state, it appears, may vote with its purse, but may not make an explicit statement of the value system underlying its choices.

As discussed in the introduction, the question under the *Webster* decision would appear to be whether the regulation places an "undue burden" on the pregnant woman. 492 U.S. at 530 (O'Connor, J., concurring). It is an open question whether this sort of statute would meet that limitation.

rather than from shared certitude."[129] If by changing the way that we ask the questions, and by surveying some of the possible implications of that change, we can agree on where we disagree, we will at least be a little closer to resolving what has become one of the most emotional, controversial and seemingly intractable problems of our time.

129. B. BERGER & P. BERGER, THE WAR OVER THE FAMILY: CAPTURING THE MIDDLE GROUND 81 (1983).